

REVIEW PANEL ESTABLISHED UNDER ARTICLE 17 AND ANNEX II OF THE
CONVENTION ON THE CONSERVATION AND MANAGEMENT OF HIGH
SEAS FISHERIES RESOURCES IN THE SOUTH PACIFIC OCEAN (OBJECTION
OF THE RUSSIAN FEDERATION TO CMM 1.01)

HEARING
1 JULY 2013

Presentation by the Chairman of the Commission

Mr Chairman, Members of the Panel

It is an honour to appear before you today.

May I begin by thanking you on behalf of the South Pacific Regional Fisheries Management Organisation for undertaking this important task. As you know the Organisation is a new one - still in its first year - having been established with the entry into force of the Convention on 24 August 2012 and having held the first meeting of its principal body, the Commission, in January this year. It is very important it gets off to a good start that unifies the parties in support of the objective of the Convention and also encourages other states that may have an interest in the fishery resources covered by the Convention to join the Organisation.

In this regard I should note that the right of any Member of the Commission to raise an objection to a decision of the Commission is an important right. Equally important is the process established by the Convention to ensure any such objection is promptly, properly and fairly considered and resolved. The timetable for this process certainly puts pressure on everyone involved. And in this regard I would like particularly to acknowledge the willingness of you, Mr Chairman, and the other Members of the Panel to fit this task into your already very busy schedules. As Chair of the Commission with responsibilities in respect of the establishment of the Review Panel I am most grateful to you, as is the Organisation as a whole. May I also, through you, express the appreciation of the Organization to the Permanent Court of Arbitration. We are most grateful for the willingness of the PCA to provide the facilities for this hearing and to undertake the role of servicing and supporting the Review Panel and I would like to acknowledge the experience and expertise they bring to this task and the high level of professionalism with which they are carrying out their role.

Without wishing to emphasise the obvious I should note that the intention behind the tight deadlines for the objection review process was to ensure, as far as possible, that any significant disagreement amongst the members of the Commission is resolved quickly, thereby avoiding the situation that has occurred in some other regional fisheries management organisations where disagreements have dragged on over several years to the detriment of the stocks under management and the efficacy of the decision-making capability of the organisations concerned.

If I may I would like to offer a very brief overview of the process leading to the establishment of the Organisation and set the objection under consideration in the

context of what, in my view, is for the most part a history of very good cooperation and constructive engagement.

I would begin back in 2006 and note that there was an excellent response to the invitation from Australia, Chile and New Zealand to all interested states and fishing entities to attend a meeting to discuss the establishment of a South Pacific Regional Fisheries Management Organisation. The outcome of that meeting was that the participants agreed to work to establish a binding legal agreement as a matter of priority and to that end requested the Chair to develop a draft Convention text and a draft text for interim arrangements for the next meeting. They also established a Science Working Group and a Data and Information Working Group.

The reasons for the strong attendance at that first meeting are best known to the states themselves. Some were not actively engaged in fishing and were more concerned about the need for an organization to manage the potential future pressures on the high seas in the South Pacific and the possible effects of those pressures on the fisheries within their own EEZs. Others were active participants in the most important commercial fishery – jack mackerel – and saw the need for a new international organization to work with coastal states to manage this important straddling stock. All recognised the need to fill the major gap that existed in the architecture of high seas fisheries management and protection of the marine environment in the South Pacific.

One of the risks of commencing negotiations on a new regional fisheries agreement is that fishing states may enter an existing fishery or seek to increase their effort in that fishery in order to position themselves for future allocation decisions. The participants at this first meeting recognised this risk in requesting a draft of voluntary interim measures for consideration at their next meeting. But in retrospect they were slower than they should have been in agreeing appropriate measures.

The draft interim measures prepared for the second meeting of the consultations required participants *inter alia* to agree that fishing in the area under discussion should not increase beyond the then current levels and that fishing for new fishery resources or in new parts of the area should not take place until conservation and management measures were in place. This proposal, and variants of it discussed at the meeting, was not accepted by all delegations and it was not until the third meeting in May 2007 that the first set of interim measures was agreed.

The first part of the 2007 measures, adopted in May of that year, was an attempt to control the growth in the fishing effort for jack mackerel. States that had fished for jack mackerel in the Convention Area in 2007 were not to increase the gross tonnage of vessels flying their flag in 2008 and 2009. But states with a previous catch history that had not fished in 2007 were also allowed to enter the fishery in 2008 and 2009 while exercising voluntary restraint of fishing effort. And, of even more concern, the measures placed no restraint on the introduction of additional vessels between the date of the adoption of the measures, or even the date from which they were to become operative (30 September 2007) and the end of 2007. As a result there was a significant increase in the fishing effort in the latter part of 2007 (approximately 9 more vessels). A further 16 vessels representing an additional gross tonnage of over

70,000 entered the fishery in 2008 and 2009 under the exemption for states with a previous catch history that had not fished in 2007.

The more positive aspects of the 2007 interim measures were first, the information on fishing activity by vessels flying their flag that participants were to collect and contribute to the work of the Science Working Group and second, the request to that Group to provide advice by 2009 on the status of the jack mackerel stock. As noted in paragraph 8 of the Information Paper we submitted to you, the level of information required was very detailed even compared with that required by existing regional fisheries management organisations. By the following year (2008) the Science Working Group was already indicating it had concerns about the declining state of the jack mackerel stock.

There were some issues about different possible stock structures for the jack mackerel stock and so, in the absence of an agreed stock structure and all the information necessary to undertake a stock assessment as such, the Science Working Group in 2009 used a comprehensive review of the fishery and other indicators to serve as the basis for their advice to the next and final meeting of the International Consultations. That advice was that the indicators showed that fishing mortality was likely to have exceeded sustainable levels since at least 2002, and continued to do so. It is important to note that the Science Working Group's advice was based on information about the stock throughout its range including "in zone" catches. I should also recall in this regard that Article 20 paragraph 4(a)(ii) of the Convention provides that with the express consent of the relevant coastal state the Commission may establish a total allowable catch throughout the range of the fishery resource.

The response of the 8th and final meeting of the International Consultations to this advice from the Science Working Group was to adopt the 2009 Revised Interim Measures under which participants agreed to voluntarily restrain their catches for 2010 (and until the Convention entered into force) to the levels they recorded in 2007, 2008 or 2009. The meeting passed the responsibility for reviewing these measures to the Preparatory Conference and specified that they should be reviewed and revised as appropriate no later than 31 December 2010 to take account of the stock assessment of jack mackerel that the Science Working Group had proposed and the meeting had endorsed.

That stock assessment was carried out in October 2010 and was presented in the Report of the Science Working Group to the 2nd Meeting of the Preparatory Conference in January 2011. The results were a shock. To give you a sense of the impact of this Report I would like to quote from my remarks as 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 total 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 major 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 catch 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 South Pacific Ocean, but is now reaching levels which are almost uneconomical to fish.”

As summarised in paragraph 15 of the information paper the key management message from the Science Working Group’s Report was that if catches continued at 2010 levels then, under recent average levels of recruitment, there was 100% probability that the biomass would continue to decline. If catches were to be reduced to 75% of 2010 catches then there would still be more than a 50% chance the biomass would continue to decline. But if catches were reduced to 50% of 2010 levels then the models indicated that biomass would increase to about double the then current biomass by 2020.

This time the response of the Preparatory Conference was the adoption of the 2011 Interim Measures. In essence the decision was to limit 2011 catches to 60% of those in 2010 and to signal that, in the absence of some dramatic improvement, the 2012 catches would need to be reduced to 40% of those in 2010. This was a difficult decision for all those engaged in the fishery and, as recorded in paragraph 10 of the report of the meeting; 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 a little later. (China subsequently advised it would reduce its 2010 catch by 30% for 2011 and its actual catch was significantly less than that.)

Regrettably the subsequent stock assessments by the Science Working Group did not indicate any significant improvement in the situation. Moreover the seriously depleted state of the jack mackerel fishery had become international news as a result of a series of articles by investigative journalists. The seriousness of the situation was recognised by all participants and the previously signalled reduction to 40% of 2010 catches was agreed at the 3rd meeting of the Preparatory Conference, this time without dissent. I should note here a factor that may have contributed to the lack of improvement in the status of the stock, or at least did not help. This was the straddling nature of the stock and the year on year fluctuation in catches in the high seas and economic zones.

As I noted in my remarks at the opening ceremony of the 3rd meeting 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. I pointed out that if the “in zone” catches had reduced by even just a little over 20% then the total catch would have been well under the 390,000 tonnes suggested by the Science Working Group as the maximum catch offering 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 had increased dramatically so that the total catch was 608,000 tonnes. This situation highlighted the need for the “in zone” and high seas catches to be managed cooperatively to ensure that in all years the total catch remains within the parameters for sustainability established on the best scientific advice. This was an important part of the background to the adoption of the 2012 Interim measures which was coupled with the inclusion of important paragraphs in the meeting report relating to the position of relevant coastal states regarding “in zone” catches.

It remained an important issue for the 1st meeting of the Commission at the beginning of this year in the development of its first Conservation and Management Measure (CMM 1.01). Again that decision had to be fully cognizant of the Report of the Science Working Group on the outcomes of its most recent stock assessment carried out in October 2012. This time the Report noted there were some indications of an increasing stock but it was still at very low levels. Accordingly the recommendation was that catches should be maintained at or below 2012 levels, i.e. the total catch for 2013 throughout the range should be at or below the 441,000 tonnes that, in October when the Group met, was anticipated to be the final catch for 2012.

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 therefore bound to seek to limit catches this year to the level at which the scientific advice suggested there was a reasonable prospect of rebuild. To do this 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 (Chile) to be reasonably encouraged and expected to agree that its “in zone” catches be covered by the measure and there was also room for appropriately restrained “in zone” catches by coastal state cooperating non-contracting parties.

This is the essential scheme of CMM 1.01 with shares in the limited overall catch again in proportion to those in 2010 with an adjustment for Chile. (I should pause to note that, if it was difficult to reach agreement on the 2011 Interim Measures, the negotiation of CMM 1.01 was an equal challenge. The Working Group was able to reach agreement only after several lengthy meetings involving all participating countries and for much of the time it appeared there would be no agreement on a Conservation and Management Measure limiting the catch for 2013 despite the clear advice from the Science Working Group that catches should be maintained at or below 2012 levels. If that had been the result the Commission would have failed to meet its most fundamental obligation at its first meeting.)

I have briefly traversed this history to emphasise that, at least from the point at which there was incontrovertible scientific advice that the jack mackerel stock was seriously depleted, the Preparatory Conference and the Commission have been dealing with a situation that although not formally categorised as an emergency in terms of Article 20 paragraph 5 has certainly had a similar sense of exceptionalism and urgency. In essence CMM 1.01 is the latest component of a three year effort to restrict total catches of jack mackerel to around half or less of the catches in 2010 – the catch year against which the Science Working Group made their specific recommendations for reductions. The exceptional nature of this effort was recognised by participants in the statements included in the 2011 and 2012 Interim Measures and repeated in CMM 1.01 that these measures are not to be considered precedents for allocation or other decisions in the future in accordance with Article 21 of the Convention relating to participation in fisheries for jack mackerel. In my perception participants were quite clear that in developing these measures they were not engaged in an Article 21 decision-making exercise regarding participation. Rather they were attempting to find an acceptable means of urgently and severely reducing current catches to allow the potential of a stock rebuild to a level at which an Article 21 exercise could reasonably be undertaken. And they believed that everyone’s position in relation to future participation was covered by the disclaimers included in the measures.

I would like now to say just a few words about the controversy surrounding the vessel *Lafayette*. The information paper we have provided contains a considerable amount of material on this subject. It does so simply because it seemed important that you have available to you a full account of the communications in respect of this vessel, together with the supporting documents, rather than an attempted summary by the Secretariat on a matter in which it was directly involved.

As I am sure you will appreciate a factual disagreement of this kind between participants is difficult to manage and can place the Secretariat, in particular, in an awkward position. As Chair my principal concern was that the disagreement should be managed, as far as possible, in ways that meant it did not inhibit the ongoing progress on all the other work that needed to be brought to conclusion. In the absence of agreed rules of procedure in the Preparatory Conference and a history of working by consensus in that forum and the preceding process for the drafting of the Convention this meant, where necessary, finding ways of recording different positions so they could be returned to at any relevant point in the future.

For the Secretariat, however, the situation became more difficult. It was expected to keep the website regularly updated with information about reported catches. In addition an information paper recording this information was always prepared for meetings of the Science Working Group and the Data and Information Working Group with a revised version being made available to the Preparatory Conference and the 1st meeting of the Commission respectively. Although the website and these papers were for information only and were not authoritative there was an expectation on the part of participants that the Secretariat would ensure the information was as accurate as possible.

In the light of the discussions at the final meetings of the Science Working Group and the Preparatory Conference about the catches attributed to the vessel *Lafayette* the Secretariat found itself in a difficult position. On the one hand it had no wish and no authority to challenge the catch advice submitted by the Russian Federation. On the other hand if these catches were included the information would be seen as inaccurate and potentially misleading by the majority of participants especially in view of the concerns expressed that they might, in part or in whole, include catches also reported by Peru. The Executive Secretary had several conversations with a delegate from the Russian Federation during the 3rd meeting of the Preparatory Conference in an effort to find a way to manage the situation but in the absence of an agreed solution concluded that the Secretariat had to make its best judgement as to what seemed the most accurate information to provide.

Mr Chairman, Members of the Panel, I should like to conclude by returning to the point I made at the beginning of my remarks. I consider that overall the process involved in the establishment of this new Organisation has been characterised by cooperation and constructive engagement on the part of a wide range of countries including countries from both sides of the Pacific that have not previously had many occasions to work closely together on a complex matter of this kind. The Convention itself is I think a significant achievement. Amongst its significant features are the leading edge provisions relating to the application of conservation and management principles to decision-making, the provisions relating to the management of straddling

stocks including the possibility, with the express consent of the coastal state, of Commission decisions having application throughout the range of stocks and the possibility of substantive decision-making by qualified majority coupled with a right of objection.

As I noted at the outset the right of a member of the Commission to object to a decision, even one that is taken by consensus, is an important right. The Russian Federation is a major state with a significant historical connection to fishing for jack mackerel in the Pacific as well as more recent activity in the fishery in this century. It actively participated from the beginning in the consultations that resulted in the adoption of the Convention, in all three meetings of the Preparatory Conference and in the first meeting of the new Commission. Their delegates also played their part in the work of the Science Working Group and the Data and Information Working Group. In this regard it is very appropriate that their objection is given serious and careful consideration by such a distinguished Panel and that their concerns are fully understood, explored and if possible resolved with your help.

Thank you for your attention. The Executive Secretary, Dr Allen, and I would be happy to answer any questions you may wish to address to us and to provide any additional information you may need.