

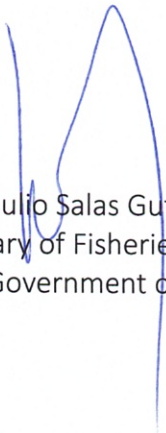
REVIEW PANEL ESTABLISHED UNDER ARTICLE 17 AND ANNEX II OF THE CONVENTION ON
THE CONSERVATION AND MANAGEMENT OF HIGH SEAS FISHERIES RESOURCES IN THE
SOUTH PACIFIC OCEAN OBJECTIONS OF THE RUSSIAN FEDERATION TO CMM 01-2023

(PCA Case No. 2023-33)

MEMORANDUM OF THE REPUBLIC OF CHILE

Valparaíso, 13 JUNE 2023




Julio Salas Gutiérrez
Undersecretary of Fisheries and Aquaculture
Government of Chile

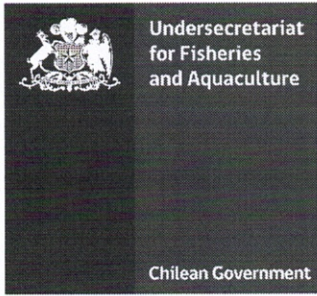


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Supporting Materials

Supporting Material No 1:
Report of the 11th Annual Meeting of the Commission.

Supporting Material No 2:
COMM 11- Report Annex 9f, Vanuatu's statement on jack mackerel

Supporting Material No 3:
Letter of the SPRFMO Secretariat Ref. G141-2022, of September 19, 2022.

Supporting Material No 4:
COMM 11- Report Annex 9b, Chile's opening statement

Supporting Material No 5:
Letter of the SPRFMO Secretariat Ref. G136-2021, of September 13, 2021.

Supporting Material No 6:
CMM 01-2022, adopted by the Commission at its 10th Meeting.

I. Introduction

1. The Republic of Chile, a Contracting Party of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (hereinafter the Convention) and a Member of the Commission of the South Pacific Regional Fisheries Management Organisation (hereinafter SPRFMO) has the honor to appear in front of you and thank you for the opportunity to contribute with its opinion and views regarding the subject of these objections, a matter of a highest importance for our country and the relevant background of the case, so that your conclusions and recommendations are based on the most accurate information possible.
2. The Russian Federation according to article 17 and Annex II of the Convention, have objected to CMM 01-2023, the decision adopted at the 11th Meeting of the SPRFMO Commission based on two grounds described in Article 17, number 2, letter c) of the Convention, namely that the objected decision unjustifiably discriminates in form and in fact against a Member of the Commission, and that such decision is inconsistent with the provisions of this Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.
3. Chile will contribute to this procedure by addressing the matters established by the Review Panel in the Procedural Directive No.2, in particular its number 2. In this regard, each of the chapters of this Memorandum will contemplate our views, inputs, and the specific request to participate in the Hearing, as it was requested by the Review Panel.

II. Regarding the consistency of CMM 01-2023 with provisions of the Convention-in particular Article 21- or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement

4. In Chile's view CMM 01-2023 is entirely consistent with the relevant provisions of the Convention in particular with Article 21 and other relevant provisions of international law reflected in the 1982 Convention and 1995 Agreement.
5. This opinion is based on the following background, starting with the base for decision-making and the margin of appreciation of the Commission in that respect. Firstly, the general provisions for any decision taken by the Commission, governing body of SPRFMO, in particular articles 8 and 16 as well as article 21, being the latter a specific provision for cases when the decision is regarding participation in fishing for any

fishery resource, including the allocation of a total allowable catch or total allowable fishing effort.

6. The Commission adopted CMM 01-2023 in accordance with article 8 number 1 letters (a) and (b) of the Convention, which establishes: “1 The Commission shall, in accordance with the objective, principles and approaches, and specific provisions of this Convention, exercise the following functions: (a) adopt conservation and management measures to achieve the objective of this Convention, including, as appropriate, conservation and management measures for particular fish stocks; (b) determine the nature and extent of participation in fishing for fishery resources including, as appropriate, for particular fish stocks”.
7. As a general rule, according to Article 16 of the Convention, decisions by the Commission shall be taken by consensus, namely with the absence of any formal objection made at the time the decision was taken. The exception is prescribed for cases when the Convention does not expressly request consensus and the Chairperson considers that all efforts to reach a decision by consensus have been exhausted. In this particular case, being a decision of substance, the quorum requested is of a three-fourths majority of the members of the Commission casting affirmative or negative votes.
8. The previous is of relevance considering the Russian Federation’s rationale in paragraph 10 of its objection which supports their allegation on the statement that the reduction of the percentage related to *Trachurus murphyi* quota of one member of the Commission **without its consent** in favor of another member demonstrates inconsistency with the provisions of the Convention.
9. In contrary to that opinion, Chile strongly deems that, the Convention is clear at establishing the possibility of applying a voting procedure in this case, when the Convention does not expressly prescribe the need for consensus and when the rest of the requested requirements were fulfilled. In that regard, as it is confirmed in paragraphs 85 and 88 of the 11th Commission Meeting Report¹, the Chairperson despite the efforts to reach consensus, including Working Group discussions over 5 days, and with the tabled measure proposed by the Chair based on the discussion of the Working Group, was unable to achieve consensus. Therefore, a decision was taken by vote with a result of 13 members supporting the proposal of the Chair and three

¹ See supporting material No. 1: Report of the 11th Annual Meeting of the Commission, page 9, paragraphs 85 and 88.

members not supporting such decision, which corresponds to an 81% percent in favor surpassing the 75% required as quorum for the decision.

10. Additionally, the Russian Federation has alleged inconsistency between the CMM 01-2023 and Article 21 of the Convention. Chile has the opposite view of the Russian Federation. In Chile's opinion, the allocated participation was based on the adopted agreement of 2017² and the subsequent modification related to Ecuador in the 2020 Commission meeting. Important is to say that the process used in 2023 was a continuation of the previous practice used to adopt the measure. In fact, the practice has been maintained since Auckland 2015, where effectively, the participation for that year was agreed.
11. It is important to mention that the agreement for having a Working Group on jack mackerel to review this measure was adopted at an intersessional meeting of the Heads of Delegation in 2022³. Later, the possibility that the presidency of this group was occupied by a representative of the US delegation was informed; this was accepted as such. Notwithstanding, there was a proposal to amend CMM 01-2022 submitted by the Republic of Korea submitted. This proposal, was discussed as well in the working group, but no consensus was reached about the participation proposed by Korea.
12. As previously mentioned, a review of CMM01- 2017 was supposed to take place in 2022 but due to the effects of the COVID 19 Pandemic, and the limited ability of several delegations to attend a meeting in person, a decision was made by the Commission in the 2022 meeting to roll over the participation in CMM01- 2022 until 2023 when the issue could be discussed in person.
13. It is also necessary to dwell on what was indicated by the objecting member, in the sense that it is necessary to present a proposal for amendment or for a new measure for the Commission to rule. It should simply be noted in this regard that the Commission is the decision-making body and that the Convention itself has endowed

² See in this regard Supporting Material No 2: COMM 11- Report Annex 9f, Vanuatu's statement on jack mackerel.

³ See supporting material No 3: Letter of the SPRFMO Secretariat Ref. G141-2022, of September 19, 2022. This letter confirms that the jack mackerel working group was agreed beforehand by the heads of delegation, as shown on the provisional meeting schedule sent as an annex of this official communication. Additionally, during the CTC meeting, when the review of the CMM proposals got into the agenda item, the relevant proposal referred to jack mackerel submitted by the Republic of Korea was differed for discussion during the Commission meeting in consideration of the commented agreement of the Heads of Delegation.

it with the possibility of making any decision it deems appropriate, as established in Article 8 (p). Thus, Rule of Procedures 5 paragraph 4 only establishes deadlines for the event in which proposals that must be discussed are presented by the members but not the obligation to present the said proposals.

14. Even though the Commission continued to work with the same basis as it did in 2017 – this is, Article 21 of the Convention, as noted before- and a decision was adopted by consensus at that time, the decision to which the Russian Federation now objects, resulted in an adjusted percentage of participation for all members, taking into account the participation of three new entrants, namely Panamá, Cook Islands, and Belize and an increase to the percentage of allocation for Chile.
15. The three new incoming participants were assigned an initial participation of 1,100 tons, as was done in the past with the incorporation of Cuba and Ecuador, and all of the other Members (including Chile) contributed proportionally to said allocation. For these allocations, the Commission considered several criteria of Article 21 including number 1 and 6.
16. The Russian Federation claims that Chile's participation in CMM 01-2023 was increased based only on the tonnage transferred by Members to Chile, according to paragraph 8 (9 in previous versions) of the relevant measure.
17. Nevertheless, the increase of the participation of Chile, adopted by the Commission, was based on the criteria of Article 21, inter alia, **the recognition of the interests and the needs of this coastal State, whose economy is dependent on the exploitation of the *Trachurus murphyi***. In this regard, the transfers of all or part of an entitlement to catch received from other members are just a reflection of that need as well as the past and present fishing patterns. This is of special relevance considering that the majority of the stock is abundant inside Chilean coastal waters (EEZ and territorial sea) where the activities of not just the industrial fleet but also of the artisanal fishermen who undertake their activities limited by this participation reflected in Chile's legal framework and our strict control as a flag State.
18. According to its needs and to continue the cooperation between members striving for the conservation and sustainable use of this fishery, Chile requested a participation increase reaching to 68% for a period of five years. In the end, the Commission adopted a decision to increase Chile's share in participation to 66.3665% (1.8% increase) which was agreed by 81% of the members.

19. Chile's request to the Commission to assign a total of 68% of the TAC was underpinned on its interests, needs, and the 2017-2022 amount of catches, **excluding the catches based on transfers**. Thus, if the total catches of *Trachurus murphyi* of all participants in the Convention Area during 2017 to 2022 were considered, the Chilean share of those catches would reach 70%. Furthermore, if the percentage of catches would have included those coming from transfers, Chile would have requested a higher amount which, under this hypothesis, would have reached to 80%.
20. Chile noted the needs of its fisheries sector in its opening statement to the meeting of the Commission⁴, in particular of its artisanal sector, and it was heard by the Commission: *"We would like you to know that it is difficult to explain this in the small fishing coves along our country, that having great availability of this resource, both in size and quantity, we still have catches well below the Maximum Sustainable Yield. This is a factor that jeopardizes the confidence and therefore the adherence of the actors to follow the measures, especially those who develop small-scale fishing."* In this regard, Chile is the only participant who have always caught 100% of its participation in table 1 since 2017 to date.
21. As a last point, it is important to note and to be considered by this Panel that the decision of Chile to include waters under its national jurisdiction for the implementation of such a measure is a demonstration of responsible management with the aim to cooperate under the framework of SPRFMO for the conservation, management and sustainable use of one of its main fisheries. Chile does this with the understanding that Article 21 will be the main rule for the decisions to be taken and that its needs will be considered, moreover when an exercise of allocation without its EEZ will have the consequence of a much larger reduction in the participation of every other member than that resulting from the current exercise.
- III. **Regarding whether CMM 01-2023 unjustifiably discriminates in form or in fact against the Russian Federation**
22. The Russian Federation has claimed the existence of an unjustified discrimination against them in form and in fact caused by the decision adopted by the SPRFMO Commission in February 2023, CMM 01-2023. This member alleges that, objectively, they could maintain or increase their share of the quota of *Trachurus murphyi* if the Commission had applied Article 21.

⁴ Supporting material No. 4: COMM 11- Report Annex 9b, Chile's opening statement.

1. The allegations of the Russian Federation are difficult to accept by Chile. The Russian Federation was not unjustifiably discriminated against by the decision CMM 01-2023. To accept such allegations would disregard not only the hard work conducted by the Commission through complex negotiations based on Article 21, which have followed the same practice since 2015, but also the particular criteria in Article 21 that may allow for some members' share to increase due to specific conditions that permits them the right for such entitlement (in this case Chile).
2. Considering the previous, it would be helpful to clarify the criteria that in Chile's opinion have served as basis for the current participation that justify the difference in the results of the participation in CMM 01-2023. Those criteria are the ones established in letters (f), (g) and (h) of Article 21.
3. In this regard, if only some of the criteria that are met by a member are considered, and not all of them, that situation would be an unjustifiable discrimination against that member in the application of Article 21. In 2023, the exercise to decide on members participation was done on a similar basis for all and considered that Chile concurred with those, its particular interests, needs and utilization of the catches for domestic consumption were legally and fairly taken into account by the Commission.
4. In that regard, the transfer of all or part of the entitlement to catch from other participants in the *Trachurus murphyi* fishery to Chile just demonstrates that need. For instance, there is a letter confirming the acceptance of transfers expressly mention the circumstance that the catches would be assigned to its artisanal sector⁵.
5. The Russian Federation stated that their shares could have been maintained or increased had the decision been based on Article 21, and in good faith, members who do not want to respect such rule can transfer part of their quota to another member. In Chile's view the Convention establishes a framework for the review and revision, and mandates the Commission to do so when appropriate, as in this case, taking into account the provisions of Article 21 and the interests of new Contracting Parties, as it is stated in number 6. Hence, this review or revision does not guarantee the maintenance or increase of each member participation.
6. During the discussions of the 2023 Meeting, a reduction of share for all the members in their participation until 2022 was discussed and resulted in a new proposed percentage for each of those members, except for Chile for the reasons previously

⁵ See Supporting Materials No. 5: letter of the SPRFMO Secretariat Ref. G136-2021, of September 13, 2021.

mentioned. After this first step of the discussions, a further reduction to each participant including Chile was considered in order to assign a participation share to the three new entrants.

7. The Commission also considered that even though there was a reduction of percentages, the new distribution of the participation allowed each member to increase their participation in tonnage compared to 2022 due to the increase of the total allowable catch of *Trachurus murphyi* in the Area to 981,832 tons. The Russian Federation was allocated a total of 32,649 tons in table 1 of CMM 01-2023, which resulted in 3,106 tons more than 2022, when its total allowable catch was a maximum of 29,543 tons⁶. Hence, In terms of tonnage, the Russian Federation increases its participation in 2023 by 10,5%.

IV. Regarding the alternative measure adopted by the Russian Federation

8. In Chile's opinion the alternative measure adopted by the Russian Federation's is not of an equivalent effect to decision CMM 01-2023 to which they have objected.
9. According to the letter of the Russian Federation submitted by the Secretariat in its Ref. G38-2023 correspondence, the objecting member proposed an alternative measure consistent in maintaining their percentage in table 2 as it was in CMM 01-2022, corresponding to 3,2835%, which would correspond to 35,452 tons in table 1 of CMM01-2023. The basis for their proposal is to maintain the status quo in the participations according to the last exercises in 2017 and 2020, when it was discussed regarding Ecuador.
10. Notwithstanding the above alternative measure, there is no explanation of the Russian Federation's rationale to consider such proposal as equivalent in effect to the one decided by the Commission in CMM 01-2023 according to Article 21 neither how it will affect the other members.
11. In the opinion of Chile, for an alternative measure to be equivalent in effect to the decision adopted in CMM 01-2023 it would be necessary to respect two core aspects. First, paragraphs 4 and 9 of CMM 01-2023 should not be modified as the effects on the resource are uncertain without an analysis and advice of the Scientific Committee. In fact, to consider this measure as an equivalent it would be essential that it does

⁶ See supporting material No. 6: CMM 01-2022, adopted by the Commission at its 10th Meeting, page 6, Table 1.

not affect the TAC, which is not the case of the Russian Federation's alternative measure. Second, the decision should not produce any affectation or changes regarding the other members participation in the fishery of the *Trachurus murphyi*, in particular, no modification on the tonnage and percentages of table 1 and 2 of the relevant measure.

12. Reckoning the abovementioned criteria, the Russian Federation's alternative measure has no equivalent effect to the one decided by the Commission and its application would constitute only an unjustifiable discrimination for the other participants by means of an additional reduction of their share with no basis on the criteria set out in Article 21, which were extensively explained in the previous paragraphs of this Memorandum. As a result, the commented alternative measure cannot be considered binding in substitution of the objected decision of CMM 01-2023 in accordance with sub-paragraph (a) of paragraph 10 of Annex II.
13. Furthermore, considering the percentages of catches of the Russian Federation in the Area during the 2017-2022 period, only in the last year the said member captured around 91.54% of its participation, showing very low capture amounts for the previous years. Thereby, even historical captures of the Russian Federation do not support the establishment of an alternative measure as the one adopted and, in the unlikely situation of the Russian Federation needing to increase the captures assigned by CMM 01-2023, Chile is of the opinion that the member could resort to the mechanism established by the CMM 01-2023 in paragraph 8.
14. CMM 01-2023 sets in its paragraph 8 the possibility for each member or Cooperating non-Contracting Party to accept transfer of all or part of the entitlement to catch of another member or CNCP up to the limit of table 1. This transfer mechanism has been the tool used by members to complement or increase their participation. This has been the mechanism used by Chile to fulfill the requirements of its sector and can be used by the Russian Federation for the same purposes.
15. The abovementioned mechanism is well known by the objecting member who had used it in the past, as they had transferred part of their participation and that measure could have an equivalent effect with no changes for the rest of the participants in the fishery.

V. Chile's specific request to participate at the Hearing.

16. In accordance with Procedural Directive No. 1, Chile respectfully requests to the Review Panel the opportunity to be heard at the Hearing that will take place at the PCA at the Peace Palace in The Hague, the Netherlands, on the 26 June 2023 and that might be extended to the next day in addition.

VI. Conclusions

17. In Chile's view CMM 01-2023 is consistent and was adopted according to the Convention's provisions and the International Law reflected in 1982 Convention and 1995 Agreement. It is essential a strict adherence to the provisions of the Convention, rules of procedure, and any other decision of the Commission of SPRFMO established for this body to take decisions and to regulate the different fisheries under its purview.

18. The Commission has the attributions given by the Convention to determine the participation in fishing for fishery resources according to Articles 8, 16 and 21.

19. The allegations of the objecting member that the decision was adopted without their consent and with no adherence to Article 21, in Chile's opinion, are not effective. In fact, the decision was adopted by the voting procedures of the Commission members in accordance with Article 16.

20. The participation was adopted in CMM 01-2013 as a reflection of the application of the different criteria stated in Article 21 of the Convention and not on the basis of the catches resulting from transfers of *Trachurus murphyi*.

21. Accordingly, the Russian Federation has not been unjustifiably discriminated in form and in fact by CMM 01-2023 and its participation in the *Trachurus murphyi* fishery is just the application of the criteria of Article 21 of the Convention.

22. The adopted alternative measure has no equivalent effect to the objected measure. In Chile's view, the alternative measure opposes to paragraphs 4 and 9 of CMM 01-2023.

23. Currently, there is a mechanism adopted by the Commission and acknowledged by the Russian Federation, corresponding to the quota transfer mechanism in paragraph 8 of CMM 01-2023. This mechanism is in place and has been used by different participants since 2013.