

IN PROCEEDINGS CONDUCTED BY

THE REVIEW PANEL ESTABLISHED UNDER ARTICLE 17 AND ANNEX II OF THE
CONVENTION ON THE CONSERVATION AND MANAGEMENT OF HIGH SEAS FISHERY
RESOURCES IN THE SOUTH PACIFIC OCEAN

with regard to

THE OBJECTION BY THE RUSSIAN FEDERATION TO A DECISION OF THE COMMISSION
OF THE SOUTH PACIFIC REGIONAL FISHERIES MANAGEMENT ORGANISATION

MEMORANDUM OF NEW ZEALAND

21 June 2013



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1 New Zealand responds to the questions posed by the Review Panel established under Article 17 and Annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (the Convention) in paragraph 1 of Procedural Directive No. 1 as follows.

Response to Question (a)

2 New Zealand considers that the decision with respect to the Conservation and Management Measure for *Trachurus murphyi* (CMM 1.01) is not inconsistent with the provisions of the Convention or other international law. Article 3(1) of the Convention provides, *inter alia*, that:

“In giving effect to the objective of this Convention and carrying out decision making under this Convention, the Contracting Parties, the Commission ...shall:

(a) apply, in particular, the following principles;

(i) conservation and management of fishery resources shall be conducted in a transparent, accountable and inclusive manner, taking into account best international practices;

...

(iv) full and accurate data on fishing, including information relating to impacts on the marine ecosystems in which fishery resources occur, shall be collected, verified, reported and shared in a timely and appropriate manner;

(v) decisions shall be based on the best scientific and technical information available and the advice of all relevant subsidiary bodies.

...”

3 In taking its decision with respect to CMM 1.01, the Commission was provided with data that was considered full and accurate by the Interim Secretariat. As noted in the Information Paper dated 13 June 2013 submitted by the South Pacific Regional Fisheries Management Organisation, the Secretariat sought additional information regarding the data submitted by the Russian Federation for the *Trachurus* species for the 2010 year, but the information provided was assessed as insufficient. Accordingly, it was consistent with the requirements of Article 3(1) for the data provided by the Russian Federation not to have been taken into account in adopting CMM 1.01.

4 In accordance with the “Standards for the collection, reporting, verification and exchange of data” that were adopted in 2007, and in every revision thereafter,

Participants in the Preparatory Conference were to ensure that fishery data were verified through an appropriate system, such as position verification, scientific observer programmes, vessel trip, landing and transshipment reports and port sampling. The interim Secretariat had a responsibility to provide accurate and complete statistical data, as was made clear, for example in the provision entitled "Maintenance of confidentiality" found in the Standards.¹ If the data provided by the Russian Federation did not meet the requirements set out in the Standards, the Commission was fully entitled not to take that data into account when adopting CMM 1.01. The decision taken by the Commission, with respect to CMM 1.01, was based on the available full and accurate data and, accordingly, was a valid decision.

5 The decision taken was consistent with Article 119 of the United Nations Convention on the Law of the Sea which requires States to take measures to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.²

6 It is also consistent with the Fish Stocks Agreement³, in particular Article 5 (General Principles), paragraphs (a), (b), (c) and (e)⁴, reflecting the need of the Commission to take immediate measures to ensure the long-term sustainability of the *Trachurus* fishery in light of the low biomass of that stock.

¹6. Maintenance of confidentiality

The interim Secretariat of the proposed SPRFMO is to compile and disseminate accurate and complete statistical data to ensure that the best scientific evidence is available while maintaining confidentiality where appropriate."

² See Article 119(1)(a): "In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factor, including that the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;"

³ The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted by the General Assembly in 1995.

⁴ Article 5 states: "In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention: (a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization; (b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global; (c) apply the precautionary approach in accordance with article 6; ... (e) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or depend upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproductions may become seriously threatened; ..."

Response to Question (b)

7 New Zealand considers that the decision with respect to CMM 1.01 does not unjustifiably discriminate in form or in fact against the Russian Federation. The only data provided by Participants for calculating the catch limits for 2013 (i.e. the catch in 2010) that was considered not to be full and accurate for the purposes of presenting to the Commission, was that of the Russian Federation.

8 In its submission of 14 June 2013, the Russian Federation states that the 2010 catch cannot be used as the basis for determining national quotas. New Zealand does not accept that contention. New Zealand considers that the use of 2010 as the reference year for CMM 1.01 was a legitimate decision in the context of the negotiations over the 2009, 2011 and 2012 Interim Measures and CMM 1.01, relating to the *Trachurus* stock.

9 The Interim Measures adopted in 2011 and 2012 did, as the Russian Federation points out, contain the words "the management measures in these Interim Measures are not to be considered precedents for future allocation or other decisions taken in accordance with Article 21 of the Convention relating to participation in fisheries for *Trachurus murphyi*...". The same wording is used in CMM 1.01.

10 In all three measures, however, the Participants and the Commission respectively agreed that 2010 should be used as a reference year for those particular measures. It was also specifically agreed that catches from 2011 until at least CMM 1.01 was reviewed would not be considered in future allocation decisions. There were no objections to this part of the decision on the adoption of CMM 1.01, by any Member or Cooperating Non-Contracting Party (CNCP). By contrast, the Russian Federation requested that a footnote be included in CMM 1.01 recording its contrasting view on Table 2. This footnote recorded the Russian Federation's view that it considered it had a legitimate right to a share in the fishery notwithstanding the situation referred to in footnote 3⁵ and asserted its right to participate in the fishery in 2013 in a proportion calculated by reference to the fishing activities it reported to the Executive Secretary for 2010. At the time of the adoption of CMM 1.01, therefore, the Russian Federation recorded its objection to the non-acceptance of data, but did not record an objection to the use of the 2010 year. Accordingly, in using 2010 as a reference year for CMM 1.01, the Commission understood this to be agreed.

⁵ Footnote 3 related to the vessel Lafayette.

11 New Zealand further notes that CMM 1.01 was adopted as a response to the assessments of the Science Working Group that urgent steps needed to be taken to reduce catches, but the measure was not considered or intended to be a decision on participation in the fishery pursuant to Article 21 itself.

12 Noting that the provisions of CMM 1.01 are not to be considered precedents for future allocation or other decisions, New Zealand stresses that participation by the Russian Federation in the fishery is not precluded in the future.

Response to Question (c)

13 New Zealand considers that the essential standard for determining whether alternative measures are equivalent in effect is whether proposed alternative measures are as consistent with the Convention as the measures objected to, particularly with regard to the objective in Article 2 which is to ensure the long-term conservation and sustainable use of the fishery resources and, in so-doing, to safeguard the marine environment in which they occur.

14 The essential scheme of CMM 1.01 was to:

- (a) establish a total catch for 2013 of *Trachurus murphyi* of 360,000 tonnes in the area to which the Measure applies – namely the Convention Area and the areas under national jurisdiction of Chile (paragraphs 5 and 1);
- (b) provide that Commission Members and CNCs shall share in the catch in the same proportions as their 2010 catches and as set out in Table 2, but subject to a transfer of 10% of the tonnages of certain Members and CNCs to Chile (paragraphs 6,7 and Table 3);
- (c) recognising that the range of *Trachurus* extends beyond the area to which CMM 1.01 applies⁶, record the agreement of Commission members and CNCs that total catches of *Trachurus* throughout the range of the stock should not exceed 438,000 tonnes in 2013 (paragraph 11).

15 New Zealand considers that for any alternative measure to have equivalent effect to CMM 1.01, it would be necessary to be satisfied that the measure did not result in either:

⁶ In particular, the range extends to areas under the national jurisdiction of Peru and Ecuador.

- the total catch of *Trachurus murphyi* in the area to which the CMM 1.01 applies exceeding 360,000 tonnes in 2013; or
- total catches of *Trachurus* throughout the range of the stock exceeding 438,000 tonnes in 2013.

16 In addition, New Zealand considers that any alternative measure may not adversely affect the rights and interests of other Commission Members under the Measure being objected to, where those Commission members have not themselves objected to the Measure and remain subject to its terms.

Response to Question (d)

17 On its face, the alternative measure proposed by the Russian Federation would not alter two key elements of the scheme of CMM 1.01:

- It would restrict the total catch of *Trachurus murphyi* in the area to which the Measure applies to 360,000 tonnes for 2013;
- It would be consistent with the recorded agreement of Commission members and CNCPs that total catches of *Trachurus* throughout the range of the stock should not exceed 438,000 tonnes in 2013.

18 However, the alternative measure would also reduce the shares of Commission members and CNCPs – none of which has objected to CMM 1.01 - from those set out in Table 3 of CMM 1.01. New Zealand questions whether it is consistent with the Convention, including Annex II, for an objecting member to propose or for a Review Panel to adopt an alternative measure which would adversely affect the interests of other Commission members which are not engaged in the objection process.

19 If, as New Zealand contends, it is not consistent with the Convention for an objecting Member to propose or for a Review Panel to adopt an alternative measure which would adversely affect the interests of other Commission members which are not engaged in the objection process, then the net effect of the alternative measure proposed by the Russian Federation would be to increase total catches of *Trachurus* in 2013 in the area to which CMM 1.01 applies by 17,949.6 tonnes. Such an increase could also mean that total catches for *Trachurus* throughout the range of the stock would exceed 438,000 tonnes in 2013. Neither outcome would be consistent with the objective

of the Convention as set out in Article 2, having regard to the advice of the Science Working Group.

20 Accordingly, New Zealand considers that the equivalent measures proposed by the Russian Federation in accordance with Article 17(2)(b)(ii) of the Convention are not equivalent in effect to CMM 1.01.

Response to Question (e)

21 New Zealand considers that any modification to CMM 1.01 would have to be made with the agreement of all affected Members and CNCPs.

Response to Question (f)

22 See response to (e) above.