

MARINE STEWARDSHIP COUNCIL

INDEPENDENT ADJUDICATION

IN THE MATTER OF

PNA WESTERN AND CENTRAL PACIFIC SKIPJACK AND YELLOWFIN UNASSOCIATED/NON FAD SET TUNA PURSE SEINE FISHERY

FINAL DECISION OF THE INDEPENDENT ADJUDICATOR 28 FEBRUARY 2018

Hearing Date: 14, 15 January 2018

Final Written Submissions Received: 31 January 2018

Introduction

1. By Notice of Objection dated 26 September 2017 the International Pole and Line Foundation (hereafter referred to as “the IPNLF” or “the Objector”) submitted an Objection to the report and recommendation of Acoura Marine Ltd, the Conformity Assessment Body (CAB) (hereafter referred to as “the CAB” or “Acoura”) to certify PNA Western and Central Pacific skipjack and yellowfin, unassociated / non FAD set, tuna purse seine fishery (hereafter shortened to “PNA Tuna” or “the Fishery” for convenience). The IPNLF objects to the proposed certification.
2. The IPNLF describes themselves as follows: *“IPNLF promotes the environmental and social benefits of one-by-one tuna fisheries by working on improvements with the fisheries and promoting these*

benefits to market partners. IPNLF also works closely with other organisations and market partners to promote improved regional management of tuna fisheries at the RFMO level.”

3. The Fishery Client is the Parties to the Nauru Agreement (hereafter “the PNA” or “the Fishery Client”).
4. Eight decisions were issued dealing with preliminary matters. Those decisions are available on the MSC website and the contents of those decisions are not repeated.
5. As directed, a hearing took place in New York, USA on 14 and 15 January 2018. The Objector was represented at the hearing by Mr Martin Davey QC, Mr Daniel Owen, counsel and Mr Tom Maple, solicitor. Mr Martin Purves attended and explained the nature of the IPNLF’s work. The CAB was represented by Ms Sasha Blackmore, counsel, and provided further oral information through Dr Jason Combes, Head of Fisheries, Dr Robert Blyth-Skyrme, expert for Principle 2 and Mr David Japp, expert for Principle 3. Mr Kevin McLoughlin the Principal 1 assessor, joined part of the hearing by Skype, but took no part in the hearing. The Fishery Client was represented by Dr Transform Aqorau, the Legal and Policy Adviser, and information was provided by Mr Maurice Brownjohn OBE, Commercial Manager and Mr Les Clark, Adviser to the PNA. I am grateful to all representatives for their clear and helpful oral and written submissions.
6. Ms Hannah Norbury, the Senior Fisheries Certification Manager with the MSC attended the hearing as an observer. Ms Francesca Gage also attended the hearing as the administrator.
7. All parties agreed there was no need for formal evidence to be provided and no party requested permission to cross-examine those who provided further information. For that reason, this decision will mostly avoid using the terms ‘witness’ and ‘evidence’.
8. This decision is divided into the following parts:
 - a. Procedural Matters
 - b. Background

- c. Role of the Adjudicator and Overall Approach
- d. The Unit of Assessment Issue
- e. Scoring Objections
- f. Conclusion and Order.

Procedural Matters

9. At the close of the hearing a number of issues arose which required to be addressed by way of written submissions. The following directions were given:

The Objector has permission, if so advised, to file and serve written submissions limited to addressing: (i) the late partial disclosure of the MSC interpretative log on 15 January 2018 (ii) the CAB's written submissions provided at the hearing on 15 January 2018 and (iii) response to the excel spreadsheet data by 12 am on 24 January 2018.

The CAB and the fishery client have permission, if so advised, to file and serve submissions in response to any submissions received from the Objector in respect of (i) the interpretative log (ii) excel spreadsheet by 12 am 31 January 2018.

10. It is necessary to address the parties' responses to those directions and to deal with two further matters. The first of which is that the CAB, by way of an email dated 19 January 2018, sought to introduce a MSC press release said to be relevant to the Objection in respect of the Unit of Assessment. The IPNLF made submissions in respect of this press release, filed and served on 24 January 2018. The Fishery Client also made further submissions in respect of the MSC Press Release in their written submissions dated 31 January 2018. Secondly, the CAB made reference to a report entitled "WCPFC 2016g". This is a report referenced in the CAB's final report and in respect of which the wrong reference was provided with the consequence that the Objector was unable to consider the contents of the report at the time of the hearing. The CAB seeks to rely on the report, as does the Fishery Client and both have made further written submissions in respect of this report. In an email dated 26 January 2018 Mr Purves has made submissions mostly limited to Appendix 2 of the

document but he has not sought to oppose the admission of the document into the proceedings.

11. In terms of compliance with the directions made, the Objector filed and served written submissions on 24 January 2018, responding to the written submissions filed and served by the CAB at the final day of the hearing. I have read and taken those submissions into account. The IPNLF's submissions made in respect of the extracts from the MSC "Interpretation Log" and the data which underpins Tables 15 and 16 of the CAB's final report, which were only disclosed at the hearing, have also been considered and taken into account.
12. Both the CAB and the Fishery Client filed and served written submissions on 31 January 2018. The terms of the direction limited the scope of their submissions. Nonetheless, both the Fishery Client and the CAB have made further written submissions in response to the Objector's written submissions filed in response to the CAB's written submissions provided at the hearing on 15 January 2018.
13. Separately I record that the Objector has accepted it has received disclosure of the data related to Tables 15 and 16 in the CAB report, albeit belatedly and with concerns about the data.
14. It is necessary, therefore, to determine the following outstanding issues:
 - a. whether the MSC Press Release should be admitted;
 - b. whether the document entitled WCPFC 2016g and the submissions related to that should be admitted;
 - c. whether submissions made beyond the scope of my directions by the CAB and Fishery Client should be accepted and considered.
15. On the first issues, I decline to admit the MSC Press Release. The role of the Adjudicator is to interpret the Fisheries Certification Requirements; that document should be capable of clear interpretation from the text of the document itself. Secondly, I have received no

information from the MSC itself about the status or purpose or audience for its press release. In those circumstances, it is a document that should be approached with some caution and it would not be appropriate to make assumptions, as I appear to be invited to do, about the circumstance behind the issue of the press release. Lastly, a proportionate approach is called for. This adjudication has been characterised by detailed and comprehensive submissions made by all parties on a considerable number of documents. The adjudication process is required to be proportionate and swift and there is a real danger that admitting further documentation, especially after the hearing, is simply disproportionate and unhelpful to the task of adjudication.

16. On the second issue, I will consider the terms of document WCPFC 2016g and the submissions made in respect of this document. It is not apparent that any party objects to its inclusion and it is a document that is referenced in the CAB report, the very subject of these proceedings. It is regrettable the parties were unable to arrange access for all parties to receive this document in the months before the hearing took place after the Notice of Objection was filed.
17. I decline to consider the further written submissions made by the CAB and the Fishery Client responding to the written submissions made by the CAB on the last day of the hearing. The reasons put forward by both parties are not persuasive and the inclusion of yet further submissions on submissions is not proportionate and does not serve to assist the adjudication process. The CAB agreed directions and chose to respond to the Objector's 55 page submissions in the manner they did prior to the commencement of the hearing. If they chose to file further lengthy written submissions in an unheralded manner on the last day, they should not be surprised that fairness dictates the Objector can respond. A further response is not called for from the CAB for any of the reasons set out in their letter dated 30 January 2018. For similar reasons I decline to consider the Fishery Client's further submissions on these issues.

Background

18. The CAB's report which underlies the proposed re-certification is entitled: "PNA Western and Central Pacific skipjack and yellowfin, un-associated / non FAD Set, tuna purse seine fishery". A considerable amount of information is contained within this title and it is helpful to break it down, explaining as it does the nature of the fishery in respect of which certification by the MSC is sought.

19. PNA of course refers to the Parties to the Nauru Agreement. This is well described in the CAB report at section 4.4.2 as:

The Nauru Agreement (PNA 1982) is a regional agreement to facilitate cooperation in the management of fisheries resources of common interest. The Nauru Agreement is a binding Treaty-level instrument considered to be a sub-regional or regional fisheries management arrangement for the purpose of the United Nations Fish Stocks Agreement (UNFSA) – the agreement requiring management of straddling/highly migratory fish stocks on a sub-region by sub-region basis through Regional Fisheries Management Organisations (RFMOs), and the WCPFC Convention (the regional fisheries agreement covering the WCPFC convention area – the WCPFC-CA). The Solomon Islands, Tuvalu, Kiribati, Marshall Islands, Papua New Guinea, Nauru, Federated States of Micronesia and Palau, commonly referred to as the Parties to the Nauru Agreement (PNA), have worked collaboratively since 1982 to manage the tuna stocks within their national waters, and are full members of the WCPFC.

20. Tokelau is also associated with the PNA, albeit not a formal member.

21. "Western and Central Pacific" refers to the geographical area where the vessels associated with the PNA fish. It is a very large area, mostly to the north and north east of Australia and Indonesia, extending as far north as the Exclusive Economic Zone (EEZ) of the Marshall Islands, as far west as the EEZ of Palau, as far south as the EEZ of the Solomon Islands and as far east as the EEZ of Kiribati.

22. Certification is sought from the MSC in respect of both “skipjack” (*Katsuwonus pelamis*) and “yellowfin” tuna (*Thunnus albacares*). Skipjack tuna is the main target species. Yellowfin is not separately targeted.

23. “Purse Seine” is a distinctive style of fishing and is explained in the CAB report at 4.4.1:

Purse seine fishing for tuna involves circling a tuna school with a deep curtain of netting. A float line mounted on the top of the net keeps it at the surface while the bottom of the net is weighted. The bottom of the net is pursed (closed) underneath the fish school by hauling a wire running from the vessel through rings along the bottom of the net and then back to the vessel, preventing the fish from swimming down to escape the net or ‘sounding’.

24. Fishing for tuna with the purse seine method can take place opportunistically when a school is discovered (vessels use various and sophisticated methods to detect schools); swimming freely (defined as free school); around a natural object (defined as log set); or the fishing can take place by placing the net around a “fish aggregation device” (hereafter a FAD). The CAB report states FADs “*are specifically designed to attract and hold fish around them and are either anchored to the seabed or left to drift in the prevailing currents. FADs may be constructed from an array of materials, including ropes, palm tree fronds and old netting.*” There is also a Western and Central Pacific Fish Commission (hereafter “WCPFC”) definition of FAD at page 20 of the CAB report.

25. The Fishery is one the world’s largest and is of very significant importance to the economies of the PNA. Certification of a fishery by the MSC is not dependent upon the size of the fishery, but the size of the Fishery and its impact on the related small island nations is noted.

26. The Fishery (without yellowfin tuna) has been the subject of certification since December 2011. An objection was lodged to the then CAB’s report and proposed certification. Annual surveillance audits have taken place and reports from these audits have been produced in 2012, 2013, 2014 and 2016. These reports are included in the adjudication bundle and I have read them. On 4 February 2016 yellowfin tuna was certified alongside skipjack tuna. On 5

August 2016, Acoura were appointed to act as the CAB for the Fishery, as both skipjack and yellowfin entered the re-certification process. The Public Comment Draft Report (PCDR) was published on 15 June 2017. The final CAB report was published on 5 September 2017 and the IPNLF objected on 26 September 2017. Thereafter, the chronology of these proceedings is documented in the numerous pre-hearing adjudication decisions.

27. Pursuant to the MSC Fisheries Certification Requirements (7.24.4.1) the CAB extended the expiry date of the existing Fishery certification on 10 October 2017 by six months to 15 April 2018.

Role of the Adjudicator and Overall Approach

28. Annex PD of the Fishery Certification Requirements (hereafter “FCR”) sets out in full the Objections Procedure. IPNLF have objected under two grounds of challenge which may lead to a remand of the determination to the CAB, these are:

There was a serious procedural or other irregularity in the fishery assessment process that was material to the fairness of the assessment;

and

The score given by the CAB in relation to one or more performance indicators cannot be justified, and the effect of the score in relation to one or more of the particular performance indicators in question was material to the determination because [....]

- d. The scoring decision was arbitrary or unreasonable in the sense that no reasonable CAB could have reached such a decision on the evidence available to it.

29. In the Notice of Objection, the IPNLF has advanced one objection on the basis there is a serious non-procedural irregularity in the assessment process, namely the CAB’s decision to select the unit of assessment of the basis of difference in practice alone. More particularly, fishing on un-associated schools as one practice and seeking certification for this fishing, whilst fishing on FAD schools (another practice) takes place but in respect of which

certification is not sought. The Notice of Objection also contains twenty four objections to scoring assessments the CAB has taken, as against the performance indicators (PIs). In relation to scoring challenges the Notice of Objection does not set out which of the four sub-clauses of PD 2.7.2.3 applies to explain why the score given by the CAB cannot be justified, however, this is clarified at paragraph 59 of the Objector's submissions for the hearing and each of the 24 scoring objections is put on the basis of the scoring assessments being "arbitrary or unreasonable in the sense that no reasonable CAB could have reached such a decision on the evidence available to it".

30. In determining each of the twenty five Objections, I must have regard to the following common factors:

- a. Section 1 of the Fisheries Certification Requirements makes clear the Requirements "are for the CAB's use when assessing fisheries against the MSC's Fisheries Standard". The Requirements are publicly available, but they in reality a private document which directs how an expert body (the CAB) should carry out the assessment process and against what standards.
- b. There has been no challenge by the Objector to the expertise of the team assembled by the CAB to carry out the re-certification of the relevant fishery.
- c. The Objector has not relied on any expert evidence or assessment by its team.
- d. The adjudication does not involve choosing between two competing bodies of expert evidence.
- e. FCR PD 2.6.6.2 states: "*In no case shall the independent adjudicator substitute his or her own views or findings of fact for those of the CAB.*"

31. The process of adjudication is very much one of review, as seen against principles of English or US administrative law. At no stage of the adjudication is it appropriate for the adjudicator to set about a 'first instance' determination of whether or not the Fishery meets the FCR requirements: that is the role of the CAB, deploying its expertise. The role of the adjudicator is to review the CAB's process of decision making without substituting factual decisions or expert judgements. This is reinforced by FCR PD 2.1:

The purpose of the Objections Procedure is to provide an orderly, structured, transparent and independent process by which objections to the Final Report and Determination of a Conformity Assessment Body (CAB) can be resolved.

PD2.1.1.1

It is not the purpose of the Objections Procedure to review the subject fishery against the MSC Fisheries Standard, but to determine whether the CAB made an error of procedure, scoring or condition setting that is material to the determination or the fairness of the assessment.

PD2.1.2

Subject to PD2.3.1.3 the procedure is open only to parties involved in or consulted during the assessment process.

PD2.1.3

An independent adjudicator will examine the claims made by an objector in a notice of objection and will make a written finding as to whether the CAB made an error that is material to the determination or the fairness of the assessment. If any error is identified, and if there is adjudged to be a real possibility that the CAB may have come to a different conclusion, the independent adjudicator will remand the determination back to the CAB for reconsideration.

The Unit of Assessment Objection

32. The Objector's submissions under this head are clearly put in their written submissions, dated 8 January 2018, filed for the hearing at paragraphs 8 to 45. Importantly, the Objector notes that a PNA Purse Seiner on the same voyage may catch unassociated or free school tuna and also catch tuna from a FAD. The same vessel can do this on the same day or on different days of the same vessel voyage. Only the tuna caught with the non FAD or free school purse seine method is certified by the MSC. There exists therefore a difference in practice as to what can be certified and what cannot. By compartmentalising the tuna into a FAD free element and a FAD element for the purposes of the unit of assessment by the CAB, the Objector states there has been a non-procedural irregularity.

33. More generally, the IPNLF object to the same vessel carrying out a certified (and therefore sustainable) fishery alongside a non-certified fishery, although their submissions accept this is not the proper basis for an objection under the FCR.

34. Mr Davey QC's oral and written submissions under this part of the objection make four key points:

- a. By way of reference to the FCR "General Introduction" the overarching purpose of the MSC scheme for certification is to consider the "fishery" being certified and there is no indication this fishery could be carved up and permit fishing which was not sustainable. He linked this issue to the references at page 10 and 11 of the FCR to the need for transparency and more broadly public confidence.
- b. Secondly, it was argued through written and oral submissions that the MSC Vocabulary document defined Unit of Assessment and Unit of Certification in such a way so as to exclude practice alone being used to determine the unit of assessment. So by using the unassociated non FAD practice alone the CAB erred, it being further submitted that the definition required the CAB to look at all the practices pursuing the stock. It was submitted the Vocabulary document was definitive and should take precedence in the event of a conflict with the FCR.
- c. Further it was argued that selecting a Unit of Assessment on the basis of practice was contrary to the Food and Agriculture Organisation of the United Nations (FAO) Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries, at paragraph 25. It was said the MSC, through its website, held out that it complied with FAO standards.
- d. Fourthly, it was argued the approach taken by the CAB in its selection of the Unit of Assessment was contrary to the "precautionary approach" and in particular the Objector argued the CAB was wrong to be reliant upon observers to assist with implementing the Unit of Assessment.

35. The MSC relies upon a document entitled "MSC-MSCI Vocabulary". It is dated 20 February 2015. The introduction to the document simply states the vocabulary defines concepts and terms etc. It further states definitions, where possible, are taken from authoritative sources

and lists one as the FAO. It contains no further guidance as to how the vocabulary should be used or what should happen in the context of a conflict with the FCR. Section 3 of the FCR makes reference to the MSC-MSCI Vocabulary.

36. The definitions of Unit of Assessment and Unit of Certification are provided in the Vocabulary document:

Unit of Assessment

(UoA)

The target stock(s) combined with the fishing method/gear and practice (including vessel type/s) pursuing that stock, and any fleets, or groups of vessels, or individual fishing operators or other eligible fishers that are included in an MSC fishery assessment. In some fisheries, the UoA and UoC may be further defined based on the specific fishing seasons and/or areas that are included.

Unit of Certification

(UoC)

Target stock(s) combined with the fishing method/gear and practice (including vessel type/s) pursuing that stock, and any fleets, or groups of vessels, or individual fishing operators that are covered by an MSC fishery certificate. Note that other eligible fishers may also be included in some Units of Assessment but not initially certified (until covered by a certificate sharing arrangement).

37. The FCR is a document for the CAB's use. It directs the CAB in respect of how it must define the Unit of Assessment as follows:

Defining the unit of assessment and unit of certification

7.4.6 After receiving an application for certification, the CAB shall review all pre-assessment reports about the fishery and other information that is available to it, and shall determine the unit of assessment required.

7.4.7 The CAB shall confirm the proposed unit of assessment (UoA) (i.e., what is to be assessed) to include:

7.4.7.1 The target stock(s),

7.4.7.2 The fishing method or gear type/s, vessel type/s and/or practices, and

7.4.7.3 The fishing fleets or groups of vessels, or individual fishing operators pursuing that stock, including any other eligible fishers that are outside the unit of certification.

38. It can be seen from FCR 7.4.7 the process of determining the Unit of Assessment is mandatory (“shall”) and involves determining the target stock first (the skipjack and yellowfin tuna); the fishing method/gear (purse seine) and the practice (unassociated non-FAD) and thereafter consideration can be given to the detail of the fleet. There is no dispute between the CAB and the Objector that the CAB adopted this approach when carrying out the certification process.

39. The CAB in their submissions make two background points: one is that the Fishery has been certified on the basis of the same Unit of Assessment adopted since 2011; and secondly that as of 1 January 2018 there are three MSC certified tuna fisheries based upon a Unit of Assessment determined by the unassociated non-FAD practice of purse seine fishing. These are plainly relevant background factors, but the answer to this issue must be based upon the proper construction of the FCR.

40. My reasons for dismissing this ground of objection are as follows:

- a. The definition of Unit of Assessment and understanding of the FCR is an aspect of the expert judgment of the CAB. Acoura is an expert body with much experience of understanding and applying the FCR. Their approach is consistent with the history of the PNA tuna fishery but also other CAB’s approaches to other purse seine fishing practices, as the CAB submitted. It is reasonable to provide the CAB with a degree of deference on this issue.
- b. I reject the Objector’s interpretation of the MSC Vocabulary as requiring all the practice(s) deployed to pursue the target stock. The Vocabulary does not state this. It is silent as to whether it is permissible to use one practice, several practices or all practices.

- c. The Vocabulary must be read in the context of the FCR, and in particular the mandatory language of FCR 7.4.7 which makes clear the CAB must confirm the Unit of Assessment and must do so on the basis of practice as set out in 7.4.7.2.
 - d. Even if I am wrong and there is a contradiction between the Vocabulary definition and FCR 7.4.7, this latter document is the determinative one and I reject the Objector's submission that the Vocabulary is determinative. The MSC documents are not to be read like parliamentary legislation, where definitions are accepted to have greater interpretative value. The MSC documents have not been drafted in this way. Whilst they are a publicly available document to provide confidence to the seafood buying public (and others) the FCR is, above all, a practical and normative tool directed to the CAB to permit it to carry out its certification process.
 - e. I reject the submission in respect of the FAO standards for two reasons. First, I have not properly been provided with the information in respect of the MSC's website which demonstrates the Unit of Assessment is entirely aligned to the FAO standard, nor have I received the MSC's views on this point. Secondly, my role is to consider the CAB's certification as against the FCR, this I have done. If the FCR is inconsistent with a FAO definition (and I express no view on this issue) then that is a matter for the MSC to consider not an Adjudicator.
 - f. I also reject the Objector's submission in respect of the precautionary approach. In considering the CAB's interpretation and application of the FCR, I am not concerned with interpreting "information". I understand this to be a reference to data or scientific information, not a normative standard. Even, if I am wrong on that, there is nothing in the CAB's application of the FCR in respect of the Unit of Assessment to suggest it acted with a lack of caution.
41. I accept the CAB's application of the FCR as being consistent with my interpretation of the FCR and the Vocabulary read together in a way which is relevant to the context of these documents. I understand the Objector's complaint that consumers of a targeted stock which receives MSC certification may not realise that the same vessel has been engaged in fishing which would not meet the MSC standards. However surprising that may be to a consumer, and again it is an issue upon which I do not express a view, it cannot affect my decision that there has been no non-procedural error on the part of the CAB.

42. Having determined there was no serious non-procedural irregularity in the CAB's fishery assessment, I need not determine the second limb in respect of whether any such error was material to the fairness of the assessment. I dismiss this ground of objection.

The 24 Scoring Objections

43. There are twenty four scoring objections. Each is confined to an arbitrary and/or unreasonable challenge by the Objector. All administrative lawyers appreciate the relatively high standard required by such a test. Not all the scoring grounds of objection were covered by the parties' advocates at the oral hearing, but Mr Davey QC made clear his client continued to rely on all written grounds in respect of the scoring objections. I take each in turn.

44. It is important to note the reasons produced under each of the 24 grounds are directed at the parties to the Objection, who are familiar with the FCR and the evidence and materials presented. Reasons are provided to a standard to permit the parties to know, in outline, why they have won or lost on each issue.

Performance Indicator 2.2.1-2.2.3 – Main Secondary species

45. Performance Indicator 2.2.1 (Outcome) states: "*The UoA aims to maintain secondary species above a biologically based limit and does not hinder recovery of secondary species if they are below a biological based limit.*" The CAB scored 100. The Objector submits the CAB improperly failed to conclude black marlin and striped marlin should have been registered as "main secondary species" (which requires references to PI 2.1.1 and SA 3.4 which determines which species are main). The submissions in respect of blue marlin were withdrawn (see paragraph 77 (1) of the Objector's written submissions for the hearing).

46. The CAB submits it was correct to determine black and striped merlin were minor and not major species. The question which falls to be determined is whether this conclusion is arbitrary or unreasonable.

47. The submissions focus on whether the marlin catches within the Unit of Assessment are “*exceptionally large*” at SA 3.4.4. This is because neither the 5% nor 2 % thresholds for the other parts of SA 3.4 are met. In order to be classified as “exceptionally large” pursuant to SA 3.4.4, the small catch proportion of secondary species must “*significantly impact the affected stocks/population*”.

48. The MSC has produced FCR Guidance and paragraph GSA 3.4.4 states (emphasis added):

Exceptionally large catches and main species

In considering whether a species should be treated as 'main', CABs should take account of the relative catches of both target and the P2 species and determine whether the risk to the population of the impacted P2 species is significant enough to warrant a designation as 'main'. **In the absence of full information**, CABs should regard a catch by the UoA of 400,000mt of the target species as being 'exceptionally large'.

49. The CAB did not address all these issues in its report (see page 161). However, the issue before me is whether or not its scoring conclusion is arbitrary and unreasonable. The CAB has produced significant further information regarding the two species of marlin, both in its formal response to the Notice of Objection, and the written submissions produced at the hearing. In respect of black marlin, considerable data was provided at page 35 of the response to the Notice of Objection, which concludes: “*This [the data] supports the assertion that black marlin is not at risk from the PNA Tuna fishery*”. Similar data was produced in respect of striped marlin on pages 35 and 36 of the CAB’s response to the Notice of Objection. This concludes: “*...the PNA Tuna fishery is not hindering recovery, and by association is not putting the stock at risk*”.

50. The Objector complains no stock assessment was carried out for black marlin and otherwise the CAB have ignored the precautionary approach. I accept the CAB’s evidence that they can make the assessment without a stock assessment and I accept their position that the

PNA catch is a small percentage of the total black marlin catch. As stated in the introduction, the CAB are experts and have presented their detailed findings. Their expertise has not been challenged and no expert evidence filed in response.

51. In respect of striped marlin, the Objector notes in the Western and Central Pacific Ocean (WCPO) report that striped marlin is overfished. The CAB accepts this, but they state: “*reported catch compromises around 1 % of the total catch stock. As per MSC guidance (GSA 3.4.6) this indicates the PNA Tuna Fishery is not hindering recovery, and by association is not putting the stock at risk.*” The Objector disputes the relevance of GSA 3.4.6 because of the use of the word “collectively” in the title to that section of the Guidance. Having read the guidance carefully, and the parties submissions, I conclude the CAB is correct to rely on it for the reasons they give in the table at page 4 of their submissions filed on the last day of the hearing.

52. The CAB’s expert assessment is clear: that despite the fact both species were fished at the “exceptionally large” level, they were not main species in their professional judgement. Information was provided in respect of other exceptionally large catches which other CABs had accepted were not main species.

53. Despite the forensic details with which the arguments for the Objector were put, I cannot conclude the CAB’s scoring, in the light of the recent information provided since the CAB’s final report, in response to the Objection, is arbitrary or unreasonable. I reject this ground.

PI 2.2.1 (A) Outcome – Stock status

54. The Objector argues a CAB cannot score by default at the SG 100 level. The CAB scored in this manner because it determined there were no main secondary species. PI 2.2.1 (a) requires an assessment as to whether or not the main secondary species are likely/highly likely/there is a high degree of certainty to be above biologically based limits. It is an outcome assessment.

55. I agree with the CAB that whilst its use of the term “default” is incorrect, it is entitled to rely on SA 3.2.1, which states: “*If a team determines that a UoA has no impact on a particular component,*

it shall receive a score of 100 under the outcome PLA". The CAB has not acted arbitrarily or unreasonably by concluding that because there is no main secondary species there is no impact on P1 2.2.1 a. The Objector complains there is no determination on impact, but the CAB having concluded there was no main secondary species and having made this determination in its report by implication have made an assessment on impact. Further, I disagree with the Objector's submission that no score should be recorded. The purpose of the assessment is to consider the impact on secondary species of the fishery, if the fishery has no impact on secondary species, then it is entitled to be scored positively, rather than not at all, because that is part and parcel of the scoring system, seen in the context of the three MSC principles.

56. The fact the remaining complaints set out at paragraph 86 of the Objector's written submissions were not dealt with by the CAB does not mean its scoring was arbitrary or unreasonable. The Objector is descending into a level of detail that is not necessary to address. This ground of objection is dismissed.

PI 2.2.1 (b) Secondary Species Outcome - Minor Species

57. The Objector withdrew several aspects of the Notice of Objection as recorded at paragraphs 88, 89 and 98 of its written submissions for the hearing. The objection in respect of black marlin was pursued. It was submitted the CAB's scoring of the Fishery hindered the recovery and rebuilding of the black marlin. There is nothing arbitrary or unreasonable about the CAB's conclusion that the catch of black marlin is well below the 30 % threshold, which may indicate recovery is being hindered; nor that catches of black marlin in the PNA fishery are less than 5 % of the total catch of the species. The CAB has reasoned these responses and I accept their position.

58. The CAB did not act in an arbitrary or unreasonable fashion when awarding a scoring of 100 for this performance indicator, when the totality of their report and the information provided during the objection period is considered.

PI 2.2.2 Secondary Species Management Strategy - General

59. I consider it difficult to understand the Objector's individual complaint in respect of PI 2.2.2 apart from its specific complaints set out in its objections to PI 2.2.2 (a) to (e). The concerns raised by the Objector are dismissed for the reasons provided below in respect of the individual PI at 2.2.2 (a) to (e) and for the reasons given by the CAB at page 8 of their written submissions filed on the final day of the hearing. There is nothing irrational or unreasonable about the CAB's overall approach to scoring PI 2.2.2 and its approach to the term "if necessary" where it does not appear.

PI 2.2.2 (a) Secondary Species Management Strategy – Strategy In Place

60. The objection on this point as refined in the written submissions is confusing. As I understand paragraphs 112-114 of the Objector's written submissions for the hearing, no challenge is being made to the score at PI 2.2.2 (a) because the CAB's explanation and reliance on the Table at GSA 3 is accepted. The Objector states in terms at paragraph 114 it accepts the CAB's score of 80 for SI 2.2.2 (a). The Objector accepts a partial secondary species plan is acceptable, because it is not necessary to have a 'complete' strategy given the absence of main secondary species.

61. There no longer appears to be a challenge to the CAB's scoring at 2.2.2 (a) and so this ground of objection is dismissed. If I have misunderstood the Objector's position, in any event, for the broader reasons given in respect of PI 2.2.2 (a) to (e), I do not consider the CAB's approach is irrational or unreasonable.

PI 2.2.2 (b) Management Strategy Evaluation

62. The Objector's challenge to this Performance Indicator score is based upon the previous submissions above and the word "if necessary" which are missing from the Guideposts. The Objector argues the score of 100 cannot be given because the approach taken at PI 2.2.2. (a) cannot be repeated here at (b). In other words, the Objector accepts at 2.2.2 (a) it was appropriate to score the PNA fishery on a partial strategy because a full one was not

necessary because there are no main secondary species. The Objector submits this approach cannot follow through the remaining sub-sections of the PI 2.2.2 scoring.

63. Each Performance Indicator must be read in a holistic manner and in a common sense way. P1 2.2.2 is entitled “*Secondary Species Management Strategy*”. All five of the scoring issues from (a) to (d) are related to the management strategy or partial management strategy. PI 2.2.2 (a) scores the suitability of the strategy in place; 2.2.2 (b) scores the effectiveness of the strategy related to the species involved; 2.2.2 (c) scores the extent to which the strategy has been implemented; 2.2.2 (d) scores the management strategy in the specific context of managing shark finning; and 2.2.2 (e) scores the strategy in the specific context of the mortality of unwanted secondary species. Each of the five scoring issues is directly related to the management strategy in respect of secondary species. This relates directly back to principle 2: the environmental impact of the fishing.
64. I note for completeness SG 60 was, contrary to the Objector’s submissions, considered because the Box entitled “*Met?*” was ticked, although no justification was provided. This is a common complaint made by the Objector. However if the relevant box was ticked, indicating the score was met, then the CAB has considered the score guidepost, even if it has not been reasoned. If the reasoning is provided for a score of 100, it may not be necessary for the lower scores to be explicitly addressed.
65. The second point raised in the Objector’s written submissions under this head is that the “*justification*” box fails to set out “*plausible arguments based on expert knowledge*”. The Objector does not attempt to explain why the CAB’s response in the report, and information submitted since then, is arbitrary and/or unreasonable and I decline to find that it is. Point 2 of this ground of the objection is merely the Objector’s disagreement with the scoring on the part of the CAB. ‘Plausible argument’ is defined as including “general experience”. The CAB is an expert body and their assessment and the testing data (both referred to the justification section of the CAB report) supports the conclusion that the PNA’s partial strategy is working with a level of high confidence. I accept that conclusion.

66. Thirdly, the Objector objects to the CAB relying on the data in Table 15 at page 55 of the CAB final report to support its position that this amounts to “relatively complete” data. The reference to “relatively complete” relates to the test to be met for the objective test of confidence at Table SA8 in the FCR. Pages of submissions are made in the Notice of Objection which are expanded and repeated in the Objector’s written submissions for the hearing for the purposes of scientifically undermining the data as set out in Table 15. Table 15 is a complex Table with 7 columns and 84 rows. However, I am concerned with whether or not the score of 100 for PI 2.2.2 (b) is unreasonably or irrational. Instead, I am being asked to carry out a technical and scientific review of the underlying data put together by the CAB. This approach by the Objector is to misunderstand the role of the independent adjudicator. I am being invited to enter the scientific ring and make conclusions about the validity of underlying data. This submission is contradicted by FCR PD 2.6.6.2, which states: *“In no case shall the independent adjudicator substitute his or her own views or findings of fact for those of the CAB.”* This ground is dismissed.

67. There is nothing irrational or arbitrary about the CAB’s decision to score the PNA Fishery 100 under this PI.

PI 2.2.2 (c) – Secondary Species Management – strategy implementation

68. I dismiss the Objector’s related challenge for the same reasons set out above under PI 2.2.2 (b).

69. The second point raised is that to obtain a score of 100 under this PI, “clear evidence” is required of the partial strategy being implemented successfully and achieving its objective. The CAB’s report at page 164 sets out three paragraphs to explain why the CAB considered the score of 100 was justified for the PNA fishery. The Objector, at paragraph 136 of its written submissions for the hearing, sets out four critiques of the justification by the CAB for finding “clear evidence” exists.

70. The submissions do not grapple with why it is said the CAB’s conclusions in respect of “clear evidence” is arbitrary and/or unreasonable. The CAB is an expert body which has

presented a detailed report based on evidence. I accept the CAB's reasons at pages 15 and 16 of their written submissions filed on the last day of the hearing. The Objector is not an expert and has not filed any expert evidence. The Objector is incorrectly asking the adjudicator to come to a judgement on the evidence, when that is not the role of the adjudicator.

71. The challenge to the 100 score for this PI is dismissed.

PI 2.2.2 (d) – Shark Finning

72. The relevant Performance Indicator in respect of shark finning states for a score of 60: *“It is likely that shark finning is not taking place.”* For a score of 80: *“It is highly likely that shark finning is not taking place.”* And for a score of 100: *“There is a high degree of certainty that shark finning is not taking place.”* The CAB scored the PNA fishery 80 and justified this score as follows:

SPC provided observer data showing that shark finning does occur at a low level in the PNAFTF. However, the number of finning instances has dropped considerably recently, and the overall number of animals concerned has also dropped dramatically (Table 16).

In part, this is in response to the adoption of CMM2010-07, which requires that *“CCMs shall take measures necessary to require that their fishers fully utilize any retained catches of sharks. Full utilization is defined as retention by the fishing vessel of all parts of the shark excepting head, guts, and skins, to the point of first landing or transshipment.”* In addition, the vast majority of the instances of finning appear to have involved silky shark, a species that has recently been subject to enhanced management in WCPFC waters through the adoption of CMM2013-08. This requires that CCMs should consider measures directed at by-catch mitigation as well as measures directed at targeted catch to improve the status of the silky shark population, and requires that silky sharks are not retained in whole or in part in the WCPFC-CA.

Importantly, through the MSC interpretations log, the MSC has clarified the following: *“If rare and isolated cases of shark finning are encountered in the most recent year*

(or the recent period considered in scoring the fishery, which should be no less than the last full season of landings), the team should evaluate the nature of such cases to determine whether further cases of shark finning could be happening in the fishery in a systematic way.” Also, “Fisberies should not be perversely penalised, for example, for putting in place very good surveillance and enforcement systems that are proving effective and still detecting and quickly resolving the odd rare case”
 (<http://msc-info.accreditation-services.com/questions/shark-finning/>)

The finning identified in the PNAFTF is not systematic, and the Assessment Team was shown evidence that PNA member countries are prosecuting vessel masters for shark-finning violations. As such, the fishery is scored 80 for this SI. It cannot score 100 as a small amount of finning does occur.

A Recommendation (#1) is made that, for each MSC audit, the PNA provide a PNAFTF-specific enforcement and compliance summary report of CMM 2010-07 (for sharks), CMM 2011-03 (for oceanic whitetip sharks) and CMM 2013-08 (for silky sharks). This should detail any contraventions of these CMMs that have occurred in the PNAFTF in the preceding year, the enforcement action taken as a result in each case, and any statutory or non-statutory approaches taken to further reduce the likelihood of any contraventions occurring.

73. The Table 16 figures are as follows:

Year	Instance of Finning	Animals retained	% Silky shark
2012	179	928	84.8
2013	191	970	94.4
2014	45	222	94.1
2015	14	32	96.9

74. The Objector, through Mr Davey QC, made a number of powerful points:

- a. plainly, shark finning is taking place in the PNA fishery, as set out in the CAB's own report;
 - b. given shark finning is taking place in the PNA fishery, the plain wording of the scoring indicator requires the CAB to fail the PNA fishery;
 - c. the CAB improperly relied upon the MSC "Interpretation Log" - a log which is not publicly available and which the CAB selectively quoted from to justify the score of 80, (see the excerpted justification section of the CAB report above);
 - d. it was improper for the CAB to rely upon the interpretations log, which is not publicly available, to interpret a publicly available standard;
 - e. the Objector had not had access to the Interpretation Log, despite asking for access to it from the MSC, which was declined;
 - f. the WCPFC-TCC reports did not demonstrate the drop in recorded finning was the result of effective investigation, enforcement and prosecution, and it was said there were reports of intimidation and bribery of the observers on board vessels;
 - g. overall, the CAB failed to provide proper evidence of the law enforcement activities around shark finning and were wrong to rely on media reports and anecdotal evidence.
75. At the hearing, concerned by the CAB's reliance on the Interpretation Log and the fact the Objector had reported it had been declined access to this document, I asked the CAB to query with the MSC whether the entire Interpretation Log could be made available to all the parties to these proceedings and if that was not possible whether all excerpts which related to shark finning could be disclosed to the parties.
76. The following day the MSC provided the parties with only those parts of the Interpretation Log which related to shark finning but declined to provide the parties with the full log. As can be seen above, permission was granted to the Objector to make further written submissions on the issue of the CAB's reliance on the Interpretation log. The Objector's post hearing written submissions covered this issue at paragraphs 42 to 51. The Objector maintained its submission that the CAB's reliance on the log was "not legitimate" but without prejudice made a number of other points. As will be seen below, I direct the

Objector's submissions will form part of the Annex to this decision and so do not set out the remaining written submissions made.

77. The CAB submitted that reliance on the Interpretation Log was legitimate for the following summarised reasons: it forms part of the record pursuant to PD 2.6.5.4; it is published by the MSC who alone control its contents and has been in existence since 2014 and is highly relevant to the MSC's standards; the peer assessors raised no issue with the log; the CAB would have applied for a variation if the CAB was unable to rely on the Interpretation Log; the clarification of the PI by the Interpretation Log is within the intention of the scoring indicator and the approach advanced by the Objector lacks common sense as one individual transgression would lead to a fail; the use of the Interpretation Log was not arbitrary or unreasonable; the use of the Interpretation Log did not result in any unfairness to the Objector; the non-publication of the Log is a governance issue for the MSC, not an issue for the Adjudication.

78. Having considered the rival submissions carefully, I have come to the clear conclusion it is not legitimate for the CAB to rely on the Interpretation Log when assessing the PNA Fishery's compliance with the FCR. Regrettably, given the structure of the adjudication process, I have not received the MSC's submissions on this issue, but the points for and against have been well made by the CAB and the Objector. My reasons are as follows:

- a. The FCR is publicly available and is made public to permit consumers, environmentalists, Governments and others to have confidence in the MSC certification process. Therefore to rely on a private document which is not published, which was not available in full form to the parties to an Objection, is lacking in proper transparency. It is wrong for a publicly available standard to be interpreted based upon a privately available policy. Further it is unfair to a party to an Objection not to be provided with a full copy of the document, when it forms a part of the CAB's rationale to certify a fishery when an objection is made.
- b. The FCR makes no reference to the Interpretation Log in its list of normative documents, yet CABs may rely on it when interpreting these normative standards.

- c. The MSC through its FCR holds out the standards to: *“provide the transparency that is required of an international certification scheme for it to have credibility with potential stakeholders...”*. It is inconsistent with this important principle of transparency for CABs to rely on a private Interpretation Log.
- d. I reject the CAB’s submission that it is appropriate for me to have regard to the Interpretation Log because it is said it forms part of the record pursuant to PD 2.6.5.4. Notwithstanding the fact I am unclear what is meant by “related interpretations”, it is a surprising submission for the CAB to make, given they had responsibility for putting the bundle together and omitted the Interpretation Log. It is further surprising, given that when asked the MSC did not disclose the full Log to the parties.
- e. The CAB makes the powerful point that they would have sought a variation for the Fishery on this issue. That, however, is irrelevant to the issue of whether it is legitimate or fair for an adjudicator to place reliance on the Interpretation Log when considering the issue of shark finning and the CAB score of 80.
- f. Whether or not there is any direct unfairness to the Objector does not address the issue of the need for transparency in the application of the MSC standards by CABs to fisheries.
- g. I agree, whether or not the MSC continue to wish to rely on the Interpretation Log remains a governance issue for them. However, as an independent adjudicator, it is my task to ensure a fair adjudication, and for the reasons I have set out it is lacking in full transparency and therefore not fair for the CAB to rely upon a private Interpretation Log when interpreting and applying the publicly available FCR to the PNA fishery.

79. Therefore, I agree with the Objector that the scoring of the shark finning scoring indicator was arbitrary because it relied upon a document which was illegitimate and unfair for the reasons set out above. That being said, I am not persuaded that this error by the CAB “was material to the determination” for the reasons developed below.

80. Before turning to the substance of the shark finning issue, I must also address the dispute between the parties in respect of Table 16. As can be seen from the pre-hearing adjudication

decisions, the Objector's application for disclosure of documents and information related to Table 16 was refused. At the hearing, however, the CAB relented and the underlying shark finning data was provided. In their respective post hearing written submissions the parties addressed the data which underpins Table 16.

81. The Objector complains that the data in Table 16 should include information related to the FAD fishing which takes place in respect of the PNA fishery fleet. They make several further complaints related to the WCPFC Conservation and Maintenance Measures which are detailed at paragraphs 56 to 69 of their post hearing submissions. Once again, I find the Objector is asking me to descend into the scientific arena and substitute my scientific judgement for that of the CAB. There is a disagreement of scientific approaches between the CAB and the Objector, but importantly there is nothing arbitrary or unreasonable about the CAB's reliance on Table 16 and for me to otherwise find would require me as an adjudicator to improperly second guess the CAB on a question of scientific judgement. Furthermore, I agree with the CAB's background and reasoning related to table 16, which is explained as follows, taken from their report at page 58:

In 2010, the WCPFC introduced CMM 2010-07, which specifies that Commission Members (CCMs) take measures necessary to require their fishers to fully utilize any retained catches of sharks, with all parts of the shark excepting head, guts and skins to be retained to the point of first landing or transshipment. CMM 2010-07 also requires that CCMs take measures to encourage the release of live sharks that are caught incidentally and are not used for food or other purposes in fisheries not directed at sharks. CMM 2011-04 was then adopted and requires that no oceanic whitetip sharks (*Carcharhinus longimanus*) are retained in whole or in part, while CMM 2013-08 also requires that silky sharks (*Carcharhinus falciformis*) are not retained in whole or in part. Importantly, there is a requirement for 100% observer coverage in the PNAFTF (although some purse seine observer data are yet to be processed – SPC, pers. comm.), and while there is evidence of shark finning having occurred in the PNAFTF, the number of finning instances has dropped considerably in the recent period, and the overall number of animals concerned has also dropped dramatically (Table 16). The recent introduction and enforcement of CMM 2011-04

and 2013-08 appear to have been fundamental in this regard, in particular because silky shark was, by far, the species that was most commonly recorded as being finned (Table 16). It is noted that finning or possession of sharks in contravention of legislation is an offence, and the Assessment Team was provided with evidence to show that PNA member countries are prosecuting vessel masters as required.

(Table 16). It is noted that finning or possession of sharks in contravention of legislation is an offence, and the Assessment Team was provided with evidence to show that PNA member countries are prosecuting vessel masters as required.

82. Turning back then to the issue of the CAB's score of 80 in respect of shark finning it is necessary to understand the context of the PI related to shark finning 2.2.2 (d). First, the relevant PI must be read in context. The shark finning PI is to be assessed within the context of the secondary species management. The assessment by the CAB of shark finning is a subset of: "*Information on the nature and amount of secondary species taken is adequate to determine the risk posed by the UoA and effectiveness of the strategy to manage secondary species.*" It is apparent from the context of the overall PI that management is required because there are risks to secondary species, such as sharks. An interpretation of the shark finning scoring that required no finning of sharks at all would be surprising. Properly understood PI 2.2.2 (d) is requiring the assessed fishery to have in place a management strategy that leads to it being likely/highly likely/high degree of certainty that shark finning is not taking place. PI 2.2.2 (d) cannot be understood and interpreted shorn of its context. The overall purpose is to assess the fishery to ensure it has in place a management strategy which is operative and effective to ensure shark finning is not taking place. Given the reduction in shark finning cases from 2012 to 2015, seen against the scale of the PNA fishery, the strategy has resulted in it being highly likely that shark finning is not taking place at any assessed time.

83. Secondly, the assessment process under the FCR is a common sense method to reduce risks to the marine environment. PNA with their 100 % observer team and strategies have significantly reduced shark finning to a very limited extent (only 32 reported cases in 2015). I accept the CAB's submission that any fishery would be vulnerable to failing the certification process if only one or two "saboteurs" deliberately finned sharks. If the Objector were correct in their interpretation, then one single incident of shark finning would make a fishery

ineligible for certification. Such an approach is unrealistic, which is why PS 2.2.2 focuses on management strategies to reduce risk. The MSC standard could be rendered obsolete by such an absolutist position, resulting in many fisheries failing, greatly undermining the implementation of the MSC standards, which contribute significantly to the aims of sustainability and environmental protection. I further agree with the CAB that the Objector's interpretation would result in there being a perverse incentive for fisheries not to monitor the fishing activities.

84. Fourthly, if the Objector were correct in their interpretation there would be no need for three gradations of scores (60, 80, 100). The Objector's approach is binary: either there is shark finning or there is not. It must pass or a fail. That is inconsistent with the MSC decision to have three gradations of scoring which reinforces the reasoning above in respect of the proper context of PI 2.2.2 (d).

85. Lastly, as a separate point, but one which adds support to the reasoning above, the terminology used in PI 2.2.2 (d) must be read in a similar manner to PI 2.1.2, which uses identical language in the scoring component for shark finning (see PI 2.1.2 (d)). The terms used "likely" "highly likely" and "high degree of certainty" are defined for the outcome PIs, such as PI 2.1.2. as set out in table SA9. In this table a score of 80, which is "highly likely" requires probability to "greater than the 80th percentile". That is to say when a CAB states that "it is highly likely that shark finning is not taking place" that is with a 20 % margin of error. Whilst PI 2.2.2 is a management and not outcome PI, Table SA9 should also be applied to PI 2.2.2 (d), because the test at PI 2.2.2 (d) is focusing on the outcome (stopping shark finning) as opposed to management strategy issues and secondly the language used at PI 2.2.2 (d) and PI 2.1.2 (d) is the same.

86. Therefore for these reasons, and without any reliance on the Interpretation Log, I find the PNA fishery justifies a score of 80 at PI 2.2.2 (d). Whilst the manner of the scoring by the CAB was arbitrary, this error was immaterial and the Fishery justifies a score of 80 for PI 2.2.2 (d) for the reasons I have given. I dismiss this ground of objection. I also note in concluding the error was immaterial, I have not been required to substitute any of the CAB's

facts or scientific judgements with my own; rather I have applied the FCR without the Interpretation Log to the CAB's findings.

PI 2.2.2 (e) – Mortality of Unwanted Catch

87. Many of the submissions made here by the Objector are a repeat of their argument over whether there should be scoring or not when there are no main secondary species. I have explained above why I am unpersuaded by this general argument and I reject the argument as it is sought to be applied to this specific ground. Contrary to the Objector's submissions in the written submissions at paragraph 155, the CAB did score the PI 2.2.2 at each of 2.2.2 (a) to (e) so there has been no contravention of SA 3.8.1.

88. Secondly, in respect of point 2, I do not consider the CAB was confused. It did not award a score of 100, because there was no regular review of all secondary species. A score of 80 was appropriate, because as there are no main secondary species, there is no negative environmental impact and so the CAB is entitled to score the PNA fishery at the 80 level.

89. On points 3, 4 and 5 it is accepted the CAB is required to consider SA 3.5.3.3. pursuant to SA 3.8.4. However, given there is no need for alternative measures, a five year review or the term "as appropriate" (because there are no main secondary species) this does not assist the Objector.

90. For the reasons given the CAB score of 80 for PI 2.2.2 (e) is neither arbitrary nor unreasonable and this ground is dismissed.

PI 2.2.3 (a) – secondary species information - adequacy of assessment

91. The Objector's complaint is predicated again on the basis that notwithstanding the fact the CAB has assessed there to be no main secondary species, no score should be attributed for PI 2.2.3 (a). I disagree for reasons provided above. The CAB has not acted unreasonably or irrationally and this ground is dismissed.

PI 2.2.3 (b) Secondary Species Information – assessment of impact

92. This PI requires the CAB to be satisfied that some quantitative information is adequate to estimate the impact of the UoA on minor secondary species with respect to status. The only score is 100. The CAB awarded a score of 100. The Objector objects because: i. it submits black and striped marlin are main secondary species; ii. there is a paucity of data for black marling so the test is not met; iii. the CAB failed to take a ‘precautionary approach’.
93. I reject this ground of objection for these reasons. First, a reasoned explanation has been provided above for why the black and striped marlin are not main secondary species.
94. Secondly, the CAB is an expert body and it has determined there is sufficient quantitative information for it to assess the impact of the Fishery on the minor secondary species. This is reinforced by GSA 3.6, the relevant MSC Guidance to this PI which states (my emphasis added):

For each scoring element in each component, it is expected that the assessment team will use their expert judgement to decide whether the information provided is adequate to estimate the stock status in the Outcome PI and to evaluate methods and measures in the Management PI.

If the management approach is very precautionary or the status of the species is very high or the catches and impact of those catches are very low, information with low precision may be adequate for both the estimation of current status and the performance of the management strategy. Conversely, where the status is unknown or based on limited information, CABs would be expected to be more precautionary in their assessment of information adequacy to support the Outcome or Management PIs.

95. Therefore, even with the relatively limited information in respect of black marlin, seen in the context of the Guidance and given black marlin is a very low catch in the PNA fishery (0.016 % of the PNAFTF catch), there is nothing arbitrary or unreasonable about the CAB’s conclusion. The CAB appropriately, in the context of the Guidance, acknowledges the

limited information for black marlin in their justification section of their report. For the same reasons, there has been no failure to adopt a precautionary approach. I also adopt and rely on the CAB's additional reasoning in their table on page 21, set out in their submissions filed on the last day of the hearing.

PI 2.2.3 (c) – secondary species – information adequacy management strategy

96. The CAB scored the Fishery at 80 for this PI. The scoring post for 80 required: “*Information is adequate to support a partial strategy to manage main secondary species.*” The Objector disagrees on the basis it considers there are main secondary species and it challenges the CAB's view that the PNA fishery meets the 80 score by default because there are no main secondary species.

97. I have explained my reasons for considering why the CAB has not acted irrationally or unreasonably by (i) concluding there are no main secondary species and (ii) why a score of 80 is permitted when the score guide is only in respect of matters related to main secondary species when none exist. For these same reasons I reject this ground of objection.

PI 2.3.1 (b) ETP species outcome – direct effects

98. This PI focuses on the effects of the fishery on Endangered, Threatened or Protected (ETP) Species. The CAB scored the Fishery 100 for silky shark and 80 for other ETP species. A significant amount of text is set out in the CAB report to justify its findings at pages 169-172. The Objectors disagrees because: i. it considers silky shark is over fished and the CAB cannot overlook this because silky shark is a small proportion of the overall catch and the Objector disputes the CAB's reliance on GSA 3.4.6; ii. The score of 80 for the other ETP species is incorrect because the CAB used the wrong standard form text in the report which incorrectly added the word “known” (to “*known direct effects of the UoA are highly likely to not hinder recovery of ETP species*”) and thereby failed to assess the unknown direct effects.

99. On the first point, in relation to silky shark, the CAB rely on GSA 3.4.6 which states (emphasis added):

Teams should note that the impact of a UoA should here be assessed in terms of stock removals and the marginal F of the UoA and the percentages listed here should therefore not be confused with the percentages used to designate ‘main’ species, which are based on the proportion of a species as part of the total catch of the UoA (SA3.4.2).

100. I agree with the CAB this is relevant for the reasons given by the CAB. Even if the heading to this section of the Guidance (MSC UoAs Collectively Not Hindering Recovery) describes collective Units of Assessment, it is clear the paragraph relied upon is in the singular (“a UoA”) and no good reason is put forward by the Objector as to why this section of the Guidance must be confined only to collective Units of Assessment, beyond what might be an erroneous heading. In any event there is no logic to confining the guidance therein contained to two or more Units of Assessment.

101. I further agree with the CAB that as silky shark comprises 0.05% of the PNA fishery and the entire WCPO un-associated purse seine fishery comprises 3 % of the overall silky shark, the CAB’s position is justified and not arbitrary or unreasonable when concluding the Fishery has no significant detrimental direct effect on silky shark.

102. I also agree that, notwithstanding the error of template and the addition of the word “known” the CAB had in any event properly assessed the other ETP species as against known and unknown direct effects of the PNA fishery. The CAB had considered post-release mortality which is an unknown effect. For the sake of completeness I also accept the CAB’s submissions in respect of the Objector’s ground related to “does not hinder” as set out in the CAB’s consolidated Notice of Objection and its response at page 74.

103. The CAB did not act in an arbitrary or unreasonable manner. The ground is dismissed.

104. This PI requires the Fishery to have measures (score of 60) or a strategy (score 80) in place to ensure the Unit of Assessment does not hinder the recovery of ETP species. The CAB scored the PNA fishery 80 for all others species, but 60 for devil and manta rays. The Objector's grounds are: i. the strategy in place for non ray species is not a strategy as defined in SA 8; ii. the assessment of the rays does not include the definition of "does not hinder"; iii. the CAB has failed to demonstrate the strategy or measures are in place.

105. On the first point, the CAB is an expert body which has carried out the assessment. The CAB is in the best position to assess whether the strategy is 'cohesive' and 'strategic'. The Objector might disagree with these adjectives being applied and hope for a more detailed strategy, but this does not result in the CAB's assessment being rendered arbitrary or unreasonable.

106. As to the second point, the CAB relies on the fact devil and manta rays are caught in other fisheries which have been certified, such as: the Solomon Islands Skipjack and Yellowfin Purse Seine Anchored FAD fishery, the Tri Marine Western and Central Skipjack and Yellowfin Tuna fishery and the Talley's New Zealand Skipjack Tuna Purse Seine Fishery. This adds to the conclusion that the score of 60 by the CAB for 'ray' measures is not arbitrary or unreasonable. Further the CAB report at page 176 states:

Overall, there are considered to be measures in place that are expected to ensure the UoAs do not hinder the recovery of devil rays and manta rays, but it is not clear that together they comprise a strategy to manage and minimise impacts. The fishery meets SG60 but not SG80, and so two Conditions of Certification (#5 for UoA 1 and #6 for UoA 2) are introduced.

107. Whether or not the definition of "does not hinder" was expressly set out in the CAB report is a marginal issue. The CAB addressed the measures in place for rays and considered conditions were necessary and imposed them. There is nothing arbitrary or unreasonable about this approach.

108. The last point concerns whether the strategy/measures are actually in place. The CAB noted the CMMs were in place. There is nothing in this point. It is dismissed.

PI 2.3.2 (c)- ETP species management strategy – evaluation

109. The CAB scored the Fishery a score of 80 for the evaluation of its management strategy. The Objector raises three points: i. the measures required for a score of 60 require plausible arguments based on expert knowledge and the CAB has failed to identify the expertise; ii. the wrong version of the scoring guide was used and the PI should be re-scored because of the confusion; iii. the CAB in scoring 80 failed to demonstrate the appropriate test for “objective basis for confidence” was met as expanded in paragraphs 212 to 217 of the Objector’s written submissions.

110. I accept the CAB has based its assessment on the WCPFC Scientific Committee. The CAB report states:

The requirement for 100% observer coverage and a comprehensive sampling regime allow for the collection of data at a very high level, and research is reviewed and management measures proposed through the WCPFC SC process.

111. This meets the test set out in the PI and cannot be viewed as an arbitrary or unreasonable conclusion by the MSC given the expertise of the WCPFC SC.

112. As for the discrepancy in the FCR ground, the CAB report is erroneous in referring to “measures/strategy”, as the FCR prescribes “partial strategy/strategy”. This ground was not referred to by the parties in oral argument at the hearing and no party required the MSC to clarify the terms of the FCR. I accept the Objector is correct and the wrong standard was applied by the CAB. However, this ground must be dismissed as no party has advanced a proper case explaining the difference between a partial strategy and measures. I accept there is a difference between a strategy and measures, but I was not referred to the subtle difference between measures and a partial strategy. Probably correctly, as I accept the CAB’s

submission that: “*the difference in our professional view is minor*” and this approach cannot be said to be arbitrary or unreasonable.

113. The third point refers back to the first point by way of querying the role of experts. For similar reasons as above, I reject this ground and adopt the reasoning set out in page 25 of the CAB’s submissions filed on the second day of the hearing and their submissions set in in page 82 of the consolidated Notice of Objection and Response. The CAB’s reliance on WCPFC SC reports and guidance is neither arbitrary nor unreasonable. This ground is dismissed.

SI 2.3.2 (e) ETP Management Strategy – review of alternative measures to minimise mortality

114. The Objector in its admirably forensic manner casts doubt on the justification for a score of 100, which requires: “*a biennial review of the potential effectiveness and practicality of alternative measures to minimise UoA-related mortality ETP species, and they are implemented, as appropriate.*” The CAB’s justification in its report states:

There is an ongoing research programme to improve understanding of the interactions and implications of the different WCPO fisheries on non-target species, and ecosystem and bycatch mitigation is a standing item on the SC agenda (e.g., WCPFC 2016b). Measures are implemented as appropriate. The PNAFTF meets the SG100 level of performance.

115. This is a poorly reasoned response for a score of 100. That being said the CAB has provided ample data in its response to the Notice of Objection at pages 85 to 86 and on pages 26 and 27 of its written submissions filed on the last day of the hearing to justify the score of 100. In the context that the measures must be “as appropriate”, I accept sufficient aspects have been identified by the CAB, with the result that its score of 100 is not unreasonable or arbitrary. I also accept the CAB is correct, given its expertise and given the Objector relied on no specific evidence, that ETP does not include secondary species. The Objector at paragraph 27 of its post-hearing submissions, did not dispute this. The

Objector, therefore, has made an error which has coloured its analysis of the CAB's response.

116. The CAB submit there is “*ample evidence provided to demonstrate there is an on-going, annual process to review*” the measures. I accept that. For example:
- a. CMM 2010-07 measures such as national plans of action for sharks, reporting catches of specific sharks to species; addressing shark finning;
 - b. CMM 2011-04 – measures such as: prohibitions on retaining, trans-shipping, storing or landing oceanic whitetip sharks;
 - c. CMM 2013-08 - measures such as: prohibitions in respect of silky shark.

PI 2.3.3 (a) ETP species information – adequacy for assessment of impacts

117. This ground is a repetition of the issue of whether or not it is appropriate for the CAB to rely on the fact the silky shark catch is a small proportion of the overall PNA fishery catch. It adds nothing to the earlier ground which rely on this point and is dismissed for the same reasons. The CAB's decision was not arbitrary or unreasonable when scoring 100 for silky shark.

PI 3.1.1 Legal/Customary Framework

118. I consider the CAB have correctly followed FCR 7.10.5.3 and awarded a score of 95. I accept the CAB has not used an average. There is nothing arbitrary or irrational about the overall performance indicator score of 95.

PI 3.1.1 (a) – Compatibility of Laws or standards with effective management

119. The CAB scored the PNA fishery with a score of 100 for this PI, which means: “*There is an effective national legal system and binding procedures governing cooperation with other parties which delivers management outcomes consistent with MSC Principles 1 and 2.*”

120. The Objector disagrees for the following reasons: i. the CAB failed to evidence the assertions used in the justification contained in the CAB report to meet the PI set out in the paragraph above; ii. rather than stating the laws “deliver” the outcomes, the CAB report noted it “seeks” to ensure relevant outcomes; iii. the report has not dealt with flag state participants as it should pursuant to SA 4.3.2.4.

121. It is fair to say the CAB has expanded on its reasoning in both its response to the Notice of Objection at pages 96 to 100 and at paragraphs 9 to 21 of its final day hearing submissions. However, much of the relevant background is set out in the CAB report at pages 70 to 80, which provides a useful overview, at Figure 31, and with a list of the relevant legislation for each nation state member of the PNA at pages 78 to 79. Clear reference is made to the “Dropbox” resource to permit stakeholders to access these relevant laws. It is important the “justification” for the scoring of the Principle 3 Performance indicators is read in the context of this information.

122. On this point generally, I agree with the CAB that the overall submission made by the Objector in respect of big eye tuna stock is inapposite, because one cannot extrapolate the trajectory of only one species to condemn the effectiveness of the legal system. I accept any problems with big eye tuna may have other, regional causes.

123. On the first point, I have little hesitation in concluding the CAB’s assessment is correct. The CAB, through its expert, was satisfied, after his analysis, that each nation of the PNA complied with the standard. There was no challenge to the expertise of Mr Japp. The Objector relied on no Principle 3 evidence of its own. The CAB’s overall conclusion was concisely put that:

The PNAFTF operates within three broad management regimes. The overarching management regime is underpinned by the RFMO (WCPFC) to which all members of the PNA have obligations under the convention including the application of WCPFC conservation and management measures (CMMs). Secondly each member state (and those part of the PNA) has national legislation inclusive of fisheries laws which are binding legal instruments consistent with the principles and provisions of

UNCLOS, UNFSA and CBD. A third level within the management framework is the PNA level (Nauru Agreement) with agreed implementing arrangements including Minimum Terms and Conditions between signatories. The Nauru Agreement is therefore integrated into the legal (fisheries) framework at a National level which in turn has obligations under the WCPFC convention.

124. The short answer to this point is that the CAB has provided the links to each national legislature's relevant legislation, but the Objector has not responded explaining which nation state, through deficient laws, is non-compliant. The Objector complains that the CAB must detail all this in the report and it is not its role to go to links and read legislation. I disagree. The CAB has explained its expert has considered the legislation and other materials and is satisfied the standard is met. If the Objector wishes to contest this, it cannot sit on its hands and complain, but do no more. It must study the legislation and provide its analysis of defects. It has chosen not to do so. The CAB report is already 392 pages long. There are eight PNA countries. If the CAB were required to detail each aspect of the eight national laws which complied with the standards, the report would become unwieldy. This ground is dismissed.
125. I reject the complaint referring to the use of the word "seek". This is no more than a form of phrasing. The author had the standard well in mind.
126. The third point is also without merit, given the further detail set out in paragraphs 15 to 17 of the CAB final day written submissions on Principle 3. This document will also be incorporated as an appendix to this decision, for reasons of transparency. In short, I accept the CAB's response that "*foreign flag vessels are either full members of the WCPFC or are CMMS (as fully listed in the CABs response to the PCDR comments by the IPNLF)...being a signatory to the convention is binding and explicit acceptance of the CMMS?*". This is the view of the expert, and paragraph 37 of the Objector's post hearing submissions do not meaningfully or adequately engage with Mr Japp's further explanation and information.
127. There is nothing arbitrary or unreasonable about the CAB's approach to PI 3.1.1 (a).

SI 3.1.1. (b) – resolution of disputes

128. The CAB scored the Fishery with 80, meaning: “*The management system incorporates or is subject by law to a transparent mechanism for the resolution of legal disputes which is considered to be effective in dealing with most issues and that is appropriate to the context of the UoA*”. The Objector disagrees because: i. the CAB’s justification in the report is inadequate; and ii. specific concerns are raised about the nature of the PNA Treaty dispute resolution system, first in respect of Article 8 (2) of the Palau Agreement and secondly as to whether PNA Instruments are a sub-regional agreement for the purposes of Article 30 of the UN Fish Stocks Agreement.

129. The CAB’s expert has studied the issues, produced a detailed report and supported his conclusions in the response to the Notice of Objection and in further written submissions on Principle 3, filed on the second day of the hearing. No evidence or information on these issues has been filed by the Objector. Specifically no evidence has been filed by the Objector, or submissions made, related to whether the legal dispute mechanisms has been ineffective in dealing with “most issues”. Indeed, no party has pointed me towards any information related to unresolved disputes. Given the CAB’s position, it is not difficult to conclude there are no or very few outstanding legal issues which have been incapable of resolution by “transparent mechanisms”. The Objector complains negotiation cannot be sufficient, but unless the Objector can point to examples of where negotiation has failed and there are outstanding disputes, its argument is substantially weakened.

130. It is relevant that the CAB did not grant a score of 100 on this PI, acknowledging, correctly, the dispute resolution mechanisms in force are not as effective as they could be for an award of 100.

131. Further, I am unpersuaded I should embark upon the journey to determine (even if I had a jurisdiction) whether or not the PNA Instruments are regarded as sub-regional agreements for the purposes of the UN Fish Stocks Agreement. The CAB asserts they are, the Objector states they are not. Neither counsel addressed me on this issue and none of the relevant legal materials, including the UN Agreement, were put before me. I decline to rule on this issue. Even leaving this issue aside, I am satisfied that “most issues” are capable of

dispute resolution, noting of course, that the score of 80, implies not all legal disputes need be resolved.

132. I am satisfied, notwithstanding the clear points made by Mr Davey QC and his team, that the CAB has reached a decision that is not arbitrary or unreasonable. The presentation of the information by the CAB on this issue may not be as transparent and as clear with appropriate references as would be ideal, but that does not result in the CAB's conclusions being arbitrary or unreasonable. It is clear an expert has assessed this matter, formed a view and in the absence of opposing expert assessment and information, I prefer the CAB's position on this issue. This ground of objection is dismissed.

PI 3.1.1 (c) Legal/Customary Framework – respect for rights

133. The CAB scored the Fishery 100 for this PI. This requires: *“The management system has a mechanism to formally commit to the legal rights created explicitly or established by custom of people dependent on fishing for food and livelihood in a manner consistent with the objectives of MSC Principles 1 and 2”*.

134. As the Objector properly points out, FCR SA 4.3.8 states: *“The team shall interpret “formally commit” in scoring issue (c) at SG100 to mean that the client can demonstrate a mandated legal basis where rights are fully codified with the fishery management system and/ or its policies and procedures for managing fisheries under a legal framework.”*

135. In essence, the Objector submits this test is not met because the CAB's reliance on the WCPFC Convention (Convention On The Conservation And Management Of Highly Migratory Fish Stocks In The Western And Central Pacific Ocean) to upgrade the score from 80 at the PCDR to 100 in the final CAB report is misplaced, given the Convention does not embrace the protection of rights. The Objector makes these submissions at paragraphs 303 to 316 of its written submissions, but has not provided a copy of the Convention or fully argued the matter.

136. The CAB's rationale for a score of 100 is clearly set out:

PNA objectives implicitly include optimizing the benefits of tuna resources for members. Under the WCPFC convention there is a mechanism formally committing to the legal rights created explicitly or established by custom of people dependent on fishing for food and livelihood in a manner consistent with the objectives of MSC Principles 1 and 2. This includes Under Article 7 of the WCPFC : Implementation of principles in areas under national jurisdiction : the needs of each country (national jurisdiction) is acknowledged viz. :

1. The principles and measures for conservation and management enumerated in article 5 shall be applied by coastal States within areas under national jurisdiction in the Convention Area in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks.

2. The members of the Commission shall give due consideration to the respective capacities of developing coastal States, in particular Small Island Developing States, in the Convention Area to apply the provisions of articles 5 and 6 within areas under national jurisdiction and their need for assistance as provided for in this Convention.

Further, this article explicitly embraces the commitments of each country under their national legislation (refer to the numerous Acts, Titles and regulations) that commit to protecting the rights of the traditional folk to benefit from the resources under their jurisdiction.

Further, under Article 10 of the commission (para3.a-j) the rights of SIDS and coastal communities is explicitly stated as well as the “the record of compliance by the participants with conservation and management measures”. SG100 is met

137. The CAB in its submission filed on the second day of the hearing also made further submissions on the WCPFC Convention at paragraphs 22 and 23. These were not responded to in the Objector’s post hearing written submissions.

138. I have not received detailed submissions from counsel on the proper interpretation, structure and application of the WCPFC Convention in the PNA nation states. Therefore, I am not in a position to rule definitely on its application, even it were appropriate for me to do so. However, looking at the matter shortly in the context of the CAB's approach to the FCR, the following is relevant: Article 7 (1) states:

The principles and measures for conservation and management enumerated in article 5 shall be applied by coastal States within areas under national jurisdiction in the Convention Area in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks.

139. Article 5 (h) states: "*take into account the interests of artisanal and subsistence fishers*"

140. There is limited doubt that when these provisions of the Convention are read with the CAB's expert justification, and its explicit reference to national legislation, that the CAB's conclusion is not arbitrary or unreasonable. There exists a mechanism (the Convention and national legislation) to formally commit (a legal framework exists for policies and procedures) to the legal rights created explicitly or by custom on people dependent on fishing for foods and livelihood (the interests of artisanal and subsistence fishers). There is nothing irrational or arbitrary about this conclusion by the CAB and the PI/FCR does not require a codified system of rights in each nation state. This ground of objection is dismissed.

PI 3.2.2 (a) – decision making processes

141. The PI requires the Fishery to have "*fishery-specific management system includ[ing] effective decision-making processes that result in measures and strategies to achieve the objectives, and has an appropriate approach to actual disputes in the fishery.*" The CAB scored the fishery 80, the Objector disagrees.

142. The main thrust of the Objector's submissions is that whilst at the WCPFC Convention level there are established decision making processes, there is no evidence or

justification provided by the CAB in the report at the PNA or national levels. In the light of the CAB's response to the Notice of Objection, the Objector submits their response is "rather opaque". Secondly, the Objector states the CAB failed to have regard to the need to consider whether the Fishery in its decision making took account of "wider implications".

143. I am satisfied the CAB finally produced a clear and full response to the Objection at paragraph 24 of its Principle 3 submissions filed on the last day of the hearing. I accept the CAB's rationale and logic and conclude its score of 80, in the light of this information was neither arbitrary nor unreasonable when seen in the light of the two points made by the Objector. That is because the CAB has demonstrated, in reliance on their expertise, that: i. the decision making at the national, PNA and WCPFC levels are all integrated; ii. the PNA decision making tools and arrangements are established; and iii. it is implicit that states who are signatories to the Nauru Agreement and all its decision making tools, and states that are signatories to the WCPFC Convention, are obligated to comply with decisions including responsibility for implementing management tools, and this extends to foreign flag vessels fishing on behalf of those states.

144. I accept the deployment of the CAB's expert knowledge and investigation into the workings of decision making related to the Fishery at the international, regional and national level. The CAB's approach is well within the range of reasonable responses and this ground of objection is dismissed.

PI 3.2.2 (c) – decision making processes- precautionary approach

145. This PI is a pass or fail based on whether the Fishery can establish to the CAB that: *"Decision-making processes use the precautionary approach and are based on best available information."*

146. The Objector complains by providing two examples where the Fishery does not use a precautionary approach and complains that at the national level only laws related to two of the eight PNA countries were provided in the CAB report and even those examples were insufficiently clear. The CAB provided a full response to the Notice of Objection and listed the national legislation for another five of the PNA states at page 121 of its response to the

Notice of Objection. Further, the CAB explained why the use of 1 nautical mile to distinguish FAD from non FAD fishing (one of the Objector's two examples) alongside other measures was precautionary in its Principle 3 written submissions filed on day 2 of the hearing. The CAB also explained in the same document that whilst there was no commitment to the precautionary approach at the PNA level, this was applied both at the WCPFC and national levels and the CAB, in its expert judgement did not doubt the Fishery was committed to the precautionary approach. The CAB's overall response on this issue is neither arbitrary nor unreasonable and the ground of objection is dismissed.

PI 3.2.2 (d) – decision making processes –accountability and transparency

147. This PI was scored by the CAB at the 80 level, requiring: *“Information on the fishery’s performance and management action is available on request, and explanations are provided for any actions or lack of action associated with findings and relevant recommendations emerging from research, monitoring, evaluation and review activity.”*

148. The Objector's response essentially can be distilled to a challenge that the CAB's reasoning is insufficiently robust. It is, correctly, pointed out that SA 4.8.5 and 4.8.6 apply. This requires some additional language to the interpretation of the relevant PI. The Objector puts it this way:

So, for a score of SG 80, there must be the following in respect of each of the relevant levels (i.e. WCPFC, PNA and national): (a) “at least a general summary of information on subsidies, allocation, compliance and fisheries management decisions”; and (b) “information on decisions, fisheries data supporting decisions, and the reasons for decisions.

149. Ample information has been provided to meet this test at pages 125 and 126 of the CAB's consolidated response to the Notice of Objection, combined with the valid point it makes in its final day written submissions on Principle 3, at paragraph 27, namely, much of the required information is available on request. Indeed, the CAB did request some information and reviewed it against this part of the PI, to justify a score of 80. There is no

adequate response from the Objector in the light of the information that the CAB requested the PNA minutes of meetings and adjudged them to be sufficiently transparent. Indeed, whilst the Objector quotes SA 4.8.5 and 4.8.6, which detail information which should be made available “on request”, there is no information provided by the Objector it requested this information and was refused, such that the necessary transparency has been defeated by the Fishery. Seen overall, relying on the CAB’s expertise, their decision to award a score 80 is well within the range of reasonable responses and this, last, ground of objection is also dismissed.

Conclusion

150. Having considered all the information, the Objection is dismissed. The Objector has forensically and appropriately taken the CAB to task on many parts of its report. As can be seen from my decision, it has been only through the objection process that further information and justification has emerged to support the conclusions made by the CAB. That should be seen as part and parcel of an appropriate and helpful objection process. Whilst I have had to rely on information provided by the CAB since, at no stage has this called into question its determination on the Fishery certification, such that a remand was required.

151. However, the CAB’s conclusions are now, in some areas, more transparent, clearer and more robust. For that reason all written submissions by all three parties shall be placed together and published (if they have not already been published on the MSC website) alongside this decision. This shall include:

- a. the Objector’s 54 page written submissions for the hearing;
- b. the CAB’s 27 page written submission for the hearing;
- c. the Fishery Client’s 21 pages of presentation/submissions for the hearing;
- d. the CAB’s 32 pages of further written submissions filed and served on day 2 of the hearing;
- e. the Objector’s 11 page post hearing supplementary reply and Mr Purves 11 paragraph email on the subject of WCPFC2016g;

- f. the CAB 21 page letter and submissions dated 30 January 2018 which were accepted;
- g. the CAB's 7 page letter and submissions dated 30 January 2018 were rejected;
- h. the Fishery Client's email dated 30 January 2018 and 14 pages of attached submissions;
- i. the correspondence related to the MSC press release on the subject of the Unit of Assessment.

152. It may be noted that in the decision I have made little reference to the Fishery Client's submissions. They have not been overlooked or ignored, but the Objector's challenge was accurately focused on the actions and omissions of the CAB, therefore I have focused on their rival submissions.

153. I have included above the page numbers of the written submissions. These reached nearly 200 pages. The consolidated "pleadings" ran to 126 pages. It would have taken hours to count the length of the hearing bundle. Whilst I have been very considerably assisted by the involvement of all the lawyers in reaching my decision, the proportionate approach to an independent adjudication may have been somewhat lost in the forensic analysis.

154. Lastly, given the volume of paperwork, I have not commented on every aspect of every submission made by the Objector, but have provided my reasons for the main and salient submissions made both in writing and orally. Where I have not addressed an issue, it has not been ignored; rather, I have not found it sufficiently persuasive to require further reasoning.

Order

155. Pursuant to FCR PD 2.7.1.1 the determination of the CAB is hereby confirmed.

John McKendrick QC
Independent Adjudicator
28 February 2018