

IN PROCEEDINGS CONDUCTED BY

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

with regards to

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

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**MEMORANDUM OF AUSTRALIA**

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17 May 2018





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1. Australia is committed to ensuring the long-term conservation and sustainable use of fisheries resources in the South Pacific Ocean through giving effect to obligations in the Convention, the 1982 Convention and the 1995 Agreement. Australia acknowledges the importance of dispute resolution mechanisms in these treaties, including the objection procedure contained in Article 17 of the Convention. In this regard, Australia welcomes the opportunity to respond to questions posed by the Review Panel established under Article 17 and Annex II of the Convention in paragraph 2.1 of Procedural Directive No. 1 as follows:

### **Response to questions 2.1(a)**

2. The Republic of Ecuador (Ecuador) has asserted that Tables 1 and 2 of CMM 01-2018 are inconsistent with provisions of the Convention, the 1982 Convention and the 1995 Agreement.<sup>1</sup> We note that Ecuador's objection and the parameters of the Review Panel's jurisdiction are limited to the decisions of the Commission contained in CMM 01-2018<sup>2</sup>. However, Australia recognises that the decision of the Commission to set the tonnages of Members contained in Table 1 of CMM 01-2018 and the corresponding percentages contained in Table 2 are best understood in the context of past decisions of the Commission in relation to *Trachurus murphyi*.
3. Australia also notes the Review Panel's request for submissions from the South Pacific Regional Fisheries Management Organisation ('the Organisation') in relation to the history, rationale, agreed allocation criteria and the sources of information considered in the allocation processes relevant to conservation and management measures applicable to *Trachurus murphyi*<sup>3</sup> and the Organisation's submission on these matters.<sup>4</sup>
4. Accordingly, without prejudice to Australia's position on the parameters of Ecuador's objection noted in paragraph 2 above, Australia makes the following submissions in response to paragraph 2.1(a) of Procedural Directive No. 1 with a view to informing the Review Panel's consideration of 'the basis for the decision in fact and law'<sup>5</sup> of the Commission in 2018 in relation to Tables 1 and 2 of CMM 01-2018.

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<sup>1</sup> See 'Objection against CMM 01-2018 presented by the Republic of Ecuador' 29 March 2018 (Objection of the Republic of Ecuador), page 3.

<sup>2</sup> CMM 01-2018 is included in Supporting Material Prepared by the Secretariat of the South Pacific Regional Fisheries Management Organisation (Supporting Material of the Organisation) No 48, from page 222.

<sup>3</sup> Procedural Directive No. 1, paragraph 2.2(b).

<sup>4</sup> See 'Memorandum to assist the Review Panel Established under Article 17 of the SPRFMO Convention to consider the Objection by Ecuador to the Conservation and Management Measure for *Trachurus murphyi* (CMM 01-2018)', 14 May 2018 (Memorandum of the Organisation).

<sup>5</sup> Procedural Directive No. 1, paragraph 2.1(a).

(1) *A range of factors were taken into account in the development and adoption of CMM 01-2017*<sup>6</sup>

5. Australia (Mr. Gordon Neil) was Chairperson of the Commission for a two year term from the conclusion of the 3rd Annual Meeting in 2015 to the conclusion of the 5th Annual Meeting in 2017. Accordingly, Mr. Neil was the Chairperson of the Commission when the 2017 allocation discussions described below took place and when the Commission adopted CMM 01-2017.
6. On 14 October 2016, the Scientific Committee recommended that 'the Commission should aim to maintain 2017 catches for the entire jack mackerel range in the southeast Pacific at or below 493kt.'<sup>7</sup> As noted in Annex 7 of the Report of the 4<sup>th</sup> Scientific Committee Meeting, while there was some uncertainty around the exact stock structure, the relevant assessments used to provide this advice related to *Trachurus murphyi* in the waters under the national jurisdictions of the Republic of Chile (Chile) and the Republic of Peru (Peru) and in the adjacent high seas.<sup>8</sup> On the question of whether the relevant range of the southeast Pacific stock also extends into the waters under the national jurisdiction of Ecuador, Australia notes that the submission of the Organisation on this stock refers to these waters being 'located at the northern range limit of Jack mackerel'.<sup>9</sup>
7. In light of this advice from the Scientific Committee, consistent with previous practice of the Commission, the Chairperson proposed convening an informal working group of the Commission to discuss allocation issues at the 5<sup>th</sup> Commission Meeting in Adelaide. To this end, on 21 December 2017, in his capacity as Chairperson, Mr. Neil wrote to all Members (Heads of Delegation) on two issues: (i) jack mackerel allocation and (ii) finding a replacement for the Compliance and Technical Committee Chair. The relevant part of the correspondence was as follows:

*The Scientific Committee has recommended an increase to the jack mackerel TAC which equates to an increase of 33 000 tonnes of catch in the Convention Area. As in previous years, Members may wish to convene a separate working group to negotiate the allocation of that additional TAC. As the meeting is being hosted by Australia, the Australian Delegation has indicated it could provide a Chair from its delegation for this purpose, if this course of action is supported by Members.*

*Australia has suggested that Mr. Frank Meere is available and willing take on this important role. Mr. Meere is highly respected in his field and will be known to many of*

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<sup>6</sup> See Australian Supporting Material No 1 'CMM 01-2017 Conservation and Management Measure for *Trachurus murphyi*', page 4.

<sup>7</sup> See Australian Supporting Material No 2 'Report of the 4<sup>th</sup> Meeting of the Scientific Committee', page 15.

<sup>8</sup> See Australian Supporting Material No 3 'Annex 7 to the Report of the 4th Scientific Committee meeting in 2017', which provides at page 60:

*the Jack Mackerel Sub-group (JMSG) of the Science Working Group (SWG) of the SPRFMO at its 11th Session (SWG-11) carried out parallel assessments of the Jack mackerel stock(s) in the Eastern South Pacific under the two main working hypothesis already identified. That is: that Jack mackerel caught off the coasts of Peru and Chile each constitute separate stocks (Peruvian or northern and Chilean or southern stocks - hypothesis 1) which straddle the high seas; and, that Jack mackerel caught off the coasts of Peru and Chile constitute a single shared stock (hypothesis 2) which straddles the high seas.*

<sup>9</sup> Memorandum of the Organisation, paragraph 14.

*you. By way of background, Mr Meere has a wealth of experience in fisheries management, including serving as the head of the Australian Fisheries Management Authority. Mr. Meere is active in the international fisheries space, particularly in issues related to IUU fishing, with a sound understanding of the complexities associated with international fisheries governance and allocation issues. Mr Meere is also a member of the International Institute of Fisheries Economics and Trade. This question is finally a matter for the members with a strong interest in the matter of allocation and the allocation process. I would very much welcome any views that you might have.*<sup>10</sup>

8. Representatives of the European Union, the Republic of Vanuatu (Vanuatu) and Chile responded directly to the Chairperson indicating support for the suggestion to convene a working group to be chaired by Mr. Meere.
9. On 4 January 2017, Peru wrote a letter to be circulated to Members of the Commission outlining its interest in an increased allocation. In the letter Peru also stated its view that the discussions should not be limited to the allocation of the additional 33,000 tonnes recommended by the Scientific Committee but should consider the 'total allowable catch as well'.<sup>11</sup>
10. In anticipation of the Commission giving its approval to form a jack mackerel working group, Mr. Meere, assisted by members of the Australian delegation, began informal consultations on these matters with other delegations present in Adelaide in the margins of the 4<sup>th</sup> Meeting of the Compliance and Technical Committee which commenced on 14 January 2017.
11. This matter of convening a jack mackerel working group was again raised at the Heads of Delegation meeting held on 17 January from 5pm-6pm, the day prior to the commencement of the Commission meeting. All delegations present supported convening a working group in light of the Scientific Committee's advice.
12. Consistent with the discussion in the Heads of Delegation meeting, the jack mackerel working group (JMWG) was convened by Mr. Meere and discussions between delegates concentrated on allocating the increase in the catch limit (33,000 tonnes), rather than revisiting tonnages contained in Table 1 of CMM 4.01.<sup>12</sup>
13. The Chair of the JMWG 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).<sup>13</sup>

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<sup>10</sup> See Supporting Material of the Organisation No 38, page 180.

<sup>11</sup> See Supporting Material of the Organisation No 39, page 184.

<sup>12</sup> See Supporting Material of the Organisation No 40, page 190, noting that '[t]he Commission convened a WG, chaired by Mr. Frank Meere (Australia) to address the allocation of the additional 33,000 tonnes of catch recommended by the Scientific Committee and endorsed by the Commission.'

<sup>13</sup> Supporting Material of the Organisation No 36, page 174 provides 'Members and CNCPs agree, having regard to the advice of the Scientific Committee, that catches of *Trachurus murphyi* in 2016 throughout the range of the stock should not exceed 460 000 tonnes' (paragraph 10 of CMM 4.01).

14. 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).<sup>14</sup> 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.<sup>15</sup>
15. 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.<sup>16</sup> This so-called 'set aside' amount had been 50,000 tonnes since the adoption of CMM 2.01 in 2014.<sup>17</sup> 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.
16. Over the course of discussions many views were put forward and all Members present were able to make their case. The JMWG referred to Article 21(1) and considered the criteria contained in this provision in its discussions. The Chair stressed the need to have an outcome that was consistent with Article 21. However, the JMWG did not go through the criteria listed in paragraph 1 of Article 21 line-by-line.
17. Ecuador did not attend the SPRFMO annual meetings in 2017, but on 20 January the Secretariat distributed in hard-copy a letter from Ecuador to the delegations in Adelaide which was read out at the meeting. This occurred when discussions in the JMWG were well underway. In that letter Ecuador explained that it was not able to attend the meeting due to 'force majeure problems'.<sup>18</sup> It expressed the view that it was 'timely to review the distribution of quotas' in the *Trachurus murphyi* measure.<sup>19</sup> It also requested a 5690 tonne catch limit for the development of its high seas fishery, stipulating that the increase should come in part from the 33,000 tonne increase in the catch limit recommended by the Scientific Committee and in part from 'the unused total'.<sup>20</sup>

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<sup>14</sup> See Supporting Materials of the Organisation No 36, page 174 (paragraphs 5 and 10 of CMM 4.01).

<sup>15</sup> Memorandum of the Organisation, paragraph 14.

<sup>16</sup> See Supporting Material of the Organisation No 43, page 200 (paragraphs 5 and 10 of CMM 01-2017).

<sup>17</sup> The set aside amount was 50,000 tonnes in CMM 4.01 (2016), CMM 3.01 (2015) and CMM 2.01 (2014) and 78,000 tonnes in CMM 1.01 (2013) – see respectively Supporting Material of the Organisation No 36, page 174; No 31, page 156; No 21, page 121; and No 12, pages 91 and 92.

<sup>18</sup> Supporting Material of the Organisation No 42, page 197.

<sup>19</sup> Supporting Material of the Organisation No 42, page 197.

<sup>20</sup> Supporting Material of the Organisation No 42, page 198.

18. The JMWG considered this request and also the tonnages to be allocated to Ecuador in light of it becoming a Member of the Commission in 2015. The JMWG also considered requests from Peru, including in light of its changed status from Cooperating Non-Contracting Party (CNCP) to Member of the Commission in 2016.<sup>21</sup> The JMWG also considered a request from the Republic of Cuba (Cuba) for allocation to enable it to develop a fishery, over time, if the stock continued rebuilding as well as a request for more than a proportionate increase from the Republic of Korea (Korea).
19. As a result of these discussions, Ecuador's tonnage in Table 1 of CMM 01-2017 increased by 79 tonnes to a total of 1179 tonnes which reflected proportional increase of the extra 33,000 tonnes. The People's Republic of China (China), the Kingdom of Denmark in respect of Faroe Islands (Faroe Islands), the Russian Federation and Vanuatu also received equivalent proportional increases.
20. Peru received an increase which was 2069 tonnes higher than a proportional increase. Korea received 1426 tonnes above a proportional increase. As noted in the submission of the Organisation, 1000 tonnes of this increase came from a one-off transfer from Chile.<sup>22</sup> On the basis of its request (referred to in paragraph 18 above), for the first time Cuba was allocated tonnage in Table 1 (1100 tonnes).
21. On the other hand, Chile's tonnage was 1007 tonnes below what it would have been as a proportional increase (explained by the one-off transfer of 1000 tonnes to Korea noted in paragraph 20 above). Likewise the European Union's tonnage was 1001 tonnes below what would have been a proportionate increase.
22. The JMWG also considered requests from Members for securing certainty in *Trachurus murphyi* allocations into the future. Accordingly, in conjunction with the tonnage discussions, Members considered converting the 2017 tonnages to percentages to be used in future years. Ultimately, these discussions resulted in support for a second table to be included in CMM 01-2017 that contains a percentage share for each Member of the catch limit in the entire range of the stock based upon the tonnages set out in Table 1. The only exception to this was that the one-off transfer of 1000 tonnes from Chile to Korea was not accounted for in calculating the percentages in Table 2; meaning Chile's percentage in Table 2 was calculated as if it included an additional 1000 tonnes and conversely Korea's percentage was calculated using the figure of 6321 tonnes, which was 1000 tonnes below its tonnage in Table 1.
23. An effect of this approach was that the set aside amount that had been 50,000 tonnes from 2014-2017, was effectively converted to a percentage (10.1421%) of the catch limit for the range of the stock. As such, any increase in the overall catch limit recommended by the Scientific Committee would see the set aside amount grow in future years.<sup>23</sup>

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<sup>21</sup> Supporting Material of the Organisation No 40, page 190.

<sup>22</sup> Memorandum of the Organisation, paragraph 69.

<sup>23</sup> See also Memorandum of the Organisation, paragraph 70.

24. On this basis and in light of the increased transparency and security it provided, the JMWG reached consensus to use these percentages for calculating tonnages in future years up to and including 2021.
25. As noted in the submission of the Organisation, paragraph 4 of CMM was amended to include the word ‘Relevant’ at the start of the paragraph and the word ‘Such’ was also included at the start of the final sentence.<sup>24</sup> As recorded in the Meeting Report ‘[t]he Working Group noted that changes to paragraph 4 of CMM 4.01 were needed, as two Members who have now been allocated quota in 2017 are not included in Table 1 of CMM 1.01.’<sup>25</sup> Australia submits that these changes were made to accommodate for both Ecuador and Cuba to ensure that they would not be prevented from catching their tonnage of *Trachurus murphyi* in the area to which CMM 01-2017 applied. Because the same wording is included in paragraph 4 of CMM 01-2018, Australia submits that the gross tonnage restriction in this paragraph is not applicable to Ecuador and therefore not relevant to Ecuador’s objection.<sup>26</sup>
26. The JMWG also took into account the Cook Islands’ desire to be included in Table 1, albeit with a tonnage of zero, to reflect their legitimate interest in the fishery and as a means of reserving its right to claim a *Trachurus murphyi* catch limit in future years.
27. As noted in the Meeting Report and the submission of the Organisation, the JMWG also discussed a proposal by Vanuatu seeking to ensure greater use of *Trachurus murphyi* tonnage.<sup>27</sup>
28. The Commission considered this work of the JMWG and adopted CMM 01-2017 containing Tables 1 and 2 by consensus. The decision was transmitted in accordance with Article 17(1)(a) in Circular 006-2017 on 23 January 2017.<sup>28</sup> No Member made an objection.

*(2) Australia disagrees with Ecuador’s arguments in relation to the 2017 allocation process*

29. Ecuador appears to infer in its objection letter that CMM 01-2017 is inconsistent with Articles 3(1)(a)(viii), 19(1), 19(2)(c), 19(3)(a) and 21(1)(e)-(f) of the Convention, Article 119(1)(a) of the 1982 Convention and Articles 5(b), 24(2)(c) and 25(1)(a) of the 1995 Agreement.<sup>29</sup> In Australia’s view, Ecuador has not substantiated its arguments in relation these provisions each relating to the interests of developing States. Instead Ecuador makes general assertions that ‘fair criteria’ were not applied in 2017 and if they were, then it would have resulted in a greater allocation of quota

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<sup>24</sup> Memorandum of the Organisation, paragraph 90.

<sup>25</sup> Supporting Material of the Organisation No 40, page 190.

<sup>26</sup> Cf Australian Supporting Material No 4 ‘Ecuador’s presentation to the 6<sup>th</sup> Commission Meeting’, page 115 in which Ecuador proposes that Members of the Commission consider including Ecuador ‘to replace Belize, within Table 1 of CMM Resolution 01 of the members and CNCP to establish the limit of total gross tonnage (GT) of vessels participating in the *Trachurus murphyi* fishery in the Convention Area.’

<sup>27</sup> Supporting Material of the Organisation No 40, page 190; and Memorandum of the Organisation, paragraphs 79-83.

<sup>28</sup> Australian Supporting Material No 5 ‘Circular 006-2017 (23 January 2017)’, page 120.

<sup>29</sup> Objection of the Republic of Ecuador, pages 3-7.

to Ecuador.<sup>30</sup> Ecuador also appears to assert that historic catch is the only criterion that has been considered in coming to the current allocation.<sup>31</sup>

30. Australia submits that these assertions made by Ecuador are not supported by the facts for the following reasons.
31. First, in relation to historic catch, an allocation based exclusively on historic catch would not be consistent with Article 21 of the Convention. However, as pointed out in Ecuador's objection letter, Ecuador itself 'does not have a record of fishing of jack mackerel [in the area to which CMM 01-2017 applies]'.<sup>32</sup> Despite this, Ecuador's share of the total catch of *Trachurus murphyi* in the area to which CMM 01-2017 applied was 1179 tonnes.
32. Second, most Members held the view that the existing allocation in Table 1 of CMM 4.01 reflected an outcome which was consistent with the criteria listed in Article 21(1) of the Convention. This view was the basis for the JMWG's decision to use a proportionate increase as a starting point for allocating the additional 33,000 tonnes.
33. Third, the JMWG's decisions to deviate from this proportionate increase of the 33,000 tonnes reflect the interests of various Members in the fishery, including Cuba, a developing State, which had no significant recent catch history.<sup>33</sup> Peru, itself a developing coastal State into whose waters the range of the relevant jack mackerel stock extends, received the largest increase in tonnage above the proportional increase amount (2069 tonnes).<sup>34</sup> As noted in the Organisation's submission, Korea reiterated its concerns about size of its tonnage in Table 1 and referred to its active participation in the fishery and its record of compliance.<sup>35</sup> Article 21 framed both requests for and consideration of such claims for shares of the 33,000 tonnes by the JMWG. Accordingly, the tonnages and percentages in Tables 1 and 2 of 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.
34. Fourth, in response to Ecuador's assertions in relation to Articles 3(1)(a)(viii), 19(1), 19(2)(c) and 19(3)(a) of the Convention, Article 119(1)(a) of the 1982 Convention and Articles 5(b), 24(2)(c) and 25(1)(a) of the 1995 Agreement, Australia makes the following points:
  - the criteria in Article 21(1), including sub-paragraphs (e), relating to the fisheries development aspirations and interests of developing States, and (f), relating to the interests of developing

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<sup>30</sup> Objection of the Republic of Ecuador, page 7.

<sup>31</sup> Objection of the Republic of Ecuador, page 7 states '[s]ince only the criterion of historical catches with their practices regimes, is being considered'.

<sup>32</sup> Objection of the Republic of Ecuador, page 7. Note Ecuador has reported catch history in its EEZ between the years 1990 and 2015 - see Australian Supporting Material No 6 'Catch data submitted to the SPRFMO Secretariat (as at 28 December 2017) COMM 6 – INF 03', page 123.

<sup>33</sup> See Australian Supporting Material No 6, page 123.

<sup>34</sup> A proportionate increase of Peru's share of 460,000 tonnes would have been 7931 tonnes, but Peru's tonnage in Table 1 of CMM 01-2017 is 10,000.

<sup>35</sup> Memorandum of the Organisation, paragraph 69.

coastal States in a fishery that straddles areas of national jurisdiction, which Ecuador also refers to, framed both requests for and consideration of claims for shares of the 33,000 tonnes by the JMWG, including requests made by Ecuador, Peru and Cuba; and

- seven of the 11 Members listed in Table 1 of CMM 01-2017 are developing States and/or Small Island Developing States according to the tables supplied in Ecuador's memorandum – accounting for over 86% percent of the catch limit for the area in which CMM 01-2017 applies (443,000 tonnes).<sup>36</sup>

35. In Australia's view, Ecuador has asserted that its particular requests were not fully satisfied in CMM 01-2017, but it has not effectively made the case for how this amounts to inconsistency with the provisions it has listed in relation to the interests of developing States, particularly in the context where Ecuador's claims would have needed to be balanced against the interests of other States, including other developing States, in order to be accommodated.

36. For the reasons stated above, Australia submits that the Review Panel should not accept Ecuador's assertions relating to the development and adoption of CMM 01-2017 in assessing consistency of CMM 01-2018 with Articles 3(1)(a)(viii), 19(1), 19(2)(c), 19(3)(a) and 21(1)(e)-(f) of the Convention, Article 119(1)(a) of the 1982 Convention and Articles 5(b), 24(2)(c) and 25(1)(a) of the 1995 Agreement.

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<sup>36</sup> Memorandum of Ecuador, pages 11 and 15; note that Cook Islands does not have tonnage in Table 1 of CMM 01-2017.

## Response to Questions 2.1(c) and (d)

37. Ecuador has proposed alternate measures which it contends are equivalent in effect to the decision in CMM 01-2018.<sup>37</sup> Australia understands these proposed alternate measures to be:

- Ecuador's tonnage in Table 1 is increased by 5123 tonnes (from 1379 tonnes to 6500 tonnes);
- Ecuador's percentage in Table 2 is increased from 0.2391 percent to 1.13 percent; and
- These changes are accommodated by increasing the total allowable catch of *Trachurus murphyi* in the area to which CMM 01-2018 applies from 517,582 tonnes to 522,705 tonnes.

38. Without commenting on Ecuador's arguments that CMM 01-2018 unjustifiably discriminates against Ecuador, Australia makes the following submissions in response to these proposed alternate measures and the relevance in this respect of paragraphs 4, 5 and 10 of CMM 01-2018.<sup>38</sup>

(1) *There is no 'reserve'*

39. Ecuador's objection notes that paragraph 5 of CMM 01-2018 sets a catch limit of 517,582 tonnes which is less than the catch limit for the stock in the entire range (576,000).<sup>39</sup> Ecuador contends this 'leaves a reservation in the Convention of 58,218 tons.'<sup>40</sup>

40. As a preliminary matter, Australia submits that the difference between the recommended catch limit from the Scientific Committee (576,000 tonnes) and the total catch in the area to which CMM 01-2018 applies (517,582 tonnes) is 58,418 tonnes (not 58,218 tonnes as stated by Ecuador).<sup>41</sup>

41. For the reasons set out below, Australia disagrees with the characterisation of this difference as a 'reservation' or 'reserve':<sup>42</sup>

- As explained in paragraphs 14 and 15 above, in 2017 the Commission decided to set a catch limit in the area which CMM 01-2017 applies of 443,000 tonnes in order to accommodate for catch outside the area of 50,000 tonnes;
- Furthermore, as noted in paragraphs 22 to 24 above, a decision was made in 2017 as part of the allocation discussions to effectively convert this difference from a set amount of 50,000 tonnes (where it had been since the adoption of CMM 2.01 in 2015) to a percentage of the catch limit for the entire range of the stock recommended by the Scientific Committee (10.1421%); and

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<sup>37</sup> Objection of the Republic of Ecuador, pages 7-9.

<sup>38</sup> Procedural Directive No. 1, paragraph 2.1(c).

<sup>39</sup> See Supporting Material of the Organisation No 48, page 223 (CMM 01-2018, paragraph 10); and Objection of the Republic of Ecuador, page 7.

<sup>40</sup> Objection of the Republic of Ecuador, page 7.

<sup>41</sup> See Supporting Material of the Organisation, page 223 (CMM 01-2018, paragraphs 5 and 10) cf Objection of the Republic of Ecuador, page 7.

<sup>42</sup> Objection of the Republic of Ecuador, pages 7 and 8.

- An effect of this decision was that if the stock continued to rebuild, it would allow for increases in the catch limit to be distributed proportionately across the range of the stock (and not exclusively to the area in which the measure applies, as had been the case since 2015).

42. Therefore when the revised catch limit of 576,000 tonnes was applied to CMM 01-2018, this had the effect of setting aside 58,418 tonnes to accommodate for catch outside the area to which the measure applies.<sup>43</sup> Accordingly, in Australia's view, this difference of 58,418 tonnes or 10.1421% is not a 'reservation in the Convention' but rather properly characterised as a percentage of the overall catch limit for the stock that has been deliberately set aside by the Commission.

*(2) No justification has been provided for adjusting the set aside percentage*

43. In Australia's view, the following factors need to be taken into account in considering any adjustment of the set aside percentage.

44. First, as noted in the Preamble to CMM 01-2018, a primary purpose of the measure to ensure that catch of *Trachurus murphyi* is sustainable.<sup>44</sup> The 576,000 tonne catch limit takes into account stock in waters under the national jurisdiction(s) that are outside the area in which CMM 01-2018 applies. Accordingly, the cooperation between all relevant Commission Members, CNCs and relevant coastal States who have not provided their express consent to apply the total allowable catch in waters under their national jurisdiction is needed in order to ensure that catch of *Trachurus murphyi* in these two areas does not exceed the overall catch limit recommended by the Scientific Committee.

45. Members at the meeting of the Commission reached an agreement in CMM 01-2017 that formed the basis for such cooperation until 2021. This framework was applied in CMM 01-2018. In Australia's view, it may be difficult for the Review Panel to arrive at a similar agreement in the course of considering Ecuador's objection.

46. Second, Australia does not consider reducing the set aside percentage from 10.1421% to 9.2512% –as would be the effect of Ecuador's proposed alternate measure– is equivalent in effect to the decision in CMM 01-2018. It is unclear to Australia why it would be equitable to accommodate all, or part, of Ecuador's request for tonnage in Table 1 and percentage share of the catch limit in Table 2, by revising the percentage that has been set aside for catch outside the area to which the measure applies. Australia submits that no case has been made to justify why this area should bear the exclusive burden of accommodating the increased tonnage and percentage in Ecuador's proposals. In this regard, Australia's view is that the area outside the measure should not be

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<sup>43</sup> See Memorandum of the Organisation, paragraphs 73-78.

<sup>44</sup> Specifically, CMM 01-2018, preambular paragraph 6 affirms the Commission's 'commitment to rebuilding the stock of *Trachurus murphyi* and ensuring its long-term conservation and sustainable management in accordance with the objective of the Convention' see Supporting Material of the Organisation No 48, page 222.

adjusted if the Review Panel decides to accommodate some, or all, of Ecuador's proposed increases.