

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 REPUBLIC OF ECUADOR TO A DECISION OF THE  
COMMISSION OF THE SOUTH PACIFIC REGIONAL FISHERIES MANAGEMENT  
ORGANISATION

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**MEMORANDUM OF NEW ZEALAND**

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17 May 2018



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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 2 of Procedural Directive No. 1 as follows.

### **New Zealand's interest**

2 New Zealand is not a Participant in the fishery for *Trachurus murphyi* (Chilean jack mackerel)<sup>1</sup> and has no direct interest in the substance of the objection by the Republic of Ecuador to the decision of the Commission of the South Pacific Regional Fisheries Management Organisation (SPRFMO) in CMM 01–2018. New Zealand submits this memorandum as a constructive and engaged Member of the Commission, in an attempt to assist the Panel in its consideration of the present matter. This memorandum will set out some background to earlier decisions regarding the fishery which New Zealand considers relevant, and will also make some comments regarding the current objection. New Zealand requests the opportunity to be heard at the hearing to be held on 23 May.

### **Relevant background**

3 New Zealand was one of three countries (the others were Australia and Chile) that in 2006 invited all interested states and fishing entities to attend a meeting in Wellington to discuss the establishment of a South Pacific Regional Fisheries Management Organisation. It was closely involved in all phases of the negotiation of the Convention and the establishment of the Commission (including the Preparatory Conference) and is the host country of the Secretariat of the Commission.

4 New Zealand considers it has some background knowledge and information relating to the reasons for the establishment of the Organisation and the efforts made to manage the jack mackerel fishery during the negotiation of the Convention, through the period of the Preparatory Conference and subsequently by the Commission itself, that is relevant to the issues to be considered by the Panel and the written questions posed by the Panel. In particular, New Zealand is of the view that the revelation of the catastrophic decline of this stock in the first decade of this century, the history of the struggle to manage the pressures on the stock in the light of that decline and the ongoing commitment of participants to following the scientific advice on the status of the stock, are essential background to the consideration of this objection.

5 In the understanding of New Zealand, a key motivation for the participation of some States and fishing entities in the negotiations to establish the SPRFMO, was their active participation in the most important commercial fishery - jack mackerel – and their acknowledgement of the need for a new international organisation that would work with relevant coastal states to manage this important straddling stock. Some were not actively engaged in high seas fishing

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<sup>1</sup> For simplicity, this submission will refer to *Trachurus murphyi* (Chilean jack mackerel) as 'jack mackerel'.

but were concerned about the potential future pressures, especially from northern hemisphere fleets, on the high seas fisheries in the South Pacific and the possible effects of those pressures on the fisheries within their own EEZs. They saw the need for a new international organisation to manage these pressures. And all participants were aware that the absence of an organisation with responsibility for the conservation and management of non-highly migratory species and the protection of biodiversity in the marine environment in the high seas of the South Pacific constituted a major gap that needed to be filled.

#### *Interim measures*

6 At the start of the negotiations the participants recognised the risk that participants might increase their effort in the jack mackerel fishery in order to position themselves for future allocation decisions and requested a draft of voluntary interim measures for consideration at their next meeting. In retrospect they were slower than they should have been in agreeing effective measures. The draft prepared for the second meeting required participants to agree that fishing in the area under discussion should not increase beyond the current levels and fishing for new fishery resources or in new parts of the area should not take place until conservation and management measures were in place. That draft proposal was not accepted by all participants and it was not until the third meeting that a more limited interim measure proposal was adopted. The limited measure adopted in 2007 allowed additional vessels to enter the fishery. As a result, there was a significant increase in the fishing effort for jack mackerel in the latter part of 2007 (approximately nine more vessels) and a further sixteen vessels entered the fishery in 2008 and 2009.

7 More positive features of the interim measures adopted in 2007 were: a) the requirement on all participants to collect and supply to the Scientific Working Group (SWG) detailed information on the fishing activity by vessels flying their flag; and b) the request to the SWG to provide advice by 2009 on the status of the jack mackerel stock. On the basis of the information supplied to it, the SWG indicated as early as 2008 that it had concerns about the declining state of the jack mackerel stock and, in 2009, following a comprehensive review of the fishery, advised that fishing mortality was likely to have exceeded sustainable levels since 2002 and was continuing to do so.

8 In response, the final meeting of the negotiations on the Convention adopted, along with the Final Act, a revised set of interim measures under which participants agreed voluntarily to restrain their catches for 2010 (and until the Convention entered into force) to the levels they recorded in 2007, 2008 and 2009. That meeting also specified that these measures should be reviewed and revised by the Preparatory Conference no later than 2010 to take account of a further planned comprehensive stock assessment by the SWG.

#### *Decline of the stock*

9 The result of this comprehensive stock assessment was presented in the Report of the Scientific Working Group to the second meeting of the Preparatory Conference in January 2011 and sent shock waves through the Conference. Its conclusions and implications were summarised in the following remarks by the Chair of the Preparatory Conference at the formal opening ceremony:

“Between the time of our first meeting in 2006 and the end of last year [2010] jack mackerel biomass is estimated to have declined by 65% to its historically lowest level – only 11% of the estimated unfished biomass level. Spawning biomass is estimated to have declined to only 3% of the unfished level, quite possibly making this the most depleted fish stock under the responsibility of an RFMO anywhere in the world.

Immediate and substantial measures are required to reverse this decline.

To rebuild the stock to long-term sustainable levels it seems we need to consider at least halving the catch compared to the 2010 level. Every indication is that, failing to implement such measures will result in continued decline in a stock that was once the largest fish stock in the Pacific Ocean, but is now reaching levels which are almost uneconomical to fish.”

10 Faced with this Report the preparatory Conference adopted revised interim measures (the 2011 Interim Measures) that limited 2011 catches to 60% of those in 2010 and signalled that, unless there was a dramatic improvement, the 2012 catches would need to be reduced to 40% of those in 2010. This decision presented great difficulties for all the participants in the fishery. Four delegations (Cuba, Faroe Islands, Korea and Venezuela) advised they could not accept the decision and a fifth (China) said it would advise its position later. China subsequently advised it would reduce its 2010 catch by 30% for 2011 and its actual catch was significantly less than that.

11 This dramatic agreed reduction in catch did not of itself lead to a significant improvement in the stock in 2011. Part of the reason for this appeared to be the straddling nature of the stock and the year on year fluctuation in catches on the high seas and economic zones. The total catch on the high seas in 2011 was only 114,000 tonnes – a much greater percentage reduction than the 40% reduction on the 2010 catch levels specified in the 2011 interim measures. And if the “in zone” catches had reduced by just over 20% the overall catch would have been well under the 390,000 tonnes recommended by the SWG as the maximum catch level that would offer some prospect of rebuild. In fact, although one of the “in zone” catches (that of Chile) was significantly down on the previous year’s catch, the catch in the other two zones (those of Peru and Ecuador) had increased dramatically so that the total catch was 608,000 tonnes.

12 The seriousness of the situation was recognised by all participants and the signalled reduction to 40% of 2010 levels was agreed unanimously at the third meeting of the Preparatory Conference in 2012. But the situation that had arisen

in 2011 had highlighted the need for “in zone” and high seas catches to be managed cooperatively so that the total catch remained within the levels recommended by the scientists and some important paragraphs (13-16) were included in the meeting report relating to the position of relevant coastal states regarding “in zone” catches.

13 The first meeting of the Commission the following year (2013) faced the same difficulty when developing its first binding conservation and management measure under the Convention. This time the SWG reported there were some indications of an increasing stock but it was still at very low levels. Their recommendation was that catches should be maintained at or below 2012 levels. Accordingly, in terms of the objective of the Convention and the conservation and management principles and approaches it was required to apply under Article 3, the Commission was bound to limit catches for the year to the level at which scientific advice suggested there was a reasonable prospect of rebuild. To achieve that, it had to ensure that high seas catches for members and cooperating non-contracting parties were set significantly below that level so there was room for the coastal state member (at that time Chile) to be reasonably encouraged and expected to agree its “in zone” catches be covered by the measure and there was room for appropriately constrained “in zone” catches by coastal state cooperating non-contacting parties (at that time Peru and Ecuador).

14 Agreement proved very difficult to achieve and the situation was complicated by the controversy surrounding the vessel *Lafayette* that led to an objection by the Russian Federation to the measure finally adopted by the Commission. That objection was, in part, upheld by the Review Panel. It is important to note, however, that the alternative measure recommended by the Panel ensured the total allowable catch would not exceed that contained in the measure adopted by the Commission based on the scientific advice it had received.

15 New Zealand suggests that decisions made in following years, including 2017 and 2018, should be seen in the context of this background. The conservation and management measures adopted by the Commission relating to the jack mackerel fishery have consistently continued to ensure that the total allowable catch has not exceeded the relevant levels recommended by the Scientific Committee. This has enabled a gradual and carefully controlled increase in the total allowable catch that has demonstrated the wisdom of the extraordinary levels of voluntary restraint agreed to by most participants in the fishery, as outlined above, in response to the evidence of the dramatic decline of the stock in earlier years.

#### **New Zealand comments on the current objection**

##### *Following best scientific advice*

16 In connection with the background provided above, and in relation to the objection by the Republic of Ecuador to CMM 01-2018, New Zealand remains

firmly of the view that any conservation and management measure adopted by the Commission for a particular fish stock must first and foremost be designed to contribute to the objective of the Convention. To this end, such measures must be based on the best scientific advice and ensure the long-term conservation and sustainable use of that fish stock. In New Zealand's view, there is no justification under the Convention for an increase in a total allowable catch set in accordance with the advice of the Scientific Committee.

17 New Zealand is well aware that the failure of some other RFMOs to manage certain stocks sustainably has been caused at least in part, by a failure to reach agreement on catch allocation except by increasing the size of the total allowable catch beyond the limits of the relevant scientific advice. In contrast, the voluntary restraints agreed and followed (on the basis of the best scientific advice) by most participants in the jack mackerel fishery during the later years of the negotiation of the SPRFMO Convention and the period of the Preparatory Conference until its entry into force and the establishment of the Commission, was nothing short of remarkable. It established a precedent that has been followed without exception since then and is firmly in line with the obligations set out in the Convention. In New Zealand's view it is important it is maintained.

*Consistency with the Convention and other international law*

18 The Panel has asked for comments on questions relating to the consistency or otherwise of the decision with respect to CMM 01-2018, with the Convention or other international law. For its part, New Zealand does not see any basis to consider the decision is inconsistent with the provisions of the Convention or other international law as reflected in the 1982 Convention<sup>2</sup> and the 1995 Agreement.<sup>3</sup>

19 The decision of the Commission with respect to CMM 01-2018 was made pursuant to Article 21 of the Convention. Article 21 requires the Commission to take into account the status of the fishery resource and the existing level of fishing effort for that resource and further criteria to the extent relevant, including, *inter alia*:

- “(a) historic catch and past and present fishing patterns and practices in the Convention Area;
- ...
- (e) the fisheries development aspirations and interests of developing States in particular small island developing States and of territories and possessions in the region;
- (f) the interests of coastal States and of territories and possessions, in a fishery resource that straddles areas of national jurisdiction of such States, territories and possessions and the Convention Area;”

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<sup>2</sup> The United Nations Convention on the Law of the Sea of 10 December 1982.

<sup>3</sup> 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.

20 Article 3(1) of the Convention requires the Commission when making a decision under Article 21, to, *inter alia*:

"... (a) apply, in particular the following principles:

...

(ii) fishing shall be commensurate with the sustainable use of fishery resources taking into account the impacts on non-target and associated or dependent species and the general obligation to protect and preserve the marine environment;

...

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

...

(viii) the interests of developing States, in particular the least developed among them and small island developing States, and of territories and possessions, and the needs of developing State coastal communities, shall be recognised;"

21 Article 19 of the Convention further requires the Commission to give full recognition to the special requirements of developing State Contracting Parties in relation to the conservation, management, and sustainable use of fishery resources in the Convention Area.

22 These provisions of the Convention implement and build upon the provisions of the 1982 Convention and the 1995 Agreement that have been invoked by the Republic of Ecuador in the present objection. Primarily, these are Article 119 of the 1982 Convention,<sup>4</sup> and Articles 5(a), (b), (c) and (e),<sup>5</sup> Article 24, and Article 25 of the 1995 Agreement.

23 In New Zealand's view, decision making by the Commission pursuant to Article 21 and in accordance with Articles 3 and 19, must be considered as a holistic exercise. In this respect Article 21 and the various criteria enumerated

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<sup>4</sup> 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;"

<sup>5</sup> 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; ..."



therein should not be considered to be a precise algorithm, but rather a range of factors of greater or lesser relevance in any given circumstance, which collectively will be in the minds of Commission Members when they debate the issues and make a decision regarding participation in a fishery resource. This is due not only to the nature and extent of the factors that the Commission must consider in making such a decision, but also because some of the criteria cannot be considered independently from each other, given they are interconnected. For example, while fisheries development aspirations and interests of developing States should be taken into account, they may also be factored in by virtue of consideration of historic catch, which may in turn be based on decisions previously made in which those aspirations and interests were taken into account.

24 As outlined in the historical background provided above, decisions made under Article 21 by the Commission have been reached after significant discussion, negotiation and compromise by and between Commission Members. What is consistent in those decisions however, has been the commitment of Members to achieving outcomes which are in accordance with the advice of the Scientific Committee on the limits of the total jack mackerel catch throughout the range of the stock for each year. As stated, this has been particularly in response to the status of the stock and the recognition of the Commission of the need to take decisions that will ensure the long-term conservation and sustainable use of the fishery, in accordance with Article 2 of the Convention.

25 In New Zealand's view, Article 21 decisions should not be found to be inconsistent with the Convention or other international law merely because a Member requests a greater allocation and is able to point to provisions of the Convention in doing so, but does not receive one. This is because the Commission must consider any request by a Member not in isolation, but in the context of the range of other principles and criteria that it is bound to apply, take into account, or recognise, in light of the circumstances it is faced with.

#### *Questions of unjustifiable discrimination*

26 With respect to the questions from the Panel on unjustifiable discrimination, New Zealand suggests that an appropriate starting point is that as an international organisation, the Members of SPRFMO should be presumed to be operating in good faith in the absence of evidence that points to the contrary. On this basis, New Zealand would propose that there should be a fairly high threshold for a finding that discrimination is unjustifiable, which should not be arrived at lightly.

27 New Zealand suggests that unjustifiable discrimination would involve either: a) an unwillingness on the part of the Commission to treat the request by the Republic of Ecuador on the same basis as a similar request by other members; or b) an insistence by the Commission on an unreasonable level of information from the Republic of Ecuador about the basis for their request and their capability and readiness to participate in the fishery on the granting of their request.

28 The percentages used by the Commission as a basis for catch allocations in CMM 01-2018 were decided in 2017, in CMM 01-2017. These percentages were agreed by the Commission in 2017, to be used from 2018 to 2021 inclusive. New Zealand notes that the memorandum of the SPRFMO Organisation states that the Republic of Ecuador had not presented a formal proposal to amend or modify the jack mackerel measure within the deadlines agreed by the Commission in the SPRFMO rules of procedure.<sup>6</sup> The decision of the Commission in CMM 01-2018 allocated the additional total catch entitlement to Participants on a proportional basis, and so in this respect, did not discriminate between Participants.

29 Furthermore, New Zealand understands that the Republic of Ecuador's request for a greater allocation in 2017 was considered by the Commission at that time, and resulted in the Republic of Ecuador receiving an increased allocation, again on a proportional basis. That decision by the Commission did also provide proportionally greater increases to some other Participants. However, the differences in the amount of the increases received by those Participants should also be considered in the context of their different circumstances and the different elements of Article 21 that applied to them.

30 New Zealand does not consider that evidence has been presented which would demonstrate that the decision of the Commission in CMM 01-2018 unjustifiably discriminated against the Republic of Ecuador.

*Whether the alternative measure is 'equivalent'*

31 In response to the questions from the Panel relating to alternative measures and whether they are 'equivalent' to CMM 01-2018, New Zealand submits the following comments.

32 In New Zealand's consideration, the essential standard for determining whether alternative measures are equivalent in effect is whether the proposed alternative measures are equally 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.

33 New Zealand considers that for any alternative measure to have equivalent effect to CMM 01-2018 it would be necessary to be satisfied that the measure did not result in either:

- the total catch of *Trachurus murphyi* in the area to which the CMM 01-2018 applies exceeding 517,582 tonnes; or

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<sup>6</sup> SPRFMO Memorandum to assist the Review Panel established under Article 17 of the SPRFMO Convention to consider the Objection by Ecuador to the Conservation and Management Measure for *Trachurus murphyi* (CMM 01-2018), paragraph 75.

- total catches of *Trachurus murphyi* throughout the range of the stock exceeding 576,000 tonnes in 2018.<sup>7</sup>

34 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.

35 The Review Panel established under Article 17 and Annex II of the Convention with regard to the objection by the Russian Federation to a decision of the Commission (namely CMM 1.01) agreed with this analysis:<sup>8</sup>

*"The Review Panel therefore believes that the alternative measure, to have equivalent effect to CMM 1.01, should seek to avoid inconsistency not only with the total allowable catch but also with the allocations to other Members and CNCPs."*

36 The Republic of Ecuador asserts that its alternative measure utilises "a reservation" of 58,218 tonnes, being the difference between the total catch limit throughout the range of the stock and the total catch limit in the area to which CMM 01-2018 applies. As outlined in the memorandum of the SPRFMO Organisation, this difference is not a 'reservation', but is rather an allowance for the fisheries for jack mackerel in areas within national jurisdictions, not included in the area to which CMM 01-2018 applies (i.e. those in the exclusive economic zones of Ecuador and Peru).

37 The alternative measure adopted by the Republic of Ecuador would increase the total allowable catch and therefore, New Zealand does not see how it can be considered to be an equivalent measure.

38 As outlined above it is New Zealand's view that for any measure to have equivalent effect it must ensure that in 2018, the total catch of jack mackerel in the Area does not exceed 517,582 tonnes and does not exceed 576,000 tonnes throughout the range. In this regard it would note that the effort management rules in paragraph 4 of CMM 01-2018 have been largely superseded by the catch management rules in paragraphs 5 to 10.

39 New Zealand accepts, as the Review Panel in the case of the objection by the Russian Federation stated, that Article 17(2) applies to decisions on catch allocation. Nevertheless, New Zealand is of the view that the scope for alternative measures to be equivalent in the case of catch allocation is inherently more limited than in relation to measures which specify, for example, the types of fishing gear to be used or specific fishing techniques. In those situations,

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<sup>7</sup> These figures being those recommended by the Scientific Committee.

<sup>8</sup> Findings and Recommendations of 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, 5 July 2013, paragraph 99.

alternative measures which achieve the same ends by different means, without affecting the rights and interests of other Members may well be more readily available. Modifying a catch allocation or a total allowable catch, would be to change the means and the ends, or else adversely affect the rights and interests of others.

*Future reviews of the jack mackerel Measure*

40 New Zealand does not have any suggestions as to other alternative measures that would be equivalent in effect to the decision with respect to CMM 01-2018 to which the Republic of Ecuador has objected.

41 New Zealand does however, recall that throughout the process of negotiating the Convention, preparing for the establishment of the Commission in the work of the Preparatory Conference and throughout the life of the Commission itself to date, there has been a notable spirit of constructive cooperation amongst participants even when it has been difficult to reach agreement on specific issues. In particular there has been a demonstrated willingness, given the necessary notice and information, to find solutions to genuine interests and concerns raised from time to time by one delegation or a small minority of delegations.

42 In light of this past cooperation it is New Zealand's view that if the Republic of Ecuador has a serious interest in developing its capacity and capability to participate directly in the fishery for jack mackerel on the high seas, then other participants in that fishery will be willing to accommodate that interest appropriately. On the basis of its experience since the beginning of the negotiations for the new Convention in 2006, New Zealand considers the most effective way of ensuring that an important interest is understood and accommodated is for it to be identified and discussed well in advance of the annual meeting of the Commission. In the case of a developing coastal state member such as the Republic of Ecuador, assistance in the preparation of the explanation of the interest and the case for accommodation should be available on request from the Secretariat and other members.

43 New Zealand notes that CMM 01-2018 will be reviewed by the Commission in 2019. In connection to this, New Zealand respectfully suggests that the Panel could provide suggestions to the Commission on how it might give due consideration to the Republic of Ecuador's aspirations.