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DESPACHO VICEMINISTERIAL DE PESCA Y ACUICULTURA

"Decenio de la Igualdad de oportunidades para mujeres y hombres"  
"Año del Diálogo y la Reconciliación Nacional"

**OBJECTION RAISED BY THE REPUBLIC OF ECUADOR TO  
CMM 01-2018, CONSERVATION AND MANAGEMENT MEASURE FOR *Trachurus murphyi***

**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**

**WRITEN MEMORANDUM OF THE  
REPUBLIC OF PERU**

**15 MAY 2018**

Through this document, the Government of the Republic of Peru presents its position to the objection raised by the Republic of Ecuador, in conformity with paragraph 6 of annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, based on the elements presented by the Government of Ecuador.



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## I. BACKGROUND INFORMATION

1. The *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean* (here and after, the Convention) was adopted in November 2009, and entered into force on March 24th, 2012.
2. The South Pacific Regional Fisheries Management Organisation (SPRFMO) is an inter-governmental organization established by the “*Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*”, whose competence includes straddling fish stocks and highly migratory fish stocks in the area to which this Convention applies, which includes waters of the Pacific Ocean beyond areas of national jurisdiction. In this context, the SPRFMO is committed to the long-term conservation and sustainable use of the fishery resources of the South Pacific Ocean and in so doing safeguarding the marine ecosystems in which the resources occur. Currently, the SPRFMO Contracting Parties (Members) are: Australia, Republic of Chile, People's Republic of China, Cook Islands, Republic of Cuba, Republic of Ecuador, European Union, Kingdom of Denmark in respect of the Faroe Islands, Republic of Korea, New Zealand, Republic of Peru, Russian Federation, Chinese Taipei, The United States of America and Republic of Vanuatu; and, Cooperating non-Contracting Parties (CNCPS) are: Republic of Colombia, Curaçao, Republic of Liberia and Republic of Panama.
3. Peru has participated actively in the SPRFMO from its beginning in 2006 during the international consultative process resulting in the adoption of the Convention in 2009, being Peru its fifth signatory country; subsequently, Peru continue intervening diligently in the preparatory phase and after the entry into force of the Convention, first as Cooperating non-Contracting Party (CNCPS) and then as Contracting Party. Following this path, Peru approved its full incorporation to the Convention, treaty establishing the SPRFMO, through the Legislative Resolution N° 30386 ratified by the President of the Republic of Peru by the Supreme Decree N° 071-2015-RE, thus from January 21<sup>st</sup>, 2016 Peru became SPRFMO Contracting Party, with the right of voice and vote in any decision-making processes of the organization.
4. In the 5<sup>th</sup> Meeting of the SPRFMO Commission, held from 18 to 22 January 2017 in Adelaide, Australia, the CMM 01-2017 was adopted. Among others, with the adoption of this measure, the Commission established the maximum catch limit of jack mackerel in the area to which the Convention applies (443 000 ton), there was a consensus amongst Members and CNCPS not to exceed catches of jack mackerel by more than 493 000 ton throughout its whole distribution range, and two tables were accepted as integral parts of CMM 01-2017. Table 1 refers to the allocation in tons of the catch limits of jack mackerel in the area to which the Convention applies for Members and CNCPS participating in this fishery, corresponding to the year 2017; and, Table 2 refers to the percentages related to the maximum catch limit agreed for the whole distribution range to be allocated to Members and CNCPS allowed to participate in this fishery in the area to which the Convention applies. These percentages apply up to and including 2021, according to what was approved in 2017 and ratified in 2018.
5. In the 6th Meeting of the SPRFMO Commission, held from 30 January to 3 February 2018, in Lima, Peru, the updating of CMM 01-2017 as CMM 01-2018 was approved. Among others, this measure updated up to 2018 the following: (i) the agreement that catches of



jack mackerel should not exceed 576 000 ton in all its distribution range, following the recommendation of the 5th meeting of the SPRFMO Scientific Committee; (ii) the maximum total catch limit of jack mackerel in the area to which the Convention applies (517,852 ton); and, (iii) Table 1, referred to the allocation in tons of the maximum catch limit to each Member and CNCP authorized to participate in this fishery in the area to which the Convention applies for 2018, according to the distribution in percentages established in Table 2, already approved in 2017 with validity up to and including 2021.

## II. THE ADOPTION OF THE CMM 01-2018

6. During the 6th Annual Meeting of the SPRFMO Commission, the Contracting Parties analyzed the updated proposal of CMM 01-2018 (*Trachurus murphyi*), which: i) established that the total catch of jack mackerel in areas to which the Convention applies should be limited to 517 582 ton; ii) renewed the agreement of the Contracting Parties, in response to the recommendation of the Scientific Committee, that the total catch of the aforementioned resource throughout its distribution range should not exceed 576 000 tons; and, iii) updated the distribution in ton of the quota or catch limits of jack mackerel in the area to which the Convention applies according to the percentages in Table 2 of CMM 01-2017.
7. During the 6th Meeting of the Commission, the delegate of Ecuador expressed that his country did not attend the 5th Meeting of the Commission, which prevented Ecuador from participating in the discussion and determination of the percentages for the allocation of jack mackerel quotas, so they considered that the 0.2391% assigned does not allow them to participate actively in the jack mackerel fishery in area to which the Convention applies. Later in the meeting, they presented the conclusions of a feasibility study indicating that to develop a fishery for jack mackerel in area to which the Convention applies they would require at least 6 500 tones. In this sense, they requested the allocation of 6 500 tons starting in 2018, which would be equivalent to increasing their participation percentage from 0.2391% to 1.13%, suggesting that such increase should be taken from what they called the "reserve percentage" of the SPRFMO.
8. The delegation of Peru stated, among others, that Ecuador's request implied ignoring CMM 01-2017 in relation to how catch limits and allocation percentages were established (Table 2 of CMM 01-2017), pointing out that such a proposal did not correspond with the objective of updating the CMM as agreed by the Commission in 2017. It was recalled that the agreement reached in 2017 was the result of an intense and lengthy debate that culminated with the approval of Table 2, whose validity was agreed until 2021 inclusive. The delegation of Peru also stressed that the so called "surplus reserve" referred to in Ecuador's proposal did not exist, and was not contemplated in any document of the SPRFMO, and that according to the wording of the proposal it would seem to be confusing with the fraction of the total catch that the Commission is not allocating as it corresponds to the portion of the stock or stocks of jack mackerel found and that are fished or can be fished outside the area to which the Convention applies, in the waters under the national jurisdiction of coastal States. Which includes the distribution areas and the share of the straddling fishery resources over which the Commission has no functional competence. For this reason, it was pointed out that any initiative to change this or any other relevant aspect tending to increase the portion or the sum of portions of the total catch limit of jack mackerel to be caught in area to which the Convention applies in detriment of the portion that could be caught outside that area, including the Peruvian jurisdictional waters, would



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be unacceptable for Peru and may imply the need for a complete renegotiation of the agreement. Likewise, it was indicated that one way to make Ecuador's request viable would be for Ecuador to accept and give its express consent for the conservation and management measures adopted by the Commission to be applied to its national jurisdictional waters. With this, the Commission could allocate them a larger quota that would include in a single amount what Ecuador could catch both in the high seas, where the Commission has functional competence, and in its own national jurisdiction waters. This, however, would require the prior determination of what portion of the 10.1498%, outside of area to which the Convention applies (which in this case includes the waters under Chilean national jurisdiction with the express consent of Chile) in areas corresponding to Ecuador and Peru's national jurisdiction, would correspond to Peru and what percentage would correspond to Ecuador. Determination that is outside the authority of the Commission and shall be decided through bilateral negotiations between Peru and Ecuador, either directly or under the auspices of the SPRFMO if the two parties agree on it.

9. Other delegations expressed similar views to those of the delegation of Peru and, particularly, the delegation of Chile, that have tasked with preparing and proposing the update of CMM 01-2018, indicated its agreement and support to what was expressed by Peru. Confirming also that the agreement expressed in Table 2 of CMM 01-2017, valid until 2021 inclusive, which was repeated in the proposal of CMM 01-2018, had been the result of a debate process that took long time and effort.
10. The President of the Commission, after trying unsuccessfully to reach the consensus in the decision-making on the update of CMM 01-2018, applied what is established in the Convention, proceeding to vote on the proposal of CMM, which "shall be taken by a three-fourths majority of the members of the Commission". Therefore, he pointed out that, having 14 Members present, 11 votes were required to adopt the measure. The voting was carried out in accordance with the provisions of the text of the Convention, confirming the approval vote of Australia, Republic of Chile, People's Republic of China, Republic of Cuba, New Zealand, European Union, Kingdom of Denmark in reference to the Faroe Islands, Republic of Korea, Republic of Peru, Chinese Taipei, United States and Republic of Vanuatu and only the contrary vote of the Republic of Ecuador, after which the President of the Commission announced the adoption of CMM 01-2018 with an affirmative vote of 13 against 1.
11. The approved CMM 01-2018 establishes, among others, the maximum catch limit for jack mackerel in the area to which the Convention applies for 2018 at 517 582 ton and reports the agreement of the Parties not to exceed 576 000 ton of catch of this resource throughout its distribution range. Likewise, with this CMM, Table 1 of CMM 01-2017 was updated for 2018, referring to the allocation in ton of jack mackerel quotas or catch limits for each Member and each NCPC participating in this fishery in area to which the Convention applies, in accordance with the new maximum catch limits adopted (for the entire distribution range and for Area to which the Convention applies) at the 2018 meeting, and the percentages for distributing the catch limits approved at the meeting of the 2017 (as illustrated in Table 1 below).

**Table N° 1: Allocation in tons and percentages of the limit for the entire distribution range of the quotas or catch limits of jack mackerel in the area of application of the Convention of the SPRFMO 2018 (as adopted by the CMM 01-2018)**

Member or PCNC	Quota in the Convention area Table 1 CMM 01-2018	Percentage of the catch limit for the entire distribution range for 2018-2021 Table 2 CMM 01-2017 and CMM 01-2018*
	Ton	(%)
Chile	371,887	64.5638
China	36,563	6.3477
Cook Islands	0	0.0000
Cuba	1,285	0.2231
Ecuador (HS)	1,377	0.2391
European Union	35,186	6.1086
Faroe Islands	6,386	1.1087
Korea	7,385	1.2822
Peru (HS)	11,684	2.0284
Russian Federation	18,907	3.2825
Vanuatu	26,921	4.6738
<b>TOTAL</b>	<b>517,582</b>	

\* Table 2 was approved by the CMM 01-2017, this percentages shall apply up to 2021 inclusive.

Source: SPRFMO

Elaborated by: DGPARPA-DSE

### III. THE OBJECTION OF ECUADOR AGAINST CMM 01-2018

12. Through the Official Letter N ° MAP-2018-0594-O dated 28 March 2018, the Minister of Aquaculture and Fisheries of Ecuador sent to SPRFMO, a formal objection to CMM 01-2018, within the framework of literal (a), numeral (2) of Article 17 of the Convention, detailing the supporting arguments, which, in general terms, are aligned with the intervention made by the Ecuador delegation at the 6th Meeting of the SPRFMO Commission. Likewise, as part of its objection, includes a proposal to modify the CMM with respect to its Tables 1 and 2 (as detailed in Table No. 2 below) and appoints Mr. Rodrigo Arturo Polanco Zamora<sup>1</sup> as a member of the Review Panel on behalf of Ecuador.

<sup>1</sup> Subsequently, Ecuador appointed Dr. Cecilia Engler, of Chilean nationality.



**Table N° 2: Proposed modification to Tables 1 and 2 of CMM 01-2018 contained in the objection filed by Ecuador**

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

Member/ CNCP	Tonnage
Chile	371,887
China	36,563
Cook Islands	0
Cuba	1,285
Ecuador (HS)	6,500
European Union	35,186
Faroe Islands	6,386
Korea	7,385
Peru (HS)	11,684
Russian Federation	18,907
Vanuatu	26,921
<b>TOTAL</b>	<b>522,705</b>

**Table 2: Percentages<sup>4</sup> related to the catches referred to in paragraph 10**

Member/ CNCP	%
Chile	64.5638
China	6.3477
Cook Islands	0.0000
Cuba	0.2231
Ecuador (HS)	1.1300
European Union	6.1086
Faroe Islands	1.1087
Korea	1.2822
Peru (HS)	2.0284
Russian Federation	3.2825
Vanuatu	4.6738

<sup>4</sup> these percentages shall apply from 2018 to 2021 inclusive

Source: SPRFMO

Elaborated by: DGPARPA-DSE

13. In its objection, Ecuador intends to increase its percentage of participation in the jack mackerel fishery in the area to which the Convention applies from 0.2381% to 1.1300%, through the modification of the agreement reached by consensus in the 5th Meeting of the Commission, which established, through the approval of Table 2 of CMM 01-2017, the percentages of distribution of the participation limits in this fishery, valid up to and including 2021. The aforementioned claim is based on the results of a feasibility study that indicates, among others, that to develop a fishery in area to which the Convention applies with one vessel, Ecuador requires at least a quota of 6 500 ton of jack mackerel.
14. On the other hand, Ecuador indicates in its argumentation that the increase of the percentage required would not affect the percentages of SPRFMO Members but would come out from an alleged "surplus reserve" that the Commission would keep, suggesting that the existence of such a reserve would be recognized by SPRFMO. Although during the 6th meeting of the Commission it was explained that such reserve does not exist.

#### IV. THE POSITION OF PERU IN RELATION TO THE OBJECTION OF ECUADOR

15. It is noted that the claim of Ecuador to increase its participation quota in the jack mackerel fishery in the area to which the Convention applies by increasing the portion of the maximum total catch limit for the entire distribution range, which would be captured in the area of the application of the Convention, would lead to an increase of the total sum of the percentages already adopted by the Commission in 2017, valid up to and including



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2021. These adopted percentages for the area to which the Convention applies are those indicated in table 2 of CMM 01-2017 and CMM 01-2018 and they add 89.8579%, indirectly leaving 10.1421% to be captured in areas outside the area of the application of the Convention, where the Commission does not have functional competence and, in this case, correspond to the areas under national jurisdiction of Peru and Ecuador. Ecuador’s proposal would imply a reduction of the 10.1421% to 9.2512% in the percentage of jack mackerel to be caught outside the Convention area, which would affect the catching possibilities within waters under national jurisdiction adjacent to the area to which the Convention applies, which would be unacceptable for Peru since: a) it would imply that the SPRFMO will be determining limits or levels of participation in catches within areas under national jurisdiction, which would contravene the provisions of Article 5 of the Convention with respect to its area of application and Article 20 (4) (c) of the Convention; and, b) it would transfer to Peru, a coastal State with a well-established jack mackerel fishery, a disproportionate and arbitrary burden, which would be contrary to the spirit of the New York Agreement of 1995 (ref.: Art. 24 (2) (ac)) and the text of the Convention of the RFMO-PS (ref.: Art. 19 (2) (ac)).

16. It shall be noted that the SPRFMO Convention does not establish, define, or recognize the term “surplus reserve” nor its variants mentioned in Ecuador’s objection. This concept in which Ecuador intends to support its request for a larger percentage of participation in the high seas jack mackerel fishery is not contemplated either in the text of the Convention or in any of the agreements adopted by the Commission, the Law of the Sea<sup>2</sup> or in the New York Agreement of 1995<sup>3</sup>.
17. On this point, is necessary to clarify that, regardless of the hypotheses about the stock structure of jack mackerel that may still be under discussion within the Scientific Committee of the SPRFMO, the reality is that the jack mackerel is a straddling species that is distributed and can and is in fact captured both in areas under national jurisdiction of coastal States outside the Convention area, and in the adjacent high seas within the Convention area. Therefore, when deciding on the management of the jack mackerel in the high seas, the SPRFMO cannot go beyond its faculties and cannot ignore the rights of coastal States to sovereignly develop jack mackerel fishing activities within its national jurisdiction waters under their national regulatory framework. In this regard, the SPRFMO can only determine, when appropriate, catch limits within its the application scope of the Convention, in addition to assigning, under the criteria established for this purpose in Article 21 of the Convention, to each Member or CNCP of the Organization a quota or level of participation that can be effective only in the area of high seas, in the area to which the Convention applies, being able to extend this prerogative to adjacent areas under national jurisdiction only with the express consent of the coastal State that so determines.
18. Regarding the previous paragraph, it shall be noted that the allocation of quotas or catch limits in the jack mackerel fishery in the area to which the Convention applies has not only been made based on the criteria of “historical catches and past and present fishing

<sup>2</sup> United Nations Convention on the Law of the Sea (UNCLOS), adopted in New York, April 1982, open for subscription in December 1982 and in force since November 1994.

<sup>3</sup> Agreement on the Application of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted in New York, August 1995.



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patterns and practices in the Convention area” (Art. 21(1) (a) of the text of the Convention). Since the first Meeting of the Commission held in Auckland in 2013, historical catches have been considered, as well as fishing patterns and practices in the area to which this Convention applies, in addition to being taken into account, perhaps in a less explicit manner, the other nine criteria of Art. 21 (1), and whose form and level of compliance varies greatly among the Parties.

19. Some Members and PCNCs are able to fully satisfy all or most of these 10 criteria, while other Members and PCNCs only partially satisfy some of them. In this case, Ecuador call upon, in particular, only 2 of the 10 criteria of article 21 (1), those in subparagraphs (e) and (f) that refer to the aspirations and interests of developing States and Coastal States. It shall be noted that other developing States, as well as other Coastal States have and had expressed aspirations and interests similar to those expressed by Ecuador during the previous meetings of the Commission, and it is in consideration these requests that some Members and PCNCs without a jack mackerel fishing record in area to which this Convention applies (including Ecuador) have benefited from the allocation of limited catch quotas in the area to which this Convention applies. With participation quotas that have been allocated at the expenses of the participation quotas of other Members and PCNCs that had already been participating in the jack mackerel fishery in the area to which this Convention applies, which already had an assigned quota, and have seen their participation quotas reduced to accommodate these new entrants.
20. It is clear that any increase in the participation quota of one of the Parties will have as a consequence the proportional reduction in the participation quota of one or more of the Parties that have already been enjoying an assigned participation quota.
21. Other of the issues expressed by Ecuador both during the 6<sup>th</sup> meeting of the SPRFMO Commission and in its objection, is that they require that the SPRFMO allocates them at least a quota or catch limit of 6 500 ton of jack mackerel to start a fishery for this fishery resource in the high seas, in the area to which this Convention applies. However, without willing to enter into the debate on the soundness of the draft financial study that supports this request, it is noted that not having a larger quota is not an impediment to develop or expand a fishery in the area to which this Convention applies, since both CMM 01-2018 and the CMM's of jack mackerel of previous years contemplate the possibility that any Member or PCNC that wishes or needs to have access to, and use a catch limit higher than the one originally assigned may do so through the transfer from another Member or PCNC that is willing to transfer all or part of its right to reach the limit it has been allocated with for the current year. These same CMMs explain clearly the mechanisms to achieve this (ref.: paragraph 9 of CMM 01-2018), indicating that these transfers could be made operational until December 31 of each year, by means of a simple communication to the Secretariat of the SPRFMO.
22. As such, within the framework of the SPRFMO, from 2013 until March 2018, the Members and PCNCs of the SPRFMO have transferred among themselves quotas or catch limits of jack mackerel for a total of 119 379 ton (Table N° 3). This shows that when there is a real interest and the capacity to do so, the allocated quota is not a limitation to develop, expand or modify its own fishing activities within the scope of the SPRFMO.



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**Table N° 3: Summary of the transfers of the catch limits of jack mackerel carried out within the framework of the SPRFMO (2013-2018)**

Year	Tonnages of jack mackerel transferred
2013	2 100
2014	4 900
2015	1 350
2016	33 200
2017	51 887
2018*	25 942
<b>Total tonnages</b>	<b>119 379</b>

\* Updated up to march 2018.

Source: Sub secretary of Fishery of Chile

Elaborated by: DGPARPA-DSE

23. On the other hand, from the analysis of the quota transfers made by the Members and PCNCs since 2013 (Table N ° 4), it is noted that since it had a quota assigned to catch jack mackerel in the high seas in 2015, Ecuador has been transferring the whole of it to other Members of the SPRFMO (Chile), demonstrating full knowledge and familiarity with this mechanism. In addition, it shall be noted that on March 9, 2018, that is 19 days before submitting its objection to CMM 01-2018, Ecuador proceeded to transfer the whole jack mackerel catch quota of 1 377 ton it had assigned within the framework of CMM 01-2018, benefiting from it and implicitly recognizing its validity and applicability, to object it 19 days later.



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**Table N° 4: Transfers of the catch limits of jack mackerel carried out in the framework of the SPRFMO (2013-2018)**

Year	País cedente	Assigning country	Species	Transferred tonnages	Transfer date
2013	Vanuatu	Korea	Jack mackerel	1 500	2-Oct-13
2013	Vanuatu	Korea	Jack mackerel	600	-
2014	Vanuatu	Korea	Jack mackerel	500	5-Ago-14
2014	European Union	Chile	Jack mackerel	4 400	13-Nov-14
2015	Vanuatu	Corea	Jack mackerel	250	30-Ago-15
2015	Ecuador	Chile	Jack mackerel	1 100	03-sep-2015
2016	Ecuador	Chile	Jack mackerel	1 100	16-Jun-16
2016	European Union	Korea	Jack mackerel	2 000	16-Ago-16
2016	European Union	Chile	Jack mackerel	4 000	01-sep-2016
2016	Islas Faroe	European Union	Jack mackerel	5 100	06-sep-2016
2016	European Union	Chile	Jack mackerel	3 000	21-sep-2016
2016	Vanuatu	Chile	Jack mackerel	5 500	18-Oct-16
2016	European Union	Chile	Jack mackerel	5 000	19-Oct-16
2016	European Union	Chile	Jack mackerel	4 000	9-Nov-16
2016	Corea	Chile	Jack mackerel	0 500	23-Nov-16
2016	European Union	Chile	Jack mackerel	3 000	23-Nov-16
2017	Cuba	European Union	Jack mackerel	1 100	17-May-17
2017	Vanuatu	Chile	Jack mackerel	10 000	18-May-17
2017	Ecuador	Chile	Jack mackerel	1 179	29-May-17
2017	Vanuatu	Chile	Jack mackerel	5 000	10-Jul-17
2017	European Union	Chile	Jack mackerel	5 000	6-Jul-17
2017	European Union	Chile	Jack mackerel	5 000	6-Jul-17
2017	Vanuatu	Chile	Jack mackerel	3 000	20-Jul-17
2017	Vanuatu	Chile	Jack mackerel	3 042	9-Ago-17
2017	Vanuatu	Chile	Jack mackerel	2 000	17-Ago-17
2017	Faroe Island	European Union	Jack mackerel	5 466	12-sep-2017
2017	Korea	Chile	Jack mackerel	1 100	6-Nov-17
2017	Peru	Chile	Jack mackerel	3 500	17-Nov-17
2017	Peru	Chile	Jack mackerel	4 500	17-Nov-17
2017	Peru	European Union	Jack mackerel	2 000	16-Nov-17
2017	Korea	Chile	Jack mackerel	3 280	17-Nov-17
2018	Vanuatu	Chile	Jack mackerel	1 500	7-Mar-18
2018	Vanuatu	Chile	Jack mackerel	15 000	7-Mar-18
2018	Vanuatu	Chile	Jack mackerel	3 500	7-Mar-18
2018	Cuba	European Union	Jack mackerel	1 285	7-Mar-18
2018	Ecuador	Chile	Jack mackerel	1 377	9-Mar-18

\* Updated up to march 2018 .

Source: Subsecretary of Fishery of Chile

Elaborated by: DGPAPPA-DSE

24. It is also noted that the objection of Ecuador is mainly oriented to try to modify its percentage of participation in the jack mackerel fishery in the high seas, which was established through the percentages in Table 2 of CMM 01-2017, adopted in January 2017 valid up to and including 2021. It should be noted that CMM 01-2017 and the percentages of distribution in Table 2 were approved during the 5th annual meeting of the Commission of the SPRFMO held from January 18 to 22, 2017, in Adelaide, Australia, noting that on that



occasion Ecuador didn't present any objection to CMM 01-2017 within the deadlines established in numeral 2 of Article 17 of the Convention.

25. In this sense, since the CMM 01-2018 of the SPRFMO only updates specific information of CMM 01-2017 as agreed on that opportunity and does not modify in any sense the distribution percentages of the quota allocation of jack mackerel approved with CMM 01-2017 (and specified in its Table 2), having remained as agreed by the Commission in 2017, we consider that the objection presented by Ecuador in fact constitutes an objection to what was agreed with the CMM 01-2017. In this regard, we consider and propose that this objection has been submitted outside the deadline established in Article 17 of the Convention.

## V. LEGAL CONSIDERATIONS

26. Ecuador bases its objection referring to Article 17(2)(c) of the Convention, which states that the only admissible reasons to raise an objection are that the decision unjustifiably discriminates in form or in fact against the member of the Commission, or that such decision is inconsistent with the provisions of the Convention or other relevant provisions of international law as reflected in the United Nations Convention on the Law of the Sea of 1982 or the UN Fish Stocks Agreement.
27. In relation to the first assumption stated above, which is, that the decision objected assumes or implies an unjustifiable discrimination in form or in fact against any Member of the Commission, it should be pointed out that Ecuador has not demonstrated the existence of an action or omission that configures or represent a differentiated or unequal treatment, that is to say, a discriminatory treatment relative to the other SPRFMO members. The percentages related to the jack mackerel catch established in the CMM 01-2017 and CMM 01-2018, had not change, remaining unchanged, in compliance and respect for the Agreements adopted in the 5<sup>th</sup> Meeting of the Commission held in Adelaide, Australia, as well as in consideration of the negotiations held by the members since 2013. The decision adopted by the Commission, which is matter of the Ecuadorian objection, can't be typified, neither as a matter of form nor fact, as a discriminatory act.
28. The increase of the quota allocated to Members, corresponded to the increase of the total allowable catch of such fishery in the area of which the Convention is applied. Such increase was adopted in accordance to the decision-making procedure stated in the Article 16 of the Convention, which is a substantial provision, as it is a Conservation and Management Measure (CMM), it required a majority of three quarters of the Commission Members, being approved by 13 votes of 14 attending Members. Such quota increase came formally from the recommendation of the Scientific Committee, after their annual meeting held in September 2017 in Shanghai, China, in which an Ecuadorian delegation participated actively.
29. *Contrario sensu*, it could be conceptualized that the objection presented by Ecuador constitutes an act of discrimination against other Convention Members, meanwhile the alternative proposal presented seeks to increase its catch capacity to 6 500 ton in 2018 (5 123 ton in addition to the current quota). The other Members would be left with the quota allocated through CMM 01-2018. Conforming to the expressly stipulated, an eventual



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change of quota must inevitably be subject to the substantive and procedural provisions explicitly referred in the article 20 of the Convention related to Conservation and Management Measures. In this context, it is worth mentioning the principle of good faith to which the paragraph 5 of article 24 the Convention strictly sets Members obligations.

30. More importantly, it is appropriate and necessary to refer to the alleged “surplus reserve”, on the basis of the Scientific Committee recommendation, issued in the Report of its meeting of September 2017, which –on its own merit- recommends a total allowable catch of 576 000 ton for all the jack mackerel in its distribution range on which is based the catch limit allowable of 517 582 ton for the area on which the Convention applies, through the CMM 01-2018. In effect, the Scientific Committee, taking into account the precautionary approach and given that the current stock of jack mackerel is subject to a recovery plan, recommended the Commission to keep in 2018 the allowable catch for all the distribution range in 576 000 ton, such recommendation is welcomed by the Commission as it is specified in the paragraph 10 of the CMM 01-2017; and, updated Table 1 referred to the catch quota for each Member and CNCP participant in the area of which the Convention applies, according to the distribution percentages of catch limits approved in the 5<sup>th</sup> Meeting of the Commission in 2017, as it is indicated in the Table 2 of CMM 01-2017 and in its reproduced without further modification in CMM 01-2018.
31. Ecuador pretends to increase its current percentage share of 0.238% to 1.130%, basing its position in a so called feasibility study, which, as a result, sets a requirement of a minimum annual catch of jack mackerel of no less than 6 500 ton. According to Ecuador, such percentage increase does not affect the rest of the Members since it would come from the “surplus reserve”, whose existence was clearly denied during the 6<sup>th</sup> Meeting of the Commission; and, additionally, it is not provided for in UNCLOS, the New York Agreement and far less in the Convention, in other words, it is not provided for in either of the three international instruments called by Ecuador on which bases its objection.
32. In addition, it should be added, in application of the article 10 of the Convention, the Scientific Committee has, among others, the role of providing advice and recommendations to the Commission and its subsidiary bodies based on scientific assessments of the state of fishery resources including, in cooperation with the Parties, straddling resources presented in all its distribution range, as for the case of jack mackerel includes the Convention Area and areas under national jurisdiction. In this sense, it is wise to remember what is presented in Table 2 of CMM-01-2017, valid up to and including 2021, was repeated and ratified in CMM-01-2018, recognizing the result of a long and dedicated debating process originated in the Scientific Committee and concluded through the Commission approval.
33. Concerning to the current system of quota allocation, the Ecuadorian objection specifies that is unjustifiable and discriminatory “since only the criterion of historical catches is being considered, which disadvantages small and developing nations, such Ecuador that does not have a record in the fishing of jack mackerel”.
34. In this regard, it is reasonable to point out that the allocation of quotas or catch limits of jack mackerel between SPRFMO Members and CNCPs is made on the basis of the application of ten criteria established in the paragraph 1 of article 21 of the Convention.
35. Ecuador bases its objection claiming that the quota or catch limit allowed to each Party basically considers the historical catches and past and present fishing patterns in the



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Convention area (article 21(1)(a)), which creates a discriminatory and unjustifiable situation in the distribution, for which proposes to take into account as criteria two of the ten criteria of article 21(1), specifically referring to (e) referred to “the fisheries development aspirations and interests of developing States in particular small island developing States”; and, (f) related to “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”.

36. However, it is assumed that the Commission has considered both criteria for the quota allocation of jack mackerel in the area for which the Convention is applied, thus allocating catch limits to developing coastal States that have expressed their interests and aspirations to participate in this fishery. As a result of which some Members and CNCs without historical catches in the Convention area, like Ecuador, were benefited with quota allocations, being conferred that right at the expense of other Members and CNCs that were already participating in the jack mackerel fishery in the area for which the Convention applies.
37. Referring to both criteria called by Ecuador, Peru estimates that, notwithstanding the foregoing and according to the article 20 of the Convention, the CMM adopted by the Commission must be aimed to guarantee the long-term sustainable use of the fishery resource and to promote the objective of its responsible use; as well as to prevent or eliminate overfishing and overcapacity to ensure that fishing effort levels do not exceed compatible values of sustainable exploitation of resources.
38. As stated in paragraph 3 of article 20, in determining the total allowable catch or total allowable fishing effort for any fishery resource, the Commission shall take into account the state and stage of development of the resource; relevant ecological and biological factors limiting the nature of fishery resources; relevant environmental factors, including trophic interactions which may have an effect upon the fishery resource and non-target and associated or dependent species; among others.
39. It is stressed once again that the jack mackerel stock in all its distribution range as well as in the Convention area is in a recovery status, so the measures adopted since the entry into force of the SPRFMO Convention have taken into account its overfished situation and risk of extinction. It is worth mentioning that the recovery is being achieved, to a large extent, due to the self-imposed restrictions of those who are engaged in the fishery for jack mackerel and have accepted to limit their own catches in the whole distribution range of the species, including the area to which the Convention applies beyond areas of coastal states jurisdiction. All with the aim to contribute to the recovery, taking into account the maximum sustainable yield and through a fisheries management established in advance on the basis of certain criteria that with regards to the area to which the Convention applies, usually considers rights, historic catch and patterns as well as other criteria that, in relation to the SPRFMO, are specified in article 21(1) of the Convention.
40. The Ecuadorian objection is also based in the article 3 of the Convention, referred to the principles and approaches provided for the application of conservation and management; and points out that “in giving effect the objective of the Convention and carrying out decision making”, the Contracting Parties, the Commission and subsidiary bodies shall apply: “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



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of developing State coastal communities, shall be recognized”, as well as the recognition of special requirement of developing states in article 19 of the Convention.

41. The objective of the Convention, as stated in article 2, is to ensure the long-term conservation and sustainable use of fishery resources through the application of the precautionary approach and an ecosystem approach to safeguard the marine ecosystems in which these resources occur. The reference made by Ecuador, in relation to the interests and special requirements of developing States, while is a principle to be considered in the adoption of a decision related to conservation and management, it is not the only principle, given that article 21 of the Convention considers other nine additional criteria to be considered, such as: transparent, accountable and inclusive decisions taking into account best international practices; sustainable use of fishery resources; prevention or elimination of overfishing and excess fishing capacity; collection, verification, reporting and sharing data on fishing; the use of best scientific and technical information available; cooperation and coordination among Contracting Parties; protection of marine ecosystems; effective compliance with conservation and management measures; and, minimizing pollution and waste originating from fishing vessels.
42. Ecuadorian position in this specific aspect remind us that the decision-making process for the conservation and management of fishery resources is multidimensional, which takes into account the analysis of several features of biological, environmental, socioeconomic, scientific and juridical nature, among others that have as a purpose the sustainability of the fishery resource. If it is added the precautionary approach, in line with the Code of Conduct for Responsible Fisheries and the relevant rules and principles of International Fisheries Law, it has to be concluded that the current values and principles of marine fishing favors the protection of biotic resources over State interests opposing interests. It is in this context that are constituted, organized and act Regional Fisheries Management Organizations.
43. Furthermore, the Ecuadorian objection alludes other binding international regulatory instruments, such as the United Nations Convention on the Law of the Sea (UNCLOS), mentioning specifically article 119(1)(a) of Section 2 related to Conservation and Management of the living resources of the high seas of Part VII related to High Seas: “In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub regional, regional or global”
44. The above-quoted paragraph refers to conservation measures of living resources in the high seas, in the understanding that it alludes to discrete populations or purely high seas fish stocks, since when referring to straddling fish stocks as in the case of jack mackerel, they are specifically regulated by article 63 (2) of UNCLOS, extended by the UN Fish Stocks Agreement of 1995 (New York Agreement) so that article 119(1)(a) of UNCLOS does not support Ecuadorian claim.
45. That is also what is provided and determined in article (116)(b) of UNCLOS referring that all States have the right for their nationals to engage in fishing on the high seas subject to the



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rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, to say that straddling species (jack mackerel), are subject to a differential treatment that is not ruled by the provisions of Part VII of UNCLOS related to High Seas, being a special regime later complemented by the New York Agreement in 1995.

46. Proof thereof is the fact that according to what is established in article 2, the objective of the Agreement of 1995 is “to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks” through the implementation of general principles related to the adoption con conservation and management measures based on best scientific available and with the aim to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global; as well as the application of the precautionary approach, the compatibility of conservation and management measures, the international cooperation, the establishment of subregional or regional fisheries management organization or arrangement, the collection and disseminations of information and cooperation in scientific research, among others.
47. Even though there is an express recognition of the special needs of developing States in relation to the conservation and managements of species, that recognitions is limited to the cooperation required to: build and increase capacities of countries in the conservation and management of their own fisheries; provide technical assistance so that those countries can have a participation in the capture of those fisheries in the high seas; and to facilitate the participation of developing States in subregional or regional fisheries management organization or arrangement.

## VI. CONCLUSIONS

48. The objection to the CMM 01-2018 of SPRFMO presented by Ecuador proposes the modification of the table (Table 2) referred to percentages for the allocation quotas or limits in the participation of the Jack Mackerel fishery in the area to which the Convention applies, established by SPRFMO through CMM 01-2017 valid up to and including 2021. To solve its objection, Ecuador proposes an increase of its percentage in the quota allocation or catch limit of Jack Mackerel in the high seas from 0.2391% to 1.1300%, which tons is equivalent to an increase in its participation in the Jack Mackerel fishery from 1 377 ton to 6 500 ton. In other words, Ecuador proposes an increase of more than 372% in their percentage participation approved in CMM 01-2017 as well as in the amount in tons approved in CMM 01-2018, an increase that, if adopted, would need to be given at the expenses of participation quota already assigned to other Members or participants in this fishery. This was only one of the reasons why this original request was rejected during the 6th Meeting of the Commission and it is suggested that, for the same reason, the objection of Ecuador may not be accepted by the Panel.
49. It can be seen that Ecuador’s objection is principally oriented to increase its percentage of participation in the allocation of Jack Mackerel quota in high seas. That is, it is oriented to modify an agreement established by the Commission in CMM 01-2017 approved in the 5th Meeting of the Commission (January 2017). In this sense, it is considered that the



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objection missed the deadline of paragraph 2 of article 17 of the Convention, as it has not been presented within 60 days of the date of notification, after the end of the 5th Annual Meeting of the SPRFMO Commission. This is another reason why it is proposed that the objection of Ecuador not be accepted by the Review Panel.

50. Furthermore, it must be said that the percentages of quota allocation or catch limits of Jack Mackerel established in Table 2 of CMM 01-2017, repeated without changes in Table 2 of CMM 01-2018 were agreed by consensus in the 5th Annual Meeting of the SPRFMO Commission in 2017 and was a result of a long negotiation process starting in the 1st Meeting in 2013, in which Ecuador has been participating. Therefore, this is another reason why the objection of Ecuador should not be accepted by the Review Panel.
51. Notwithstanding the afore mentioned, Ecuador proposes that to solve its objection, that the SPRFMO adopts a measure or may be obligated to adopt a measure that would result in the reduction from 10.1421% to 9.2512% in the percentage of total catch that could be caught beyond the area to which the Convention applies, an action that would contravene the Convention and exceed Convention faculties and prerogatives, limiting catches in areas under national jurisdiction (beyond the area of which the Convention applies), and affecting the rights of coastal States that have not provided their express consent for the Commission to adopt fisheries management measures applicable in their national jurisdictional waters. Peru has not provided its express consent to allow that the fisheries management measures adopted by the Commission be applied in its national jurisdictional waters, therefore Peru rejects the proposal of Ecuador since it adversely affects Peruvian rights and fisheries interest in its own jurisdictional waters, establishing a negative precedent regarding the rights, obligations and prerogatives of SPRFMO and coastal States in relation to conservation and management of straddling fish stocks, contrary the spirit of the Convention as well as to relevant provisions of UNCLOS and the New York Agreement of 1995. This is another reason why it is proposed that the objection of Ecuador not be accepted by the Review Panel.
52. The objection of Ecuador is considered unviable since it has not been demonstrated the existence of an action or omission that constitutes a discriminatory act with respect to the Jack Mackerel quota allocated to Members or CNCs in the area on which the Convention applies, through CMM 01-2018, which recognizes the percentages of participation in the Jack Mackerel stock fishery approved by CMM 01-2017 and in consideration to the negotiations held since 2013 by the Convention Parties.
53. The increase in Jack Mackerel quota allocated to SPRFMO Members and CNCs established by CMM 01-2018 was adopted pursuant the decision-making process stated in article 16 of the Convention, which provides that decisions on questions of substance shall be taken by a three-fourths majority of the members of the Commission. The CMM afore mentioned was adopted by 13 votes out of 14.
54. The objection of Ecuador could constitute a discriminatory act against the other Members of the Convention, since the alternative measure being proposed could increase the Ecuadorian catch limit in 2018, without other Members being able to increase theirs. In addition, their proposal would not be subject to the substantive and adjective procedural provisions set forth in article 20 of the Convention, referred to conservation and management measures.



55. The objection of Ecuador invokes a so called SPRFMO “surplus reserve” of the SPRFMO, part of which could contribute to increase their percentage of participation in the Jack Mackerel fishery in the high seas. However, it is noted that neither the term nor the concept of what they call “surplus reserve” is contemplated either in the Convention or in any of the agreements adopted by the Commission, nor it is contemplated in other international mechanisms such as UNCLOS<sup>4</sup> and New York Agreement of 1995<sup>5</sup>. It should be clarified that, as already done during the 6<sup>th</sup> Meeting of the Commission and all the other Parties understood and agreed, the amount and percentage that are not reflected in Tables 1 and 2 of CMM 01-2017 and CMM 01-2018 do not constitute a surplus and are not explicitly shown in those tables no because they correspond to what is captured or could be captured outside the area to which the Convention applies. That is, in areas under national jurisdiction of coastal States adjacent to the area of application of the Convention. Where the Commission has no competence and could not have it unless the coastal State gives its express consent for the Commission's measures to be applied also in its jurisdictional waters (ref: Art 4(2) (a) of the Convention). It is therefore considered that the use of this alleged “surplus reserve” has no basis and does not support, and rather weakens and detracts from the Ecuadorian request. An aspect that it is suggested should also be taken into account by the Review Panel in the evaluation of the objection presented by Ecuador.
56. Considering the straddling characteristic of Jack Mackerel, the Convention recognizes the rights of coastal States to develop their fishing activities in a sovereign manner within its national jurisdictional waters, and recognizes that the SPRFMO Commission has no competence to decide on, or limit directly or indirectly fishing activities on the Jack Mackerel that take place in waters under the national jurisdiction of coastal States, beyond the area to which the Convention applies, unless coastal States involved give their express consent to do so. This aspect should also be taken seriously into account when evaluating the viability and eventual procedural and legal implications of the petition contained in Ecuador’s objection.
57. In this regard, the SPRFMO Commission established the maximum catch limit of Jack Mackerel in the area to which the Convention applies; from there, the Commission allocates the portions of said catch limit that each of its Members and CNCs authorized to participate in this fishery may catch in the area to which the Convention applies, that, if applicable, may be extended to waters under national jurisdiction provided that there is the express consent of the coastal State involved. During the meetings of the Commission, the distribution of these allocations between the Parties is made taking into account the ten groups criteria established in the Convention (article 21), and the extent in which any of the Parties satisfy the ten groups of criteria. Therefore, any consideration that could be made in the petition in Ecuador’s objection would have to be made in the light of an equally detailed examination of the level to which these 10 groups of criteria are satisfied not only by Ecuador, but also by for all the other Parties participating in the Jack Mackerel

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<sup>4</sup> United Nations Convention on the Law of the Sea (UNCLOS), adopted in New York in April 1982, open for signature in December 1982 and in force since November 1994

<sup>5</sup> United Nations 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 (in force as from 11 December 2001)



fishery, who may be harmed and discriminated against by the request for a larger quota from Ecuador and by eventual annulment of the agreements reached with CMM 01-2017.

58. Jack Mackerel is a renewable but limited natural resource that is in a recovery phase and its recovery is being achieved largely thanks to the imposed (self-imposed) restrictions between those who have been fishing this resource and have agreed to limit and reduce their catches. It is understood that each of the Parties has agreed to limit and reduce their catches precisely in order to contribute to the recovery of the population or populations of jack mackerel throughout its distribution range with the expectation of being able to benefit from larger future catches, as this fishery resource recovers. It should be noted that when negotiating quotas or catch limits for jack mackerel, what is being negotiated is the distribution of the rights to use this renewable but limited, which is already being fully used at the maximum permissible level by multiple users. Where each user has a share in the catches expressed in tons and percentages of the total, with defined limits that in a well-managed fishery are established or tried to be established with due anticipation based on certain criteria, which usually take into consideration the historic rights, catches and practices, as well as other criteria that, in the case of the SPRFMO, include the 10 subparagraphs of Art. 21 (1) of the Text of the Convention. Therefore, it is suggested that when examining Ecuador's objection due consideration be given to the impact on those who have a proven participation in the fishery and in the research, the recovery and the conservation efforts of the jack mackerel, as well as the impact on the legal certainty and validity of past and future agreements.
59. The jack mackerel CMMs of the SPRFMO contemplate that the Members and CNCs authorized to participate in the jack mackerel fishery in the area of application of the Convention may transfer each year part or all of their allocated quota, through a simple mechanism that facilitates and that besides the limit of the allocated quota, doesn't impose other limits or requirements on the quota transfers between Members and CNCs that are authorized to operate in the jack mackerel fishery in the area of application of the Convention. In fact, in the period between 2013-2018 (March) the effective transfer of jack mackerel quotas amounted to 119 379 ton (as shown in Tables N ° 3 and 4 above). Ecuador consecutively has transferred to Chile the total of its assigned quota, as detailed in Table 5 below. Therefore, the possibility of using this transfer mechanism in the opposite direction, that is consider turning from being a transferring State into becoming a receiving State, may be suggested if Ecuador would have a real interest and capacity to develop its own jack mackerel fishery in the area of application of the Convention, Noting that the process for this is extremely simple and would allow a further increase in their quota of participation in this fishery without it implying a modification of the specific CMM for jack mackerel.

**Table N° 5: Allocations and transfers of catch limits in the area to which the SPRFMO Convention applies made by Ecuador between 2013 and 2018**

Year	Quota allocated (Ton)	Quota transferred (Ton)
2013	0	n/a
2014	0	n/a
2015	1 100	1 100
2016	1 100	1 100
2017	1 179	1 179
2018*	1 377	1 377
<b>Total</b>	<b>4 756</b>	<b>4 756</b>

\* March 2018.

Spource: Fisheries Department of Chile

Elaboration: Produce-Peru

60. It is worth mentioning that Ecuador, by making effective the transfer of the catch limit of 1 377 ton allocated according to CMM 01-2018, accepted explicitly the validity of that CMM, so it is considered contradictory and legally questionable that a measure is objected after having made full use of the benefit granted by that same measure.
61. There is no evidence of inconsistency between the provisions of the Convention, UNCLOS and the New York Agreement of 1995, since in relation to needs and interest of developing States and Coastal States, those instruments note that the decision-making process for conservation and management of fisheries resources is multidimensional, which requires an analysis of various factors of biological, environmental, ecological, socioeconomic, scientific and legal matters, among others, that have the purpose of the sustainability of the fishery resource.

Considering the factual and legal reasons explained above, the Government of Peru considers viable to submit this Memorandum for the consideration of the Review Panel, pursuant to the provisions of numeral 6 of Annex II of Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean.

#### VII. PERUVIAN REQUEST

62. In the light of the provisions of paragraph 6 of Annex II of the Convention, the Government of the Republic of Peru request the Review Panel the opportunity to be heard in the Oral Hearing in order to present the Peruvian arguments related to the objection of the Republic of Ecuador.