

MARINE STEWARDSHIP COUNCIL

IN THE MATTER OF OBJECTIONS TO THE FINAL REPORT ON THE PROPOSED CERTIFICATION OF THE USUFUKU HONTEN NORTHEAST ATLANTIC LONGLINE BLUEFIN TUNA FISHERY UNDER THE MSC PRINCIPLES AND CRITERIA FOR SUSTAINABLE FISHING

FINAL DECISION OF THE INDEPENDENT ADJUDICATOR POST-REMAND

1. On June 26, 2020, I issued an initial decision on these objections. In this decision, I determined that the objectors' challenges to the scoring of three Performance Indicators ("PIs") -- PI 1.1.1a, PI 1.2.1a and PI 1.2.1b -- should not be upheld. However, I upheld WWF's challenge to the scoring of PI 1.1.1b. I found that it was arbitrary and unreasonable for the Conformity Assessment Body (the "CAB"), once it determined that there was an apparent discrepancy between MSC Guidance and the underlying equation in the source document (the "Goodyear Equation"), not to reconsider its approach to this scoring issue, based upon the exercise of its "own, independent scientific judgment." Accordingly, I remanded the matter to the CAB "to explain in light of its current knowledge how this PI should properly be scored."

2. The CAB responded to my remand in a submission dated July 17, 2020. In its submission, the CAB has proposed to rescore PI 1.1.1b based upon a calculation of Generation Time ("GT") as 16.7 years under the Goodyear Equation.¹ This results in the CAB concluding that Scoring Guidepost ("SG") 80 cannot be met for this scoring issue. There are several consequences which flow from this conclusion: (1) the rationale for PI 1.1.1b has been revised, and the issue is no longer scored at the SG 80 level; (2) a revised rationale has been provided for PI 1.1.1a, reflecting that, under FCR 7.10.2.3.b, SG 100 is not considered in the overall score for PI 1.1.1, since PI 1.1.1b does not reach SG 80; (3) the overall score for PI 1.1.1 has been reduced to 70; (4) a condition has been raised on PI 1.1.1b, together with the crafting of a Client Action Plan (the "CAP") focussed on maintenance of F less than $F_{0.10}$ and inclusion of a letter of confirmation of support from the client's national management body (the Fisheries Agency of Japan); and (5) per SA 2.3.1, PI 1.1.2 has been scored, with the resulting score at the SG 100 level.² In my judgment, the proposed changes satisfy the terms of my June 26 remand decision.

¹ A GT of 16.7 years was in fact originally calculated as such by WWF.

² The CAB had previously indicated that it would recalculate the overall score for Principle 1 based upon the new score for PI 1.1.1 and incorporating the additional score for PI 1.1.2. However, it has not done so in its response to the remand.

3. WWF, in a submission of July 24, 2020, agrees with the rescoring of PI 1.1.1b. and the concomitant overall rescoring of PI 1.1.1.³ However, it is dissatisfied with the new condition raised under PI 1.1.1b; it regards the CAP as inadequate; and it challenges the scoring of PI 1.1.2. While WWF's arguments are not without force, I find them insufficient to warrant a conclusion that the CAB's response to the remand is unsatisfactory and should not be accepted.

4. WWF contends that the new condition raised under PI 1.1.1b "lacks sufficient detail and does not clarify how target reference points can be met." WWF also asserts that "the condition as formulated provides little information as to the 'measurable improvements and outcomes (using quantitative metrics) expected each year' as required by 7.11.1.4a." However, conditions are to be written "to follow the narrative or metric form of the PISGs used in the final tree." FCR 7.11.1.2. Further, as stated in Section 7.11.2 of the FCR Guidance, "CABs should not be overly prescriptive about the means of meeting conditions." In fact, the condition crafted by the CAB closely hews to the template set out in the MSC Guidance. See FCR Guidance, Table G8 (Example of conditions for Principle 1). The condition is sensible in requiring a demonstration that the stock is fluctuating at or around a level consistent with MSY ("Maximum Sustainable Yield"), and it does state milestones, leading ultimately to a determination that the SG 80 level is met. As a general matter, the condition is not unjustified because it has not been shown that it "fundamentally cannot be fulfilled," nor is it "arbitrary or unreasonable in the sense that no reasonable CAB could have reached such a decision on the evidence available to it" within the meaning of PD 2.7.2.2. WWF's challenge to the condition must therefore fail.

5. WWF also objects to the CAP. It questions, given the "minimal leverage" that the client has over the International Commission for the Conservation of Atlantic Tunas ("ICCAT"), whether it is "achievable" and "realistic" within the meaning of FCR 7.11.3.2. In light of the "political" nature of ICCAT decision-making, it "also questions the CAB's justification regarding 7.11.3.1 and 7.11.3.3 that no other entities need to be consulted." The short response to WWF is simply that challenges to a CAP are not cognizable under Version 2.0 of the Objections Procedure. See *In re: New Zealand Orange Roughy Fisheries*, ¶ 120 (MSC, December 2, 2016). In any event, I am not persuaded that the CAP is insufficient, especially because the acquisition of a letter of support from the Fisheries Agency of Japan notably bolsters the leverage of the client in the ICCAT decision-making process. Further, the CAP does not require changes to applicable management measures. Indeed, maintenance of the $F_{0.10}$ strategy is expected, with measures to keep F below $F_{0.10}$ remaining in place. Last of all, the CAB points out that, even should ICCAT contemplate changing its management measures, the overall purposes of the Convention establishing ICCAT would help ensure that any such changes would be consistent with the fundamental objectives of the current plan. Thus, the CAP appears achievable and realistic, and, as affirmed by the CAB, consultation with other entities would not appear necessary.

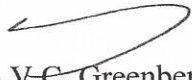
6. Finally WWF challenges the scoring of PI 1.1.2, which has been scored for the first time on remand.⁴ It emphasizes "high uncertainty" regarding the Eastern Atlantic bluefin tuna stock assessment, and it takes issue with the CAB's conclusions regarding the success of the

³ The fishery client did not avail itself of the opportunity to respond to the CAB's submission.

⁴ SA 2.3.1 provides for the scoring of PI 1.1.2 only when the score for PI 1.1.1 does not reach the SG 80 level.

rebuilding process. However, as I pointed out in my remand decision of June 26, delicate scientific judgments regarding levels of uncertainty in the stock assessment are within the province of the CAB, and they are not something that I can or will disturb. *See* PD 2.6.6.1. Additionally, as set out in paragraph 52 of my decision, contrary to WWF's contentions about the possible lack of success of the rebuilding process, ICCAT's Standing Committee on Research and Statistics concluded in 2016 that the rebuilding goal was possibly already achieved or would likely "soon be reached." It cannot be said in such circumstances that the CAB made a "mistake of material fact" or was "arbitrary or unreasonable" within the meaning of PD 2.7.2.3a, d in concluding that the evidence of rebuilding was strong.

7. In light of the considerations just discussed, in accordance with PD 2.8.4.1 of the Objections Procedure, I now accept the CAB's response as adequately addressing the findings raised in my remand and confirm the amended Final Report and Determination by the CAB, which is now understood to include the revisions set out in (a) the CAB's response to the remand, (b) the CAB's response, dated February 21, 2020, to the Notices of Objection, and (c) the parties' agreement resulting from the consultation process. This decision is final, and no additional objections may be lodged. *See* PD 2.8.7. Pursuant to PD 2.8.8 of the Objections Procedure, the CAB shall proceed to "make such amendments to the Final Report and Determination as may be necessary in light of the findings of the independent adjudicator and shall proceed to issue a Public Certification Report in accordance with FCR 7.19.1." Such amendments shall incorporate any recalculation of the overall scoring for each MSC Principle.⁵ As specified in PD 2.8.8 and PD 2.8.9 of the Objections Procedure, the CAB is directed to provide me with a copy of the Public Certification Report, with tracked changes from the Final Report, prior to the publication thereof, for the purpose of allowing me to assess whether it adequately addresses my findings.



Eldon V.C. Greenberg
MSC Independent Adjudicator

Dated: July 30, 2020

⁵ Because this is a simple arithmetical exercise, I do not believe that a remand is necessary for this purpose.