

# MARINE STEWARDSHIP COUNCIL - TECHNICAL ADVISORY BOARD

## TAB DIRECTIVE SERIES

TAB Directive Number	Title	Date of issue
TAB D-023 v3	Revised Fisheries Certification Methodology Objections Procedure	09 August, 2010
Decision date: 1 July 2010 Effective date: 06 September, 2010		

### Documents Supplemented or Modified by this Directive

MSC Scheme Document	Status Change
Fishery Certification Methodology (FCM v6.1)	Section 4 superseded
TAB Directive 23 v2	Superseded

### Background

The MSC Objections Procedure is a key component of the fishery assessment process. It is intended to provide a robust dispute resolution mechanism and produce an outcome that all parties in a fishery certification would consider fair and impartial. There are two objectives of the process: (1) to provide for an independent review of certification body decisions to ensure that such decisions are not arbitrary or unreasonable, and (2) to provide an orderly, structured procedure in which parties' concerns about certification decisions can be transparently addressed and resolved.

In April 2007 the MSC's Stakeholder Council developed a number of recommendations regarding possible changes to MSC's Objection Procedure. Upon reviewing this topic the MSC's Board of Trustees at its May 2007 meeting directed the MSC Executive to review the MSC's Objections Procedure and present recommendations for changes that would improve its 'fit for purpose', cost and time efficiency, transparency and credibility'.

Following review and stakeholder consultation, a revised Objections Procedure was agreed for implementation at the January 2009 meeting of the MSC Board of Trustees. Further small changes to improve clarity in a number of areas were agreed for implementation at the December 2009 and again at the June 2010 meetings of the MSC Board of Trustees.

### Intent

To implement changes to the Fisheries Certification Methodology (FCM v6.1) following the review of the MSC's Objections Procedure.

### Directive

1. The requirements specified in this TAB Directive shall come into immediate effect on the 6<sup>th</sup> of September 2010 for:
  - a. all fisheries currently under assessment or undergoing recertification and not subject to an existing objection; and
  - b. all fisheries that enter assessment (having signed a contract with a certification body for a full assessment) or commence re-assessment after the 6<sup>th</sup> of September 2010.
2. The contents of Annex 1 revoke the existing Section 4 (pages 25 - 29) of the Fisheries Certification Methodology Version 6.1.

## **Annex 1: MSC OBJECTIONS PROCEDURE**

### **Section 4 - Full Assessment, Step 3 - Final Report, Determination and Objections**

#### **4.1 Final Report**

4.1.1 The assessment team shall review the report taking account of the stakeholder comments and revise the report as appropriate. The Public Comment Draft Report of the certification body's appointed assessment team, all written comments by the unidentified peer reviewers, and all written comments by stakeholders and relevant responses to stakeholder comments will be submitted to the certification body's decision-making entity.

4.1.2 The certification body will make a Determination and release a Final Report incorporating the Public Comment Draft Report (including scores, weightings and conditions), written comments by the peer reviewers, all written comments by stakeholders and relevant responses to stakeholder comments and the Determination.

4.1.3 The Final Report will be posted on the MSC website and the MSC will actively distribute to the public a statement that explains the meaning of the Determination and the process to follow for raising an objection to a Determination.

4.1.4 The certification body and the MSC will actively notify stakeholders involved in the fishery's certification assessment process of the existence of the Final Report.

#### **Objections Procedure**

#### **4.2 Object and purpose**

4.2.1 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 certification body can be resolved. It is not the purpose of the Objections Procedure to review the subject fishery against the MSC Principles and Criteria for Sustainable Fisheries, but to determine whether the certification body made an error that materially affected the outcome of its Determination.

4.2.2 Subject to Section 4.4.1(c), the procedure is open only to parties involved in or consulted during the assessment process.

4.2.3 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 certification body made an error that materially affected the outcome of its Determination. If any such error is identified, and if there is adjudged to be a real possibility that the certification body may have come to a different conclusion, the Independent Adjudicator will remand the Determination back to the certification body for reconsideration.

4.2.4. In the event that a notice of objection is filed, no formal certificate or logo licensing agreements may be issued or entered into relating to any fishery product until the objections procedure has run its course in accordance with the procedures set out in this Section and the Public Certification Report has been issued in accordance with Section 5.1.

### **4.3 The Independent Adjudicator**

4.3.1. The MSC Board of Trustees shall appoint an Independent Adjudicator to consider all objections to a Final Report or Determination. The Independent Adjudicator shall be appointed for a period of three years and may be reappointed. The decision of the Board in appointing or reappointing the Independent Adjudicator shall be final. The Independent Adjudicator shall perform all the functions allocated to him or her in accordance with the procedures set out in the MSC Fisheries Certification Methodology. An additional Adjudicator may be appointed at any time to act in cases where the Independent Adjudicator is unavailable to act for any reason, including a conflict of interest or unavailability.

4.3.2. The Independent Adjudicator may be removed by the MSC Board of Trustees for good cause, including incompetence, bias or impropriety.

4.3.3. The Independent Adjudicator shall be independent of the MSC Executive, but the MSC Executive may provide him or her with appropriate administrative and logistic support, including sending and receiving notices and correspondence.

### **4.4 Notice of objection**

4.4.1 A notice of objection to a Final Report or Determination may be submitted by:

- (a) the fishery client(s)<sup>1</sup>;
- (b) any party to the assessment process that made written submissions to the certification body during the fishery assessment process or attended stakeholder meetings;
- (c) any other party that can establish that the failure of the certification body to follow procedures prevented or substantially impaired the objecting party's participation in the fishery assessment process.

4.4.2 A notice of objection must be submitted no later than 15 days after the date on which the Final Report and Determination is posted on the MSC website.

4.4.3. A notice of objection must be submitted in the format prescribed by the MSC Executive (contact the MSC for details). It shall be addressed to the Independent Adjudicator with a copy to the MSC Chief Executive.

4.4.4. The notice of objection must set out clearly and precisely the basis upon which Section 4.8.2 is said to apply. It must identify the alleged errors in the Final Report and Determination and must explain in sufficient detail why it is claimed that such alleged errors made a material difference to the outcome of the Determination or the fairness of the assessment. If it is asserted that the Determination should be remanded for the reasons set out in Section 4.8.2 (c), the notice of objection must specify, in sufficient detail, the nature of the additional information that it is asserted should reasonably have been made available to the certification body and the reasons why it is considered that such material, if considered, could have made a material difference to the outcome of the assessment.

4.4.5. Upon receipt of a notice of objection, the Independent Adjudicator shall proceed in the manner set out in Section 4.5.

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<sup>1</sup> Fishery client(s) refers to the applicants for certification in the subject case.

## **4.5 Procedure on receipt of a notice of objection**

4.5.1. If the Independent Adjudicator, in his or her discretion, determines that the notice of objection is not in the form required by these procedures or has no reasonable prospect of success, the Independent Adjudicator may either:

- (a) dismiss the objection, giving written reasons therefore; or
- (b) request further clarification from the objector.

For purposes of this Section, an objection has a “reasonable prospect of success” if, in the view of the Independent Adjudicator,

- (a) it is not spurious or vexatious; and
- (b) some evidence is presented on the basis of which the Independent Adjudicator could reasonably expect to determine that one or more of the conditions set forth in Section 4.8.2 are satisfied.

4.5.2. In the event that the Independent Adjudicator decides to dismiss the objection, the objector may nonetheless submit a new or amended notice of objection within five days of being so notified by the Independent Adjudicator. An objector shall have only one opportunity to submit such a new or amended notice of objection.

4.5.3. In the event that the Independent Adjudicator requests further clarification from the objector, the Independent Adjudicator shall notify the objector in writing of the clarification sought and the time limit for responding (which, in the absence of special circumstances to justify a longer time, should normally be not more than five days). If the objector fails to respond within the time specified, it shall be assumed that the objector does not wish to proceed further and the Independent Adjudicator shall thereupon issue a notice in writing dismissing the objection.

4.5.4. If the Independent Adjudicator, in his or her discretion, determines that the new or amended notice of objection submitted under Section 4.5.2 or 4.5.3 does not disclose any of the grounds set out in Section 4.4.4, is not in the form required by these procedures, has no reasonable prospect of success or is spurious or vexatious, the Independent Adjudicator shall dismiss the objection, giving written reasons therefore.

4.5.5. Where a notice of objection is accepted, the Independent Adjudicator shall promptly notify the certification body, the fishery client(s) and any other objectors, of the objection. The MSC Executive shall also cause a copy of the notice of objection to be posted on the MSC website. The date upon which the notice of objection is posted on the website shall be the “date of publication”.

4.5.6. The fishery client(s) or any stakeholder that participated in the fishery assessment process (other than the objector(s)), may, within 15 days of the date of publication, submit written representations on the matters raised in the notice of objection. All such written representations shall be submitted through the Independent Adjudicator and shall be posted on the MSC website.

## **4.6 Reconsideration by the Certification Body**

4.6.1. Where a notice of objection has been accepted, the certification body shall be required to reconsider its Final Report and Determination in light of the matters raised in the notice of objection. The certification body shall, within 20 days of the

date of publication, provide a written response to the notice of objection. The response shall provide appropriate information indicating the extent to which the matters set forth in the notice of objection were considered in the fishery assessment and the impact thereof on the Determination. In formulating its response, the certification body shall also take into account any written representations received in accordance with Section 4.5.6. The certification body shall also indicate and give reasons for any proposed amendments to its Final Report and Determination in the light of the reconsideration.

4.6.2. The response of the certification body shall be made available to all interested parties, including the objector(s), the fishery client(s) and the MSC Executive.

4.6.3. Upon receipt of the response by the certification body, the Independent Adjudicator shall consult with the objector(s), the fishery client(s) and the certification body in order to determine whether the response of the certification body, including any proposed amendments to the Final Report and Determination, adequately addresses the issues raised in the notice of objection. The Independent Adjudicator shall strive to conclude such consultations within a period of 10 days but may if necessary, at his or her discretion after consultation with the parties, extend such period if it appears that there is a real and imminent prospect of reaching a solution that is acceptable to all relevant parties.

4.6.4. In the event that the issues raised in the notice of objection can be resolved through consultations, the certification body, in consultation with the Independent Adjudicator, shall make such amendments and revisions to the Final Report and Determination as may be agreed and shall proceed to prepare a Public Certification Report in accordance with Section 5.1. No further appeal or objection shall be permitted.

4.6.5. In the event that some or all of the issues raised in the notice of objection cannot be resolved through consultations, the Independent Adjudicator shall notify all parties that the adjudication phase will commence immediately in accordance with Section 4.7.

## **4.7 Adjudication**

4.7.1. Subject to Section 4.10 (Costs), the Independent Adjudicator shall, within 30 days of the date upon which the objector(s) have signed a costs agreement with the MSC Executive or obtained a waiver from the Independent Adjudicator pursuant to paragraph 4.10.4, convene an oral hearing of the objection, unless the parties to the objection agree otherwise.

4.7.2. The oral hearing is intended to provide an opportunity for the certification body, the objector(s) and the fishery client(s) (if not the objecting party) to present their respective cases in person, including by video or teleconference.

4.7.3. The Independent Adjudicator shall conduct the hearing in accordance with the provisions of this Section but may also promulgate additional rules of procedure, including time limits on oral presentations and rules as to representation. The Independent Adjudicator shall normally aim to complete the hearing during one session, but may, where necessary, adjourn to continue the hearing using electronic communications or other means.

4.7.4. The fishery client(s), the objector(s), and the certification body may submit additional or supplementary written representations on the matters raised in the notice of objection or in the written representations submitted by other parties under

Section 4.5.6. All such written representations shall be submitted through the Independent Adjudicator and must be received not later than 5 days before the date set for hearing.

4.7.5. The Independent Adjudicator shall evaluate objections solely on the basis of:

- (a) the record, which shall include and be limited to:
  - (i) the Final Report of the certification body and the record on which the Final Report was based, including written submissions and reports provided to the certification body during the assessment process, the written record of oral, written or documentary evidence submitted in the assessment process, as well as any other evidence referenced or cited in the Final Report.;
  - (ii) the notice of objection;
  - (iii) any written representations submitted pursuant to Sections 4.5.6 and 4.7.4;
  - (iv) any representations made by any party at an oral hearing pursuant to these procedures; and,
  - (v) other clarifications required by the IA.
- (b) any additional information, not forming part of the record, that is relevant to matters accepted in the notice of objection and the circumstances at the date of the scoring of the fishery that:
  - (i) was known or should reasonably have been known to any party to the assessment process, and
  - (ii) should reasonably have been made available to the certification body during the assessment process, and
  - (iii) if considered, could have made a material difference to the outcome of the assessment;
- (c) the MSC Principles and Criteria for Sustainable Fishing; and
- (d) the Fisheries Certification Methodology and the Fisheries Assessment Methodology current at the time of the assessment in question, together with Directives, Guidance and amendments thereof made by the MSC Technical Advisory Board and the Board of Trustees, any related interpretations to these documents whether or not of mandatory effect with regard to certifying body compliance made by the MSC Executive and the MSC Accreditation Manual.

4.7.6. The Independent Adjudicator may not consider issues not raised in the notice of objection, even if the Adjudicator is of the view that a particular issue should have been raised. In no case shall the Independent Adjudicator substitute his or her own views or findings of fact for those of the certification body; nor may the Independent Adjudicator change the score awarded by the certification body for any particular performance indicator.

4.7.7. The Independent Adjudicator may solicit external advice on technical matters from, and for this purpose may sit with and receive technical advice from qualified experts. Such technical experts shall not take part in decision-making. Any written reports or advice tendered by the technical experts shall be attached to the Independent Adjudicator's written decision.

4.7.8. The experts selected by the Independent Adjudicator to provide advice in relation to any particular objection shall not be involved in any activity that constitutes a conflict of interest. Such conflicts include, but are not limited to, the following criteria:

- (a) Experts shall not be members of the MSC Board, Technical Advisory Board, Stakeholder Council or Executive;
- (b) Experts shall not have commercial involvement with the certifier, the subject fishery or the objector(s);
- (c) Experts shall not be involved in management, or lobbying for or against the fishery or be involved with an organization that has indicated its opposition to the certification of the fishery under objection;
- (d) Experts shall not have been involved in any part of the current assessment process for the fishery under objection.

4.7.9. In order to facilitate the Objections Procedure, the MSC Executive may maintain a public register of suitably-qualified persons willing and available to act as independent experts. Experts may, however, be selected who are not on the register.

4.7.10. In the event that, in relation to any particular objection, there is a conflict of interest involving the Independent Adjudicator, he or she shall excuse him or herself from further participation in that particular objection. The Chair of the MSC Board of Trustees shall appoint another suitably-qualified candidate to act as Independent Adjudicator *ad hoc* for that particular objection. In the event of any difference of opinion between the Independent Adjudicator and any party to the objection as to whether a conflict of interest exists, the decision of the MSC Board of Trustees on the matter shall be final.

4.7.11. At any stage of the objections process, any party to an objection may, by notification in writing, call the attention of the Independent Adjudicator to an alleged error of fact, procedural error or unfairness on his or her part with respect to the objections process and the Independent Adjudicator shall respond as soon practicable.

## **4.8 Powers of the Independent Adjudicator**

4.8.1. The Independent Adjudicator shall issue a decision in writing either:

- (a) confirming the Determination by the certification body; or
- (b) remanding the Determination to the certification body.

4.8.2. The Independent Adjudicator shall remand the Determination to the certification body if he or she determines that:

- (a) there was a serious procedural or other irregularity in the fishery assessment process that made a material difference to the fairness of the assessment; or
- (b) the score given by the certification body 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 outcome of the Determination, because:

- (i) the certification body made a mistake as to a material fact; or
  - (ii) the certification body failed to consider material information put forward in the assessment process by the fishery or a stakeholder; or
  - (iii) the scoring decision was arbitrary or unreasonable in the sense that no reasonable certification body could have reached such a decision on the evidence available to it; or
- (c) it is necessary to remand the Determination in order to enable to certification body to consider additional information described in Section 4.7.5(b) and described in the notice of objection. In such a case, the remand shall be limited to a request to the certification body to consider the impact of the additional information on its original Determination and to provide a response in accordance with Section 4.9.2.

## 4.9 Remand

4.9.1. In the event that a Determination is remanded, the Independent Adjudicator shall state, in writing, the grounds upon which the objection has been remanded, the specific matters which the certification body must consider in the remand and the relationship of these matters to one or more of the MSC's Principles and Criteria for Sustainable Fishing or procedural rules. Copies of the remand shall be sent to the MSC Chief Executive, the fishery client(s) and the objecting party.

4.9.2 Within 10 days after receipt of the remand instructions, unless the Independent Adjudicator has granted the certification body a specific amount of additional time, the certification body shall respond in writing to the matters specified in the remand, with copies sent to the MSC Chief Executive, the fishery client(s) and the objecting party. The response of the certification body either

- (a) shall include a statement of "no change" in relation to the scoring of performance indicators; or
- (b) shall indicate any proposed changes to the justification for a score or indicate a change in the score in relation to any of the performance indicators,
- (c) and shall give reasons for its decision under either (a) or (b).

4.9.3. Any party to the objection may make written submissions on the matters specified in the remand or on the response thereto by the certification body under Section 4.9.2. Such submissions must be received by the Independent Adjudicator no later than 5 days following the response by the certification body.

4.9.4. The Independent Adjudicator shall, within 10 days of the response by the certification body, either

- (a) accept the response as adequate to meet the matters raised in the remand and confirm the original or amended Determination, as the case may be, by the certification body; or

- (b) after reviewing the response of the certification body, determine that the objection shall be upheld on one or more of the grounds specified in Section 4.8.2.

4.9.5 If the certification body does not respond to the remand within the time limits specified in Section 4.9.2 the Independent Adjudicator shall proceed to Section 4.9.4 as if the certification body had made a “no change” response to the remand.

4.9.6. A decision by the Independent Adjudicator under Section 4.9.4 is final. No additional objections may be lodged under these procedures in respect of such decision. The certification decision of the certification body shall be made with reference to the decision of the Independent Adjudicator.

4.9.7. In the event that the Independent Adjudicator confirms the amended Determination, the certification body shall make such amendments to its Final Report and Determination as may be necessary in the light of the findings of the Independent Adjudicator and shall proceed to issue a Public Certification Report in accordance with Section 5.1.

4.9.8. Nothing in these procedures shall prevent any party to a fishery assessment from submitting a complaint relating to the certification body to the relevant Accreditation Body in accordance with the procedures of the Accreditation Body. No such appeal to the Accreditation Body shall affect the outcome under this Objection Procedure.

#### **4.10 Costs**

4.10.1. The costs of the adjudication process, up to a maximum level established from time to time by the MSC Board of Trustees,<sup>2</sup> shall be borne by the objector or, if there is more than one objector, the objectors in equal shares.

4.10.2. In exceptional circumstances, the Independent Adjudicator may decide to waive the costs in respect of an objector in whole or in part in accordance with Section 4.10.6.

4.10.3. The MSC Executive shall provide information relating to the costs agreement and waiver application to the objector(s) at the earliest opportunity after the acceptance of the notice of objection and in any case no later than 5 days from when the notice of objection is accepted as per Section 4.5.5.

4.10.4. Notwithstanding the provisions of Section 4.7, an objection shall not proceed to adjudication unless, within 10 days after the date on which the Independent Adjudicator notifies the parties that the adjudication phase will commence, the objector(s) have:

- (a) signed a costs agreement with the MSC Executive; or
- (b) obtained a waiver from the Independent Adjudicator in accordance with Section 4.10.6.

4.10.5. An application for a waiver shall be made in writing to the Independent Adjudicator by a duly authorized representative of the objector within 15 days from when the notice of objection is accepted per Section 4.5.5. Such an application should provide the justification as to why a waiver is sought and must be

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<sup>2</sup> The maximum level established by the MSC Board is presently £5,000.

accompanied by appropriate evidence to demonstrate exceptional circumstances, including, where available, the objector's most recent audited financial report.

4.10.6. The Independent Adjudicator shall decide within five days, to refuse the application or to waive the whole or part of the costs that would otherwise be attributed to the objector. A waiver shall only be granted if the Independent Adjudicator is satisfied that there are exceptional circumstances justifying such a waiver. The onus is on the objector to demonstrate that there are such exceptional circumstances. In determining whether there are exceptional circumstances, the Independent Adjudicator shall take into account:

- (a) any evidence relating to the financial ability of the objector to meet the costs of the adjudication process;
- (b) the impact on the objector's other activities of paying the costs of the adjudication process; and
- (c) the ability of the objector to raise funds from external sources, including support from other participants in the assessment process, for the purposes of meeting the costs of the adjudication process.

4.10.7. Where the application is refused or where a partial waiver is granted, the objector must sign a costs agreement with the MSC Executive in order for the objection to proceed further.

4.10.8. In the event that, 10 days after the date on which the Independent Adjudicator notified the parties that the adjudication phase will commence, any objector has not either signed a costs agreement with the MSC Executive or obtained a waiver from the Independent Adjudicator in accordance with Section 4.10.6, the objection in respect of that objector shall be considered to have been dismissed. If there is more than one objector, the Independent Adjudicator shall nonetheless go on to consider the notice of objection submitted by those objectors that have either signed a costs agreement with the MSC Executive or obtained a waiver from the Independent Adjudicator in accordance with Section 4.10.6. If the Independent Adjudicator fails to decide the waiver issue within the time specified by section 4.10.6, and such failure is attributable solely to the Independent Adjudicator, the time deadline specified in the first sentence of this subsection shall be extended for such limited period as the MSC Executive considers appropriate under the circumstances

4.10.9. Nothing in this section shall prevent reconsideration by the certification body and consultations pursuant to Section 4.6.

#### **4.11 General provisions relating to the objections process**

4.11.1. Where these procedures require that any notice or document is to be submitted to the Independent Adjudicator or to the MSC Chief Executive within, or before, a specified time limit, the following provisions shall be applied in order to determine whether the notice or document was served in time:

- (a) Service shall be effective if made by hand, or by facsimile or by the provision of the information in an electronic document containing a digital signature;
- (b) Service by hand shall be effective when made. Delivery by facsimile shall be effective when the "transmit confirmation report" confirming the

transmission to the recipient's published facsimile number is received by the transmitter. An electronic document is presumed to be received by the addressee when it enters an information system designated or used by the addressee for the purpose of receiving documents of the type sent and it is capable of being retrieved and processed by the addressee;

- (c) Any references to time shall, unless it is otherwise specifically stated, be held to be Greenwich Mean Time;
- (d) "Days" means "working days";
- (e) A document served after 5 p.m. or at any time on a Saturday, Sunday or a UK Bank Holiday, will be treated as being served on the next working day;
- (f) Where the time limits prescribed in these procedures do not account for statutory holidays in countries where involved stakeholders reside, the Independent Adjudicator will have the discretion to allow an extension of time limits so as to give effect to the intent of these procedures; that all parties have the nominated number of days within which to respond.

4.11.2. For the avoidance of any doubt, every notice or document issued, or posted on the MSC website, by the Independent Adjudicator or the MSC Executive, shall bear the date upon which it was so issued or posted and shall also specify the date upon which any subsequent notice, response, submission or document is required to be submitted in accordance with these procedures. Notwithstanding any other provision of these procedures, and regardless of whether a particular document is posted on the MSC website or not, any documentation submitted by any party to an objection, except for documentation relating to costs under Section 4.10, shall be available to any other party.

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