

PCA Case No. 2018-13

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 (CMM 01-2018)**

**Findings and Recommendations of the Review Panel
5 June 2018**

Review Panel:

Prof. Don MacKay (Chair)
Ms. Cecilia Engler
Prof. Erik J. Molenaar

Registrar:

Martin Doe Rodriguez
Permanent Court of Arbitration

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DEFINED TERMS

| | |
|---|---|
| 1982 Convention | United Nations Convention on the Law of the Sea of 10 December 1982 |
| 1995 Agreement | 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 of 4 December 1995 |
| 2013 Review Panel | Review Panel established under Article 17 and Annex II of the Convention with regard to the objection of the Russian Federation to CMM 1.01 dated 19 April 2013 |
| 2013 Review Panel Findings and Recommendations | Findings and Recommendations of the 2013 Review Panel dated 5 July 2013 |
| CMM | Conservation and Management Measure |
| CMM 01-2017 | Conservation and Management Measure for <i>Trachurus murphyi</i> adopted by the Commission on 22 January 2017 |
| CMM 01-2018 | Conservation and Management Measure for <i>Trachurus murphyi</i> adopted by the Commission on 3 February 2018 |
| CNCP | Cooperating Non-Contracting Party |
| Commission | Commission of the South Pacific Regional Fisheries Management Organisation, established by Article 7 of the Convention |
| Convention | Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean of 14 November 2009 |
| Convention Area | Area to which the Convention applies pursuant to Article 5 thereof |
| Executive Secretary | Executive Secretary of SPRFMO |
| Member | Member of the Commission of the South Pacific Regional Fisheries Management Organisation |
| MT | Metric tonne(s) |
| Objection | Objection by Ecuador made pursuant to Article 17 of the Convention dated 28 March 2018 |
| Participants | The Organisation and Members taking part in the 2018 Review Panel proceedings |
| PCA | Permanent Court of Arbitration |
| RFMOs/As | Regional fisheries management organisations or arrangements |
| Secretariat | Secretariat of the Organisation based in Wellington, New Zealand |
| SPRFMO or Organisation | South Pacific Regional Fisheries Management Organisation, established by Article 6 of the Convention |
| SWG | Science Working Group |
| TAC | Total allowable catch |

I. INTRODUCTION

1. This Review Panel is convened pursuant to 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 relation to the Objection by the Republic of Ecuador (“**Ecuador**”).
2. Having reviewed and considered the views and submissions of, as well as the information supplied by, the Participants described herein relating to the Objection, the Review Panel hereby transmits to the Executive Secretary its findings and recommendations pursuant to Article 17(5)(e) and Annex II, paragraph 9 of the Convention.

II. PROCEDURAL HISTORY

3. On 3 February 2018, at its sixth meeting in Lima, Peru, the Commission of the South Pacific Regional Fisheries Management Organisation (the “**Commission**”) adopted a Conservation and Management Measure for *Trachurus murphyi* (“**CMM 01-2018**”).
4. In a letter dated 28 March 2018, Ecuador presented an objection to that decision pursuant to Article 17(2)(a) of the Convention, which permits Members of the Commission (“**Members**”) to object to a decision of the Commission within 60 days of the date of notification of the decision. As will be further described in the following sections, Ecuador objects to its tonnage and percentage share in the total allowable catch (“**TAC**”) of *Trachurus murphyi* in 2018 as specified in paragraph 5 and Tables 1 and 2 of CMM 01-2018 (the “**Objection**”).
5. In its letter, Ecuador appointed Mr. Rodrigo Arturo Polanco Zamora as a member of the Review Panel. On 13 April 2018, Prof. Erik J. Molenaar was appointed to the Review Panel by the Commission Chair, Mr. Osvaldo Urrutia. On 23 April 2018, Ecuador informed the Commission Chair of the appointment of Ms. Cecilia Engler as a member of the Review Panel in lieu of Mr. Polanco, after the latter advised that he was unable to accept the position. On 25 April 2018, in accordance with paragraph 1(c) of Annex II of the Convention, Prof. Don MacKay was appointed as the third member and chair of the Review Panel by agreement between Ecuador and the Commission Chair. The Review Panel was therefore established on 25 April 2018. Under cover of a letter from the Commission Chair, dated 25 April 2018, the Members were provided with copies of the Review Panel members’ *curricula vitae*. That same letter of 25 April 2018 informed the Members that the Permanent Court of Arbitration (“**PCA**”) would act as Registry to the Review Panel in the proceedings.
6. By letter dated 30 April 2018 on behalf of the Review Panel, the PCA issued Procedural Directive No. 1, including a timetable for the proceedings, to the South Pacific Regional Fisheries Management Organisation (“**SPRFMO**” or the “**Organisation**”), Members, and Cooperating Non-Contracting Parties (“**CNCs**”). The letter further advised that a hearing would be held on Wednesday 23 May 2018 at the Peace Palace in The Hague, the Netherlands, and attached the Review Panel Members’ signed declarations of independence and impartiality.
7. Procedural Directive No. 1 included the following instructions regarding the content of written submissions from Ecuador, the Organisation, and the other Members (together, the “**Participants**”):

2. Substance of Written Submissions

- 2.1 Without prejudice to its findings and recommendations in any respect, the Review Panel requests that, in addition to such other matters as may be considered relevant, memoranda, information and documents submitted to it in accordance with the Convention address or are pertinent to one or more of the following matters:

- (a) Whether, apart from the question of discrimination referred to in sub-paragraph (b) below, the decision with respect to CMM 01-2018 to which the Republic of Ecuador has objected is inconsistent with the provisions of the Convention – in particular Articles 3, 19 and 21 – or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement, and in this respect the basis for the decision in fact and law, the competence and margin of appreciation of the Commission to make that decision, and the competence of the Review Panel with regard that decision.
- (b) Whether the decision with respect to CMM 01-2018 to which the Republic of Ecuador has objected unjustifiably discriminates in form or in fact against the Republic of Ecuador, and in this respect the standard and means for determining what constitutes unjustifiable discrimination under the Convention.
- (c) The standard and means for determining whether the alternative measures adopted by the Republic of Ecuador are equivalent in effect to the decision with respect to CMM 01-2018 to which the Republic of Ecuador has objected, and the relevance in this respect of paragraphs 4, 5, and 10 of CMM 01-2018.
- (d) Whether, with reference to sub-paragraphs (a) and (j) of paragraph 10 of Annex II of the Convention, the total catch and its share specified by the Republic of Ecuador in its Objection are alternative measures that are equivalent in effect to the decision to which the Republic of Ecuador has objected.
- (e) Whether, with reference to sub-paragraph (b) of paragraph 10 of Annex II of the Convention, there are specific modifications to the total catch and the share referred to in sub-paragraph (d) above that would render it an alternative measure that is equivalent in effect to the decision with respect to CMM 01-2018 to which the Republic of Ecuador has objected.
- (f) Whether, with reference to sub-paragraph (c) of paragraph 10 of Annex II of the Convention, other alternative measures would be equivalent in effect to the decision with respect to CMM 01-2018 to which the Republic of Ecuador has objected.

2.2. Without prejudice to its findings and recommendations in any respect, the Review Panel further requests that the written information, documents, and material submitted by the Organisation include, in addition to other information, documents and material that the Organisation deems relevant, the following:

- (a) Information, documents and material on *Trachurus murphyi* and the *Trachurus murphyi* fishery, including its area of distribution, the status of the fishery resource, the fleets actively fishing for the resource and their fishing areas, the historic and present catches, and the past and present fishing patterns and practices.
- (b) Information, documents and material on the conservation and management measures applicable to *Trachurus murphyi*, in particular the allocation of the total allowable fishing effort and the total allowable catch, including their history, rationale, agreed allocation criteria, and the sources of information considered in the allocation processes, including information about the fishing reserve referred to by Ecuador in its Objection.

2.3. The Review Panel may seek further information following the receipt of written submissions.

- 8. On 14 May 2018, Ecuador and the Organisation each submitted a memorandum (“**Ecuador Memorandum**” and “**SPRFMO Memorandum**”, respectively), with the Organisation also submitting relevant supporting material (“**SPRFMO Supporting Material**”).
- 9. The Republic of Peru (“**Peru**”) submitted a written memorandum (“**Peru Memorandum**”) on 16 May 2018, and requested the opportunity to make oral submissions at the hearing.

10. New Zealand, the Commonwealth of Australia (“**Australia**”) and the Republic of Chile (“**Chile**”) filed written memoranda on 17 May 2018 (“**New Zealand Memorandum**”, “**Australia Memorandum**”, and “**Chile Memorandum**”, respectively). Australia and Chile submitted supporting material with their memoranda. New Zealand and Chile also requested the opportunity to make oral submissions at the hearing.
11. By letter dated 17 May 2018 on behalf of the Review Panel, the PCA invited Participants to submit in writing any information they may have relating to the following matters:
 - (a) the Commission’s basis and process for establishing the tonnage or percentage difference between the total allowable catch for the resource throughout its range (as set forth in paragraph 11 of CMM 1.01 and paragraph 10 of subsequent CMMs, including CMM 01-2018) and the total allowable catch for the area of application of the CMM (as set forth in paragraph 6 of CMM 1.01 and paragraph 5 of subsequent CMMs, including CMM 01-2018);
 - (b) data regarding the estimated or actual annual tonnage of catch of *Trachurus murphyi* in the years 2013-2018 in the areas of national jurisdiction of Chile, Ecuador, and Peru; and
 - (c) the reports of the Jack mackerel Working Groups established between 2013 and 2017 to address conservation and management measures, including allocation of catch limits, for *Trachurus murphyi*; the submissions made to these Working Groups; and any other written material submitted to or produced by these Working Groups.
12. A hearing schedule was issued on 19 May 2018, setting out the schedule for the hearing including the order of oral submissions to be made by Ecuador, the Organisation, Peru, New Zealand and Chile.
13. On 21 May 2018, Ecuador submitted its written comments on the submissions made by the Organisation and the other Members (“**Ecuador Comments**”). The Organisation and Peru, in turn, responded to the Panel’s request of 17 May 2018 and submitted certain further materials.
14. A hearing was held at the Peace Palace in The Hague on 23 May 2018. Delegations from Ecuador, the Organisation, Peru, Chile, New Zealand, Australia, and Chinese Taipei attended the hearing. Oral interventions were made by representatives of Ecuador, the Organisation, Peru, Chile, and New Zealand.

III. FACTUAL BACKGROUND

The Convention

15. The United Nations Convention on the Law of the Sea of 10 December 1982 (the “**1982 Convention**”) calls on States to cooperate with each other in the conservation and management of living resources on the high seas, and to establish regional and sub-regional fisheries organisations to that end.¹ When the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the 1982 Convention also calls on relevant coastal States and the States fishing for those stocks in the adjacent area to agree upon measures necessary for the conservation of these stocks in the adjacent area, either directly or through appropriate subregional or regional organizations.² 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 of 4 December 1995 (the “**1995 Agreement**”) further provides that

¹ 1982 Convention, Articles 117 and 118.

² 1982 Convention, Article 63(2).

fisheries for straddling and highly migratory fish stocks should be managed through regional fisheries management organisations or arrangements (“**RFMOs/As**”).³

16. The Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean came into effect on 24 August 2012, with the objective of “ensuring the long-term conservation and sustainable use of fishery resources in the South Pacific Ocean and in so doing safeguarding the marine ecosystems in which the resources occur.”⁴ The Convention applies within the geographical area as described in Article 5 of the Convention, being the waters of the Pacific Ocean within that area lying beyond areas under national jurisdiction (the “**Convention Area**”).⁵ The Convention creates the Organisation, comprised of a Commission, a Secretariat (the “**Secretariat**”), a Scientific Committee, and other subsidiary bodies.
17. At present, the Commission comprises 15 Members: the Commonwealth of Australia, the Republic of Chile, the People’s Republic of China, the Cook Islands, the Republic of Cuba, the Republic of Ecuador, the European Union, the Kingdom of Denmark in respect of the Faroe Islands, the Republic of Korea, New Zealand, the Republic of Peru, the Russian Federation, Chinese Taipei, the United States of America and the Republic of Vanuatu. The Organisation also has four CNCPs: the Republic of Colombia, Curaçao, the Republic of Liberia, and the Republic of Panama.
18. Ecuador participated in the international consultations to establish SPRFMO, which were held between 2007 and 2009, as well as in two of three Preparatory Conferences held between 2010 and 2012. Ecuador attended the 1st Commission Meeting (2013) as an Observer State, and hosted the 2nd Commission Meeting (2014) in Manta as a CNCP. At the 3rd Commission Meeting (2015) Ecuador still participated as a CNCP, but subsequently acceded to the Convention on 11 May 2015, and obtained full membership of the Commission on 10 June 2015.⁶ Ecuadorian scientists have also participated in every Scientific Committee Meeting.⁷

Trachurus murphyi

19. One of the species managed by SPRFMO is *Trachurus murphyi* (also known as “Chilean jack mackerel”, “horse mackerel”, or “jurel”). This species occurs both in the Convention Area and in adjacent areas under national jurisdiction.
20. The Commission adopted its first Conservation and Management Measure (“**CMM**”) regarding *Trachurus murphyi* by a vote at its 1st Meeting (2013). CMM 1.01 was drafted with regard to, among other things, the Jack mackerel Working Group’s recommendations regarding the TAC of *Trachurus murphyi* and its allocation.
21. While the sovereign rights of coastal States are not affected by CMMs adopted by the Commission,⁸ Members may consent to the application of such measures within areas under their national jurisdiction.⁹ Chile is the only coastal State to have expressly consented to the extension of CMM 1.01 (and each subsequent amended CMM in relation to *Trachurus murphyi*) in this regard.¹⁰ The area of application of the *Trachurus murphyi* CMMs thus includes both the

³ 1995 Agreement, Article 8.

⁴ Convention, Preamble, first recital. *See also* Article 2, describing the Convention’s objective.

⁵ Convention, Article 5(1).

⁶ SPRFMO Memorandum, para. 84.

⁷ SPRFMO Memorandum, para. 85.

⁸ Convention, Article 20(4)(c).

⁹ Convention, Article 20(4)(a), Annex III.

¹⁰ CMM 1.01, para. 1; CMM 2.01, para. 1; CMM 3.01, para. 1; CMM 4.01, para. 1; CMM 01-2017, para. 1; CMM 01-2018, para. 1.

Convention Area and areas under Chile’s national jurisdiction (hereinafter referred to as the “**Applicable Area**”).

22. CMM 1.01 set a TAC throughout the range of the *Trachurus murphyi* fishery resource (the “**TAC (Resource)**”), as well as a TAC for *Trachurus murphyi* within the Applicable Area (the “**TAC (Applicable Area)**”). The TAC (Resource) in CMM 1.01 was set at 438,000 tonnes,¹¹ and the TAC (Applicable Area) was set at 360,000 tonnes.¹² The TAC (Applicable Area) was then allocated among those Members and CNCPs participating in the *Trachurus murphyi* fishery.¹³
23. On 19 April 2013, the Russian Federation objected to the absence of any allocation to it in CMM 1.01, arguing that such absence was inconsistent with the Convention and amounted to unjustifiable discrimination.¹⁴ In accordance with Article 17 and Annex II of the Convention, a Review Panel was established to examine the Russian Federation’s objection (the “**2013 Review Panel**”). The 2013 Review Panel, in its Findings and Recommendations on the Objection by the Russian Federation dated 5 July 2013 (the “**2013 Review Panel Findings and Recommendations**”), summarised the early phases of *Trachurus murphyi* conservation as follows:

The sustainable management of *Trachurus murphyi* was of high concern to the negotiating parties during the drafting of the Convention. Catches of the species had increased throughout the 1980s and reached their peak in 1995, totaling five million tonnes. After declining for the following four years and then stabilising until 2007, they again declined and have continued to drop through the present.

In light of these trends, while international negotiations leading up to the conclusion of the Convention were ongoing, the negotiating parties undertook initiatives to study and manage the fishery. As an initial step, at the first international consultations meeting in 2006, the participants established a Science Working Group (“**SWG**”) to provide scientific data on the stock. At the 2007 international consultations, the participants adopted Interim Measures, pursuant to which, participants were to verify the effective presence of their vessels in the area prescribed by the measures and to communicate appropriate data to the Interim Secretariat.

By 2008, the SWG had indicated it had concerns about the declining state of the *Trachurus murphyi* stock. In the absence of agreed stock assessments, in 2009, the SWG carried out a comprehensive review of the fishery and other indicators as a basis for advice to the ongoing international consultations. At that time, the fishery was suffering from low biomass, recruitment, and spawning, suggesting that urgent and adequate measures limiting fishing were required. Further, the SWG advised that the fishing mortality was likely to have exceeded sustainable levels since at least 2002 and would continue to do so.

In response to the SWG’s advice, at the final international consultations in 2009, the participants adopted Revised Interim Measures, in which they agreed to voluntarily restrain their catches beginning in 2010 until the Convention entered into force to the levels they recorded in 2007, 2008, or 2009. The responsibility for reviewing these measures was passed to the Convention Preparatory Conference with the suggestion that they be reviewed and revised by 31 December 2010, taking account of the forthcoming stock assessment the SWG proposed.

In the first stock assessment by the SWG carried out in 2010, data indicated that immediate catch reductions were required to prevent further biomass decline. The key management message from the SWG was that if catches continued at 2010 levels, it was certain that the

¹¹ CMM 1.01, para. 11.

¹² CMM 1.01, para. 6.

¹³ CMM 1.01, para. 6.

¹⁴ 2013 Review Panel Findings and Recommendations, paras. 62, 70, 73, 89.

biomass would continue to decline at a rapid pace. At the opening meeting of the Preparatory Conference, the Chair stated:

Between the time of our First Meeting in 2006 and the end of . . . 2010, jack mackerel total biomass is estimated to have declined by 65 percent to its historically lowest level—only 11 percent of the estimated unfished biomass level. Spawning biomass is estimated to have declined to only 3 percent of the unfished level, quite possibly making this the most depleted major fish stock under the responsibility of a[] [regional fisheries management organisation] anywhere in the world. Immediate and substantial Measures are required to reverse this decline. . . . [F]ailing 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.

The second Preparatory Conference adopted additional Interim Measures in 2011, providing that participants would limit 2011 catches to 60 percent of those in 2010. In principle, 2012 catches would then be reduced to 40 percent of those in 2010. Four delegations (Cuba, Faroe Islands, Korea, and the Bolivarian Republic of Venezuela) advised they could not accept the decision; the People’s Republic of China (hereinafter “China”) subsequently advised it would reduce its 2010 catch by 30 percent in 2011.

In the absence of any significant improvement in the status of the stock, the participants at the following and last Preparatory Conference unanimously affirmed a reduction to 40 percent of 2010 catches for 2012.¹⁵

24. In relation to the Russian Federation’s objection, the 2013 Review Panel found, *inter alia*, that the failure to make any catch allocation to the Russian Federation in CMM 1.01 amounted to unjustifiable discrimination.¹⁶ The 2013 Review Panel therefore recommended an alternative measure authorising the Russian Federation to catch *Trachurus murphyi* in 2013, but only after the Russian Federation could conclude that it was likely that the total catch in 2013 would not reach the TAC (Applicable Area) of 360,000 tonnes, and only until the Organisation reported that such limit had been reached.¹⁷

Subsequent Conservation and Management Measures

25. The CMM regarding *Trachurus murphyi* conservation has been amended each year at the annual meeting of the Commission in accordance with Article 20(3) of the Convention, which requires the Commission to “regularly review the total allowable catch or total allowable fishing effort established for any fishery resource.” The Organisation submits that, since 2010, when the biomass of *Trachurus murphyi* in the Southeast Pacific was at its lowest, the stock has enjoyed a consistent increase. Recent assessments indicate that the biomass of *Trachurus murphyi* is nearly rebuilt for the first time since the 1980s.¹⁸
26. The following table shows the amendments made to the *Trachurus murphyi* catch limits since the adoption of CMM 1.01:

¹⁵ 2013 Review Panel Findings and Recommendations, paras. 18-24 (internal references omitted).

¹⁶ 2013 Review Panel Findings and Recommendations, paras. 90, 93.

¹⁷ 2013 Review Panel Findings and Recommendations, para. 100.

¹⁸ SPRFMO Memorandum, para. 24; Report of the 5th Scientific Committee Meeting, September 2017, SPRFMO Supporting Material, pp. 49-51.

| Year (CMM) | TAC (Resource) (tonnes) | TAC (Applicable Area) (tonnes) | Difference (tonnes) | Reported catch (Applicable Area) (tonnes) |
|--------------------|-------------------------|--------------------------------|---------------------|---|
| 2013 (CMM 1.01) | 438,000 | 360,000 | 78,000 | 353,123 |
| 2014 (CMM 2.01) | 440,000 | 390,000 | 50,000 | 395,085 |
| 2015 (CMM 3.01) | 460,000 | 410,000 | 50,000 | 394,212 |
| 2016 (CMM 4.01) | 460,000 | 410,000 | 50,000 | 388,575 |
| 2017 (CMM 01-2017) | 493,000 | 443,000 | 50,000 | 402,050 |
| 2018 (CMM 01-2018) | 576,000 | 517,582 | 58,418 | |

27. Ecuador received its first allocation of *Trachurus murphyi* as a CNCP under CMM 3.01 for 2015, in the amount of 1,100 tonnes.¹⁹ It received the same allocation (1,100 tonnes) under CMM 4.01 for 2016, after it had become a Member of the Commission in 2015.²⁰
28. Each CMM regarding *Trachurus murphyi* has contained a paragraph permitting Members and CNCPs who have received allocations under that CMM to transfer part or all of their allocation to another Member or CNCP, subject to the approval of the receiving Member or CNCP.²¹ CMM 01-2018 requires that any such transfer occur by 31 December 2018.²² Since its first allocation under CMM 3.01, each year Ecuador has transferred its entire *Trachurus murphyi* allocation to Chile using this transfer mechanism, including its allocation under CMM 01-2018.²³
29. The Commission held its fifth meeting in Adelaide, Australia between 18 and 22 January 2017. Prior to that meeting, the Scientific Committee had recommended an increase of the TAC (Resource) “which equates to an increase of 33 000 tonnes of catch in the Convention Area”.²⁴ The Commission therefore convened a working group to negotiate the allocation of the additional TAC (Applicable Area).²⁵ Australia describes the working group’s process as follows:

The Chair of the JMWG [Jack mackerel Working Group] presented a number of models and discussions eventually focussed on a straight proportional increase model based on the tonnages contained in Table 1 of CMM 4.01 as a percentage of the overall catch limit throughout the range of the stock (460,000 tonnes).

The JMWG opted to base this model on a proportionate increase of the catch limit of the entire stock in 2016 (460,000 tonnes) as opposed to the catch limit applicable in the area to which CMM 4.01 applied (410,000). The JMWG considered whether all of the 33,000 tonnes should be distributed to Members in Table 1, or if some of this amount should be added to the existing 50,000 tonnes set aside for catch in the area outside the measure. In this regard, the JMWG discussed the fact that the revised catch limit recommended by the Scientific Committee (of which the 33,000 tonnes was a part) related to the entire range of the stock, which includes waters under the national jurisdiction of Peru, and possibly Ecuador, whose waters are at the northern range of the stock.

¹⁹ CMM 3.01, Table 1. *See also* SPRFMO Memorandum, paras. 53, 57, 86.

²⁰ CMM 4.01, Table 1. *See also* SPRFMO Memorandum, para. 61.

²¹ CMM 1.01, para. 10; CMM 2.01, para. 9; CMM 3.01, para. 9; CMM 4.01, para. 9; CMM 01-2017, para. 9; CMM 01-2018, para. 9.

²² CMM 01-2018, para. 9.

²³ SPRFMO Memorandum, Table 9; Peru Memorandum, Table 4.

²⁴ Email from SPRFMO Chair to Heads of Delegations dated 19 December 2016, SPRFMO Supporting Material, p. 180.

²⁵ SPRFMO Memorandum, para. 67; Email from SPRFMO Chair to Heads of Delegations dated 19 December 2016, SPRFMO Supporting Material, p. 180.

Ultimately, the JMWG decided to recommend not to distribute any of the 33,000 tonnes to the area outside the measure. The catch limit for the area in which the measure applies reflects this decision, in that consistent with previous years it remains 50,000 tonnes less than the overall catch limit for the range of the stock recommended by the Scientific Committee. This so-called “set aside” amount had been 50,000 tonnes since the adoption of CMM 2.01 in 2014. Together, these choices of the JMWG meant that instead of proportionately increasing the amount “set aside” by 3587 tonnes, this additional tonnage could be allocated to Members.²⁶

30. Ecuador informed the Commission that it could not attend the 5th Commission Meeting (2017) due to a large earthquake it had experienced in 2016.²⁷ However, on 20 January 2017, the Commission received a letter from Ecuador requesting that it be granted 4,590 tonnes in addition to the 1,100 tonnes allocated in 2015 (being a total of 5,690 tonnes).²⁸ The Organisation notes that this letter was considered by the working group and the Commission, but the increase sought was not agreed.²⁹
31. The working group also considered requests for increased allocations from Peru and Korea, as well as a request for a first-time allocation from Cuba.³⁰ In response to these requests, Peru received an increase which was 2,069 tonnes higher than a proportional increase; Korea received 1,426 tonnes above a proportional increase (1,000 tonnes of which came from a one-off transfer from Chile); and Cuba received a first-time allocation of 1,100 tonnes.³¹ Except for the foregoing, all other Members with existing allocations, including Ecuador, otherwise received proportional increases to their allocations.
32. CMM 01-2017 thus set a TAC (Resource) of 493,000 tonnes³² and a TAC (Applicable Area) of 443,000 tonnes.³³ CMM 01-2017 allocated the TAC (Applicable Area) to the participating Members and CNCPs in tonnages, with Ecuador receiving an allocation of 1,179 tonnes.³⁴ The CMM also included a new percentage allocation for participating Members and CNCPs in relation to the TAC (Resource), which were to apply from 2018 to 2021 inclusive.³⁵ Ecuador’s allocation percentage in CMM 01-2017 was set at 0.2391%.³⁶
33. The Organisation contends that the percentage allocations were fixed for five years due to the difficulty and uncertainty created by the time-consuming process of renegotiating allocations.³⁷ The percentages listed in Table 2 of CMM 01-2017 total 89.8579% of the TAC (Resource) for 2017, which corresponds to the TAC (Applicable Area) for 2017.
34. Also at the 2017 meeting, Vanuatu submitted a Proposal on Interim Allocation of Jack Mackerel Quotas (“**Vanuatu Proposal**”).³⁸ The proposal involved establishing and assigning a “minimum annual utilization” threshold to each Member and CNCP participating in the *Trachurus murphyi*

²⁶ Australia Memorandum, paras. 13-15.

²⁷ Objection, p. 7; SPRFMO Memorandum, paras. 66, 84.

²⁸ Letter from Ministerio de Agricultura, Ganadería, Acuacultura y Pesca to the Executive Secretary dated 19 January 2017, SPRFMO Supporting Material, pp. 197-198; SPRFMO Memorandum, para. 66.

²⁹ SPRFMO Memorandum, paras. 68-69.

³⁰ SPRFMO Memorandum, para. 81; Report of the 5th Meeting of the Commission, SPRFMO Supporting Material, p. 190.

³¹ Australia Memorandum, para. 20.

³² CMM 01-2017, para. 10.

³³ CMM 01-2017, para. 5.

³⁴ CMM 01-2017, Table 1.

³⁵ CMM 01-2017, para. 26 and fn. 4; SPRFMO Memorandum, para. 70;

³⁶ CMM 01-2017, Table 2; SPRFMO Memorandum, Table 7.

³⁷ SPRFMO Memorandum, para. 81; Australia Memorandum, para. 22.

³⁸ Proposal on Interim Allocation of Jack Mackerel Quotas, SPRFMO Supporting Material, pp. 227-228; SPRFMO Memorandum, para. 79.

fishery, which would prevent that Member or CNCP's catch allocation from increasing the following year if the utilisation threshold had not been reached in the Member or CNCP's reported catch or transfers. Any increase in the catch allocation would be forfeited, and allocated by the Commission to Members or CNCPs with no or very low allocations.³⁹ The Commission decided that further consideration of the Vanuatu Proposal was required, and that a revised proposal should be submitted to the 2018 Commission meeting.⁴⁰

Adoption of CMM 01-2018

35. Between 30 January and 3 February 2018, the Commission held its sixth meeting in Lima, Peru, at which CMM 01-2018 was adopted. No Jack mackerel Working Group was established for this meeting due to the intended continued application of the fixed percentage allocations contained in CMM 01-2017.⁴¹ At that meeting, the Scientific Committee presented a report recommending that the TAC (Resource) for 2018 should not exceed 576,000 tonnes.⁴² A working paper was subsequently prepared by Chile to set the TAC (Resource) and TAC (Applicable Area) for CMM 01-2018.⁴³ The working paper suggested increasing the TAC (Resource) for 2018 to 576,000 tonnes and the TAC (Applicable Area) for 2018 to 517,582 tonnes, with the percentage allocations specified in CMM 01-2017 to be applied to determine the catch allocations for Members and CNCPs participating in the *Trachurus murphyi* fishery in 2018.⁴⁴
36. At the same meeting, Ecuador presented a proposal to develop its *Trachurus murphyi* fishing in the Convention Area, and requested that it be assigned an allocation of 6,500 tonnes for 2018 (1.13% of the TAC (Resource)).⁴⁵ Ecuador argued that its allocation under CMM 01-2017 (1,179 tonnes/0.2391% of the TAC (Resource)) was insufficient for it to develop its high seas *Trachurus murphyi* fishery in a profitable way, stating that:
- the intertemporal equilibrium point for the investment in a used vessel dedicated to the fishing of jack mackerel in waters of the SPRFMO convention is reached from the 6,500 MT; this is 5,321 [MT] in addition to the current quota[.]⁴⁶
37. Ecuador added that the 2016 earthquake had prevented it from attending the Commission's 2017 meeting in Adelaide where the prior allocations were set.⁴⁷ Ecuador therefore proposed that the Organisation consider increasing Ecuador's allocation to 6,500 tonnes. In particular, it proposed that the requested increase could be taken from the "reserve", being the difference between the TAC (Applicable Area) and the TAC (Resource).⁴⁸
38. The Commission did not agree to Ecuador's proposal, and all efforts to reach consensus on the proposal having been exhausted, the Commission voted on the amendment of CMM 01-2017 in

³⁹ Proposal on Interim Allocation of Jack Mackerel Quotas, SPRFMO Supporting Material, pp. 227-228.

⁴⁰ SPRFMO Memorandum, para. 81; Report of the 5th Meeting of the Commission, SPRFMO Supporting Material, p. 190.

⁴¹ SPRFMO Memorandum, para. 74.

⁴² Report of the 5th Scientific Committee Meeting, September 2017, SPRFMO Supporting Material, p. 49.

⁴³ SPRFMO Memorandum, para. 74.

⁴⁴ Working Paper 11, Revision 3, "COMM6-Report Annex 7a: Edits to CMM 01-2017 (*Trachurus murphyi*)", SPRFMO Supporting Material, pp. 199-203.

⁴⁵ Objection, p. 1; Report of the 6th Meeting of the Commission, SPRFMO Supporting Material, p. 212; SPRFMO Memorandum, para. 75.

⁴⁶ Proposal by Ecuador to develop JUREL fishing in the area of the SPRFMO Convention, 6th Meeting, SPRFMO, 2 February 2018, p. 2.

⁴⁷ Report of the 6th Meeting of the Commission, SPRFMO Supporting Material, p. 212.

⁴⁸ Proposal by Ecuador to develop JUREL fishing in the area of the SPRFMO Convention, 6th Meeting, SPRFMO, 2 February 2018, p. 4.

accordance with Chile's working paper.⁴⁹ Thirteen Members voted in favour, one Member voted against (Ecuador) and one Member was not present (Cook Islands), resulting in the Commission's adoption of CMM 01-2018.⁵⁰ The allocation recorded for Ecuador in the newly adopted CMM 01-2018 was 1,377 tonnes, corresponding to 0.2391% of the TAC (Resource).⁵¹

39. The relevant provisions of CMM 01-2018, as finally adopted, state:

5. In 2018 the total catch of *Trachurus murphyi* in the area to which this CMM applies in accordance with paragraph 1 shall be limited to 517 582 tonnes. Members and CNCPs are to share in this total catch in the tonnages set out in Table 1 of this CMM.
6. Catches will be attributed to the flag State whose vessels have undertaken the fishing activities described in Article 1 (1)(g)(i) and (ii) of the Convention.
[...]
10. Members and CNCPs agree, having regard to the advice of the Scientific Committee, that catches of *Trachurus murphyi* in 2018 throughout the range of the stock should not exceed 576 000 tonnes.
[...]
25. This Measure shall be reviewed by the Commission in 2019. The review shall take into account the latest advice of the Scientific Committee and the CTC, and the extent to which this CMM, CMM 1.01 (*Trachurus murphyi*, 2013), CMM 2.01 (*Trachurus murphyi*, 2014), CMM 3.01 (*Trachurus murphyi*; 2015), CMM 4.01 (*Trachurus murphyi*, 2016) and CMM 01-2017 (*Trachurus murphyi*) as well as the Interim Measures for pelagic fisheries of 2007, as amended in 2009, 2011 and 2012, have been complied with.
26. Without prejudice to Members and CNCPs without an entitlement in Table 1 and the rights and obligations specified in Article 20(4)(c) and having regard to paragraph 10, the percentages included in Table 2 will be used by the Commission as a basis for the allocation of Member and CNCPs' catch limits from 2018 to 2021 inclusive.

Table 1: Tonnages in 2018 fishery as referred to in paragraph 5

| Members / CNCP | Tonnage |
|--------------------|---------|
| Chile | 371,887 |
| China | 36,563 |
| Cook Islands | 0 |
| Cuba | 1,285 |
| Ecuador (HS) | 1,377 |
| European Union | 35,186 |
| Faroe Islands | 6,386 |
| Korea | 7,385 |
| Peru (HS) | 11,684 |
| Russian Federation | 18,907 |

⁴⁹ Report of the 6th Meeting of the Commission, SPRFMO Supporting Material, p. 212.

⁵⁰ Report of the 6th Meeting of the Commission, SPRFMO Supporting Material, p. 212.

⁵¹ CMM 01-2017, Table 2; SPRFMO Memorandum, Table 8.

| | |
|--------------|---------|
| Vanuatu | 26,921 |
| Total | 517,582 |

Table 2: Percentages⁴ related to the catches referred to in paragraph 10

| Members / CNCP | % |
|-----------------------|----------|
| Chile | 64.5638 |
| China | 6.3477 |
| Cook Islands | 0.0000 |
| Cuba | 0.2231 |
| Ecuador (HS) | 0.2231 |
| European Union | 6.1086 |
| Faroe Islands | 1.1087 |
| Korea | 1.2822 |
| Peru (HS) | 2.0284 |
| Russian Federation | 3.2825 |
| Vanuatu | 4.6738 |

⁴ These percentages shall apply from 2018 to 2021 inclusive.⁵²

40. A revised Vanuatu Proposal was submitted at the 2018 Commission Meeting, repeating the mechanism outlined in the earlier proposal and including that any forfeited allocation would become available for redistribution by the Commission to other Members or CNCPs with no or very low allocations.⁵³ The Organisation notes that the revised Vanuatu Proposal received general support from Members at the 2018 meeting, but was withdrawn to allow one Member further time to adjust its internal procedures in preparation for adoption of the proposed mechanism.⁵⁴ The Organisation further notes that the Commission requested that Vanuatu resubmit the proposal at the next Commission meeting.⁵⁵
41. Following the rejection of its proposal at the 2018 Commission Meeting, on 2 March 2018, Ecuador transferred its entire 2018 catch entitlement to Chile, as it has done each year since 2015.⁵⁶

IV. ECUADOR'S OBJECTION

42. Ecuador objects to its allocation under CMM 01-2018 and argues that CMM 01-2018 unjustifiably discriminates in form or in fact against Ecuador and is inconsistent with the Convention, the 1982 Convention, and the 1995 Agreement.⁵⁷ Ecuador invokes Articles 3(1)(a)(viii), 19, and 21(1)(e)-(f) of the Convention, Article 119(1)(a) of the 1982

⁵² CMM 01-2018, paras. 5-10, 25-26, Tables 1-2.

⁵³ Proposal to Amend CMM 10-2017 [*sic*] on Jack Mackerel, SPRFMO Supporting Material, p. 230; SPRFMO Memorandum, para. 82.

⁵⁴ SPRFMO Memorandum, para. 83; Report of the 6th Meeting of the Commission, SPRFMO Supporting Material, p. 212.

⁵⁵ SPRFMO Memorandum, para. 83.

⁵⁶ SPRFMO Memorandum, Table 9.

⁵⁷ Objection, p. 3.

Convention, and Articles 5(b), 24(2)(c), and 25(1)(a) of the 1995 Agreement, all of which require consideration of the special requirements of developing coastal States.⁵⁸

43. In particular, Ecuador argues that it is a developing coastal State that wishes to develop its own high seas *Trachurus murphyi* fishery, but that this is not economically feasible or sustainable under its current allocation of 1,377 tonnes.⁵⁹ Rather, a minimum allocation of 6,500 tonnes would be required in order to allow for the operation of a single vessel.⁶⁰ According to Ecuador, CMM 01-2018 is based on “only the criterion of historical catches with their practices regimes [...] which disadvantages small and developing nations such as Ecuador, that does not have a record in the fishing of jack mackerel.”⁶¹ Ecuador adds that “force majeure caused by the effects of the 2016 earthquake” prevented it from attending the Commission’s 2017 meeting in Adelaide where the prior allocations were set, and that its absence from that meeting “does not justify the lack of application of the fair criteria that would have resulted in a greater allocation of quota to the country.”⁶²

V. ARGUMENTS OF THE PARTICIPANTS

44. For the purposes of these Findings and Recommendations, the Review Panel summarises relevant aspects of the Participants’ submissions. These summaries are without prejudice to the complete written and oral submissions which the Review Panel has considered in their entirety.

Procedural Validity of the Objection

45. Article 17(2) of the Convention states:
- (a) Any member of the Commission may present to the Executive Secretary an objection to a decision within 60 days of the date of notification “the objection period”. In that event the decision shall not become binding on that member of the Commission to the extent of the objection, except in accordance with paragraph 3 and Annex II.
 - (b) A member of the Commission that presents an objection shall at the same time:
 - (i) specify in detail the grounds for its objection;
 - (ii) adopt alternative measures that are equivalent in effect to the decision to which it has objected and have the same date of application; and
 - (iii) advise the Executive Secretary of the terms of such alternative measures.
 - (c) The only admissible grounds for an objection are that the decision unjustifiably discriminates in form or in fact against the member of the Commission, or is inconsistent with the provisions of this Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.
46. Peru and Chile both submit that the Objection fails to meet the procedural requirements of Article 17(2) of the Convention. They argue that the Objection is directed at modifying Ecuador’s percentage allocation for the jack mackerel fishery as contained in Table 2 of CMM 01-2017, to which Ecuador did not raise any objection.⁶³ According to Peru, since CMM 01-2018 does not modify in any sense the percentage allocations contained in CMM 01-2017, Ecuador’s Objection

⁵⁸ Objection, pp. 3-6.

⁵⁹ Objection, p. 7.

⁶⁰ Objection, p. 7.

⁶¹ Objection, p. 7.

⁶² Objection, p. 7.

⁶³ Peru Memorandum, paras. 24, 49; Chile Memorandum, para. 3; Hearing Transcript, 63:19-64:2.

effectively constitutes an objection to what was agreed in CMM 01-2017.⁶⁴ Chile adds that Ecuador did not present any proposed amendment to CMM 01-2017 for the consideration of the Commission in advance of its Sixth Annual Meeting in accordance with the Organisation's rules of procedure.⁶⁵ On this basis, Peru and Chile assert that the Objection has not been submitted within the 60-day deadline in Article 17(2)(a) of the Convention.⁶⁶

47. Peru and Chile also both submit that Ecuador has implicitly accepted the validity of CMM 01-2018 by transferring its allocation to Chile in March 2018, thereby making full use of the benefit granted to it under the CMM while objecting to it shortly thereafter.⁶⁷ Chile adds that the same is true of CMM 01-2017.⁶⁸
48. Ecuador responds that its proposal was acknowledged and discussed at the 2018 Commission Meeting, and that a decision on it was made at that meeting.⁶⁹ Ecuador therefore submits that its objection was raised within the time established for this purpose.⁷⁰

Inconsistency with the Convention, the 1982 Convention, and the 1995 Agreement

49. Ecuador submits that CMM 01-2018 is inconsistent with the Convention, the 1982 Convention and the 1995 Agreement.⁷¹ Ecuador refers to specific provisions within these instruments providing for the recognition of the special requirements of developing (coastal) States.⁷² In particular, Ecuador invokes Articles 21(1)(e)-(f) of the Convention,⁷³ which provide:

1. When taking decisions regarding participation in fishing for any fishery resource, including the allocation of a total allowable catch or total allowable fishing effort, the Commission shall take into account the status of the fishery resource and the existing level of fishing effort for that resource and the following criteria to the extent relevant:

[...]

- (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 in particular developing coastal States and territories and possessions, in a fishery resource that straddles areas of national jurisdiction of such States, territories and possessions and the Convention Area[.]

50. Ecuador adds that the decision is inconsistent with Article 3(1)(a)(viii) of the Convention, which provides:

⁶⁴ Peru Memorandum, paras. 25, 49; Hearing Transcript, 79:11-17.

⁶⁵ Chile Memorandum, para. 5; Hearing Transcript, 64:13-65:17. This was equally noted by the Organisation during the Hearing (Hearing Transcript, 26:16-20).

⁶⁶ Peru Memorandum, paras. 25, 49; Chile Memorandum, para. 6.

⁶⁷ Peru Memorandum, paras. 23, 60; Chile Memorandum, para. 4; Hearing Transcript, 64:3-12.

⁶⁸ Chile Memorandum, para. 4, *referring to* Letter from Ecuador to Executive Secretary dated 24 May 2017, Chile Supporting Material, pp. 14-15; Hearing Transcript, 63:19-64:2.

⁶⁹ Ecuador Comments, p. 6; Hearing Transcript, 46:17-48:8; 102:2-7.

⁷⁰ Ecuador Comments, p. 6.

⁷¹ Objection, p. 3.

⁷² Objection, pp. 4-7.

⁷³ Objection, p. 4.

In giving effect to the objective of this Convention and carrying out decision making under this Convention, the Contracting Parties, the Commission and subsidiary bodies established under Article 6 paragraph 2 and Article 9 paragraph 1 shall:

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

[...]

(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[.]

51. Ecuador also refers to those provisions that provide for the development and enhancement of the ability of developing States to develop their fisheries.⁷⁴ In particular, Ecuador invokes Article 19 of the Convention, which provides:

1. The Commission shall give full recognition to the special requirements of developing State Contracting Parties in the region, in particular the least developed among them and small island developing States, and of territories and possessions in the region, in relation to the conservation and management of fishery resources in the Convention Area and the sustainable use of such resources

2. In giving effect to the duty to cooperate in the establishment of conservation and management measures for fishery resources covered by this Convention, the members of the Commission shall take into account the special requirements of developing State Contracting Parties in the region, in particular the least developed among them and small island developing States, and territories and possessions in the region, in particular:

[...]

(c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto such developing State Contracting Parties, and territories and possessions.

3. The members of the Commission shall cooperate either directly or through the Commission and other regional or sub-regional organisations to:

(a) enhance the ability of developing State Contracting Parties in the region, in particular the least developed among them and small island developing States, and of territories and possessions in the region, to conserve and manage fishery resources and to develop their own fisheries for such resources[.]

52. The provisions of the Convention on which Ecuador bases its objection are consistent with Article 119(1)(a) of the 1982 Convention and Articles 5(b), 24(2)(c), and 25(1)(a) of the 1995 Agreement. Ecuador claims, therefore, that the decision is also inconsistent with the aforementioned provisions.

53. Ecuador argues that, since its current allocation does not allow it to develop a *Trachurus murphyi* fishery, it fails to achieve the objective of the aforementioned provisions and is therefore inconsistent with them.⁷⁵

⁷⁴ Objection, pp. 4-6.

⁷⁵ Hearing Transcript, 24:14-25:8; 42:19-43:21.

54. Peru submits that there is no evidence of inconsistency with the provisions of the Convention, the 1982 Convention or the 1995 Agreement.⁷⁶ It contends that, while there is an express recognition of the special requirements of developing States in relation to the conservation and management of fishery resources, this is only one of ten criteria to be taken into account.⁷⁷ Peru also questions the relevance of some of the provisions of the 1982 Convention and the 1995 Agreement invoked by Ecuador.⁷⁸
55. New Zealand states that it does not see any basis to consider that CMM 01-2018 would be inconsistent with the provisions of the Convention or other international law as reflected in the 1982 Convention and the 1995 Agreement.⁷⁹ New Zealand submits that “decision making by the Commission pursuant to Article 21 and in accordance with Articles 3 and 19, must be considered as a holistic exercise”, and that the Article 21 criteria should be considered to be a “range of factors of greater or lesser relevance in any given circumstance”.⁸⁰ New Zealand therefore contends that “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.”⁸¹
56. Australia submits that Ecuador’s inconsistency argument is not supported by the facts.⁸² According to Australia, the allocations contained in each CMM cannot be based exclusively on historic catch, since Ecuador, a State without a record of *Trachurus murphyi* fishery within the Convention Area, received an allocation of 1,179 tonnes in CMM 01-2017.⁸³ Australia also notes that the working group decided to deviate from a strictly proportionate increase of the additional 33,000 tonnes in 2017, and that the tonnages and percentages in CMM 01-2017 “represent a compromise achieved from balancing a range of interests and factors which were not exclusively represented by historic catch of Members”.⁸⁴ Australia further asserts that most Members held the view that the allocation in CMM 4.01 reflected an outcome consistent with Article 21(1) of the Convention, hence its use by the working group as a basis for the percentage allocations recorded in CMM 01-2017.⁸⁵ Finally, Australia points out that Articles 21(1)(e)-(f) of the Convention were taken into account in the consideration of the requests made by, *inter alia*, Ecuador, Peru and Cuba for shares in the 33,000 tonnes to be allocated in 2017, and that seven of the 11 States listed in Table 1 of CMM 01-2017 are developing States or Small Island Developing States, whose allocations accounted for over 86% of the CMM 01-2017 TAC (Applicable Area).⁸⁶
57. Chile disagrees with Ecuador’s statement that the Commission only considered the historical catch criterion as a basis for its allocation.⁸⁷ According to Chile, the allocation process adopted in CMM 01-2017 and CMM 01-2018 reflects the application of various different criteria included in Article 21 of the Convention, as evidenced by the fact that Ecuador received an allocation despite having no historical catch in the Convention Area.⁸⁸ According to Chile, Ecuador’s

⁷⁶ Peru Memorandum, para. 61.

⁷⁷ Peru Memorandum, para. 41.

⁷⁸ Peru Memorandum, paras. 43-47.

⁷⁹ New Zealand Memorandum, para. 18.

⁸⁰ New Zealand Memorandum, para. 23; Hearing Transcript, 53:8-55:7.

⁸¹ New Zealand Memorandum, para. 25.

⁸² Australia Memorandum, paras. 29-30.

⁸³ Australia Memorandum, para. 31. *See also* fn. 32: “Note Ecuador has reported catch history in its EEZ between the years 1990 and 2015”, *referring to* Australia Supporting Material, p. 123.

⁸⁴ Australia Memorandum, paras. 33, 35.

⁸⁵ Australia Memorandum, para. 32.

⁸⁶ Australia Memorandum, para. 34.

⁸⁷ Chile Memorandum, paras. 16-17, 38; Hearing Transcript, 125:19-126:5.

⁸⁸ Chile Memorandum, para. 38; Hearing Transcript, 69:2-24.

allocation includes consideration of its status as a coastal State and its interests and aspirations as a developing State, expressed in Articles 21(1)(e)-(f) of the Convention.⁸⁹

58. Chile further contends that if Ecuador raises its status as a developing coastal State as a basis for a claim for higher allocation, its compliance with other applicable duties under the Convention should also be open to scrutiny.⁹⁰ Therefore, Chile argues that Ecuador should be asked how its own conservation and management measures for *Trachurus murphyi* in areas under its national jurisdiction are intended to avoid harmful impact to the living marine resources as a whole in the Convention Area, how those measures are compatible with those adopted by the Commission, and what scientific research it has conducted on the *Trachurus murphyi* fishery.⁹¹

Unjustifiable Discrimination

59. Ecuador asserts that CMM 01-2018 and its imposition of the *Trachurus murphyi* catch limit of 1,377 tonnes on Ecuador is “unjustifiabl[e] and discriminat[ory], in form or in fact; ‘since only the criterion of historical catches with their practices regimes, is being considered’”.⁹² Ecuador submits that this criterion “disadvantages small and developing nations...that [do] not have a record in the fishing” of *Trachurus murphyi*.⁹³ Ecuador asserts that it is a developing country to which all the provisions of the Convention, the 1982 Convention, and the 1995 Agreement providing for the special requirements of developing coastal States apply, which it submits “were not considered at the time of the allocation”.⁹⁴ Ecuador argues that there is no evidence that the criteria under Article 21 of the Convention (other than historical catch) were applied.⁹⁵
60. Ecuador asserts that it wishes to develop its *Trachurus murphyi* fishery in the area of the Convention, but that this is “unfeasible and economically unsustainable” with the allocation set in CMM 01-2018.⁹⁶ Given its allocation of only 0.2391% of the TAC (Resource), Ecuador contends that, at the current expected rates of growth of the TAC (Resource) of around 17% annually, it would take approximately 25 years to obtain the 6,500 tonnes needed for the viability of a single fishing vessel.⁹⁷ Ecuador adds that it is difficult for it to obtain transfers of allocations from other Members without having an existing fishery in which to put such transfers to use, and that it cannot rely on transfers that it cannot control.⁹⁸ Ecuador thus argues that, if the Commission only takes into consideration historical catches when allocating annual catch allocations, “Ecuador will continue to be excluded and as such, discriminated”.⁹⁹ Ecuador further submits that its transfers of quota to Chile demonstrate that its current allocation is insufficient to develop a *Trachurus murphyi* fishery.¹⁰⁰
61. Furthermore, Ecuador submits that, given that there is a “reserve” of 58,418 tonnes, its suggested increase to its allocation would not harm the sustainability of the species, would not cause detriment to the allocations to other members, and would not cause any damage, such that its refusal necessarily “unjustifiably discriminates in form or fact” against Ecuador independently of

⁸⁹ Chile Memorandum, para. 18.

⁹⁰ Chile Memorandum, paras. 19-20.

⁹¹ Chile Memorandum, para. 20; Hearing Transcript, 70:13-71:4.

⁹² Objection, p. 7.

⁹³ Objection, p. 7; Hearing Transcript, 99:14-25.

⁹⁴ Ecuador Memorandum, p. 2, *referring to* Annex 3, World Economic Situation and Prospects (WESP) 2014 Country Classification.

⁹⁵ Ecuador Comments, p. 5.

⁹⁶ Objection, p. 7.

⁹⁷ Ecuador Memorandum, p. 2; Ecuador Comments, p. 5; Hearing Transcript, 42:10-18.

⁹⁸ Hearing Transcript, 44:18-45:22; 105:8-15.

⁹⁹ Ecuador Memorandum, p. 2.

¹⁰⁰ Ecuador Comments, p. 5.

its status as a coastal and developing State.¹⁰¹ It contends that, since the report of the Scientific Committee determines that the current biomass would support catches of 576,000 tonnes, Ecuador's suggested increase to its allocation is justified.¹⁰²

62. Ecuador raises its absence from the 2017 Commission meeting held in Adelaide as causing “the lack of application of the fair[ness] criteria that would have resulted in a greater allocation of” *Trachurus murphyi*.¹⁰³ Ecuador's absence, it explains, was justified and due to the effects of an earthquake which occurred in the region in 2016.¹⁰⁴ Yet, Ecuador notes that both Peru and Korea received the more-than-proportional increases that they requested, while Ecuador did not.¹⁰⁵
63. Peru contends that Ecuador has not demonstrated that there was any act or omission amounting to discrimination.¹⁰⁶ According to Peru, the percentages in CMM 01-2018 are the same as those in CMM 01-2017, which resulted from the agreements reached at the Commission's fifth meeting and negotiations that have taken place since 2013 in which Ecuador has fully participated.¹⁰⁷ Peru adds that Ecuador's proposal to increase its allocation would be at the expense of the allocations already assigned to other participants in the *Trachurus murphyi* fishery, which would constitute a discriminatory act against other Members.¹⁰⁸
64. Peru also submits that historical catch is not the only criterion used to determine catch allocations in the *Trachurus murphyi* CMMs, and states that since the Commission's first meeting, “historical catches have been considered, as well as fishing patterns and practices [...] [and], perhaps in a less explicit manner, the other nine criteria of Art. 21 (1)”.¹⁰⁹ Peru also argues that, given the recovering status of the *Trachurus murphyi* stock, any CMM in respect of it must be aimed at guaranteeing the long-term sustainable use of the fishery resource and that a variety of criteria are therefore considered in determining the allocations for those participating in the *Trachurus murphyi* fishery.¹¹⁰ Further, Peru points out that States without a historical catch of *Trachurus murphyi*, including Ecuador itself, have benefitted from catch allocations.¹¹¹
65. Finally, Peru suggests that Ecuador could use the transfer mechanism contemplated within the CMMs to develop its *Trachurus murphyi* fishery.¹¹² Peru states that the absence of a large allocation is not an impediment to the development or expansion of fisheries within the purview of the Organisation given the clear and simple mechanisms for transfers within the CMMs.¹¹³ Peru argues that the use of this process would allow a further increase in Ecuador's participation in the fishery without requiring a modification of CMM 01-2018.¹¹⁴
66. New Zealand contends that Members should be presumed to be operating in good faith in the absence of evidence to the contrary.¹¹⁵ Accordingly, it submits that “there should be a fairly high threshold for a finding that discrimination is unjustifiable”.¹¹⁶ New Zealand suggests that

¹⁰¹ Ecuador Memorandum, p. 2.

¹⁰² Ecuador Comments, pp. 2-4.

¹⁰³ Objection, p. 7.

¹⁰⁴ Objection, p. 7; Hearing Transcript, 44:7-12.

¹⁰⁵ Hearing Transcript, 43:22-44:6, 101:12-102:1.

¹⁰⁶ Peru Memorandum, paras. 26-27, 52.

¹⁰⁷ Peru Memorandum, paras. 27-28, 32, 50, 52-53.

¹⁰⁸ Peru Memorandum, paras. 20, 29, 48, 54; Hearing Transcript, 79:24-80:8; 127:16-128:15.

¹⁰⁹ Peru Memorandum, para. 18. *See also id.*, paras. 33-36, 57.

¹¹⁰ Peru Memorandum, paras. 37-39.

¹¹¹ Peru Memorandum, paras. 19, 36.

¹¹² Peru Memorandum, para. 59; Hearing Transcript, 80:19-81:1.

¹¹³ Peru Memorandum, paras. 21-22.

¹¹⁴ Peru Memorandum, para. 59.

¹¹⁵ New Zealand Memorandum, para. 26; Hearing Transcript, 57:18-23.

¹¹⁶ New Zealand Memorandum, para. 26.

unjustifiable discrimination would involve either: (a) the Commission’s unwillingness to treat Ecuador’s request on the same basis as a similar request by other members; or (b) the Commission’s insistence on an unreasonable level of information from Ecuador about the basis of its request and its capability and readiness to participate in the fishery.¹¹⁷ In this vein, New Zealand recalls that the percentages used by the Commission as a basis for allocations in CMM 01-2018 were already decided and agreed in CMM 01-2017, and that Ecuador did not present a formal proposal to amend CMM 01-2017 within the deadline agreed by the Commission.¹¹⁸ Moreover, New Zealand considers that Ecuador’s request for a greater allocation in 2017 was considered by the Commission at that time, and resulted in Ecuador receiving an increased allocation.¹¹⁹ Thus, New Zealand concludes that insufficient evidence has been presented to demonstrate that CMM 01-2018 unjustifiably discriminates against Ecuador.¹²⁰

67. Chile submits that Ecuador’s claim of discrimination cannot be supported.¹²¹ Chile points out that, since Ecuador has no historical catch to speak of, Ecuador’s current percentage allocation is necessarily “based on other criteria established in Article 21 of the Convention different from historical catches”.¹²² Chile also contends that “precisely the consideration given to the Republic of Ecuador as a coastal State and developing State has supported the catch percentage allocated to Ecuador in the Convention Area”.¹²³ Thus, granting a further allocation to Ecuador on the basis of its status as a coastal developing State would, Chile submits, result in double-counting the same criteria, which would unjustifiably discriminate against the other participants in the *Trachurus murphyi* fishery.¹²⁴
68. Finally, Chile recalls that CMM 01-2017 is the basis for the current allocations and notes that, given that the TAC (Resource) for 2018 increased by approximately 16.84% in relation to 2017, “all States participating in the fishery increased their allocation in tonnages by the same proportion, with no discrimination at all”.¹²⁵

Alternative Measures

69. In relation to alternative measures, Ecuador notes that the difference between the TAC (Resource) and the TAC (Applicable Area) in CMM 01-2018 creates a “reserve” of 58,418 tonnes.¹²⁶ Ecuador therefore proposes that its allocation may be raised to 6,500 tonnes by taking from this “reserve”, thereby leaving the allocations of other Members unchanged.¹²⁷
70. Accordingly, Ecuador contends that the proposed alternative measure “is similar and equivalent, since it does not violate the principles of long-term maintenance, conservation and sustainable management” of *Trachurus murphyi*.¹²⁸ It submits that, to the extent that the increase in Ecuador’s allocation does not affect the TAC (Resource), “the precautionary principles of maintenance, conservation and sustainable management in the capture of the mackerel species remain in force”.¹²⁹

¹¹⁷ New Zealand Memorandum, para. 27; Hearing Transcript, 57:9-17.

¹¹⁸ New Zealand Memorandum, para. 28; Hearing Transcript, 56:25-57:8.

¹¹⁹ New Zealand Memorandum, para. 29.

¹²⁰ New Zealand Memorandum, para. 30.

¹²¹ Chile Memorandum, paras. 21-22.

¹²² Chile Memorandum, para. 22; Hearing Transcript, 72:1-19.

¹²³ Chile Memorandum, para. 24; Hearing Transcript, 72:24-73:2.

¹²⁴ Chile Memorandum, para. 25; Hearing Transcript, 73:3-6.

¹²⁵ Chile Memorandum, paras. 27-28.

¹²⁶ Ecuador Memorandum, p. 3; Objection, p. 7; Hearing Transcript, 39:1-40:20.

¹²⁷ Objection, pp. 7-8; Hearing Transcript, 115:21-116:5.

¹²⁸ Ecuador Memorandum, p. 3.

¹²⁹ Ecuador Memorandum, p. 3; Hearing Transcript, 40:21-41:18.

71. The Organisation submits that Ecuador's reference to a "reserve" is inaccurate. It explains that, in light of the range of the *Trachurus murphyi* fishery and the fact that the TAC (Applicable Area) applies only to the high seas and areas under Chile's national jurisdiction, the difference between the TAC (Resource) and the TAC (Applicable Area) refers by implication to catches within the areas under the national jurisdiction of Ecuador and Peru.¹³⁰ The Organisation therefore states that there is no "reserve" as contended by Ecuador.¹³¹
72. Peru is also of the view that there is no "reserve".¹³² It submits that such a concept is not contemplated by the Convention, the 1982 Convention or the 1995 Convention.¹³³ In any event, Peru contends that Ecuador's proposal to utilise the unallocated percentage of the TAC (Resource) would result in a reduction of the percentage of jack mackerel to be caught outside the Convention Area, and argues that such an approach would result in the Organisation impliedly determining allocations in areas under national jurisdiction without the consent of the relevant coastal States, in contravention of Article 5 of the Convention.¹³⁴
73. New Zealand agrees with the Organisation's analysis that there is no "reserve" of 58,218 tonnes, asserting that such difference "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)".¹³⁵ New Zealand notes that the establishment of such an allowance is in fact foreseen in Article 20(3)(c) of the Convention, as well as Article 7(1)(a) of the 1995 Agreement and Article 63(2) of the 1982 Convention.¹³⁶ Accordingly, New Zealand submits that the alternative measure proposed by Ecuador is not an "equivalent measure", as it would increase the TAC in the Convention Area.¹³⁷
74. New Zealand contends that for any alternative measure to have equivalent effect, the measure must not result in either: (a) the TAC (Applicable Area) exceeding 517,582 tonnes; or (b) the TAC (Resource) exceeding 576,000 tonnes.¹³⁸ In addition, New Zealand refers to the 2013 Review Panel Findings and Recommendations, and contends that any alternative measure may not adversely affect the rights and interests of other Members under the measure being objected to, where those Members have not themselves objected and remain subject to its terms.¹³⁹ New Zealand further suggests that these restrictions mean that the scope for a Review Panel to impose alternative measures is inherently more limited in the case of allocation decisions.¹⁴⁰
75. Finally, while not making any suggestions as to other potential equivalent alternative measures, New Zealand suggests that the Review Panel "could provide suggestions to the Commission on how it might give due consideration to the Republic of Ecuador's aspirations" when CMM 01-2018 is next reviewed by the Commission in 2019.¹⁴¹
76. Australia also disagrees with the characterisation of the difference between the TAC (Resource) and the TAC (Applicable Area) as a "reserve", on the basis that such difference is set aside to

¹³⁰ SPRFMO Memorandum, para. 92, referring to Annex III of the Convention; Hearing Transcript, 119:7-120:2.

¹³¹ SPRFMO Memorandum, para. 94(f); Hearing Transcript, 21:9-25.

¹³² Peru Memorandum, paras. 30-31, 55; Hearing Transcript, 80:9-13.

¹³³ Peru Memorandum, paras. 16, 31, 55.

¹³⁴ Peru Memorandum, paras. 15, 17, 51, 56; Hearing Transcript, 80:13-18, 114:21-25, 128:22-129:2.

¹³⁵ New Zealand Memorandum, para. 36; Hearing Transcript, 59:18-60:8.

¹³⁶ Hearing Transcript, 59:23-60:25

¹³⁷ New Zealand Memorandum, para. 37.

¹³⁸ New Zealand Memorandum, paras. 33, 38; Hearing Transcript, 58:18-59:9; 110:23-111:1.

¹³⁹ New Zealand Memorandum, paras. 34-35; Hearing Transcript, 59:10-61:8; 111:6-16.

¹⁴⁰ New Zealand Memorandum, para. 39; Hearing Transcript, 111:17-25.

¹⁴¹ New Zealand Memorandum, paras. 40-43.

accommodate catches within areas under national jurisdiction.¹⁴² In Australia’s view, such amount would be more properly characterised as a “percentage of the overall catch limit for the stock that has been deliberately set aside by the Commission.”¹⁴³

77. Australia also submits that Ecuador’s suggested alternative measure is not equivalent in effect to the decision in CMM 01-2018.¹⁴⁴ Australia argues that the difference between the TAC (Resource) and the TAC (Applicable Area) should not be adjusted,¹⁴⁵ in light of CMM 01-2018’s primary purpose being to “ensure that catch of *Trachurus murphyi* is sustainable.”¹⁴⁶ Australia submits that Ecuador has failed to justify why the areas outside the scope of CMM 01-2018 as stipulated in its paragraph 1 should “bear the exclusive burden of accommodating the increased tonnage and percentage in Ecuador’s proposals”.¹⁴⁷
78. Chile also submits that the difference between the TAC (Resource) and the TAC (Applicable Area) is not a “reserve established by the Commission for coastal States”, but rather corresponds to the tonnages or percentages outside the Applicable Area.¹⁴⁸ In this regard, Chile argues that the Commission lacks jurisdiction to allocate catches within areas under the national jurisdiction of coastal States adjacent to the Convention Area.¹⁴⁹ Chile recalls that the only way that the Commission may allocate percentages or tonnage in relation to areas under the national jurisdiction of a State is when that State has expressly consented to this, such as Chile has done in relation to the *Trachurus murphyi* CMMs.¹⁵⁰ Chile therefore contends that the alternative measure proposed by Ecuador lacks equivalent effect as required by the Convention.¹⁵¹
79. Chile suggests that Ecuador could develop its fishery through the transfer mechanism contained in CMM 01-2018, which Ecuador has applied on previous occasions.¹⁵² It also suggests that Ecuador and Peru could determine the allocation of the resources within areas under their national jurisdiction through an exercise of bilateral cooperation, either directly or through SPRFMO.¹⁵³
80. Finally, Chile refers to the Vanuatu Proposal, recalling that a revised version is intended to be submitted at the next annual Commission meeting in 2019.¹⁵⁴ Chile is of the view that this proposal, once adopted by the Commission, will allow access for new entrants to this fishery and increase catch entitlements for Members with lower allocations.¹⁵⁵
81. Ecuador responds to the argument that there is no “reserve” by pointing to the difference between the TAC (Resource) and the TAC (Applicable Area). Ecuador notes that Annex III allows the Commission to set the TAC for the fishery resources throughout their range and submits that nowhere is it established that the difference between the TAC (Resource) and the TAC

¹⁴² Australia Memorandum, paras. 39-42.

¹⁴³ Australia Memorandum, para. 42.

¹⁴⁴ Australia Memorandum, para. 46.

¹⁴⁵ Australia Memorandum, para. 46.

¹⁴⁶ Australia Memorandum, para. 44.

¹⁴⁷ Australia Memorandum para. 46.

¹⁴⁸ Chile Memorandum, paras. 12-14; Hearing Transcript, 68:6-69:1; 124:20-23.

¹⁴⁹ Chile Memorandum, paras. 7-9, 11; Hearing Transcript, 65:18-68:5; 113:8-14.

¹⁵⁰ Chile Memorandum, paras. 10, 35-36; Hearing Transcript, 125:1-6.

¹⁵¹ Chile Memorandum, paras. 29, 37.

¹⁵² Chile Memorandum, paras. 30-31, 39, *referring to* Transfers of Jack Mackerel Catch Entitlement 2017, Chile Supporting Material, p. 21; Transfers of Jack Mackerel Catch Entitlement 2018, Chile Supporting Material, p. 23; Hearing Transcript, 74:9-25; 126:6-13.

¹⁵³ Chile Memorandum, para. 11.

¹⁵⁴ Chile Memorandum, para. 34, *referring to* Report of the 6th Meeting of the Commission, Chile Supporting Material, p. 28. The Report is also available at SPRFMO Supporting Material, p. 212. *See also* Hearing Transcript, 75:1-21; 113:15-20, 126:14-18.

¹⁵⁵ Chile Memorandum, paras. 32-33, 40; Hearing Transcript, 77:5-12.

(Applicable Area) corresponds to catch in the areas under the national jurisdiction of Peru, Ecuador, or any other Member.¹⁵⁶ Ecuador adds that Peru does not in fact recognise the application of the TAC (Resource) to their waters.¹⁵⁷

VI. ANALYSIS

82. The background to the establishment of SPRFMO is well covered in the memorandum from the Organisation itself, as well as those from Members, and the oral presentations. The Organisation has been highly successful in its effective management of *Trachurus murphyi* which was in catastrophic decline, an outcome that has been described as “nothing short of remarkable”.¹⁵⁸ The way in which it has operated has been testament to the foresight and commitment of those involved in establishing the Organisation, and the Commission’s current Members and CNCPs. It has also been testament to the willingness of Members and CNCPs to significantly reduce and constrain their catches so as to enable the recovery of the stock. This sets the context for the commendably conservative approach taken by Members and CNCPs to the setting of the TACs and the management of the stock(s), and their contemplation of only modest increases in the TACs which respect the scientific advice upon which they are based.
83. Ecuador has objected to its 2018 allocation of the TAC (Applicable Area) for *Trachurus murphyi* established in paragraph 5 and Tables 1 and 2 of CMM 01-2018, adopted during the 6th Commission Meeting (2018). The Objection by Ecuador invokes both of the admissible grounds for an objection set out in Article 17(2)(c) of the Convention, namely unjustifiable discrimination and inconsistency with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement. Before turning to these grounds, the Review Panel first addresses the procedural validity of the Objection.

Procedural Validity of the Objection

84. The allocations included in Table 1 of CMM 01-2018 are the result of the mathematical application of the percentages included in Table 2 to the increased TAC recommended by the Scientific Committee and adopted by the Commission for 2018, culminating in proportionally increased allocations. For this reason, several Participants in these proceedings argued that Ecuador’s Objection is in fact directed at Table 2, which was adopted during the 5th Commission Meeting (2017) and made applicable from 2018 to 2021 inclusive as part of CMM 01-2017 (albeit reproduced once again in CMM 01-2018), and to which Ecuador did not object.
85. The Review Panel acknowledges the importance and usefulness of multi-annual allocation agreements, which are the result of difficult negotiations requiring a high level of mutual compromise and accommodation by Members and CNCPs, and in which the multi-annual character of the allocation is often a key consideration.
86. It is the view of the Panel, however, that individual Members are always entitled to propose amendments to multi-annual decisions, and the Commission can amend those decisions at any time. Ecuador made such a proposal to amend CMM 01-2017 at the 6th Commission Meeting (2018), and Members entertained this proposal. The Panel agrees with Ecuador’s contention that, in adopting CMM 01-2018 without accepting Ecuador’s proposed amendment, the Commission decided on a question of substance to which Ecuador had the right to object. If there had been any concern regarding non-compliance with procedural requirements for the presentation of proposals for amendment, this was not explicitly dealt with at the time. The Review Panel has also

¹⁵⁶ Ecuador Comments, pp. 3-6; Hearing Transcript, 108:25-109:15.

¹⁵⁷ Hearing Transcript, 39:18-20, 103:1-5.

¹⁵⁸ New Zealand Memorandum, para. 17.

considered the implications of Ecuador's transfer of its allocation before invoking the objection procedure and concludes that it has no material effect on the procedural validity of the Objection.

87. The Review Panel further notes that the Objection is in part based on circumstances which stretch back to the special situation affecting Ecuador during and after the 5th Commission Meeting (2017), as well as Ecuador's perception of a persistent lack of acknowledgment of its interests and aspirations by the Commission over a period of some years.
88. The Review Panel also realises that Members will not—and should not—take lightly the decision to object to a measure adopted by the Commission, considering the strict procedural and substantive standards of Articles 17(2)-(6) of the Convention, as are addressed further below.
89. In light of these considerations, the Review Panel finds no reason to dismiss the Objection based on procedural invalidity.

Inconsistency with the Convention, the 1982 Convention, and the 1995 Agreement

90. In relation to the ground of inconsistency, Ecuador argues that the allocation accorded to it pursuant to paragraph 5 and Tables 1 and 2 of CMM 01-2018 is inconsistent with the Convention as well as with the 1982 Convention and the 1995 Agreement. In its oral submissions, Ecuador asserted that the allocation exercise was inconsistent with the Convention because the Commission did not apply Article 21 correctly. In support of its argument, Ecuador invokes several provisions of these conventions, all of which require consideration of the special requirements of developing (coastal) States.
91. The Review Panel considers it appropriate to start out by noting that the competence of the Commission to take decisions on the allocation of the TAC pursuant to the Convention is not inconsistent with the competence of RFMOs/As to take such decisions as stipulated by the 1982 Convention or the 1995 Agreement. In fact, the Convention implements and builds on the 1982 Convention and the 1995 Agreement in this regard. The 1982 Convention does not explicitly or specifically deal with the allocation of the TAC by regional fisheries bodies, but recognises the special position and interests of developing States in the context of marine capture fisheries more broadly, *inter alia*, in Articles 61, 62, and 119.
92. The 1995 Agreement explicitly includes allocation of the TAC as part of the functions of RFMOs/As in Article 10(b), and provides guidance on allocation by means of the implicit and explicit allocation criteria incorporated in Articles 7(2)(d) and (e) and 11. Articles 11(f) and 25(1)(a) and (b) implicitly or explicitly refer to the interests of developing States in relation to allocation, and the broader interests of developing States are also prominently reflected in the Preamble and other provisions of the 1995 Agreement. However, this falls short of specific guidance on how these (and other criteria) are to be practically applied with regard to specific fish stocks, such as by prioritising them or giving them weight. The 1995 Agreement thus recognises that RFMOs/As—and thereby their members or participants—have a wide margin of discretion in allocating the TAC.
93. As the Convention implements and builds on the 1982 Convention and the 1995 Agreement, this wide margin of discretion is also accorded to the Commission pursuant to Article 21 of the Convention. While there are differences between the 1995 Agreement and the Convention with regard to their explicit and implicit allocation criteria, such as their number, order and content, the Review Panel is unable to draw any definitive conclusions from such differences. As neither the 1995 Agreement nor the Convention provide guidance on how these criteria are to be practically applied with regard to specific fish stocks, there is no fundamental difference between them in this regard.

94. In light of the genesis of the developing States provisions in the 1982 Convention, and the reinforcement of the importance of the interests of developing States in the 1995 Agreement and the Convention, the Panel shares Ecuador's view that such interests need to be treated with the utmost seriousness. This is of course consistent with well-established international principles supporting the sustainable development of developing States, and also with the view that developing States should not be disadvantaged because their economic status has prevented them from developing a high seas fishery. This is especially pertinent in the context of RFMOs/As such as SPRFMO, whose membership comprises a large number of developing coastal States in the region.
95. In light of the foregoing, it is the opinion of the Review Panel that the decision on the allocation of the TAC (Applicable Area) laid down in paragraph 5 and Tables 1 and 2 of CMM 01-2018 would be inconsistent with the Convention, the 1982 Convention, or the 1995 Agreement if the Panel determines that the Commission acted outside of its aforementioned wide margin of discretion. This also implies that a Member invoking inconsistency must substantiate its claim with compelling evidence.
96. In the view of the Panel, a determination of inconsistency could for example arise if the allocation were exclusively based on only one of the allocation criteria listed in Article 21(1) of the Convention. Ecuador argues in its Objection and memorandum that the decision on the allocation of the TAC in CMM 01-2018 is based exclusively on the criterion of historic catch laid down in Article 21(1)(a). In the opinion of the Review Panel, this argument is not supported by the material available to it in these proceedings. Of particular significance in this regard is the initial high seas allocation accorded to Ecuador in 2015, despite not having any historic catch in the high seas. The SPRFMO Memorandum and its supporting material provide other examples of the efforts undertaken within the Commission since the 2013 Review Panel Findings and Recommendations to ensure that the allocation of the TACs for *Trachurus murphyi* is based on a broader range of allocation criteria and considerations than historic catch alone.
97. The Review Panel considers that Ecuador has not otherwise substantiated its claim of inconsistency, and the Panel itself also has not found there to be compelling evidence that the Commission has acted outside its wide margin of discretion on allocation pursuant to the Convention. The Panel therefore finds that the decision to which objection has been presented is not inconsistent with the Convention, the 1982 Convention or the 1995 Agreement.

Unjustifiable Discrimination

98. Ecuador's Objection also invokes the ground of unjustifiable discrimination. This is founded on Article 17(2)(c) of the Convention, which provides that an admissible ground for objection is that "the decision unjustifiably discriminates in form or in fact" against a Member.
99. As regards the meaning of "unjustifiable discrimination" in Article 17(2)(c), the reference to "in form or in fact" reflects the different ways in which discrimination can occur.¹⁵⁹ These words include not only direct discrimination (including discrimination as regards procedure), but also measures which, although they are not overtly discriminatory, have an effect, substantive result, or outcome that is discriminatory.
100. In respect of procedural discrimination, the Review Panel finds it useful to recall the background relating to Ecuador's requests for allocations, and the extent to which these have been satisfied.

¹⁵⁹ This language is also found in Article 119(3) of the 1982 Convention, which requires that conservation measures in the high seas not discriminate "in form or in fact" against the fishermen of any State.

101. Ecuador communicated its aspiration to develop its own high seas *Trachurus murphyi* fishery during the 1st and 2nd Commission Meetings in 2013 and 2014.¹⁶⁰ In 2015, it was allocated 1,100 tonnes, and Ecuador further requested that “each Member consider transferring to Ecuador 200 tonnes of its allocation to assist Ecuador’s entry into the high seas fishery”.¹⁶¹ None of the Members appear to have acceded to that request during 2015 or thereafter. Ecuador’s allocation for 2016 was maintained, but Ecuador communicated its expectation to have an increased allocation in future years.
102. On 20 January 2017, during the 5th Commission Meeting held between 18 and 22 January 2017, the Commission received a letter from Ecuador communicating its regret for not participating in the meeting given the condition of the country, which it described as a “force majeure problem” (arising out of the effects of the 2016 earthquake which struck the region). In that letter, Ecuador stated that it “ratifies” its initial request for an allocation of over 10,000 tonnes, clarifying that it was requesting an increase of 4,590 tonnes, for a total allocation of 5,690 tonnes.¹⁶² As the Jack mackerel Working Group tasked with seeking agreement on allocation received this request late during its meeting, the group was ultimately unable to accommodate Ecuador’s request. As explained by the current Commission Chair during the hearing, it is his view that the Jack mackerel Working Group could not make a decision based on a single letter, and the absence of Ecuador during the Meeting precluded it from effectively making its case and engaging in a negotiation process with other Members.¹⁶³
103. The Commission adopted CMM 01-2017 which limited the TAC (Applicable Area) to 443,000 tonnes, and established the respective allocations in tonnes in Table 1. Ecuador’s allocation was set at 1,179 tonnes. CMM 01-2017 also adopted, for the first time, a multi-annual allocation agreement, expressed in a percentage allocation of the TAC (Resource) to apply from 2018 to 2021 inclusive (Table 2 of CMM 01-2017). Ecuador’s percentage share was set at 0.2391%. The fact that the multi-annual allocation agreement was made at the 5th Commission Meeting meant that Ecuador’s absence potentially affected its aspiration for a higher allocation not only in 2017, but for a period of five years. However, Ecuador did not object to this decision, nor does it seem to have communicated or engaged in any other way with Members or the Commission Chair that would have sent a clear signal that it was dissatisfied with the adopted CMM.
104. Based on the agreements reached in 2017, the intention was for the 6th Commission Meeting (2018) to limit the review of CMM 01-2017 to updating the TAC (Resource) and TAC (Applicable Area) according to the latest advice by the Scientific Committee, and adjusting the allocations consistent with the percentages agreed in 2017. This is clearly reflected in the working paper prepared by Chile at the request of the Commission Chair at the time.¹⁶⁴ The Commission did not consider it necessary to convene a Jack mackerel Working Group, as had been the practice in previous years.
105. During the meeting, without complying with Rule 4 of the Rules of Procedure of the Commission, Ecuador made a request, supported by a presentation, for a high seas allocation of 6,500 tonnes of *Trachurus murphyi* and for the amendment of Table 2 of CMM 01-2017 to reflect a percentage share for Ecuador of 1.13%. As stated by the Commission Chair during the hearing, he was not aware of Ecuador’s expectation of a significantly increased allocation for 2018 until very late in the meeting. The Commission Chair added that Members were not expecting Ecuador to bring

¹⁶⁰ Statement of Ecuador (Annex I), SPRFMO Supporting Material, p. 99; Statement of Ecuador (Annex R), SPRFMO Supporting Material, pp. 142-143.

¹⁶¹ Report of the 3rd Commission Meeting, SPRFMO Supporting Material, p. 146.

¹⁶² Letter from Ministerio de Agricultura, Ganadería, Acuacultura y Pesca to the Executive Secretary dated 19 January 2017, SPRFMO Supporting Material, pp. 197-198.

¹⁶³ Hearing Transcript, 90:15-91:6; 94:19-95:16.

¹⁶⁴ See Working Paper 11, SPRFMO Supporting Material, p. 222.

the discussion regarding the agreement reflected in CMM 01-2017 to the table, and were unprepared to discuss Ecuador's request.¹⁶⁵ The Commission could not agree on Ecuador's request, and resorted to qualified-majority voting under Article 16(2) of the Convention to adopt CMM 01-2018. CMM 01-2018 allocates 1,179 tonnes of the TAC (Applicable Area) to Ecuador and maintains Ecuador's percentage allocation of the TAC (Resource).

106. As regards procedural discrimination, there is of course a presumption that Members will be operating in good faith when taking their decisions, and there has been no claim that there was an absence of good faith in this particular case. Indeed, Ecuador specifically said this in its oral submissions.¹⁶⁶ However, bad faith is not necessarily a requirement for discrimination. The finding of the 2013 Review Panel was that there had been discrimination, but the Objector there also specifically disavowed any suggestion of bad faith.¹⁶⁷ That said, for there to be unjustifiable discrimination in the procedures relating to allocation, there would for example need to be treatment of Ecuador which was clearly inconsistent with the treatment of other similarly placed Members, or some unreasonable requirements made of Ecuador but not applied to other Members.
107. Ecuador has explained the justification for its absence from the 5th Commission Meeting (2017), and thus from the discussions on the multi-annual allocation agreements in the TACs. It is nevertheless the opinion of the Review Panel that Ecuador's absence does not mean that the rejection of its proposal at that meeting has necessarily amounted to procedural discrimination against Ecuador. It also does not necessarily follow that the Commission's decision to maintain the same percentage allocations at the 6th Commission Meeting (2018) amounted to such discrimination. In fact, all evidence seems to point to the contrary: Ecuador's proposals were considered despite the late hour at which each of them was submitted. Under such circumstances, the Review Panel does not find that there is any evidence of procedural discrimination against Ecuador.
108. Ecuador is also suggesting discrimination as regards the substantive result or outcome of the process. In other words, that the outcome of the allocation process discriminated against it by virtue of the result itself, even if the procedure was not discriminatory. This is based on what it regards as the inadequacy of the allocation it received, especially when considered in light of the various provisions in the Convention, the 1982 Convention and the 1995 Agreement that support the special position and interests of developing States in the context of marine capture fisheries. Certainly, there may be a point at which the small size of an allocation to a developing State in the region, when compared with higher allocations to other States over a period of time, might be regarded as discriminatory in result. However, in the Panel's view that is not the case in this instance. As noted elsewhere, other factors appear to have affected the size of Ecuador's allocation. It is not sufficient for Ecuador merely to point to the fact that it is a developing State when comparing its allocations with others, since many of the other Members with allocations are also developing States. The period of time under consideration here in relation to the various allocations is also very short. Therefore, although a sustained failure to increase Ecuador's allocation over a longer period of time might amount to discrimination in result absent other legitimate reasons for it, in the Panel's view that point has not yet been reached.
109. The Review Panel therefore finds that CMM 01-2018 does not unjustifiably discriminate, in form or in fact, against Ecuador.

¹⁶⁵ Hearing Transcript, 26:16-20; 28:7-15.

¹⁶⁶ Hearing Transcript, 38:18-25; 49:14-19.

¹⁶⁷ 2013 Hearing Transcript, 101:18-20.

Alternative Measures

110. Having found that the decision is not inconsistent with the Convention, the 1982 Convention, or the 1995 Agreement, and that it does not unjustifiably discriminate against Ecuador, paragraph 10(j) of Annex II to the Convention nevertheless requires the Review Panel to assess whether the alternative measures proposed by Ecuador are equivalent in effect to the objected decision.
111. Ecuador proposes alternative measures consisting of increasing its high seas allocation by drawing on what it calls the fishing “reserve”. Considering the relevance of the “reserve” for the test of equivalency, as well as the different interpretations of this “reserve” by the Participants, the Review Panel feels compelled to clarify this issue.
112. The CMMs adopted by the Commission since 2013 identify two TACs: one for the resource throughout the range of the stock (*i.e.* the TAC (Resource)), and one for the area of application of the CMM (*i.e.* the TAC (Applicable Area)). As regards CMM 01-2018, these are reflected in paragraphs 10 and 5 respectively.
113. The range of the stock assessed by the Scientific Committee, in the absence of a definite answer regarding the structure of the stock(s), includes the stock(s) of *Trachurus murphyi* at present predominantly found in the area extending westwards from Chile and Peru out to about 120°W.¹⁶⁸ This area therefore includes areas of the high seas as well as areas under the national jurisdiction of Chile, Ecuador, and Peru. In 2018, the Commission agreed that catch in this area should not exceed 576,000 tonnes.
114. The Applicable Area of CMM 01-2018, in turn, is defined in its paragraph 1 as “the Convention Area and [...] with the express consent of Chile, [applies] to fisheries for *Trachurus murphyi* undertaken by Chile in its areas under national jurisdiction.” The TAC (Applicable Area) for 2018 was set at 517,582 tonnes.
115. In the view of the Panel, this cannot be interpreted in any other way than that the geographical area of the range of the stock falling outside the Applicable Area of all CMMs for *Trachurus murphyi* comprises areas under the national jurisdiction of States other than Chile in which *Trachurus murphyi* occur. At present these are areas under the national jurisdiction of Peru and Ecuador. In its memorandum, the Organisation notes that “Ecuador is located at the northern range limit of Jack mackerel and reports the lowest catches of all coastal States”.¹⁶⁹ It is for these

¹⁶⁸ The *Trachurus murphyi* profile developed by the Scientific Committee of the Commission and updated in 2018 notes that: “[f]or the purposes of *T. murphyi* assessments to be conducted in the immediate future, the westward boundary of this stock could be assumed to be about 120°W, to cover all areas currently fished in the southeast Pacific Ocean, until further information becomes available to improve the definition of this boundary”. See “Information describing Chilean jack mackerel (*Trachurus murphyi*) fisheries relating to the South Pacific Regional Fishery Management Organisation”, Working Draft, 21 January 2014, p. 14. The Jack Mackerel Sub-group of the SWG has carried out parallel assessments of the jack mackerel stock(s) in the Eastern South Pacific under the two main working stock structure hypotheses: jack mackerel caught off the coasts of Peru and Chile each constitute separate stocks which straddle the high seas; and jack mackerel caught off the coasts of Peru and Chile constitute a single shared stock which straddles the high seas. The profile also notes that the area of distribution of *Trachurus murphyi* in the Pacific Ocean reaches the areas under the national jurisdiction of Australia and New Zealand. However, these areas have historically reported low catches of *Trachurus murphyi*, and no catches have been reported since 2010. See “Catch data submitted to the SPRFMO Secretariat (as at 28 December 2017)”, COMM 6 – INF 03, Australia Supporting Material, pp. 123, 125.

¹⁶⁹ SPRFMO Memorandum, para. 14.

areas that CMM 01-2018 “reserves” or “sets aside” 58,418 tonnes (the difference between the TAC (Resource) and the TAC (Applicable Area)).

116. The fact that this “reserve” is at present intended for areas under the national jurisdiction of Peru and Ecuador is reflected in what the Commission Chair during the hearing called “the careful language” of paragraphs 5 and 10 of CMM 01-2018.¹⁷⁰ The TAC (Applicable Area) established in paragraph 5 of the CMM, and each participant’s share in it, are legally binding on Members, as reflected in the use of the word “shall”. By contrast, paragraph 10 reads: “Members and CNCs agree [...] that catches of *Trachurus murphyi* in 2018 throughout the range of the stock *should* not exceed 576,000 tonnes.”¹⁷¹ The hortatory nature of the word “should” in this provision is a recognition of the sovereign rights of coastal States that have not given their consent pursuant to Articles 20(4)(a)(ii)-(iii) and 21(2) of the Convention. In fact, paragraph 10 reflects, and provides substantive content to, the obligation to cooperate to ensure compatibility of conservation and management measures established for straddling fishery resources, as required by Articles 3(1)(a)(vi), 4, 20(4)(a)(i), and 21(4)(b) of the Convention.
117. Ecuador rejects the position that the “reserve” represents *Trachurus murphyi* occurring in areas under the national jurisdiction of Peru and Ecuador on the ground that it lacks a scientific basis. However, Ecuador seems to be confusing the purpose of the “reserve” with the means used to arrive at a particular sharing arrangement between the TAC (Applicable Area)—covering the Convention Area and areas under the national jurisdiction of Chile—and the implicit or set-aside TAC for catch in areas under the national jurisdiction of Peru and Ecuador. Indeed, that sharing arrangement does not necessarily have a scientific basis (such as zonal attachment), but reflects above all the outcome of negotiations between Members. As mentioned by the Commission Chair during the hearing, the amount of the “reserve” was an integral part of the overall allocation negotiation, and “some Members agreed to the outcome precisely because this number was also part of the deal”.¹⁷² That point is again made clear in the explanation as to why Peru was allocated a higher-than-proportional increase in its share of the TAC (Applicable Area) during the 5th Commission Meeting (2017).¹⁷³
118. Having clarified the purpose of the “reserve”, the Panel concludes that the alternative measure proposed by Ecuador is not equivalent in effect to CMM 01-2018. Increasing Ecuador’s allocation for the high seas in the manner it suggests would result in an increase in the TAC (Applicable Area), at the expense of the amount set aside for relevant coastal States (at present, Peru and Ecuador). Considering the hortatory nature of paragraph 10, this risks increasing the catch throughout the range of the stock, to the detriment of CMM 01-2018’s conservation objective and the rebuilding efforts of the Commission.
119. Another consequence of the purpose of the “reserve” as clarified is that nothing precludes Ecuador from increasing its catch of *Trachurus murphyi* in areas under its national jurisdiction, subject to its obligation to cooperate to ensure compatibility of measures established for the high seas and those adopted for areas under national jurisdiction (as discussed in paragraph 116 above). The Review Panel recognises, however, that this possibility is limited by the natural variability of *Trachurus murphyi* distribution in areas under its national jurisdiction, a circumstance that is beyond Ecuador’s control.
120. The Review Panel now turns to the assertions made by several Participants in these proceedings that it is beyond the competence of the Review Panel to recommend anything that may alter the TAC, the allocations or otherwise adversely affect the rights and interests of other Members or

¹⁷⁰ Hearing Transcript, 22:3.

¹⁷¹ Emphasis added.

¹⁷² Hearing Transcript, 21:20-25.

¹⁷³ Hearing Transcript, 80:18-90:14.

CNCPs. While immaterial to its findings, the Review Panel nevertheless considers it necessary to reject this restrictive interpretation. While the test of equivalency is, undoubtedly, harder to meet for allocation decisions, this should not preclude the right of a Member to object and to be granted relief if it meets the high threshold of review established under Article 17, in particular in the context of the Commission's wide margin of discretion on allocation under Article 21.

121. In the Review Panel's view, if a Panel were to find that an objected decision discriminates against an objecting member, and taking into account the purpose of the extraordinary meeting envisaged in paragraph 10(d) of Annex II of the Convention, it would be reasonable for a Panel to have the ability to recommend the convening of an extraordinary meeting. While this is not explicitly provided for in Annex II of the Convention, such an approach might be chosen in lieu of modifying or proposing new allocations of a TAC. An extraordinary meeting is also convened if a Review Panel finds that the objected decision is inconsistent with the Convention or with relevant international law.

Possible Ways Forward

122. The Review Panel will now turn to the invitations made by several Participants in their written and oral submissions for guidance as to how Ecuador's aspirations in developing a future high seas fishery for *Trachurus murphyi* could be addressed.
123. While obvious, it is worth stating that any solution will need to be rooted in long-term, consistent, inclusive, and transparent cooperation in good faith among all Members and CNCPs. Sustained cooperation represents the best option to ensure the long-term conservation and sustainable use of *Trachurus murphyi* as required by Article 2 of the Convention for the benefit of all Members and CNCPs. The Review Panel encourages all Members and CNCPs to maintain and strengthen this spirit in future meetings.
124. Some Participants referred in their written and oral submissions to the "holistic" nature of the Commission's decision-making process on allocation. In this respect, the Review Panel invites Members to consider whether the interests of developing States in the region might not be better taken into account in a more deliberative and specific discussion as part of that decision-making process.
125. It is of considerable significance to the Review Panel that, during the hearings, several Participants expressed their confidence that Ecuador's aspirations could be accommodated at future Commission meetings, provided Ecuador would submit a sufficiently compelling proposal in a timely manner, and would engage actively and constructively with other Members during Commission meetings and intersessionally. It was also suggested that the SPRFMO Secretariat might be in a position to provide assistance to Ecuador in this regard, whether through the fund to assist developing States (established under Article 19(5) of the Convention and Regulation 5 and Annex 1 of the Financial Regulations of the Commission) or otherwise.
126. During the hearing, Ecuador highlighted the shortcomings of the allocation transfer system, including its limited ability to ensure a predictable supply and the large extent to which it is driven by market forces. The Review Panel therefore invites the Commission to consider exploring the possibility of adjustments to the allocation transfer system that would address the sorts of difficulties experienced by Ecuador, such as by incorporating the notion of a right of first refusal, or elements thereof, for Members or CNCPs with no or very low allocations. An alternative could be for individual Members to revise their domestic transfer procedures to assist Ecuador directly within the framework of the present system.
127. The Panel has noted that, on some occasions, Members have made "one-off" transfers outside the scope of the allocation transfer system under paragraph 9 of CMM 01-2018; for instance, Chile's

agreement to a transfer of 1,000 tonnes to Korea in 2017 to address the latter's problems with the size of its allocation.¹⁷⁴ The Review Panel invites Members to consider whether this would be a possible option for Ecuador as well, for example if such one-off transfers were limited in duration to a certain number of years, and were compensated by exclusion from proportional increases in allocations generated by increases in TACs, whether or not adjusted by a percentage of rent.

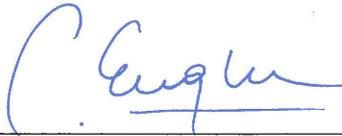
128. Finally, several Participants expressed their hope and confidence that Ecuador's aspirations could be addressed in the context of the so-called "Vanuatu Proposal" which has a dual objective of promoting increased utilisation of allocations, and increasing the allocations of Members or CNCPs with no or very low allocations. While the overall effect of the Vanuatu Proposal remains to be seen, the Review Panel can only encourage Members to make the necessary efforts towards a successful adoption of the Vanuatu Proposal at the upcoming Commission meeting, which is scheduled to take place in The Hague in January 2019. As part of the adoption of the Vanuatu Proposal, Members might also be willing to enter into an understanding that ensures that Ecuador would be among the first to benefit from it. It may also be worthwhile to explore whether the necessary support exists to develop options for promoting increased utilisation of the set-aside TAC.

¹⁷⁴ SPRFMO Memorandum, para. 69.

VII. FINDINGS AND RECOMMENDATIONS

129. In light of the foregoing, pursuant to Article 17(5)(e) of the Convention, the Review Panel:
- a. *Finds* that the decision to which objection has been presented is not inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement;
 - b. *Finds* that the decision to which objection has been presented does not unjustifiably discriminate, in form or in fact, against Ecuador; and
 - c. *Finds* that the alternative measures proposed by Ecuador are not equivalent in effect to the decision to which objection has been presented.
130. The costs of these proceedings shall be borne as provided in paragraph 7 of Annex II of the Convention.

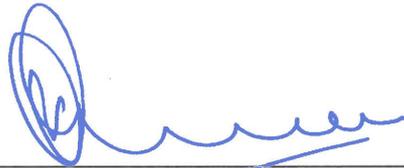
Done in English, accompanied by an unofficial Spanish translation prepared by the PCA, at the PCA's headquarters at the Peace Palace in The Hague, this 5th day of June 2018, and transmitted to the Executive Secretary in accordance with Article 17(5)(e) and paragraph 9 of Annex II of the Convention.



Ms. Cecilia Engler



Prof. Erik J. Molenaar



Prof. Don MacKay
Chair



Mr. Martin Doe Rodriguez
Registrar, Permanent Court of Arbitration