

PCA Case No. 2023-33

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 RUSSIAN FEDERATION TO A DECISION OF THE
COMMISSION OF THE SOUTH PACIFIC REGIONAL FISHERIES MANAGEMENT
ORGANISATION (CMM 01-2023)**

Findings and Recommendations of the Review Panel

1 July 2023

Review Panel:

Prof. Bernard H. Oxman (Chair)
Dr. Erik J. Molenaar
Ms. Olga Sedykh

Registrar:

Julian Bordaçahar
Permanent Court of Arbitration

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GLOSSARY OF 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	The review panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean in 2013 to examine the Russian Federation's objection (PCA Case No. 2013-14)
2013 Review Panel Findings and Recommendations	Findings and Recommendations on the Objection by the Russian Federation dated 5 July 2013 (PCA Case No. 2013-14)
2018 Review Panel	The review panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean in 2018 to examine the Republic of Ecuador's objection (PCA Case No. 2018-13)
Applicable Area	The Convention Area and areas under Chile's national jurisdiction (from 2013 onwards) and Ecuador's national jurisdiction (from 2020 onwards)
Chile	Republic of Chile
Chile Memorandum	Memorandum of Chile dated 14 June 2023
China	People's Republic of China
Chinese Taipei Memorandum	Memorandum of Chinese Taipei dated 14 June 2023
CMM	Conservation and Management Measure
CMM 01-2023	Conservation and Management Measure No. 01-2023 adopted by the Commission in its 11 th (2023) Annual Commission Meeting held between 13-17 February 2023
CNCs	Cooperating Non-Contracting Parties
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
CTC	Compliance and Technical Committee
Ecuador	Republic of Ecuador

EEZ	Exclusive economic zone
EU Memorandum	Memorandum of the European Union dated 14 June 2023
Executive Secretary	Executive Secretary of the Organisation
Korea	Republic of Korea
Members	Members of the Commission of the South Pacific Regional Fisheries Management Organisation
MSY	Maximum sustainable yield
New Zealand Memorandum	Memorandum of New Zealand dated 14 June 2023
Organisation or SPRFMO	South Pacific Regional Fisheries Management Organisation, established by Article 6 of the Convention
Organisation Information Paper	Written information, documents, and materials of the Organisation dated 8 June 2023
Organisation Response	Response of the Organisation to the Review Panel's request of 20 June 2023 dated 22 June 2023
Participants	The Organisation and Members taking part in these Review Panel proceedings
PCA	Permanent Court of Arbitration
Peru	Republic of Peru
Peru Memorandum	Memorandum of Peru dated 14 June 2023
Review Panel	The Review Panel established under the Convention on 17 May 2023 (changes in membership indicated herein) (PCA Case No. 2023-33)
RFMO/As	Regional fisheries management organisations or arrangements
Russia	Russian Federation
Russia's Objection	The objection, in respect of established shares in the catch limit of <i>Trachurus murphyi</i> in 2023 as specified in CMM 01-2023, set forth in Russia's letter of 10 April 2023 to the Executive Secretary of the Organisation
Russia Memorandum	Memorandum of the Russian Federation dated 8 June 2023
Russia Reply	Written comments of the Russian Federation on the Organisation Information Paper and memoranda filed by other Members dated 20 June 2023
Scientific Committee	Scientific Committee as defined in the Convention
Secretariat	Secretariat as defined in the Convention
TAC	Total allowable catch
TAC (Resource)	The total allowable catch throughout the range of the <i>Trachurus murphyi</i> fishery resource

TAC (Applicable Area)	The total allowable catch for <i>Trachurus murphyi</i> within the Applicable Area
Vanuatu	Republic of Vanuatu
Working Group	Working group chaired by Mr. Michael Brakke (United States of America) established during the Commission's 11 th (2023) Annual Commission Meeting held between 13-17 February 2023
Working Paper	Proposal of the Chairperson of the Commission (COMM 11 – WP24_rev1, Organisation Supporting Material No. 45)

I. INTRODUCTION

1. This review panel (“**Review Panel**”) was established on 17 May 2023 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 (“**Convention**”). Subsequent changes in the Review Panel’s membership and mandate are described below.
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 by the Russian Federation (“**Russia**”) to CMM 01-2023 (“**Russia’s Objection**”), the Review Panel hereby transmits to the Executive Secretary (“**Executive Secretary**”) of the South Pacific Regional Fisheries Management Organisation (“**SPRFMO**” or “**Organisation**”) its findings and recommendations pursuant to Article 17(5)(e) and Annex II, paragraph 9 to the Convention.

II. PROCEDURAL HISTORY

1. CMM 01-2023

3. At the 11th (2023) Annual Commission Meeting in Manta, Republic of Ecuador (“**Ecuador**”) from 13 to 17 February 2023, the Commission of the South Pacific Regional Fisheries Management Organisation (“**Commission**”) considered and adopted by a vote of 13 to 3 a Conservation and Management Measure (“**CMM**”) for *Trachurus murphyi* (“**CMM 01-2023**”).

2. Russia’s and China’s Objections

4. By letter dated 10 April 2023, Russia presented an objection to CMM 01-2023 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, Russia objected to the determination of its share in the total allowable catch (“**TAC**”) of *Trachurus murphyi* in 2023 as specified in paragraphs 4 and 9, and Tables 1 and 2 of CMM 01-2023.
5. By letter dated 20 April 2023, the People’s Republic of China (“**China**”) presented its objection to CMM 01-2023 pursuant to Article 17(2)(a) of the Convention. Similar to Russia’s Objection, China objected to the determination of its share in the TAC of *Trachurus murphyi* in 2023 as specified in paragraphs 4 and 9, and Tables 1 and 2 of CMM 01-2023.

3. Constitution of the Review Panel

6. Pursuant to Article 17(5)(c) of the Convention, if two or more Members present objections based on the same grounds, those objections shall be dealt with by the same review panel, which shall have the membership specified in paragraph 2 of Annex II to the Convention. Russia and China agreed to the constitution of a five-member review panel in accordance with paragraph 2 of Annex II to the Convention.
7. By letter dated 26 April 2023, Russia appointed Ms. Olga Sedykh as a member of the Review Panel. On 27 April 2023, the Chairperson of the Commission appointed Dr. Cecilia Engler and

Dr. Erik J. Molenaar as members of the Review Panel. On 13 May 2023, China appointed Professor Shuolin Huang as a member of the Review Panel. On 17 May 2023, in accordance with paragraph 2(b) of Annex II to the Convention, Professor Bernard H. Oxman was appointed as the fifth member and chair of the Review Panel by agreement between Russia, China and the Chairperson of the Commission. The Review Panel was therefore established on 17 May 2023.

8. By letter dated 17 May 2023, the Executive Secretary informed Members that the Permanent Court of Arbitration (“PCA”) in The Hague, the Netherlands would act as Registry to the Review Panel in the proceedings.
9. On 23 May 2023, Professor Shuolin Huang advised the PCA of his withdrawal as a member of the Review Panel.
10. On the same day, the PCA, under the instructions of the chair of the Review Panel, advised Russia, China, and the Commission of Professor Huang’s resignation, invited China to make a replacement appointment as soon as possible, and invited Russia and China to provide comments on certain administrative matters, including potential hearing dates.
11. On 24 May 2023, in accordance with paragraph 3 of Annex II to the Convention, China appointed Professor Jianye Tang as a member of the Review Panel.
12. On 26 May 2023, Russia submitted comments on the potential hearing dates indicated in the PCA’s letter of 23 May 2023, which were thereafter revised by the Review Panel in light of those comments.

4. Issuance of Procedural Directive No. 1

13. On 29 May 2023, the Review Panel issued Procedural Directive No. 1, including the rules of procedure governing the proceedings and a Procedural Timetable in which the Review Panel fixed the time limits for written submissions from Russia, China, the Organisation, and other Members of the Commission, and scheduled the hearing for 26 June 2023 (with 27 June 2023 held in reserve) at the Peace Palace in The Hague, the Netherlands.
14. On the same day, the Review Panel requested Members to provide any comments, by 31 May 2023, on the Review Panel’s decision to schedule the hearing later than the time indicated in paragraph 5 of Annex II to the Convention, and immediately prior to its deliberations. Members and the Organisation were also provided with copies of the Review Panel members’ signed declarations of independence and impartiality.
15. By 31 May 2023, no comments were received from Members or the Organisation regarding the hearing dates fixed by the Review Panel.

5. China’s Withdrawal of its Objection

16. By letter dated 2 June 2023, China withdrew its objection to CMM 01-2023.

17. By letter dated 5 June 2023, the Review Panel requested Russia and the Organisation to consult and to inform the Review Panel as soon as possible whether, taking into account paragraph 1 of Annex II to the Convention, the proceedings should continue with three members of the Review Panel and, if so, which of the two members appointed by the Chairperson of the Commission would continue to serve along with the member appointed by Russia and the chair of the Review Panel.
18. In the same letter, the Review Panel requested the PCA “to prepare an accounting of expenses attributable to these proceedings that were incurred prior to or in connection with the withdrawal of the People’s Republic of China’s Objection, for purposes of allocation of those expenses to the People’s Republic of China, the Russian Federation, and the Organisation in accordance with the Convention”.
19. On 6 June 2023, the Executive Secretary replied to the PCA that the Chairperson of the Commission and Russia had agreed that since there was only one objection remaining, the Review Panel should consist of three members, namely Professor Bernard H. Oxman (Chair), Ms. Olga Sedykh, and Dr. Erik J. Molenaar, and further indicated that this entailed no change to the timeline.
20. On 7 June 2023, the Review Panel rendered its Final Decision of the Review Panel as Comprised of Five Members, deciding (i) that the expenses of the Review Panel attributable in whole or in part to the work of the Review Panel prior to the adoption of this decision shall be borne by China, Russia, and the Organisation as provided in Annex II, paragraph 7, of the Convention; and (ii) that with only the objection from Russia before it, it would henceforth be comprised of three members as indicated in the aforementioned reply, namely Professor Bernard H. Oxman (Chair), Ms. Olga Sedykh, and Dr. Erik J. Molenaar.

6. Issuance of Procedural Directive No. 2

21. Also on 7 June 2023, the Review Panel issued its Procedural Directive No. 2, which adopted the same Procedural Timetable as contained in Procedural Directive No. 1 and included the following instructions regarding the content of written submissions from Russia, the Organisation, and other Members of the Commission (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 01-2023 to which the Russian Federation has objected is inconsistent with the provisions of the Convention – in particular Article 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 of the Commission, including possible margin of appreciation, to make that decision, and the competence of the Review Panel with regard to that decision.

- (b) Whether the decision with respect to CMM 01-2023 to which the Russian Federation has objected unjustifiably discriminates in form or in fact against the objecting member, 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 Russian Federation are equivalent in effect to the decision with respect to CMM 01-2023 to which they have objected, and the relevance in this respect of paragraphs 4 and 9 of CMM 01-2023.
- (d) Whether, with reference to sub-paragraphs (a) and (j) of paragraph 10 of Annex II of the Convention, the total catch and its shares specified by the Russian Federation in its Objection are alternative measures that are equivalent in effect to the decision with respect to CMM 01-2023 to which the Russian Federation 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 them alternative measures that are equivalent in effect to the decision with respect to CMM 01-2023 to which the Russian Federation 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 01-2023 to which the Russian Federation 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; the sources of information considered in the allocation processes, including the bases on which new entrants obtained their allocations; the transfers of quotas between the Commission Members referred to by the Russian Federation in its objection; and clarifying which three Commission Members did not support the adoption of CMM 01-2023 as indicated in paragraph 88 of the Report of the 11th (2023) Annual SPRFMO Meeting.

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

22. By letter dated 7 June 2023, received by the PCA on 8 June 2023, Russia raised several points, particularly that (i) “the powers of a [five-member] Review Panel [were] terminated” following the withdrawal of China’s objection; (ii) “the proceedings should continue with three-members of the Review Panel” in accordance with Annex II, paragraph 1, to the Convention; (iii) “the composition of the [three-member] Review Panel should be reapproved”; (iv) “the adoption of procedural directives by the newly established Review Panel along with the procedural timetable

is required”; and (v) “the timing of the hearings, as well as the submission of documents, may be changed in the current circumstances”.

23. By letter dated 9 June 2023, the Review Panel communicated to Russia its understanding that its Decision of 7 June 2023 as well as Procedural Directive No. 2 were adopted by the three-member Review Panel envisaged by both Russia and the Organisation, and had accommodated most of the concerns and suggestions set forth in Russia’s letter of 7 June 2023.

7. Written Phase of the Proceedings

24. On 8 June 2023, in accordance with the Procedural Timetable, the Organisation submitted written information, documents, and materials (“**Organisation Information Paper**”).
25. On the same day, in accordance with the Procedural Timetable, Russia submitted its written memorandum and documentation (“**Russia Memorandum**”).
26. On 12 June 2023, as foreseen in the Review Panel’s Decision of 7 June 2023, the PCA circulated to Members an accounting of expenses attributable to the proceedings that were incurred prior to or in connection with China’s withdrawal of its objection.
27. On 14 June 2023, Chinese Taipei, the European Union, New Zealand, the Republic of Chile (“**Chile**”), and the Republic of Peru (“**Peru**”) submitted their written memoranda (“**Chinese Taipei Memorandum**”, “**EU Memorandum**”, “**New Zealand Memorandum**”, “**Chile Memorandum**”, and “**Peru Memorandum**” respectively). Chile, the European Union, and New Zealand also submitted supporting materials. Chile requested an opportunity to be heard at the hearing. Chinese Taipei requested the opportunity to attend the hearing without being heard.
28. By letter dated 15 June 2023, Russia proposed that the Review Panel reschedule the hearing to 3 July 2023 in view of certain “logistical issues faced by the Russian specialists”.
29. By letter dated 17 June 2023, the Review Panel, having considered Russia’s suggestion to reschedule the hearing, informed Russia of its decision that no change to the Procedural Timetable should be made. At the same time, taking into account the logistical issues indicated by Russia, the Review Panel requested that the PCA offer to make arrangements for the remote participation in the hearing of members of Russia’s delegation who might be unable to be present in person.
30. On 20 June 2023, having reviewed the submissions made by the Organisation and Members, the Review Panel requested that the Organisation submit in writing additional information relating to certain matters by 21 June 2023.
31. On 20 June 2023, Russia submitted its written comments on the submissions made by the Organisation and other Members (“**Russia Reply**”).
32. On 20 June 2023, Russia indicated that its delegation would attend the hearing both in person and remotely. The Organisation indicated that the Chairperson, the Vice-Chairperson and the

Executive Secretary would attend the hearing remotely and did not intend to make any statement but would be available to answer any questions the Review Panel may have.

33. On 21 June 2023, the Review Panel established the schedule for the hearing on 26 June 2023. In addition, in view of the fact that the hearing would take place in a hybrid format with some participants joining in person and others by videoconference, the Review Panel determined that Members who wished to observe the hearing could also attend remotely. Following the invitation, the Kingdom of Denmark in respect of the Faroe Islands and Peru requested to attend the hearing by videoconference.
34. On 22 June 2023, the Review Panel invited Russia and Chile to address at the hearing certain questions the Review Panel had prepared.
35. On the same date, the Organisation submitted its response (“**Organisation Response**”) to the Review Panel’s request of 20 June 2023.

8. Hearing

36. A hearing was held at the Peace Palace in The Hague on 26 June 2023. Delegations from Chile, Chinese Taipei, and Russia attended the hearing in person. In addition, delegations from China, the Kingdom of Denmark in respect of the Faroe Islands, the Organisation and Peru attended the hearing remotely. Oral interventions were made by representatives of Chile and Russia. The Chairperson and the Executive Secretary answered certain questions posed by the Review Panel.

9. Execution of the Findings and Recommendations of the Review Panel

37. In view of the fact that one member of the Review Panel, Ms. Olga Sedykh, participated in the hearing and the Panel’s deliberations remotely, the Review Panel agreed that Ms. Sedykh would affix her electronic signature to these Findings and Recommendations for transmission to the Executive Secretary pursuant to Article 17(5)(e) and Annex II, paragraph 9 to the Convention. The Review Panel further agreed that, for good order, transmission of the Findings and Recommendations bearing wet signatures of all members of the Review Panel would be followed in due course.

III. FACTUAL BACKGROUND

38. The following summary is based on the written submissions, statements made at the hearing, as well as the Findings and Recommendations of the Review Panels in PCA Cases Nos. 2013-14 and 2018-13 where relevant.¹

1. The Convention

39. The United Nations Convention on the Law of the Sea of 10 December 1982 (“**1982 Convention**”) calls on States to cooperate with each other in the conservation and management

¹ Findings and Recommendations on the Objection by Russia to CMM 1.01 dated 5 July 2013 (PCA Case No. 2013-14); Findings and Recommendations on the Objection by Ecuador to CMM 01-2018 dated 5 June 2018 (PCA Case No. 2018-13).

of living resources on the high seas, and to establish regional and sub-regional fisheries organisations to that end.² When the same stock or stocks of associated species occur both within the exclusive economic zone (“**EEZ**”) 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 sub-regional or regional organisations.³ 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 (“**1995 Agreement**”) further provides *inter alia* a clear preference for fisheries for straddling fish stocks to be managed through regional fisheries management organisations or arrangements (“**RFMO/As**”).⁴

40. The Convention 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”.⁵ It applies, except otherwise provided, within the geographical area as described in Article 5 of the Convention,⁶ being the waters of the Pacific Ocean within that area lying beyond areas under national jurisdiction (“**Convention Area**”). One such exception is that Members may consent to the application of CMMs within areas under their national jurisdiction (this includes, in particular, the EEZ).⁷
41. The Convention creates the Organisation, comprised of a Commission, a Secretariat (“**Secretariat**”), a Scientific Committee (“**Scientific Committee**”), and other subsidiary bodies.
42. Article 21(1) of the Convention directs the Commission, “When taking decisions regarding participation in fishing for any fishery resource, including the allocation of a total allowable catch or total allowable fishing effort”, to “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”:
 - (a) historic catch and past and present fishing patterns and practices in the Convention Area;
 - (b) compliance with the conservation and management measures under this Convention;
 - (c) demonstrated capacity and willingness to exercise effective flag State control over fishing vessels;
 - (d) contribution to the conservation and management of fishery resources, including the provision of accurate data and effective monitoring, control, surveillance and enforcement;
 - (e) the fisheries development aspirations and interests of developing States in particular small island developing States and of territories and possessions in the region;

² 1982 Convention, Articles 117 and 118.

³ 1982 Convention, Article 63(2).

⁴ 1995 Agreement, Article 8.

⁵ Convention, Preamble, first recital. *See also* Article 2, describing the Convention’s objective.

⁶ Convention, Article 5(1).

⁷ Convention, Article 20(4)(a), Annex III.

- (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;
 - (g) the needs of coastal States and of territories and possessions whose economies are dependent mainly on the exploitation of and fishing for a fishery resource that straddles areas of national jurisdiction of such States, territories and possessions and the Convention Area;
 - (h) the extent to which a member of the Commission is utilising the catch for domestic consumption and the importance of the catch to its food security;
 - (i) contribution to the responsible development of new or exploratory fisheries in accordance with Article 22; and
 - (j) contribution to the conduct of scientific research with respect to fishery resources and the public dissemination of the results of such research.⁸
43. Article 21(2) of the Convention provides that where the Commission chooses to establish a TAC or total allowable fishing effort that will apply in areas of national jurisdiction and the Convention Area, “it may, with the express consent of the coastal State Contracting Party or Parties concerned, also take decisions regarding participation in fishing for that resource throughout its relevant range”.
44. Article 21(3) of the Convention provides that “In taking decisions under [Article 21(2)], the Commission shall take into account the historic catch and past and present fishing patterns and practices throughout the relevant range of the fishery resource concerned and the criteria listed in [Article 21(1)](b) – (j)”.
45. At present, the Commission comprises 17 Members: the Commonwealth of Australia, Belize,⁹ Chile, China, the Cook Islands, the Republic of Cuba, Ecuador, the European Union, the Kingdom of Denmark in respect of the Faroe Islands, the Republic of Korea (“**Korea**”), New Zealand, the Republic of Panama, Peru, Russia, Chinese Taipei, the United States of America, and the Republic of Vanuatu (“**Vanuatu**”). The Organisation also has two Cooperating Non-Contracting Parties (“**CNCs**”): Curaçao and the Republic of Liberia.
46. Russia acceded to the Convention on 17 May 2012, and became a Member of the Commission on 24 August 2012, upon the Convention’s entry into force.

2. Measures Adopted in relation to *Trachurus murphyi*

47. One of the species managed by SPRFMO is *Trachurus murphyi* (also known as “Chilean jack mackerel”, “horse mackerel”, or “jurel”). This species is found both in the Convention Area and in adjacent areas under national jurisdiction.
48. The Commission adopted its first CMM regarding *Trachurus murphyi* at its 1st (2013) Annual Commission Meeting. Following that, the Commission adopted a revised CMM regarding

⁸ Convention, Article 21(1).

⁹ Belize joined the Commission on 22 February 2023 and was therefore not a member of the Commission when CMM 01-2023 was adopted. See Organisation Response, p. 4; Belize becomes a Member of SPRFMO, 13 March 2023 <<https://sprfmo.int/news/current-news/belize-becomes-a-member-of-sprfmo/>>.

Trachurus murphyi every year. Chile expressly consented to the extension of CMM 1.01 and each subsequently amended CMM in relation to *Trachurus murphyi* to its areas under national jurisdiction.¹⁰ Ecuador also consented to the extension of the CMMs on *Trachurus murphyi* to its areas under national jurisdiction in 2020, 2021, 2022, and 2023.¹¹ The area of application of the *Trachurus murphyi* CMMs thus includes both the Convention Area and areas under Chile's national jurisdiction, as well as Ecuador's areas under national jurisdiction from 2020 onwards (“**Applicable Area**”). On the other hand, Peru has not consented to the application of the CMMs to its areas under national jurisdiction.

49. There have been two instances of objections lodged against CMMs on *Trachurus murphyi* before the present Objection: in 2013 Russia objected to CMM 1.01,¹² and in 2018 Ecuador objected to CMM 01-2018.¹³ These two previous instances will be briefly discussed in this survey of the measures adopted regarding *Trachurus murphyi*.
50. CMM 1.01 was drafted with regard to, among other things, the advice of the Scientific Working Group established by the Preparatory Conference regarding the *Trachurus murphyi* TAC. It sets a TAC throughout the range of the *Trachurus murphyi* fishery resource (“**TAC (Resource)**”), as well as a TAC for *Trachurus murphyi* within the Applicable Area (“**TAC (Applicable Area)**”). The TAC (Resource) in CMM 1.01 was set at 438,000 tonnes,¹⁴ and the TAC (Applicable Area) was set at 360,000 tonnes.¹⁵ The TAC (Applicable Area) was then allocated among those Members and CNCPs participating in the *Trachurus murphyi* fishery.¹⁶ Under CMM 1.01, Russia received no allocation of *Trachurus murphyi*.¹⁷
51. On 19 April 2013, Russia 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.¹⁸ In accordance with Article 17 and Annex II of the Convention, a review panel was established to examine Russia's objection (“**2013 Review Panel**”).
52. The 2013 Review Panel, in its Findings and Recommendations on the Objection by the Russian Federation dated 5 July 2013 (“**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.

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; CMM 01-2019, para. 1; CMM 01-2020, para. 1; CMM 01-2021, para. 1; CMM 01-2022, para. 1; CMM 01-2023, para. 1.

¹¹ CMM 01-2020, para. 1; CMM 01-2021, para. 1; CMM 01-2022, para. 1; CMM 01-2023, para. 1.

¹² PCA Case No. 2013-14.

¹³ PCA Case No. 2018-13.

¹⁴ CMM 1.01, para. 11.

¹⁵ CMM 1.01, para. 6.

¹⁶ CMM 1.01, para. 6.

¹⁷ CMM 1.01, Table 2.

¹⁸ 2013 Review Panel Findings and Recommendations, paras. 62, 70, 73, 89.

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 biomass would continue to decline at a rapid pace.

...

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; [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 2012.¹⁹

53. In relation to Russia’s objection, the 2013 Review Panel found, *inter alia*, that the failure to make any catch allocation to Russia in CMM 1.01 amounted to unjustifiable discrimination.²⁰ The 2013 Review Panel therefore recommended an alternative measure authorising Russia to catch *Trachurus murphyi* in 2013, but only after Russia could conclude from data reported by the Organisation, and in accordance with Article 3(1)(a)(v) of the Convention, 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.²¹

¹⁹ 2013 Review Panel Findings and Recommendations, paras. 18-24 (internal references omitted).

²⁰ 2013 Review Panel Findings and Recommendations, paras. 90, 93.

²¹ 2013 Review Panel Findings and Recommendations, para. 100; *See* Russian Federation accepts Recommendations, 7 August 2013 <<https://www.sprfmo.int/news/archive-news/russian-federation-accepts-recommendations/>>.

54. The CMM regarding *Trachurus murphyi* 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 following table shows the TACs for *Trachurus murphyi* and Russia’s allocation in the years 2013-2017:

Year (CMM)	TAC (Resource) (tonnes)	TAC (Applicable Area) (tonnes)	Reported catch (Applicable Area) (tonnes)	Russia’s allocation (tonnes)
2013 (CMM 1.01)	438,000	360,000	353,123	-
2014 (CMM 2.01)	440,000	390,000	395,085	13,445
2015 (CMM 3.01)	460,000	410,000	394,212	15,100
2016 (CMM 4.01)	460,000	410,000	388,575	15,100
2017 (CMM 01-2017)	493,000	443,000	402,050	16,183

55. No objections to CMM 2.01, CMM 3.01, CMM 4.01, and CMM 01-2017 were presented by Members under Article 17(2)(a) of the Convention.
56. In 2017, Members agreed on *Trachurus murphyi* percentage allocation for five years as part of their adoption of CMM 01-2017 by consensus.²² This is reflected in paragraph 26 of CMM 01-2017, which stipulates that the agreed percentages “will be used by the Commission as a basis for the allocation of Member and CNCPs’ catch limits from 2018 to 2021 inclusive”. These percentages are included in Table 2 in CMM 01-2017, reproduced below.²³

Table 2: Percentages³ related to the catches referred to in paragraph 10

Member/CNCP	%
Chile	64.5638
China	6.3477
Cook Islands	
Cuba	0.2231
Ecuador (HS)	0.2391
European Union	6.1086
Faroe Islands	1.1087
Korea	1.2822
Peru (HS)	2.0284
Russian Federation	3.2825
Vanuatu	4.6738

³ These percentages shall apply from 2018 to 2021 inclusive.

²² Russia Memorandum, p. 2; Organisation Information Paper, para. 14.

²³ Organisation Information Paper, para. 14; Russia Memorandum, p. 2. See CMM 01-2017 (Organisation Supporting Material No. 9), para. 26.

57. On 3 February 2018, at its 6th (2018) Annual Commission Meeting, the Commission adopted CMM 01-2018 on *Trachurus murphyi*. The TAC (Resource) in CMM 01-2018 was set at 576,000 tonnes,²⁴ and the TAC (Applicable Area) was set at 517,582 tonnes.²⁵ Under CMM 01-2018, Russia received an allocation of 18,907 tonnes.²⁶
58. On 28 March 2018, Ecuador presented an objection to its tonnage and percentage share in the TAC of *Trachurus murphyi* in 2018 as specified in CMM 01-2018. In accordance with Article 17 and Annex II of the Convention, a review panel was subsequently established to examine Ecuador's objection ("**2018 Review Panel**"). The 2018 Review Panel found that the decision to which Ecuador's objection had been presented was not inconsistent with the provisions of the Convention or other relevant international law, and did not unjustifiably discriminate against Ecuador. It was also found that the alternative measures proposed by Ecuador were not equivalent in effect to the decision to which the objection had been presented.²⁷
59. For the years 2018 and 2019, the percentage allocations agreed in 2017 remained unchanged, as envisaged in 2017 and reflected in paragraph 26 of CMM 01-2017 and the footnote accompanying Table 2. For 2020, pursuant to the inclusion of Ecuador's areas under national jurisdiction within the Applicable Area, Ecuador's percentage allocation increased to 1.2638% with no impact on the percentage allocations of the other participants.²⁸ For 2021 no changes were made to the percentage allocations.²⁹
60. The TACs, reported catches, and Russia's allocations for 2018 to 2021 were as follows:

Year (CMM)	TAC (Resource) (tonnes)	TAC (Applicable Area) (tonnes)	Russia's allocation (tonnes)	Reported Catch (Applicable Area) (tonnes)	Overall Catch (Resource) (tonnes)
2018 (CMM 01-2018) ³⁰	576,000	517,582	18,907	468,860	527,239
2019 (CMM 01-2019) ³¹	591,000	531,061	19,400	495,757	635,568
2020 (CMM 01-2020) ³²	680,000	618,001	22,321	561,742	720,622

²⁴ CMM 01-2018, para. 10 (Organisation Supporting Material No. 17).

²⁵ CMM 01-2018, para. 5 (Organisation Supporting Material No. 17).

²⁶ CMM 1.01, Table 2.

²⁷ Findings and Recommendations on the Objection by Ecuador to CMM 01-2018 dated 5 June 2018, para. 129.

²⁸ CMM 01-2020, Table 2 (Organisation Supporting Material No. 29).

²⁹ CMM 01-2021, Table 2 (Organisation Supporting Material No. 34); CMM 01-2020, Table 2 (Organisation Supporting Material No. 29).

³⁰ Organisation Information Paper, para. 22.

³¹ CMM 01-2019, paras. 5, 10, Table 1 (Organisation Supporting Material No. 22); Organisation Information Paper, para. 28.

³² CMM 01-2020, paras. 5, 10, Table 1 (Organisation Supporting Material No. 29); Organisation Information Paper, para. 34.

2021 (CMM 01- 2021) ³³	782,000	710,702	25,669	681,717	805,345
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61. Between 24 and 28 January 2022, the Commission held its 10th (2022) Annual Commission Meeting remotely. The Chairperson of the Commission recalled that the CMM was due for review, but reported that discussion by the Heads of Delegation indicated support to roll over, for one year, the allocation percentages agreed in 2017 (with the amendment in 2020 to the percentage allocation for Ecuador). Based on the agreement among the Heads of Delegation to roll over the allocation percentages, the Secretariat's proposal extended the application of the allocation percentages for the year 2022, showed the outcome of applying the previously agreed allocation percentages to the new Scientific Committee advice recommending a 15% increase in 2022 catches throughout the range, and proposed a suggestion to review the CMM in 2023.³⁴ Many Members supported the proposal to roll over the allocation percentages,³⁵ and it was therefore adopted by a vote, with 13 votes in favour, one vote against (Peru), and one Member absent during the voting.³⁶
62. The following table represents the initial catch limits and shares in the TAC (Resource) for *Trachurus murphyi* in CMM 01-2022, the catch limits and shares in the TAC (Resource) after taking into account transfers, and the actual catches in 2022.³⁷

Country	Initial Limit	Limit after Transfers	Actual Catch
Chile (High Seas & EEZ)	581,074 (64.5638%)	731,292 (81.2547%)	727,952 (75.9052%)
China	57,129 (6.3477%)	12,129 (1.3477%)	0
Cook Islands	0	0	0
Cuba	2,008 (0.2231%)	0	0
Ecuador (High Seas & EEZ)	11,374 (1.2638%)	200 (0.0222%)	5 (0.0005%)
European Union	54,977 (6.1086%)	44,746 (4.9717%)	44,425 (4.6323%)
Faroe Islands	9,978 (1.1087%)	0	0
Korea	11,540 (1.2822%)	0	0

³³ CMM 01-2021, paras. 5, 10, Table 1 (Organisation Supporting Material No. 34); Organisation Information Paper, para. 37.

³⁴ Organisation Information Paper, para. 39; COMM10-Prop08 (Organisation Supporting Material No. 36).

³⁵ Organisation Information Paper, para. 40.

³⁶ Organisation Information Paper, para. 41; CMM 01-2022 (Organisation Supporting Material No. 38); Russia Memorandum, p. 3.

³⁷ Organisation Information Paper, para. 41.

Peru (High seas)	18,256 (2.0284%)	0	0
Russia	29,543 (3.2825%)	29,543 (3.2826%)	27,043 (2.8198%)
Vanuatu	42,064 (4.6737%)	33 (0.0037%)	0
TAC (Applicable Area)	817,943	817,943	799,425
TAC (Resource)	900,000	900,000	959,028

63. In August 2022, the Scientific Committee produced a table of catch history data, which showed:³⁸
- Chile had a percentage allocation of 64.5638% of the TAC (Resource) for 2022. Chile's estimated catch for 2022 was around 73.6% of the total catches of *Trachurus murphyi*. In the six years since the adoption of CMM 01-2017, Chile had caught (including the estimated 2022 catch) 76.7% of the total catches of *Trachurus murphyi*.
 - Russia had a percentage allocation of 3.2825% of the TAC (Resource) for 2022. Russia's estimated catch for 2022 was around 2.1% of the total catches of *Trachurus murphyi*. In the six years since the adoption of CMM 01-2017, Russia had caught (including the estimated 2022 catch) 1.3% of the total catches of *Trachurus murphyi*.
64. In its 2022 report, the Scientific Committee reported that the stock assessment results suggested that the *Trachurus murphyi* stock status remained relatively stable and the population trend was estimated to be increasing, allowing for an increase in the TAC. Stock projections were favourable, even under the most conservative stock recruitment scenarios, and the 2022 biomass was estimated to be well above the level capable of supporting maximum sustainable yield ("MSY").³⁹ The Scientific Committee had recommended, considering the estimated increase in *Trachurus murphyi* biomass, a precautionary 15% increase in 2023 catches (i.e., at or below 1,035 kt) throughout the range of *Trachurus murphyi*.⁴⁰ The Scientific Committee predicted the probability that the stock level is above B_{MSY} ⁴¹ by 2028 to be greater than 98% if catches are in the range of between a 15% to a 20% increase from its 2022 advice.⁴²
65. In August 2022, the Chairperson of the Commission indicated to Members and CNCs his intention to propose the convening of a working group to address the percentage allocations.⁴³

³⁸ New Zealand Memorandum, para. 16; SC10-JM01_rev1 (New Zealand Supporting Material No. 8).

³⁹ Organisation Information Paper, para. 8; SC10-Report, paras. 90-91 (Organisation Supporting Material No. 2).

⁴⁰ Report of the 11th (2023) Annual Commission Meeting, para. 8(a) (Organisation Supporting Material No. 40); Hearing transcript, pp. 27:14-28:11.

⁴¹ The biomass at which a fish stock can support MSY.

⁴² Organisation Information Paper, para. 59; SC10-Report, Table A10.37, p. 45 (Organisation Supporting Material No. 2).

⁴³ Letter from the Chairperson, 27 August 2022 (Organisation Supporting Material No. 41); Hearing transcript, p. 25:20-24.

This proposal was agreed at an intersessional meeting of the Heads of Delegation in September 2022.⁴⁴

3. Chile's Request for an Increase in its Allocation

66. At the Commission's 10th (2022) Annual Commission Meeting, Chile agreed to the one-year roll over of the percentage allocations but indicated its desire to achieve an increase in its percentage allocation at the next Commission meeting.⁴⁵ This was the first official record of Chile's indication that it wished to increase its allocation:⁴⁶

... Chile has fished nearly 120% of its quota given the transfers by SPRFMO members, effectively fishing 78.4% of all the jack mackerel catches throughout the South-East Pacific.

...

Under the current agreement, Chile was allocated 64.6% of the regional TAC. Yet, we have fished 78.3% of the total catches of jack mackerel from 2017 to 2021. These numbers speak for themselves. They underline that Chile is the leading jack mackerel fishery in the South-East Pacific. Equally, they show that Chile has paid a cost through quota transfers that have benefitted SPRFMO members.⁴⁷

4. Requests of the New Entrants

67. In 2017, the Cook Islands wished to "record their interest in a future allocation".⁴⁸ Subsequently in 2022, the Cook Islands requested a quota allocation. The allocation request however could not be granted due to the Commission's decision to roll over the allocation percentages by one year.⁴⁹
68. Belize first requested an allocation within its submission for CNCP status at the 9th meeting of the Compliance and Technical Committee ("CTC") held in January 2022, just before the 10th (2022) Annual Commission Meeting.⁵⁰ It repeated its request in its CNCP status request dated 25 October 2022 submitted to the 10th CTC meeting held in February 2023.⁵¹
69. No official request for an allocation from Panama was recorded prior to the 11th (2023) Annual Commission Meeting.⁵²

⁴⁴ Chile Memorandum, p. 4, para. 11; Letter of the SPRFMO Secretariat No. G141-2022, 19 September 2022 (Chile Supporting Material No. 2).

⁴⁵ See Statement of Chile, Report of the 10th (2022) Annual Commission Meeting, Annex 9b (Organisation Supporting Material No. 39).

⁴⁶ Organisation Response, para. 3.

⁴⁷ Statement of Chile, Report of the 10th (2022) Annual Commission Meeting, Annex 9b (Organisation Supporting Material No. 39).

⁴⁸ Report of the 5th (2017) Annual Commission Meeting, p. 5 (Organisation Supporting Material No. 3).

⁴⁹ Organisation Information Paper, paras. 11, 40; Organisation Response, para. 5.

⁵⁰ Belize deposited its instrument of accession on 23 January 2023, therefore becoming a Member of the Commission on 22 February 2023. See Organisation Response, p. 4; Belize becomes a Member of SPRFMO, 13 March 2023 <<https://sprfmo.int/news/current-news/belize-becomes-a-member-of-sprfmo/>>.

⁵¹ Organisation Response, para. 5.

⁵² Organisation Response, para. 5.

5. Adoption of CMM 01-2023

70. Between 13 and 17 February 2023, the Commission held its 11th meeting in Manta, Ecuador, at which CMM 01-2023 was adopted. The Chairperson of the Commission recalled the decision taken by the Heads of Delegation the previous year to roll over the allocation percentages of the *Trachurus murphyi* CMM for one year and the expectations to have substantive discussion on allocation at the 11th (2023) Annual Commission Meeting.
71. Chile, in its opening statement, expressed an interest in an increase of its percentage of allocation in the TAC of *Trachurus murphyi* that would be set at the meeting.⁵³ It also considered that, in light of the “remarkable increase in the available biomass [of *Trachurus murphyi*] in successive periods, and in accordance with the indications of [their] scientists, it [was] reasonable to analyse and to propose to the Commission an upward adjustment in the catch control rule currently set at 15%”.⁵⁴
72. Ecuador, in its opening statement, opined that the state of the *Trachurus murphyi* resource “allow[ed] a review of the allocation of the quota increase”.⁵⁵
73. At the meeting, Korea introduced its proposal to amend the CMM for *Trachurus murphyi*.⁵⁶ The proposal contained the following: (a) requiring Members and CNCPs, which were not included in CMM 1.01 but included in CMM 01-2022, to submit an effort management plan; (b) in cases where there is over-catch, deducting that amount from the TAC advised by the Scientific Committee; and (c) extending the application of the percentages in the current CMM by one year, commencing a process to develop an allocation framework.⁵⁷ No other written proposals to amend the CMM for *Trachurus murphyi* were submitted prior to the meeting.⁵⁸
74. During the meeting, a working group to facilitate discussion on the quota and allocation of *Trachurus murphyi* catch limits (“**Working Group**”), chaired by Mr. Michael Brakke (United States of America), was established.⁵⁹ The Organisation describes the Working Group’s discussions as follows:

47. In the WG, the WG Chair recalled the objective and mandate of the group. The WG was responsible for exploring options related to allocation consistent with Article 21 of the Convention and fairly considering the views expressed by all Members. The WG did not have a mandate to develop a draft CMM or consider in-depth other issues related to the structure of the jack mackerel CMM, or to prepare a written report of its proceedings. The WG Chair articulated that the goal of the WG was to develop allocation tables that could be referred to the Commission Chair for inclusion in a

⁵³ Chile’s Opening Statement, Report of the 11th (2023) Annual Commission Meeting, Annex 9b (Organisation Supporting Material No. 42).

⁵⁴ Chile’s Opening Statement, Report of the 11th (2023) Annual Commission Meeting, Annex 9c (Organisation Supporting Material No. 42).

⁵⁵ Ecuador’s Opening Statement, Report of the 11th (2023) Annual Commission Meeting, Annex 9b (Organisation Supporting Material No. 43).

⁵⁶ Proposal of the Republic of Korea, COMM11-Prop21 (Organisation Supporting Material No. 44).

⁵⁷ Report of the 11th (2023) Annual Commission Meeting, para. 75; Proposal of the Republic of Korea, COMM11-Prop21 (Organisation Supporting Material No. 44).

⁵⁸ Russia Memorandum, p. 3.

⁵⁹ Organisation Information Paper, paras. 45 and 46.

proposal to amend CMM 01-2022. The WG Chair noted that, consistent with the Commission Chair's view of the process for negotiating and agreeing on allocation at this meeting, the measure was up for review and Members had the right to engage in that debate and seek changes to the allocation outcome regardless of whether they had submitted an individual proposal in advance. No Members objected to that process at the outset.

48. The WG Chair reiterated that the deliberations of the WG and Commission on allocation must be guided by the Convention, particularly Article 21 on the criteria to consider when taking decisions regarding participation in fishing for SPRFMO fisheries resources, as well as other relevant provisions including Article 19 on the Recognition of the Special Requirements of Developing States. The WG asked that Members give due consideration to Article 21 and reference it to the extent possible when articulating their positions on allocation.
49. The WG Chair considered the views of all Members and presented various draft tables and options for allocation to elicit discussion from the parties, without prejudice to any eventual outcomes, over the course of several meetings. The first table discussed reflected Korea's proposal to apply existing percentage allocations to any increase in the total allowable catch. Several Members supported that approach. However, WG discussions highlighted that a rollover of the existing percentages would not be able to address Chile's interest in increasing its percentage of the overall allocation, which it sought for the reasons articulated in its opening statement and other statements made during the WG and Commission meeting. It would also not be possible to roll over the existing percentages while also accommodating any or all of the aspirations of potential new entrants – Belize, Cook Islands, and Panama – as any quota for those entrants would have to come from the percentages allocated to some or all of the existing fishery participants.
50. The WG Chair noted that most Members supported in principle the general goal of accommodating some increase in Chile's percentage allocation, which they considered to be consistent with several criteria in Article 21. Most Members also supported in principle accommodating some interests of new entrants. The WG extensively discussed the appropriate size of increases for Chile and new entrants as well as the source of that allocation. The WG also considered Chile's request to increase the total allowable catch by 20 percent, after considering the totality of scientific advice and the history of the harvest control rule with a default maximum increase of 15 percent. The WG Chair presented various approaches to allocation, considering Article 21 and other relevant factors, but no option could attract complete consensus given the limited overlap in some Member positions. The WG Chair had also asked Members to consider whether other factors related to historical or current fishing patterns – such as the extent to which Members were utilizing their own limits through fishing by vessels flying their flags, or the extent to which Members were fully utilizing their limits to support sustainable use of fisheries resources through either direct fishing activity or the transfer of limits to other Members – but there was no consensus around how to factor those patterns into the negotiations beyond the allocations already included in the table.
51. After considering the extensive WG discussions, one Member introduced an allocation proposal that would, inter alia: accommodate an increase in Chile's percentage allocation, albeit not at the level originally requested by Chile; provide an initial allocation for new entrants consistent with the initial allocations provided to new entrants in previous years; provide a 20% increase in total allowable catch for 2023 only; and establish a 10-year allocation framework to provide increased stability in the fishery. The proposal attracted support from most Members in the WG as a potential compromise package, which would require concessions by all Members relative to their initial positions, but also provide benefits to all Members (no Members would have a lower tonnage allocation even after accommodating an increase for Chile and new entrants) and enhanced stability and predictability in the fishery.

52. Russia and two other Members argued that any increased allocations for Chile and/or new entrants should come from the existing allocations of only those Members who were willing to transfer some of their limits. The WG Chair invited Members to consider this approach and the implications of it, if it would help to achieve consensus in the negotiations. Many other Members opposed Russia's position, as they thought it would be unfair and inconsistent with the spirit of cooperation to accommodate the interests of Chile and new entrants – which to most Members seemed consistent with the criteria to be considered in allocation – through a voluntary opt-in approach as opposed to applying any changes more fairly and equitably to all Members. Such an approach would also give every Member an incentive to ask to maintain their allocation and transfer the costs of cooperation to someone else, undermining the organisation's ability to accommodate an increased allocation for Chile as well as new entrant allocations, both of which the WG Chair and most Members considered important to satisfy based on the views expressed and the criteria to be considered in Article 21.
53. The WG Chair indicated to the Chairperson that the WG had reached the limit of what could be achieved at that level and referred a version of this proposal, which had been extensively debated in the WG, to the Chairperson for consideration in potential decision-making at the Commission. The WG Chair indicated to the Chairperson that some Members that were unwilling to accept any reduction in their percentage allocation did not support the outcome. The WG Chair submitted that the proposal was designed to be consistent with Article 21 of the Convention, which had been considered throughout the WG discussions, and fairly considered the views of all Members.⁶⁰
75. The Chairperson of the Commission then integrated the Working Group's allocation table into his proposal (“**Working Paper**”).⁶¹ The Working Paper provided a 10-year *Trachurus murphyi* quota arrangement (from 2023 to 2033 inclusive), allocated each of the three new entrants—Belize, Cook Islands, and Panama—1,100 tonnes based on the precedents of new entrant allocations provided to Ecuador in 2015 and Cuba in 2017,⁶² increased Chile's share of allocation to 66.3665%, and raised the 15% TAC increase to 20% for 2023 only.⁶³
76. Vanuatu expressed its support for the Working Paper, noting that “it [was] firmly based on the 2017 allocation that was agreed by all members and which was recognized as having taken into account all of the provisions of Article 21 of the Convention”.⁶⁴ According to Vanuatu, the Working Paper recognised that the “existing level of fishing effort” referred to in Article 21 of the Convention had become highly concentrated in the coastal waters of Chile, with the result that Chilean vessels were taking around 78% of the total catch of *Trachurus murphyi*.⁶⁵ It also

⁶⁰ Organisation Information Paper, paras. 47-53.

⁶¹ Organisation Information Paper, para. 54; COMM 11 – WP24_rev1 (Organisation Supporting Material No. 45).

⁶² COMM 11 – WP24_rev1 (Organisation Supporting Material No. 45).

⁶³ Organisation Information Paper, para. 54; Report of the 11th (2023) Annual Commission Meeting, para. 79 (Organisation Supporting Material No. 40); COMM 11 – WP24_rev1, p. 3 (Organisation Supporting Material No. 45); Chile Memorandum, p. 6, para. 18.

⁶⁴ Organisation Information Paper, para. 57; Vanuatu's statement on *Trachurus murphyi*, Report of the 11th (2023) Annual Commission Meeting, Annex 9f (Organisation Supporting Material No. 46).

⁶⁵ Vanuatu's statement on *Trachurus murphyi*, Report of the 11th (2023) Annual Commission Meeting, Annex 9f (Organisation Supporting Material No. 46).

noted that the effect of the increased quota allocation to Chile and the allocations to new entrants was to be distributed proportionally across all other members with quota.⁶⁶

77. Vanuatu's statement received widespread support from numerous Members, who acknowledged that the Working Paper indeed took into account the provisions of Article 21 of the Convention and reflected past precedents.⁶⁷ They noted that except for the new entrants and the increase to Chile, the remaining increases were allocated proportionally.⁶⁸ Several Members, including Russia, expressed concern that the provisions of Article 21 of the Convention were not given appropriate consideration, especially when the increases in the percentage allocations of some Members were achieved by reducing other Members' allocations without their consent.⁶⁹
78. The Chairperson of the Commission concluded that all attempts to reach consensus on the Working Paper had been exhausted. Thus, the Commission voted on the Working Paper pursuant to Regulation 7 of the Rules of Procedure of the Commission.⁷⁰ Thirteen Members voted in favour and three Members (China, Peru, and Russia) voted against.⁷¹
79. The relevant provisions of CMM 01-2023, as finally adopted, state:

Catch Management

4. In 2023 the total catch of *Trachurus murphyi* in the area to which this CMM applies in accordance with paragraph 1 shall be limited to 981,833 tonnes. Members and CNCPs are to share in this total catch in the tonnages set out in Table 1 of this CMM.
- ...
9. Members and CNCPs agree, having regard to the advice of the Scientific Committee, that catches of *Trachurus murphyi* in 2023 throughout the range of the stock should not exceed 1,080,000 tonnes.
- ...

Review

30. This Measure shall be reviewed by the Commission in 2024. 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), CMM 01-2017 (*Trachurus murphyi*), CMM 01-2018 (*Trachurus murphyi*), CMM 01-2019 (*Trachurus murphyi*), CMM 01-2020 (*Trachurus murphyi*),

⁶⁶ Vanuatu's statement on *Trachurus murphyi*, Report of the 11th (2023) Annual Commission Meeting, Annex 9f (Organisation Supporting Material No. 46).

⁶⁷ Organisation Information Paper, para. 58; Report of the 11th (2023) Annual Commission Meeting, para. 83 (Organisation Supporting Material No. 40).

⁶⁸ Organisation Information Paper, para. 58.

⁶⁹ Organisation Information Paper, para. 56; Report of the 11th (2023) Annual Commission Meeting, para. 81 (Organisation Supporting Material No. 40); Russian Federation's statement on *Trachurus murphyi*, Report of the 11th (2023) Annual Commission Meeting, Annex 9g (Organisation Supporting Material No. 47); Peru's statement on *Trachurus murphyi*, Report of the 11th (2023) Annual Commission Meeting, Annex 9h (Organisation Supporting Material No. 49).

⁷⁰ Organisation Information Paper, para. 60; Report of the 11th (2023) Annual Commission Meeting, para. 85 (Organisation Supporting Material No. 40).

⁷¹ Report of the 11th (2023) Annual Commission Meeting, para. 88 (Organisation Supporting Material No. 40); Hearing transcript, p. 23:7-14.

CMM 01-2021 (*Trachurus murphyi*) and CMM 01-2022 (*Trachurus murphyi*) as well as the Interim Measures for pelagic fisheries of 2007, as amended in 2009, 2011 and 2012, have been complied with.

31. 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 2023 to 2032 inclusive.

Table 1: Tonnages in 2023 fishery as referred to in paragraph 4

Member / CNCP	Tonnage
Belize	1,100
Chile	716,758
China	63,136
Cook Islands	1,100
Cuba	2,219
Ecuador	12,570
European Union	60,758
Faroe Islands	11,027
Korea	12,753
Panama	1,100
Peru (HS)	20,175
Russian Federation	32,649
Vanuatu	46,487
Total	981,833

Table 2: Percentages³ related to the catches referred to in paragraph 9.

Member / CNCP	%
Belize	0.1019%
Chile	66.3665%
China	5.8459%
Cook Islands	0.1019%
Cuba	0.2055%
Ecuador	1.1639%
European Union	5.6257%
Faroe Islands	1.0211%
Korea	1.1808%
Panama	0.1019%
Peru (HS)	1.8681%
Russian Federation	3.0230%
Vanuatu	4.3044%

³ These percentages shall apply from 2023 to 2032 inclusive.

6. Status of *Trachurus murphyi* Catch in 2023

80. The estimate for the total catch of *Trachurus murphyi* in 2023 up until April 2023 is 618,630 tonnes, comprising of 485,560 tonnes caught in Chile's EEZ, 129,730 tonnes caught in Peru's national jurisdiction, and 3,340 tonnes caught in the Convention Area (i.e., in the high seas under SPRFMO's jurisdiction).⁷² During the hearing, in response to a question from the Review Panel,

⁷² Organisation Response, para. 4.

the Executive Secretary informed the Review Panel that around 67% of the TAC (Resource) had been fished to date and that the projections for the *Trachurus murphyi* stock were favourable, even under the most conservative scenarios.⁷³

IV. RUSSIA'S OBJECTION

81. In its letter of 10 April 2023, Russia states:

In accordance with paragraph 2(a) of Article 17 of the [Convention] we present the objection in respect of established shares in the catch limit of *Trachurus murphyi* in 2023 specified in the [CMM 01-2023].

We adhere to the position that the decision on distribution of shares in the total allowable catch of *Trachurus murphyi* in 2023 between the Members demonstrates unjustifiable discrimination against the Russian Federation in form and in fact, and is inconsistent with the provisions of the Convention.

The CMM 01-2023 created an unfair and inequitable situation that is not based on the criteria of Article 21 of the SPRFMO Convention, instead based only on the transfers of quotas that some members of the Commission have made in previous years, without this constituting a valid criteria for the allocation of quotas or for the change of the percentages of participation in the jack mackerel (*Trachurus murphyi*) fishery.

In accordance with CMM 01-2023 as well as superseded CMM 01 Member or CNCP may transfer to another Member or CNCP all or part of its entitlement to catch, without prejudice to future agreements on the allocation of fishing opportunities, subject to the approval of the receiving Member or CNCP. In fact, these provisions were confirmed by the Commission and reflected in the superseded CM and CMM 01-2023, and were not disputed by any Member or CNCP.

Such agreements between the two parties will nullify any claims for reconsideration of distribution rights for future allocation of fishing opportunities.

At the same time in accordance with Article 21 of the Convention 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 criteria [in Article 21] to the extent relevant[.]

...

Instead, the CM 01-2023 has realized a proportional reduction in the share of the catch of some countries without taking into account the relevant criteria.

This reduction in the *Trachurus murphyi* quota affects countries that were actively fishing since 2017 until current time and, according to most criteria in accordance with Article 21 of the Convention, could have increased their share in percentage.

At the same time, the approach taken in 2023 differs from the revision of *Trachurus murphyi* quota distribution in 2017. In this regard, it should be noted that in 2017 the proportional approach was not applied, including for accumulating the needs of new entrants.

⁷³ Hearing transcript, pp. 76:22-77:24.

As a result, the share of the Russian Federation in the total quota has been reduced twice. In 2017 from 3.6829% to 3.2825%, in 2023 from 3.2825% to 3.0230%, which was the most significant reduction for one Member during the specified period.

Members who had the intention not to comply with the provisions of Article 21 of the Convention, as well as the CM for *Trachurus murphyi*, could show good faith and transfer part of their for *Trachurus murphyi* quota to another Member. However, this approach was imposed on other Members who, objectively, according to the criteria established by Article 21 of the Convention, could claim to increase or maintain their share of the quota of *Trachurus murphyi*. Moreover, such an approach was not presented to the Commission in a formal document well in advance in accordance with the Commission's Rules of Procedure.

Reduction of the percentage related to *Trachurus murphyi* quota of one member of the Commission without his consent and without taking in to consideration provisions of Article 21 of the Convention in favor of another member demonstrates unjustifiable discrimination in form and in fact, and is inconsistent with the provisions of the Convention.

In this regards the Russian Federation adopt alternative measures that are equivalent in effect to the decision to which it has objected and have the same date of application.

The Russian Federation is guided by a percentage on its *Trachurus murphyi* quota of 3.2825% related to the catches referred to in paragraph 9 of the CM 01-2023 which is equivalent to the limits set for the period of the Conservation Measure to that was from 2017 to 2023.

Following the principle of shares distribution in the catch of *Trachurus murphyi* the Russian Federation establishes *Trachurus murphyi* catch limit in the Convention area in respect of the Russian fisheries 2023 equal to 35 452 tonnes.

At the same time, the Russian Federation will continue to monitor compliance with the provisions of all relevant conservation measures in relation of this fishery.

V. SUMMARIES OF THE ARGUMENTS OF THE PARTICIPANTS

82. Having studied all of the written and oral submissions in their entirety, the Review Panel now summarises the arguments that are of particular relevance to its Findings and Recommendations.

1. Inconsistency with the Convention, the 1982 Convention, or the 1995 Agreement

Russia's Position

83. Russia avers that a reduction of the *Trachurus murphyi* quota without taking into account Members' historical catches and other criteria set out in Article 21, as well as without obtaining its consent to the reduction of its share, is inconsistent with the Convention.⁷⁴ On historical catches, it notes that only five out of ten Members with *Trachurus murphyi* quotas have caught the whole or part of their annual allocations between 2017 and 2022.⁷⁵ On the consent issue, it points out that the allocations in CMM 01-2017 were adopted by consensus and highlights the words of the Chair of the 2017 Commission working group on *Trachurus murphyi* that the results

⁷⁴ Russia Memorandum, pp. 4-5.

⁷⁵ Russia Memorandum, pp. 4.

- were “only possible because of the considerable goodwill of the participants”.⁷⁶ While Russia acknowledges that it is possible under the Convention to take decisions by vote when there is no consensus, it regards the Convention “not as something individual but something complex, integrated”.⁷⁷
84. Russia also highlights that the Commission wrongly used catches obtained as a result of transfer of quotas between Members as the basis for determining the allocations despite paragraph 9 of CMM 01-2022 making clear that such catches cannot form a basis for future agreements on the allocation of fishing opportunities.⁷⁸
85. Russia contends that the Convention does not specify the order of priority in which the allocation criteria in Article 21 of the Convention should be applied. For this reason, Russia considers that the interests and the needs of Chile as a coastal State should not have been the only criterion used to determine the allocations, which in any case was taken into account without the need for an increased allocation to Chile.⁷⁹ This is especially so when the identical interests of another coastal State, Peru, have been “completely ignored” by the Commission.⁸⁰ Russia further argues that Article 21 does not establish as a criterion the historical catch and past and present fishing patterns and practices in the *adjacent waters* to the Convention Area.⁸¹ Russia adds that it is unclear what criteria have been taken into consideration to allocate quotas to the new entrants, especially since the new entrants will in any event transfer their quotas to Chile.⁸²
86. Additionally, Russia takes issue with the procedure followed to establish the Working Group and the procedure followed by the Working Group.⁸³ According to Russia, the Commission did not make available to Members the Working Group’s terms of reference and the procedure for the conduct of its business and, as a result, acted contrary to Article 9 of the Convention.⁸⁴
87. Russia contests the Commission’s compliance with Rule 4.5 of the Rules of Procedure, arguing that it was unaware of Chile’s intentions to seek an increase in its quota before the 11th (2023) Annual Commission Meeting as a formal proposal to modify the allocations, including any proposal regarding the new entrants’ allocation needs, was not introduced in advance of the meeting.⁸⁵ In its view, the proposal introduced by Korea was merely a proposal to “extend[] the application of the percentages in the current CMM 01 (*Trachurus murphyi*) for one year, and to commence a process to develop an allocation framework”.⁸⁶ Russia cautions that the practice of

⁷⁶ Russia Reply, p. 2, para. 6, p. 5, para. 6 (quoting Report of the 5th (2017) Annual Commission Meeting (Organisation Supporting Material No. 3)). *See also* Hearing transcript, pp. 14:1-4, 93:11-14.

⁷⁷ Hearing transcript, p. 45:8-18.

⁷⁸ Russia Memorandum, p. 4; Hearing transcript, pp. 48:21-49:6.

⁷⁹ Russia Reply, p. 2, para. 7.

⁸⁰ Russia Reply, p. 2, para. 3.

⁸¹ Russia Reply, p. 3, para. 8, p. 6, para. 1.

⁸² Hearing transcript, p. 91:11-13; Russia Reply, p. 5, para. 4.

⁸³ Russia Memorandum, p. 4.

⁸⁴ Russia Memorandum, p. 4; Article 9(2), Convention.

⁸⁵ Russia Memorandum, p. 3; Russia Reply, p. 4, paras. 2-3; Hearing transcript, pp. 14:15-15:2, 45:19-46:5. *See also* Section V.2 below.

⁸⁶ Russia Memorandum, p. 3.

the Commission making decisions on allocations without ensuring the application of Rule 4.5 neglects the Rules of Procedure and places the Organisation's legal framework at risk.⁸⁷

Other Participants' Positions

88. Peru argues that CMM 01-2023 is inconsistent with the Convention in that it allocates quotas on the basis of the transfer of quotas from previous years, a criterion not found in Article 21 of the Convention.⁸⁸ It also rejects the view that CMM 01-2023 takes into account past practice.⁸⁹ According to Peru, the discussions prior to its adoption did not reveal how these criteria were taken into account and how each allocation was decided.⁹⁰ Similarly, Chinese Taipei emphasises the importance of the link between the transfer of quotas and the future agreements on the allocation of fishing opportunities in these proceedings as well as in future decisions by the Commission.⁹¹
89. Conversely, other Participants, namely Chile, the European Union, and New Zealand, argue that CMM 01-2023 is consistent with the Convention. They reject Russia's emphasis on consent from Members, citing Article 16 of the Convention which allows Members to take decisions by a three-fourths majority, and recount that the decision to adopt CMM 01-2023 was taken by vote because, despite all efforts, Members could not reach consensus.⁹²
90. These Participants explain that allocations in CMM 01-2023 are based on the 2017 percentage allocations and that all Members, including Russia, agreed these were consistent with Article 21 of the Convention, with adjustments made to accommodate the three new entrants, as well as Chile's desire for a greater allocation to reflect its interests and historical and present catch data.⁹³ They locate Chile's interests in its economic dependence on *Trachurus murphyi* and point out that it is the only Member that has always caught 100% of its allocation of *Trachurus murphyi* (and since the beginning of 2020, Chile has exhausted its allocation within its EEZ).⁹⁴ In respect of this, Chile notes in particular that the Commission was obliged to take into account its historic catch data and fishing patterns and practices in line with paragraphs 2 and 3 of Article 21 of the Convention, and that the Commission did so in previous decisions in 2013, 2014, 2015, and 2017.⁹⁵
91. On the issue of transfers of quotas, the Participants (other than Peru) explain that these transfers reflect Chile's dependence on the resource, the demand for *Trachurus murphyi* in the Chilean

⁸⁷ Russia Reply, p. 5, para. 5.

⁸⁸ Peru Memorandum, para. 16.

⁸⁹ Peru Memorandum, paras. 17-19.

⁹⁰ Peru Memorandum, para. 20.

⁹¹ Chinese Taipei Memorandum, para. 3.

⁹² Chile Memorandum, p. 4, para. 9; Hearing transcript, pp. 21:19-23, 23:7-14. *See also* New Zealand Memorandum, paras. 13, 14, 26.

⁹³ Chile Memorandum, pp. 5, 6, paras. 10, 14. *See also* New Zealand Memorandum, paras. 5, 17, 18, 31; EU Memorandum, para. 12; Hearing transcript, pp. 29:13-20, 96:2:8.

⁹⁴ New Zealand Memorandum, paras. 17-18; Hearing transcript, pp. 34:23-35:3, 70:25-71:2; Chile Memorandum, pp. 6-7, paras. 17-20.

⁹⁵ Hearing transcript, pp. 21:13-18, 30:14-31:2, 57:23-58:3.

fishing industry, and the accumulation of the resource in Chile's EEZ.⁹⁶ They see the purpose of paragraph 9 of CMM 01-2022 as giving a transferring party the right to negotiate future allocation decisions without being bound to accept a proportionate reduction in its allocation as a direct consequence of the transfer.⁹⁷ As such, they consider that Russia's interpretation of paragraph 9 renders catch data irrelevant because "any catch in excess of, or below, quota would be attributable to transfers".⁹⁸ In their view, by recognising the abovementioned facts and accommodating requests for an allocation by the new entrants, CMM 01-2023 took into account the criteria in Article 21(1) of the Convention.⁹⁹

92. The European Union also takes the view that the Commission did not base its allocation decision only on transfers of quotas, but on a holistic application of the criteria in Article 21.¹⁰⁰ If the Commission's decision had in fact been only based on transfers, the new entrants would have received no allocation as none of them have ever received any transfers.¹⁰¹
93. Further, the Participants (except Peru) disagree with Russia that the decision to adopt CMM 01-2023 was taken in breach of procedural obligations in the Convention, highlighting that the establishment of *ad hoc* working groups during Commission meetings has been standard practice in SPRFMO and other RFMO/As.¹⁰² Chile adds that the Commission is entitled to constitute them in furtherance of its powers and functions under Articles 8(p) and 9(6) of the Convention.¹⁰³ According to Chile, the decision to convene the Working Group was taken at an intersessional meeting of the Heads of Delegation prior to the 11th (2023) Annual Commission Meeting.¹⁰⁴ New Zealand and the European Union recount the discussions preceding the creation of the Working Group, concluding that the intention of the Chairperson of the Commission to use the working group format for the discussion on allocation at the 11th (2023) Annual Commission Meeting was announced repeatedly and well in advance.¹⁰⁵ Further, New Zealand recalls that Members also agreed at the 11th (2023) Annual Commission Meeting that the Working Group should be established.¹⁰⁶ In any event, according to New Zealand, a working group is not a subsidiary body within the meaning of Article 9 of the Convention.¹⁰⁷ Moreover, the Rules of Procedure do not preclude the Chairperson of the Commission from putting to a vote a proposal arising from a working group that has not reached consensus.¹⁰⁸ The Organisation agrees that such informal

⁹⁶ Hearing transcript, pp. 33:1-6, 72:5-13; New Zealand Memorandum, paras. 17, 34; Chile Memorandum, pp. 6, 7, 8, paras. 3, 17, 19.

⁹⁷ New Zealand Memorandum, paras. 32-33.

⁹⁸ New Zealand Memorandum, para. 33. *See also* EU Memorandum, para. 9.

⁹⁹ New Zealand Memorandum, paras. 30-31; Chile Memorandum, p. 6, paras. 15-17; EU Memorandum, paras. 11-12.

¹⁰⁰ EU Memorandum, paras. 11-12.

¹⁰¹ EU Memorandum, para. 12.

¹⁰² Hearing transcript, pp. 25:1-26:7; New Zealand Memorandum, para. 35; EU Memorandum, para. 20.

¹⁰³ Hearing transcript, pp. 23:25-24:6, 26:2-7.

¹⁰⁴ Chile Memorandum, p. 5, para. 10; Hearing transcript, p. 25:21-24; Letter of the SPRFMO Secretariat No. G141-2022, 19 September 2022 (Chile Supporting Material No. 2).

¹⁰⁵ New Zealand Memorandum, paras. 19, 35; EU Memorandum, para. 20-22; Organisation Response, para. 6.

¹⁰⁶ New Zealand Memorandum, para. 35.

¹⁰⁷ New Zealand Memorandum, para. 35. *See also* Organisation Response, para. 6.

¹⁰⁸ New Zealand Memorandum, para. 35. *See also* EU Memorandum, para. 14.

working groups do not have rules and procedures distinct from the Commission and all formal decisions are made by the Commission.¹⁰⁹

2. Unjustifiable Discrimination

Russia's Position

94. Russia argues that CMM 01-2023 discriminates in form and in fact against it by reducing its allocation without considering Article 21 of the Convention and without seeking its consent.¹¹⁰ In this respect, it reiterates its arguments summarised above regarding the inconsistency of CMM 01-2023 with the Convention. In addition, Russia argues that the reduction affected some Members that could have increased their allocations based on their fishing efforts since 2017.¹¹¹
95. As noted above, according to Russia, CMM 01-2023 has reduced its allocation without considering any “agreed allocation criteria that allow for an objective allocation of quota shares”, thus discriminating against it in fact.¹¹² Further, Russia argues that the practice of the Commission making decisions on allocations without ensuring the application of Rule 4.5 of the Commission’s Rules of Procedure is contrary to these Rules of Procedure and places the Organisation’s legal framework at risk.¹¹³
96. In addition, Russia submits that CMM 01-2023 is contrary to Article 19 of the Convention.¹¹⁴ It states that the quotas allotted to developing countries in recognition of their special requirements under Article 19 of the Convention had become subject of transfers rather than ensuring “access to fisheries by, subsistence, small-scale and artisanal fishers and women fish workers, as well as indigenous people in such developing States Parties”.¹¹⁵
97. Finally, Russia argues that CMM 01-2023 contravenes the compatibility principle enshrined in Article 4 of the Convention as it places the fishermen fishing in the Convention Area at a disadvantage compared to those fishing in areas under national jurisdiction.¹¹⁶

Other Participants' Positions

98. On the issue of discrimination in form, the Participants agree that no formal written proposal to amend the *Trachurus murphyi* allocations was submitted in advance either by Chile or by the new entrants.¹¹⁷ Nevertheless, Chile and the European Union argue that there has been no discrimination against Russia in form. Chile contends that Rule 4.5 merely establishes deadlines for discussing proposals and does not impose an obligation on the Members to present a formal proposal.¹¹⁸ It explains that it did not submit a proposal to amend the *Trachurus murphyi* CMM

¹⁰⁹ Organisation Response, para. 6.

¹¹⁰ Russia Memorandum, p. 4; Russia Reply, p. 3, para. 11; Hearing transcript, p. 17:5-10.

¹¹¹ Russia Memorandum, p. 4.

¹¹² Hearing transcript, p. 15:3-7.

¹¹³ Russia Reply, p. 5, para. 5.

¹¹⁴ Hearing transcript, p. 16:3-18.

¹¹⁵ Hearing transcript, p. 16:13-18. *See* Article 19(2)(b) of the Convention.

¹¹⁶ Hearing transcript, pp. 38:11-39:15.

¹¹⁷ EU Memorandum, para. 24; New Zealand Memorandum, para. 22; Hearing transcript, p. 63:8-11.

¹¹⁸ Chile Memorandum, p. 5, para. 13; EU Memorandum, paras. 19-28.

because it was not required to do so under the Commission's previous practice, the issue was to be discussed in the Working Group in any event, and it had already expressed its interest in seeking an increase in its percentage allocation at the 10th (2022) Annual Commission Meeting.¹¹⁹ In this respect, the Participants argue that the use of working groups without formal proposals is a well-established practice of the Commission.¹²⁰ The European Union notes that the Commission also followed the procedure adopted in the context of squid fishery, where proposals on squid fishery were referred to a working group and a final decision was adopted by the Commission on the basis of a compromise proposal.¹²¹ In any event, the European Union argues that Korea's formal proposal was considered and discussed by the Working Group and adjustments to the allocations were proposed as part of those discussions.¹²²

99. The European Union adds that it is not discriminatory to put a proposal to a vote in the Commission meeting pursuant to Rule 7 of the Rules of Procedure after attempts to obtain consensus have been exhausted.¹²³
100. While not taking a position on the issue of discrimination against Russia, Chinese Taipei emphasises that Rule 4.5 of the Commission's Rules of Procedure promotes transparency and due process in the decision-making procedures of the Commission's meetings, including matters on the transfer of quotas and the decision on "future agreements on the allocation of fishing opportunities".¹²⁴
101. On the issue of discrimination in fact, Chile, the European Union, and New Zealand argue that there is also no such discrimination against Russia. They submit that the Commission applied an equal and proportional reduction to Members' shares, an approach considered by most Members to be fair, non-discriminatory and equitable.¹²⁵ Chile adds that the Convention's framework "does not guarantee the maintenance or increase of each member participation".¹²⁶
102. These Participants further point out that all Members except Chile have consistently had catches substantially below their allocations, entitling Chile to an increase in its allocation, which could only be achieved by reducing other Members' allocations.¹²⁷ In contrast, Russia's catch has not, in any of the previous 10 years, exceeded 2.1% of TAC (Resource).¹²⁸

¹¹⁹ Hearing transcript, p. 24:4-17.

¹²⁰ EU Memorandum, paras. 20, 24; Hearing transcript, p. 25:21-25, referring to Organisation Information Paper, paras. 11, 18, 27, 30 and 42.

¹²¹ EU Memorandum, para. 28.

¹²² EU Memorandum, paras. 26-27.

¹²³ EU Memorandum, para. 22.

¹²⁴ Chinese Taipei Memorandum, paras. 2-3.

¹²⁵ New Zealand Memorandum, paras. 6, 39. *See also* Organisation Response, para. 2.

¹²⁶ Chile Memorandum, p. 8, para. 5.

¹²⁷ New Zealand Memorandum, para. 39.

¹²⁸ New Zealand Memorandum, para. 40; EU Memorandum, paras. 37-38; Hearing transcript, p. 29:20-23: "... Russia catches reach only to an average of 1.45% of the total capture".

103. Regardless, while Russia's percentage allocation has reduced, its allocation share has in fact increased from 29,543 tonnes to 32,649 tonnes due to the increase of the TAC in the Convention Area to 981,832 tonnes.¹²⁹
104. In response to Russia's claim that the reduction of its percentage allocation affected some Members that could have increased their percentage allocations based on their fishing efforts since 2017, the European Union submits that the consideration of past fishing patterns and practices is only one out of ten criteria in Article 21 of the Convention. It is also unclear why Russia considers only the period since 2017 to be relevant.¹³⁰ According to the European Union, the Commission has a wide discretion in choosing how to accommodate the increase to Chile's allocation and the allocations to new entrants, subject to Article 21 and other relevant provisions of the Convention.¹³¹
105. Peru argues that CMM 01-2023 unjustifiably discriminates against itself, both in terms of the quota allotted to it in the high seas and in its national jurisdiction.¹³² Pointing to the continuous reduction of its allocated percentage share since 2013, Peru argues that the reduction of 0.0028% in its *Trachurus murphyi* quota under paragraph 25 of CMM 01-2023, which represents the difference between the amount agreed in paragraph 9 and the total catch allocated in paragraph 4 of the CMM 01-2023, is discriminatory on the ground that it favours the interests of Chile and the new entrants over Peru's.¹³³ Peru, however, points out that Russia's Objection does not "specify to which Members the percentage should be reduced in order to satisfy its demand".¹³⁴

3. Alternative Measures

Russia's Alternative Measures

106. Russia proposes its alternative measures as follows:

The Russian Federation is guided by a percentage on its *Trachurus murphyi* quota of 3.2825% related to the catches referred to in paragraph 9 of the CM 01-2023 which is equivalent to the limits set in the *Trachurus murphyi* Conservation Measure for the period from 2017 to 2023.

Following the principle of shares distribution of *Trachurus murphyi* catches the Russian Federation establishes the *Trachurus murphyi* catch limit in the Convention area in respect of the Russian fisheries for 2023, which equals to 35,452 tonnes.

In assessing the impact of the alternative measures, the recommendations of the Scientific Committee have been taken into account.

As stated in paragraph 4.3.(90) of the 10th SPRFMO Scientific Committee Meeting Report, the Scientific Committee noted the estimated biomass of jack mackerel increased from 2021 to 2022 and is estimated to be well above the *Bmsy*. Therefore, the Scientific Committee noted that the stock is estimated to be in the third tier of the harvest control rule. Within the

¹²⁹ Chile Memorandum, p. 9, para. 7; New Zealand Memorandum, paras. 6, 40. *See also* EU Memorandum, paras. 37-38.

¹³⁰ EU Memorandum, paras. 29-31.

¹³¹ EU Memorandum, para. 34. *See also* Hearing transcript, p. 26:15-24.

¹³² Peru Memorandum, paras. 27-36.

¹³³ Peru Memorandum, paras. 27-38.

¹³⁴ Peru Memorandum, para. 39.

third tier of the harvest control rule, catches should be limited to a fishing mortality of *F_{msy}* which would be expected to result in catches in 2023 of 3,120 kt. However, according to the directive of the Commission to the Scientific Committee (COMM3, Annex C), a maximum change in the catch limit of 15% should be applied relative to the TAC of the current year.

At the same time, the Russian Federation will adhere to the conservation and management principles and approaches set forth in the Convention, and will continue to monitor compliance with the provisions of all the relevant conservation measures in relation to the *Trachurus murphyi* fishery in the Convention Area.¹³⁵

107. Russia argues that its alternative measures are equivalent in effect, because their impact has been assessed in light of the Scientific Committee's recommendations. Based on the 2022 Scientific Committee Report, the estimated biomass of *Trachurus murphyi* increased from 2021 to 2022, and the stock is estimated to be in the third tier of the harvest control rule. Thus, in Russia's view, the increase in the *Trachurus murphyi* catch it has proposed will not affect the status of the stock.¹³⁶ In any case, it also agrees with the approach set out in the Peru Memorandum that an increase in Russia's quota should imply a decrease in the shares of those who increased their quotas at the expense of Russia in 2023.¹³⁷
108. At the hearing, Russia described its alternative measures in the following terms:

On the basis of the Convention, Russia adopted alternative measures equivalent [to] the impact on the [CMM 01-2023]. The alternative change in the share implies its increase by 0.2595% of the total possible allowable catch ... amounts to 35,452 tons. And this amount of the Russian share amounting to 35,452 tons was presented in the table of the Chairman of the Working Group on jack mackerel at the 11th Session of the Commission when the total allowable amount of jack mackerel was increased by 20%. While resorting to such a measure, the Russian Federation took into account the risks of condition of the jack mackerel on the basis of the recommendation of the Scientific Commission; and, according to the assessment of the Scientific Committee conducted against the Asia Pacific Model, which has applied for 13 years, the stock remains at a biological sustainable level, and the population has a tendency to grow. In this regard, the increase of the Russian Federation quota of 4.22% will not damage the jack mackerel stock.¹³⁸

Other Participants' Positions

109. Chile, the European Union, and New Zealand submit that Russia's proposal is not an equivalent measure,¹³⁹ because it would either result in the TAC (Resource) and TAC (Applicable Area) being exceeded, or unjustifiably interfere with the allocations of other participants in the fishery.¹⁴⁰ New Zealand notes that the Commission has already recommended a one-off 20% increase in the TAC, and any further increase as a result of Russia's alternative measure would undermine the achievement of the objective of the Convention as set out in Article 2.¹⁴¹ Additionally, Chile notes that Russia does not identify the modalities of its alternative measure

¹³⁵ Russia Memorandum, p. 5.

¹³⁶ Hearing transcript, p. 18:8-10.

¹³⁷ Russia Reply, p.3, para. 14, p. 7, para. 4.

¹³⁸ Hearing transcript, pp. 17:15-18:10.

¹³⁹ New Zealand Memorandum, para. 45; EU Memorandum, para. 41.

¹⁴⁰ Chile Memorandum, pp. 9-10, para. 11; New Zealand Memorandum, para. 45; EU Memorandum, paras. 45-48; Hearing transcript, p. 34:6-22.

¹⁴¹ New Zealand Memorandum, para. 46.

such as how it would operate and who would bear the increase in Russia's allocation.¹⁴² Chile further argues that Russia's historical catch record—approximately 91.54%—demonstrates that Russia does not need an increased allocation for *Trachurus murphyi*, which could in any event be met by recourse to the transfer mechanism in paragraph 8 of CMM 01-2023.¹⁴³

110. If the Review Panel were to accept Russia's Objection, Peru argues that it would be necessary to ensure that the final decision does not affect the percentage allocations of other Members, particularly since, as Russia also argues, they have not given their consent for such purpose.¹⁴⁴ Similarly, the European Union requests that the Review Panel recommend alternative measures similar to those recommended by the 2013 Review Panel.¹⁴⁵

VI. ANALYSIS

111. References to the Review Panel first appear in the Convention in the context of its provisions on decision-making by the Commission. Article 16, paragraph 1, states, "As a general rule, decisions by the Commission shall be taken by consensus". Except for certain matters not relevant to these proceedings, Article 16, paragraph 2, then goes on to provide for decisions to be taken by a majority on questions of procedure and a three-fourths majority on questions of substance "if the Chairperson considers that all efforts to reach a decision by consensus have been exhausted". This creates the possibility under Article 17, paragraph 1, that a decision will become binding on all Members notwithstanding the opposition of one or more Members.
112. Article 17, paragraph 2, accords a Member the right to object to a decision of the Commission. "In that event the decision shall not become binding on that member ... to the extent of the objection, except in accordance with ... Annex II [on review panels]". The only admissible grounds for such an objection are that "the decision unjustifiably discriminates in form or in fact against" that Member or "is inconsistent with the provisions of this Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement". The Member making the objection must at the same time "adopt alternative measures that are equivalent in effect to the decision to which it has objected and have the same date of application". Article 17, paragraph 5, then requires the establishment of a review panel that, within 45 days, must transmit "its findings and recommendations on whether the grounds specified for the objection ... are justified and whether the alternative measures adopted are equivalent in effect to the decision to which objection has been presented".
113. In other words, it might be said that as a practical matter the Review Panel procedure qualifies the objection procedure which qualifies the voting procedure which qualifies the consensus procedure. Viewed from that perspective one might reach two conclusions on Russia's assertion that a reduction in its percentage allocation requires its consent. One is that there may be good reason to try to resolve such matters by consensus in accordance with the general rule set forth in Article 16, paragraph 1. The other is that consensus is not required if the Chairperson of the

¹⁴² Hearing transcript, p. 35:4-9.

¹⁴³ Chile Memorandum, p. 10, paras. 13-15.

¹⁴⁴ Peru Memorandum, para. 40.

¹⁴⁵ EU Memorandum, para. 49.

Commission decides under Article 16, paragraph 2, that all efforts to reach a decision by consensus have been exhausted.

114. The remedy rather is in the course taken by Russia: the objection procedure followed by the review panel procedure. This includes the right of the objecting member and other members to make written and oral submissions. That right having been exercised, the Review Panel will now proceed to explain its views on the main issues posed and indicate its findings and recommendations.

1. Inconsistency with the Convention, the 1982 Convention, or the 1995 Agreement

115. Russia maintains in its Objection that the decision resulting in CMM 01-2023 with respect to allocations for 2023 to which it objects is inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.
116. The Review Panel notes the observations and conclusions of the 2018 Review Panel in paragraphs 91 to 96 of its Findings and Recommendations on the Commission's wide margin of discretion in taking allocation decisions pursuant to Article 21 of the Convention. It is evident on its face that the Commission is authorised to make decisions that increase or decrease tonnage and percentage allocations under Article 21 and other relevant provisions of the Convention. There is nothing in these provisions that suggests any limitation on the application of Articles 16 and 17 in that connection.
117. In its Objection, Russia states that "Reduction of the percentage related to *Trachurus murphyi* quota of one member of the Commission without his consent and without taking into consideration provisions of Article 21 of the Convention in favor of another member demonstrates unjustifiable discrimination in form and in fact, and is inconsistent with the provisions of the Convention".¹⁴⁶ The proposition that the percentage allocation to one Member cannot be reduced as a consequence of the increase in the percentage allocation to another Member would, if carried to its logical conclusion, preclude any change in percentage allocations and any new percentage allocations. The argument that such changes can be made only by consensus or with the consent of the adversely affected Member has no basis in the text of the Convention. There is no separate requirement of consensus or consent for the reduction of allocations. Whether there are sound policy reasons for trying to take such decisions by consensus is of course a different matter. Such policy arguments could of course be rooted in Article 16(1) as well as Article 18(1).
118. In its Objection, Russia contends that "The CMM 01-2023 created an unfair and inequitable situation that is not based on the criteria of Article 21 of the SPRFMO Convention, instead based only on the transfers of quotas that some members of the Commission have made in previous years, without this constituting a valid criteria for the allocation of quotas or for the change of the percentages of participation in the jack mackerel (*Trachurus murphyi*) fishery".¹⁴⁷ This contention overlooks the allocations made to the three new entrants (Belize, the Cook Islands,

¹⁴⁶ Russia's Objection, p. 4.

¹⁴⁷ Russia's Objection, p. 1.

and Panama) which were presumably based on Article 21(1)(e) and Article 21(6).¹⁴⁸ In its Reply, Russia implicitly withdraws this contention when it argues that “the increased *Trachurus murphyi* quota, specified in CMM 01-2023, should not be justified only by three criteria established in letters (f), (g) and (h) of Article 21”.¹⁴⁹ This position not only overlooks once again Article 21(1)(e) and Article 21(6), but also Article 21(3). This provision requires the Commission to take account of “the historic catch and past and present fishing patterns and practices” within areas of national jurisdiction of coastal States which have provided their consent as envisaged in Article 21(2). Finally, in view of the Commission’s wide discretion in taking allocation decisions—which is also reflected in the words “take into account” and “to the extent relevant” in the *chapeau* of Article 21(1)—there is no need for allocation decisions to be based on all of the listed allocation criteria.

119. Russia’s claim that the allocations in CMM 01-2023 are decided based only on transfers of quotas has been supported by several Members, including China, Chinese Taipei, and Peru. According to the Organisation Information Paper, however, many Members “noted that a significant biomass of jack mackerel is concentrated in Chilean waters”.¹⁵⁰ This implicit reference to the well-known notion of zonal attachment can be regarded as being included in the words “status of the fishery resource” in the *chapeau* of Article 21(1) or, alternatively, in Article 21(1)(a). It could well be that the relatively low volume of catches on the high seas and the significant transfers to Chile on the one hand, and the high volume of catches of Chile in its own maritime zones on the other, can, together, be regarded as an indicator of the stock’s range of distribution and abundance. In view of the above, the Review Panel has no reason to conclude that the Commission has acted outside of its wide margin of discretion under Article 21 of the Convention.
120. It should also be recalled that a CMM may not derogate from the authority or the obligations of the Commission under the Convention. Thus, for example, the provision in paragraph 8 of CMM 01-2023 and its predecessors that transfers are “without prejudice to future agreements on the allocation of fishing opportunities” does not limit the effect of the references to historic catch and past and present fishing patterns and practices in Article 21(1)(a) and Article 21(3). Similarly, the statement in paragraph 3 of CMM 01-2023 and its predecessors that “This CMM is not to be considered a precedent for future allocation decisions” does not limit the authority of the Commission to base its allocations in whole or in part on the allocation decision in a prior CMM. It may be noted in this regard that Russia determined the catch limit in its alternative measure for 2023 by applying its percentage allocation in the prior CMM.
121. Russia asserts that the Commission violated its Rules of Procedure by deciding on the allocation in CMM 01-2023 in the absence of a timely advanced written proposal required by those Rules. That position was not supported by some other Members. They argued that there was ample advance notice that the Commission would be reconsidering allocations, that a formal advance written proposal is not required, and has not in the past been required, for allocation deliberations

¹⁴⁸ See also the phrase “Without prejudice to Members and CNCPs without an entitlement in Table 1” in paragraph 32 of CMM 01-2023.

¹⁴⁹ Russia Reply, p. 3, para. 8.

¹⁵⁰ Organisation Information Paper, para. 58.

and decisions, and that in any event Korea had made an advance written proposal on allocation in compliance with the requirements of the Rules. Be that as it may, the issue is not relevant to the question of whether the allocation decision laid down in the CMM is “inconsistent with the provisions of this Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement” for the purposes of Article 17(2)(c) of the Convention. That provision contains no reference to consistency with the Rules of Procedure or any other measure adopted by the Commission. There is no other provision in the Convention that suggests a hierarchical relationship between measures adopted by the Commission for purposes of making an objection that is admissible under Article 17(2)(c).

122. For the foregoing reasons, the Review Panel determines that the provisions of CMM 01-2023 to which Russia objects are not inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.

2. Unjustifiable Discrimination

123. Russia also invokes the ground of unjustifiable discrimination. This is based 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. While this language has a rich pedigree, the immediate context for its interpretation and application by the Review Panel is the Convention, including Annex II, which specifies different procedural consequences under the Convention in respect of different findings by the Review Panel.

124. The words “in form or in fact” reflect the different ways in which discrimination can occur. As noted by the 2018 Review Panel:

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.¹⁵¹

125. The Review Panel notes that Russia’s Objection does not clearly or systematically distinguish arguments substantiating its claim of inconsistency on the one hand and arguments substantiating its claim of unjustified discrimination on the other. The memoranda submitted by other Members also do not reflect a uniform approach in this regard.
126. As regards substantive discrimination in form or in fact, the Review Panel concludes that Russia has not sufficiently substantiated such a claim. All of the percentage allocations in CMM 01-2023 that decreased in comparison with the percentage allocations in CMM 01-2022, including Russia’s, were subject to the same decrease, namely by ~ 7.91%.¹⁵² The Review Panel recognises that unjustified discrimination can occur not only where like circumstances are treated differently, but also where unlike circumstances are treated in the same way without regard to a relevant difference. The Review Panel notes that the same percentage reduction was applied both to Members with substantial active fisheries, including Russia, and to other Members with catch

¹⁵¹ Findings and Recommendations of the 2018 Review Panel, para. 99.

¹⁵² Russia’s percentage allocation of 3.2825% in 2022 decreased to 3.0230% in 2023. As noted in the EU Memorandum, para. 11, the slight differences in these percentage reductions “are the result of the rounding up or down of numbers”.

entitlements under CMM 01-2023. The Review Panel is not in a position to evaluate a claim of substantive discrimination on those grounds. The difficulty it faces is that there is little more than the decision to which Russia objects to indicate what the Commission's considered evaluation might be. There was no explanation of the reasons for using a single percentage reduction or how that related to the criteria contained in Article 21 of the Convention.¹⁵³ That suggests that the real issue at this juncture is not substantive but procedural discrimination.

127. As regards discrimination in procedure, Russia argues that Rule 4.5 of the Commission's Rules of Procedure has not been observed because, apart from the formal proposal submitted by Korea in advance of the 11th (2023) Annual Commission Meeting, no other formal proposals were submitted in advance of the meeting.¹⁵⁴ In the Organisation Information Paper, it is reported that, "The WG Chair noted that, consistent with the Commission Chair's view of the process for negotiating and agreeing on allocation at this meeting, the measure was up for review and Members had the right to engage in that debate and seek changes to the allocation outcome regardless of whether they had submitted an individual proposal in advance. No Members objected to that process at the outset".¹⁵⁵

128. As indicated in paragraph 26 of CMM 01-2018—included in the section titled "Review"—and the footnote to Table 2, the agreed percentage allocations would in principle remain unchanged for a period of four years—from 2018 to 2021—and would therefore be reviewed in 2022. Paragraph 26 reads as follows:

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.

129. As indicated in the phrase "Without prejudice to Members and CNCPs without an entitlement in Table 1", the Commission would still be able to adjust the percentage allocations during the envisaged four-year period.¹⁵⁶ In addition, nothing in the Convention prevents the Commission from extending the four-year period and thereby deferring the review of the percentage allocations. The latter did in fact occur. At its 10th (2022) Annual Commission Meeting, which was not held in person but virtually, the Commission decided by consensus on a roll-over of the percentage allocations for one year. This outcome is reflected in paragraph 32 of CMM 01-2022 and the footnote to Table 2.

130. Russia's arguments relating to Rule 4.5 of the Rules of Procedure do not in themselves establish unjustified procedural discrimination, but will be taken into account by the Review Panel along with other relevant circumstances.

¹⁵³ See Peru Memorandum, para. 20.

¹⁵⁴ It is not clear whether Russia raised this argument before the final stages of the negotiations.

¹⁵⁵ Organisation Information Paper, para. 47.

¹⁵⁶ During its 8th (2020) Annual Commission Meeting, the Commission agreed on a percentage allocation for Ecuador throughout the range of the stock. This percentage allocation did not affect the percentage allocations of other Members with catch entitlements under CMM 01-2020.

131. From 2017 to 2022, only six Members with catch entitlements for *Trachurus murphyi* under the relevant CMM (Chile, China, the European Union, Korea, Peru, and Russia) have actually engaged in fisheries leading to significant catches. Of these six Members, three voted against the adoption of CMM 01-2023 (China, Peru, and Russia). Both Russia and China decided to present an objection to the adoption of CMM 01-2023, with China subsequently withdrawing its objection. The remaining ten Members that were entitled to vote on the adoption of CMM 01-2023 during the 11th (2023) Annual Commission Meeting either had no catch entitlements for *Trachurus murphyi* or transferred their catch entitlements to other Members instead of actually engaging in fisheries leading to significant catches themselves. All of them voted in favour of the adoption of CMM 01-2023.
132. As indicated in the Organisation Information Paper, the Chair of the Working Group had asked Members to consider
- whether other factors related to historical or current fishing patterns – such as the extent to which Members were utilizing their own limits through fishing by vessels flying their flags, or the extent to which Members were fully utilizing their limits to support sustainable use of fisheries resources through either direct fishing activity or the transfer of limits to other Members.¹⁵⁷
133. The Chair nevertheless concluded that “there was no consensus around how to factor those patterns into the negotiations beyond the allocations already included in the table”.¹⁵⁸ In the end, however, another proposal that also did not attract consensus was forwarded to the Commission for decision.
134. Bearing in mind the Commission’s wide margin of discretion in making allocation decisions pursuant to Article 21 of the Convention, and the Chairperson’s authority pursuant to Article 16(2) of the Convention to determine that “all efforts to reach a decision by consensus have been exhausted”, the Review Panel is of the opinion that the abovementioned circumstances must be considered in conjunction with the relatively short duration of the allocation negotiations as well as the relatively long time—10 years, as indicated in paragraph 31 of CMM 01-2023, and footnote 2 to its Table 2—during which the allocation percentages are to remain unchanged in principle. By comparison, the previous *Trachurus murphyi* allocation negotiations in 2018 led to an agreed period of four years. The allocation negotiations in 2023 lasted for five days, which is a relatively short period of time in comparison with allocation negotiations in many other RFMO/As. Moreover, the Review Panel is not aware of any preparatory, intersessional consultations on allocation in advance of the 11th (2023) Annual Commission Meeting. The proposal submitted by Korea noted that discussions on allocation “are highly sophisticated and require difficult negotiations” and therefore envisaged the need to commence a much more lengthy “process to develop an allocation framework”.¹⁵⁹
135. In light of the foregoing circumstances, the Review Panel concludes that there was insufficient attention paid during the negotiations to ideas, factors, criteria, and proposals of interest to Russia

¹⁵⁷ Organisation Information Paper, para. 50.

¹⁵⁸ Organisation Information Paper, para. 50.

¹⁵⁹ Proposal of the Republic of Korea, COMM11-Prop21, p. 1 (Organisation Supporting Material No. 44).

and similarly situated Members, that this was due in part to the relatively short duration of the negotiations, especially when compared to the relatively long duration for which the allocation percentages will in principle remain unchanged, and that this hurried process culminating in the adoption of CMM 01-2023 by a divided vote resulted in unjustifiable procedural discrimination with respect to Russia's allocation interests.

3. Alternative Measures

136. The 2013 Review Panel observed that “the alternative measure, to have equivalent effect to CMM 1.01, should seek to avoid inconsistency not only with the total allowable catch but also with the allocations to other Members and CNCs”. The present Review Panel agrees. The determination of a catch limit that is equivalent in effect to CMM 01-2023 should respect the TACs specified therein and take into account the fact that other Members and their nationals have justified expectations based on the tonnage allocations set forth in that measure for 2023 and may have already acted in reliance on those expectations.
137. The catch limit specified in the alternative measure indicated in Russia's Objection would not satisfy this requirement. It poses too great a risk of “inconsistency not only with the total allowable catch but also with the allocations to other Members and CNCs”.
138. The Review Panel also believes that the method for calculating a precise alternative catch limit should be rooted in the Convention and, to the extent feasible, in positions shared by both the objecting Member and other Members. In important respects this has already been done. First, both Russia and the other Members that made written or oral submissions recognise the importance of respect for the TAC set forth in CMM 01-2023. The Review Panel wishes to record its agreement with the view that the determination of the TAC should be prior to and independent of the allocation of shares in the TAC. Second, the point of departure for determining allocations in 2023 in both CMM 01-2023 and Russia's alternative measures is the prior year's CMM, namely CMM 01-2022. Third, both CMM 01-2023 and Russia's alternative catch limit increase tonnage allocations in light of the increase in the TAC.
139. The difference is that the alternative catch limit indicated in Russia's Objection increases the limit for Russia by the same amount that the TAC is increased, namely 20%, while CMM 01-2023 accords less than a 20% increase to Russia and other Members with allocations in 2022 in order to accommodate the increased allocation to Chile as well as new allocations to three new entrants. That aspect of CMM 01-2023 is at the heart of Russia's Objection. It would not be plausible to expect that Russia would embrace the same methodology in calculating the catch limit in its alternative measures.
140. It is however necessary that the end result be a catch limit in the alternative measures that is equivalent in effect to CMM 01-2023. As noted above, the 20% increase in Russia's limit would not satisfy that requirement.
141. It is possible to find a basis for calculating an alternative catch limit rooted in the Convention that would satisfy the equivalence requirement. In its Memorandum, Russia observed that “according to the directive of the Commission to the Scientific Committee (COMM3, Annex C),

a maximum change in the catch limit of 15% should be applied relative to the TAC of the current year”.¹⁶⁰ That 15% limit was exceeded in CMM 01-2023 on grounds that the data and analysis of the Scientific Committee could be understood to justify a 20% increase for 2023. But in the context of an effort to identify a principled basis for calculating an alternative catch limit for Russia that satisfies the requirement of equivalent effect, a 15% increase in 2023 as compared to Russia’s allocation in 2022 would achieve that end and would unquestionably be rooted in the Convention’s provisions and processes.

142. Several passages in the Report of the 11th (2023) Annual Commission Meeting that concern the Scientific Committee’s report shed additional light on the observations in Russia Memorandum. Paragraph 8(a) states, “Considering the estimated increase in jack mackerel biomass, the SC recommended a precautionary 15% increase in 2023 catches (i.e., at or below 1,035 kt) throughout the range of jack mackerel”. Paragraph 9 reports that “Chile queried whether the quota arrangements could be revised given the healthy stock assessment and suggested that a moderate increase of the 15% ceiling of the Harvest Control Rule (HCR) as a provisional measure should be considered”. Paragraph 10 observes, “Some Members noted that the growth of the jack mackerel stocks was positive but expressed disappointment that the TAC had a 6.6% over catch in 2022, marking the fourth time in consecutive years that catches by Peru had caused the TAC to be exceeded”. And paragraph 13 reports, “Korea sought clarification whether the total jack mackerel catch of 2022 (including the over catch) was considered in determining the 2023 jack mackerel TAC. The SC chair confirmed that it was considered within the 15% and would not have an impact on the 2023 TAC”.
143. In light of the foregoing, the Review Panel recommends a modification of Russia’s alternative measures that specifies a tonnage limit for Russia for 2023 that is 15% greater than the 29,543 tonnes allocated to Russia in Table 1 of CMM 01-2022, namely a tonnage limit of 33,974 tonnes. While this recommended tonnage limit would significantly narrow the gap, it remains somewhat higher than the tonnage limit specified for Russia in CMM 01-2023. The Review Panel believes that the risk that this would result in fishing in excess of the TACs specified in paragraphs 4 and 9 of CMM 01-2023 is not substantial. Russia is not required to use all of its allotted tonnage, and has not done so in a number of years, including last year. Moreover, Russia’s Objection, immediately after indicating the alternative catch limit for Russia, adds the following qualification: “At the same time, the Russian Federation will continue to monitor compliance with the provisions of all relevant conservation measures in relation to this fishery”. In the unlikely event that the maximum Russian catch limit specified in the recommended modification of the alternative measures might result in a catch in excess of the TACs specified in paragraphs 4 and 9 of CMM 01-2023, the Russian authorities would be expected to take the steps necessary to ensure compliance. The Findings and Recommendations contain a specific reference to Russia’s conservation obligations under CMM 01-2023.

4. Additional Observations

144. The Review Panel’s duties require it to focus on problems and certain limited short-term responses. Article 8(k) of the Convention entrusts longer term solutions to the Commission. In

¹⁶⁰ Russia Memorandum, p. 5.

this connection, the Review Panel believes that the further strengthening of the deliberative and negotiating processes would contribute to the effectiveness of the CMMs adopted in meeting the objectives of the Convention. The Review Panel also believes that Russia, jointly with other interested Commission Members, could advance the prospects of success in such an endeavour by indicating their willingness to find means in accordance with the Convention to enhance the fairness, transparency, and stability of allocations to Members whose flag vessels fish for *Trachurus murphyi*.

VII. FINDINGS AND RECOMMENDATIONS

145. 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 unjustifiably discriminates in form or in fact against Russia;
 - b. *Finds* that the alternative measures for 2023 adopted by Russia are equivalent in effect to the Decision to which objection has been presented, subject to the following specific modification recommended by the Review Panel:

Russia will authorise vessels registered in Russia to fish for *Trachurus murphyi* in the Convention Area in 2023 only up to a catch limit fixed by Russia, which will not exceed 33,974 tonnes for all such vessels;
 - c. *Finds* that all provisions of CMM 01-2023 that are not covered by Russia's Objection, including in particular the TACs in paragraphs 4 and 9, remain binding upon Russia; and
 - d. *Finds*, without prejudice to the foregoing, that the Decision to which objection has been presented by Russia is not inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.
146. The costs of these proceedings, other than the costs already allocated pursuant to the Final Decision of the Review Panel as Comprised of Five Members of 7 June 2023, shall be borne by Russia and the Organisation as provided in paragraph 7 of Annex II to the Convention.

Done in English at the PCA's headquarters at the Peace Palace in The Hague, this 1st day of July 2023, and transmitted to the Executive Secretary in accordance with Article 17(5)(e) and paragraph 9 of Annex II to the Convention.



Dr. Erik J. Molenaar



Ms. Olga Sedykh



Prof. Bernard H. Oxman
Chairman



Mr. Julian Bordaçahar
Registrar, Permanent Court of Arbitration