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COOPERATING NON-MEMBERS AT WCPFC5

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New Zealand Delegation Paper

Introduction

1. The issue of Cooperating Non-Member (CNM) status was both contentious and time consuming at WCPFC4, reflecting the importance of this issue to WCPFC members, the current interest in attaining CNM status to WCPFC, and the complexity involved in applying the existing measure on CNMs. This paper sets out New Zealand's current thinking on the issue of CNMs within WCPFC, and specifically on where we consider the process and criteria for consideration of applications for CNM status under the current measure, CMM 2004-02, should be modified to take account of the status of fish stocks and the increase in applications for CNM status.

2. New Zealand considers that the adoption of such modifications should be a priority for the annual meeting of the Commission in Busan, Korea in December 2008. While any agreed modifications would not become binding until 60 days after they are adopted, New Zealand considers that it would be in the interests of the Commission, applicants for CNM status, and the fisheries themselves, for applicants for CNM status at WCPFC5 to undertake voluntarily to limit fishing in the next fishing year in a manner consistent with the objectives of the proposed modifications to CMM 2004-02.

Legal framework

3. The issue of how WCPFC deals with non-members needs to be considered in the context of the international legal framework relating to membership of RFMOs. This section summarises the components of that framework that New Zealand regards as of particular relevance to progressing the issue of CNMs within WCPFC.

4. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) reaffirms that the high seas are open to all States, and that the freedom of the high seas includes freedom of fishing. However, it also provides that this freedom must be exercised with "due regard" to the interests of other States and is subject to the "duty to cooperate".¹ In New Zealand's view, the freedom of fishing as set out in UNCLOS, including the duty to cooperate, is a rule of customary international law that binds all States.

5. The nature of this duty to cooperate is described in Article 8.3 of the UN Fish Stocks Agreement (UNFSA) that deals with membership of and cooperation with RFMOs. The terms by which such parties may participate in RFMOs shall not preclude States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a 'real interest' in the fisheries concerned. Thus under UNFSA States do not have to be members or cooperating non-members of an RFMO to access fisheries managed by that RFMO, but they do have to cooperate with the RFMO by

¹ Stated generally in Article 118, but also reflected in Article 64 regarding highly migratory species as well as in Article 117.

applying conservation and management measures put in place by the RFMO for straddling or highly migratory fish stocks. Equally RFMOs cannot ignore attempts by non-members to cooperate and must engage with them.

6. States that are neither party to UNFSA or WCPFC enjoy a freedom to fish in the WCPFC high seas subject only to a general duty to cooperate. Thus States which applied to the WCPFC for CNM status but were declined such status could fish on the high seas of the WCPFC area, either by asserting the freedom to fish on the high seas (if not Parties to UNFSA) or by asserting that they have fulfilled the duty to cooperate by applying the conservation and management measures established by WCPFC (if they are Party to UNFSA).

7. There is also the possibility that States may fish in areas under national jurisdiction through agreed derogations from WCPFC obligations, such as the exemption granted to Kiribati allowing it to license nine purse-seine vessels that are flagged to States not Party to the WCPFC to fish within its EEZ. However such derogations would transfer the responsibility for ensuring compliance with WCPFC conservation and management measures to the coastal state, while leaving the fishing activity by those vessels in the high seas unregulated, and uncertainty would remain as to how such fishing activity would be accounted for within WCPFC measures.

8. While CNMs are non-Parties in the traditional sense of international law, their commitment (expressed through their application) to be bound by the WCPFC and its conservation measures means in practice that they carry the same obligations as members, but without all the rights, such as full participation in decision making.

9. In New Zealand's view it is therefore desirable to have those States wishing to fish in the WCPFC Convention Area brought within the Commission framework as CNMs and bound by its measures, rather than continuing to fish outside it. The annual review of CNM status will provide an opportunity for the Commission to hold CNMs to account for their commitment to abide by the WCPFC Convention and its associated conservation and management measures.

Problems with the existing WCPFC measure on CNMs

10. During preparatory meetings in advance of WCPFC4, members of the Pacific Islands Forum Fisheries Agency (FFA) identified a number of shortcomings with CMM 2004-02 and put up a proposal to amend that measure (WCPFC4-2007-DP11) to incorporate relevant considerations from Article 11 of the UNFSA.

11. The fundamental problem that FFA members had identified with the existing measure is that it requires members to take into account a range of critical factors (stock status, transfer of capacity, record of compliance) in deciding whether or not to accept or decline an application for CNM status but does not provide any tools under the measure to positively address those factors. The measure essentially limits the Commission to a decision of 'yes' or 'no', and in doing so limits the ability of Commission members to approve CNM applications, particularly in circumstances where there is uncertainty about the implications of a 'yes' decision in terms of potential increases in fishing effort on threatened stocks.

12. The need for certainty about the implications of admitting new CNMs into WCPFC – particularly given the stock status of bigeye and yellowfin tuna underpinned the FFA proposal for the Commission to be able to specify the "participatory rights" of any new CNMs as envisaged by Article 11 of UNFSA.

13. The fact that existing WCPFC measures are often worded so as to apply to all CCMs where CCM is defined to include all Commission members, Participating Territories and Cooperating Non-Members creates an additional issue. Catch or effort limits currently ascribed to all CCMs in existing WCPFC measures therefore automatically apply to any new CNM as soon as they are admitted to WCPFC even though this may not have been the intention of the Commission at the time measures were originally adopted.

Progress at WCPFC4

14. Due to the focus on the pending applications for CNM status, WCPFC4 did not have time to properly consider the FFA proposed changes to CMM 2004-02. As a consequence FFA members focused on developing a process chart to guide our approach to application of the existing measure, drawing on issues that had been identified in DP11 as needing to be taken into account.

15. The process chart developed by FFA members and tabled at WCPFC4 as DP20 was used by FFA members to work through issues associated with the applications, including in the small working group chaired by Sylvia Lapointe from Canada. A number of other WCPFC members raised concerns with regard to Step 3 of DP20 which they saw as discriminatory since it proposed that the Commission be able to prescribe limits on fishing activity by any new CNMs beyond those in existing CMMs that apply to all CCMs equally. It was argued that the Commission had to ensure that existing measures applied to new CNMs in a non-discriminatory manner.

16. While the arguments about potential discrimination were accepted by FFA members at the time, these arguments did not address the fundamental problem that FFA members had identified in the existing measure – the lack of any mechanism by which the Commission can take into account a range of critical factors (stock status, transfer of capacity, record of compliance) in deciding whether or not to accept or decline an application for CNM status in the absence of any tools under the measure to positively address those factors. Left with a choice of ‘yes’ or ‘no’, and with little certainty about the implications of a ‘yes’ decision, many FFA members considered that they were not in a position to grant the majority of applications for CNM status.

17. The exception was Belize who was admitted as a CNM on its third attempt. While there were a range of reasons why Belize was admitted while others were declined, New Zealand believes the precedent set by Belize in agreeing to apply voluntary limits to its fishing activity may provide a way forward in 2008, as discussed further below.

18. The failure of the Commission to properly address the issue of fishing capacity and the development aspirations of small island developing states, an issue of direct relevance to the issue of new entrants, was a further factor influencing the positions of many WCPFC members at WCPFC4 on applications for CNM status².

19. An additional element of relevance to how WCPFC deals with CNMs was a draft resolution tabled by Australia on the final day of WCPFC4 entitled *Draft Resolution Regarding the Expectations of Aspiring Applicants* (DP32) that sought to specify the fishing opportunities available to States seeking CNM status within WCPFC. The Commission did not have sufficient time to properly consider this proposal at WCPFC4.

How to progress at WCPFC5?

20. WCPFC is in the same position this year as it was in 2007 in respect of consideration of CNM applications. The existing measure, WCPFC 2004-02, still stands and while two additional proposals are still on the table (DP11 and DP32) it is clear that any new applications for CNM status will need to be considered under the existing measure, as they were in 2007, with all its limitations intact.

21. In New Zealand’s view the Commission needs to address the CNM issue on two levels:

- Amendment of the existing measure on CNMs, CMM 2004-02, in order to address the problems outlined above noting that DP11 provides an excellent basis for initiation of this discussion; and
- Consideration of any applications for CNM status under the existing measure taking into account the issues identified above and possible ways of addressing these in the interim.

² Summary record of WCPFC4, para 318.

Amendment of CMM 2004-02

22. The Commission, at WCPFC5, should consider amendments to CMM 2004-02 based on DP11 in the first instance. Specifically, New Zealand considers that CMM 2004-02 should be amended to enable the Commission, when considering applications for CNM status, to determine the nature and extent of participatory rights of a CNM in particular fisheries, including specification of rights applicable under existing measures, taking into account *inter alia*:

- the status of the stocks managed by the Commission and the existing level of fishing effort in the fishery;
- the respective interests, fishing patterns and fishing practices of new and existing members or participants;
- the respective contribution of new and existing members or participants to conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks; and
- other matters as set out in para 5 bis of DP11.

23. The focus of such amendments should be on ensuring that the status of stocks and the limitations on fishing catch or effort prescribed in existing resolutions and measures established by the WCPFC are able to be properly taken into account and reflected in decisions on the granting of CNM status to WCPFC. In addition, when developing new CMMs that prescribe limits on catch or effort for specific fish stocks, the Commission should explicitly consider if and how those measures will apply to any new CNM in the future.

Consideration of applications for CNM status at WCPFC5

24. Pending the adoption and entry into force of modifications to CMM 2004-02, there remains the issue of how to deal with applications for CNM status that are before the Commission at WCPFC5 and, in particular, how to ensure that the admission of CNMs does not add to the current pressure on key fish stocks.

25. One of the key concerns expressed by FFA members in 2007 was the need for certainty about the implications of admitting new CNMs into WCPFC – particularly given the stock status of bigeye and yellowfin tuna, the collapse of tuna stocks in other oceans of the world and the fact that a number of the applicants have the world's largest and most efficient fishing vessels in their fleets. It was this need for clarity and certainty that underpinned the FFA proposals for the Commission to specify the “participatory rights” of any new CNMs.

26. The alternative to a separate specification of participatory rights would be clarification of exactly how the existing suite of WCPFC CMMs will apply to each aspiring CNM (in a non-discriminatory matter). In most cases such an approach would result in a clear understanding of the implications of admitting a new CNM. Existing measures apply limits on fishing activity for key stocks on the basis of historical catch or effort in particular areas (e.g. high seas, EEZs, 20N-20S, south of 20S) and such historical catch/effort limits would automatically apply to new CNMs. Purse-seine effort within areas under national jurisdiction between 20N-20S is now managed on the basis of coastal state effort allocations so new fishing opportunities could potentially exist within such areas (e.g. under the Vessel Days Scheme).

27. The exception to this approach working well is the 2000 tonne bigeye longline limit that applies to all CCMs whose historical catch was less than 2000 tonnes (paragraph 18 of CMM 2005-01). New Zealand considers that at the time this provision was negotiated WCPFC members did not envisage that such an allowance would apply automatically to any new CNM that sought to enter the WCPFC fishery – particularly if they were not coastal states within the WCPFC Convention Area or had no catch history in the bigeye longline fishery.

28. Such an approach would have been and would continue to be irresponsible and undermine both the measure and the stock itself. In addition, considerations in CMM 2004-02 with respect to the status of stocks and the impacts of a transfer of capacity would suggest CNM applications should be declined if such an allowance was to automatically apply to new CNMs. However, as outlined above (para 13), to apply a

different limit to new CNMs would be discriminatory given the way the existing measures are currently worded to apply to all CCMs.

29. Belize recognised this dilemma at WCPFC4 and responded by *voluntarily* agreeing to limit its bigeye longline catch to historical levels (of around 800 tonnes minus any double counting). Belize also explicitly recognised the vessel limits in place under existing CMMs for South Pacific albacore, Northern albacore, South-west Pacific swordfish and South-west Pacific striped marlin and agreed that it would not undertake purse-seine fishing in the Convention Area. From New Zealand's point of view at least, this voluntary agreement by Belize, agreed in the margins of the meeting and subsequently confirmed formally in plenary, provided sufficient comfort to admit Belize as a CNM under 2004-02, particularly since any deviation from the voluntary limit agreed to by Belize would likely result in it being declined CNM status the following year.

30. Voluntary agreement by CNM applicants to apply certain limits to their fishing activity, and to operate within existing arrangements adopted by the Commission for the management of fishing effort, is therefore one way around the discrimination issue and may provide an opportunity for CNM applications to be progressed under the existing measure, CMM 2004-02, while a longer term solution is developed. Timing becomes a relevant factor since such undertakings would presumably need to be made in advance of the Commission being in a position to approve CNM status, and would need to be formally recorded. CNM applicants would need to come to the Commission prepared to enter into discussions around the application of existing CMMs to their fishing activity, including through provision of all relevant historical catch and effort information, and to enter into any voluntary agreements that may be required to enable the Commission to give due consideration to the factors outlined in CMM 2004-02.

31. A revised version of the flow-chart in DP20, that removes the previously contentious Part 3 of the process, is attached to this paper to reflect the proposed changes to the process for consideration of CNM applications under CMM 2004-02 at WCPFC5 as outlined above.

Other issues

32. There are a range of additional issues that still need to be addressed with respect to CNMs, both in terms of application of the CMM 2004-02 and more generally. The attached process diagram addresses the other considerations of relevance to application of CMM 2004-02 including the extent to which applications are complete, and the applicants' previous record of compliance, including within other RFMOs.

33. The relationship between CNM status and full membership of the Commission also has to be clarified, particularly given that WCPFC 2004-02 makes the applicants' views on ratification or accession to the Convention a relevant factor for consideration. While this is clearly a relevant consideration in the case of Indonesia, as the last remaining country (apart from the UK) listed in Article 34 of the Convention yet to become a full member, it may not be of relevance to others. In New Zealand's view the issue of membership needs to be considered separately as provided for in Articles 34 and 35 of the Convention and taking into account the issue of "real interest" which hinges on the notion there may only be a limited number of countries with a "real interest" in the fisheries under the jurisdiction of WCPFC based on a range of potential factors (such as historical catch, participation in the MHLC process, coastal state etc) that might be entitled to full membership of the Commission.

34. A related consideration is the extent to which CNMs might be expected to make a financial contribution to the budget of the Commission (as anticipated by Paragraph 7 of CMM 2004-02) commensurate with the extent of their catches and the benefits obtained from fishing in the region, regardless of whether or not they are entitled to full membership. The existing CNM measure was designed as a stepping-stone for those states referred to in Article 35 of the Convention as they progressed their ratification or accession, and did not contemplate a situation where a range of additional countries may be admitted to fish in the Convention Areas as CNMs³.

³ See 1999 MHLC Resolution on Future Participation and 2002 PrepCon Decision on Participation. These previous resolutions may also provide guidance to the Commission on matters such as the seating of new CNMs during WCPFC sessions.

35. A further issue which arose from the WCPFC4 deliberations on the WCPFC IUU list, is the need for the Commission to have clear mechanisms to take measures consistent with this Convention, the UNFSA and international law to deter the activities of vessels flying the flags of non-parties to this Convention which undermine the effectiveness of conservation and management measures (Article 32(1)). The Commission will need to develop a clear definition to cover when a non-party will be presumed by the WCPFC to be cooperating as distinct from not cooperating, and a list of possible actions that may be taken against non-cooperating non-parties. The experiences of other RFMOs will be relevant to consideration of approaches to this issue within WCPFC.

36. Finally, and as outlined above, the issue of the development aspirations of small island developing states, as taken up by the Marshall Islands and Tuvalu in particular, is inextricably linked to the issue of applications for CNM status since both directly relate to the introduction of additional fishing capacity into the WCPFC fishery. CCMs and aspiring CNMs may wish to consider how their positions on either of these issues may impact on the ability of the Commission to make progress with respect to the other.

Conclusion

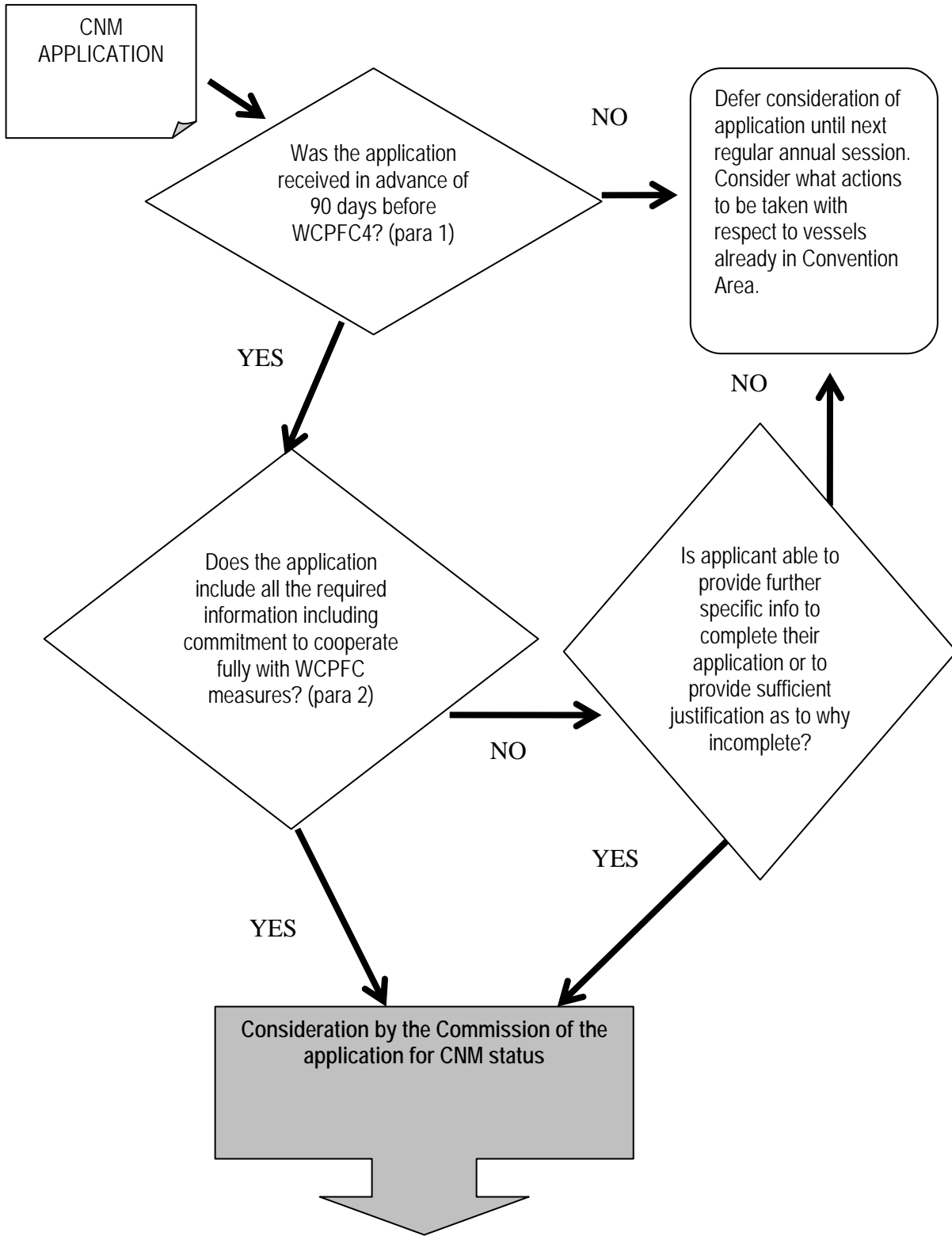
37. The current legal framework relating to membership of RFMOs envisages cooperation between all States that are engaged in fishing for highly migratory fish stocks such as those managed by the WCPFC. The ability of WCPFC to monitor, control or take sanctions against the fishing activities of vessels flagged to States that are not CCMs is limited, particularly if such States are attempting to cooperate with WCPFC by seeking CNM status. In such circumstances, and subject to appropriate considerations, WCPFC needs to fulfil its duty to cooperate with those States by admitting them as CNMs, thereby ensuring they are bound by WCPFC CMMs.

38. The existing WCPFC measure on Cooperating Non-Members, CMM 2004-02, requires a number of factors be taken into account by the Commission when assessing applications for CNM status, but it does not provide the Commission, or the applicant State, with the means to address those factors when taking a decision on whether to grant CNM status. In order to address these limitations, the WCPFC should look to revise CMM 2004-02 to enable the status of stocks and the limitations on fishing catch or effort prescribed in existing CMMs to be properly taken into account and reflected in decisions on the granting of CNM status. In the meantime, a clearer specification of how existing CMMs will apply to new entrants and voluntary agreement by applicant States to apply limitations on their fishing catch or effort should enable applications to be progressed under the existing measure at WCPFC5 in December 2008.

CNM	Cooperating Non-Member
CMM	Conservation and Management Measure
CCMs	Commission Members, Participating Territories and Cooperating Non-Members

PROPOSED PROCESS FOR CNM APPLICATIONS AT WCPFC5

PART 1 – Have the requirements of the application been met?



PART 2 – Process for Commission to consider whether CNM status should be accorded

