

IN PROCEEDINGS CONDUCTED BY

THE REVIEW PANEL ESTABLISHED UNDER ARTICLE 17 OF THE CONVENTION ON THE  
CONSERVATION AND MANAGEMENT OF THE 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

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**MEMORANDUM OF NEW ZEALAND**

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14 June 2023



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## Introduction

1. The Russian Federation has objected to Conservation and Management Measure 01-2023 (*Trachurus murphyi*) ('**CMM 01-2023**') which was adopted at the 11<sup>th</sup> Annual Meeting of the South Pacific Regional Fisheries Management Organisation ('**SPRFMO**') Commission ('**the Commission**').
2. This is New Zealand's response to the questions posed by the Review Panel established under Article 17 and Annex II of the Convention and Management of High Seas Fishery Resources in the South Pacific Ocean ('**the Convention**').
3. New Zealand is not a participant in the fishery for *Trachurus murphyi* ('**jack mackerel**') so has no direct interest in the substance of the objection by the Russian Federation to CMM 01-2023. New Zealand submits this memorandum as a constructive and engaged Member of the Commission, in an attempt to assist the Panel in its consideration of the present matter.

## Summary of New Zealand's submissions

4. New Zealand submits that CMM 01-2023 is consistent with the Convention and with other rules of international law and does not discriminate in form or in fact against the Russian Federation.
5. The allocations contained in Tables 1 and 2 of CMM 01-2023 were based on the 2017 percentage allocations that all members, including the Russian Federation, agreed were consistent with Article 21 of the Convention. Adjustments to those percentage allocations were made CMM 01-2023 to i) accommodate new entrants to the fishery; and ii) reflect that the existing level of fishing effort has become highly concentrated in Chile's exclusive economic zone ('**EEZ**').
6. To enable the increased allocation to Chile and the allocations to new entrants, proportionate reductions were applied, in a fair and equal manner, to the percentage allocations of all other existing participants in the fishery. However, those reductions in percentage allocation did not result in a reduction in the tonnage allocation for any participant. Indeed, notwithstanding the reduction in the percentage allocation for the Russian Federation, its tonnage allocation rose 9.5% from 29,543 tonnes in 2022 to 32,649 tonnes in 2023. That such a tonnage increase was possible is a testament to the success of SPRFMO in sustainably managing a stock that was previously close to collapse.

## Factual background

7. In 2006, New Zealand, Australia and Chile initiated discussions to establish a South Pacific Regional Fisheries Management Organisation. The Convention was adopted in 2009 and SPRFMO was operational in 2012. New Zealand was closely involved in all phases of the negotiation of the Convention and the establishment of the Commission (including the Preparatory Conference) and is the host country of the Secretariat of the Commission.
8. A central issue for SPRFMO has been the sustainable management of jack mackerel. In the first decade of this century the stock suffered a catastrophic decline, such that by 2010, total biomass was estimated to be 9 – 14% of the biomass that would have existed if there was no fishing.<sup>1</sup> Since then, the Commission has adopted CMMs based on best available science to ensure the sustainable management of the jack mackerel stock and support its recovery. The resulting stabilisation and recovery of the stock has been a “major success”,<sup>2</sup> to the point where projections show a high likelihood of the stock biomass being above maximum sustainable yield in 2024.<sup>3</sup>
9. Two Review Panels established under Article 17 and Annex II of the Convention have considered objections to SPRFMO’s jack mackerel CMMs. The Findings and Recommendations of both Review Panels contain useful summaries of the relevant background:
  - a. The first Review Panel was constituted in 2013 to consider an objection by the Russian Federation to CMM 1.01 (**‘the 2013 Review Panel’**). The Panel’s Findings and Recommendations dated 5 July 2013 summarised the relevant history of the Convention, SPRFMO, and the situation of jack mackerel within the Convention Area. It highlighted the urgent need sustainably to manage the stock in order to reverse a catastrophic decline in spawning biomass that had occurred prior to the entry into force of the Convention.<sup>4</sup>
  - b. The second Review Panel was constituted to consider an objection by Ecuador to the 2018 jack mackerel CMM, CMM 01-2018 (**‘the 2018 Review Panel’**). The Panel’s Findings and Recommendations of 5 June 2018 contain a useful summary of the basis for SPRFMO’s application of a TAC (Resource) and TAC

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<sup>1</sup> **Supporting Material (‘SM’) Doc 1:** PCA 2013 SPRFMO Information Paper, paragraph 15.

<sup>2</sup> **SM Doc 4:** Report of the SPRFMO Performance Review Panel, Executive Summary, para.1.

<sup>3</sup> **SM Doc 7:** SC10-Report Annex 10 Jack Mackerel Technical Advice, para.74.

<sup>4</sup> **SM Doc 2:** PCA 2013 Review Panel Findings and Recommendations, paragraphs 15 – 24.

(Applicable Area) and the relationship between the two. It records that, through Chile’s consent, the Applicable Area includes Chile’s EEZ.<sup>5</sup>

10. The 2018 Review Panel noted that the 2017 jack mackerel CMM, CMM 01-2017, was adopted by consensus after negotiation between the participants as to the appropriate allocation between participants. That negotiation took place, consistent with established practice, in a working group convened by the Commission at its 5<sup>th</sup> Annual Meeting.
11. Table 1 of CMM 01-2017 included tonnage allocations. Table 2 of CMM 01-2017 introduced, for the first time, percentage allocations of the TAC (Resource) as follows:

<b>Member / CNCP</b>	<b>%</b>
Chile	64.5638
China	6.3477
Cook Islands	0
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

12. The total allocations in the CMM amounted to 89.86% of the TAC (Resource), the 10.14% remaining applying to the resource outside the Applicable Area, almost exclusively in the EEZs of Peru and Ecuador. Cook Islands was allocated 0% to reflect its expressed desire to be a new entrant to the fishery in the future.
13. No objection was raised to the percentage allocations in CMM 01-2017, which the participants considered to be properly based on Article 21 of the Convention. The percentage allocations were to apply for five years to the end of 2021.
14. In 2020, by consent, Ecuador’s EEZ was included within the Applicable Area and Ecuador’s percentage allocation consequently increased to 1.2638% with no impact on the allocations of other participants.

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<sup>5</sup> **SM Doc 3:** PCA 2018 Review Panel Findings and Recommendations, paragraphs 21 – 22.

15. At the 10<sup>th</sup> Annual Meeting of the Commission in January 2022, when the percentage allocations were due for review, the participants agreed to roll over the percentage allocations agreed in 2017 for one more year.<sup>6</sup> Chile agreed to that rollover but made a statement indicating its desire to achieve an increase in its percentage allocation at the 11<sup>th</sup> Annual Meeting of the Commission in 2023. It said:<sup>7</sup>

“As you all remember very well, at the 5th SPRFMO Commission meeting held in Adelaide in 2017, members agreed by consensus on the participation percentages in the fishery, intended to last for five years. The Adelaide agreement proved very successful. It provided the certainty and confidence that directly supported the recovery of the jack mackerel fishery and delivered a straight framework to carry on sustainable fishing operations. Since then, SPRFMO members have acted with a sense of long-term responsibility and a shared determination that have benefited us all. My country offered proof of this purpose, demonstrated by giving consent to adopt a TAC that applied throughout the range of the fishery, including our EEZ under Article 20 paragraph 4 of the SPRFMO Convention.

Mr Chair, Chile has followed the implementation of the 2017 agreement closely. The facts are well-known to you all. Between 2017 and 2021, five out of ten SPRFMO members with jack mackerel quota have operated and fished the whole or part of their annual allocation. China caught 32.2% of its allocation, the Republic of Korea 30.2%, the European Union 45.7%, the Russian Federation 33.4%. 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. Other members that were given quota allocation do not record catches of jack mackerel on the high seas under the 2017 agreement.

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.

Distinguished delegates, the next meeting will be crucial for managing the jack mackerel fishery and our organisation’s stability. We will decisively favour another 5-year agreement consistent with the reality of the fishery, balancing fairness with stable fishing rights.

Crucially, we would like to see all SPRFMO members supporting such a future agreement. We endorse and respect the right of all coastal states to adopt unilateral measures in their waters for straddling stocks as recognised in international law, including the SPRFMO Convention. Still, they must be compatible with those adopted by the Commission because otherwise, we run the risk of exceeding the sustainable limits advised by science. Therefore, Chile invites and encourages all SPRFMO members to be part of a future agreement that can bring stability to the management measures throughout the whole range of the jack mackerel stock. We hope to start informal discussions long before the next meeting in 2023.”

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<sup>6</sup> **SM Doc 5:** COMM10-Report Annex 7a CMM 01-2022.

<sup>7</sup> **SM Doc 6:** COMM 10 – Report Annex 9b Statement of Chile.

16. In August 2022, the Scientific Committee produced a table of catch history data.<sup>8</sup> It supported Chile's claims and shows that:
- a. Chile had a percentage allocation of 64.56% of the TAC (Resource) but:
    - i. For 2022, Chile's estimated catch would be around 73.6% of the total catches of jack mackerel in the South-East Pacific ('**Total Catch**');
    - ii. In the six years since the adoption of CMM 01-2017, Chile had caught (including estimated 2022 catch) 76.7% of the Total Catch;
    - iii. In the 10 years since the first SPRFMO jack mackerel CMM, Chile had caught (including estimated 2022 catch) 75.2% of the Total Catch.
  - b. The Russian Federation had a percentage allocation of 3.2825% of the TAC (Resource) but:
    - i. For 2022, Russia's estimated catch would be 2.1% of the Total Catch;
    - ii. In the six years since the adoption of CMM 01-2017, Russia had caught (including estimated 2022 catch) 1.3% of the Total Catch.
    - iii. In the 10 years since the first SPRFMO jack mackerel CMM, Russia had caught (including estimated 2022 catch) 1.0% of the Total Catch.
  - c. As regards China, the European Union and Korea, their estimated catches for 2022, as well as catches over a six year and 10 year period were also substantially below their current percentage allocation.
17. The data makes clear that Chile's historic catch and fishing patterns, when assessed over the short-term (1-6 years) or medium term (10 years), substantially exceeded the percentage allocation of TAC (Resource) that it was given in CMM 01-2017 and maintained through subsequent CMMs to the end of 2022. In order to deploy its full capacity in the jack mackerel fishery, it was reliant on transfers of quota from other participants who choose not to or are unable to use their full quota.
18. Further, Chile's Annual Report to the Scientific Committee on jack mackerel showed that, in the 10 years since the first SPRFMO jack mackerel CMM, more than 98% of Chile's catch had been caught in Chile's EEZ. Since the start of 2020, 100% of the catch had been caught in Chile's EEZ.<sup>9</sup>

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<sup>8</sup> **SM Doc 8:** SC10-JM01\_rev1 CJM catch history data. The same data was included, in slightly (but not materially) amended form, in a document prepared for the 11th Meeting of the Commission, **SM Doc 11:** COMM11\_Inf01\_rev2.

<sup>9</sup> **SM Doc 9:** SC10-Doc23 Chile Annual Report Jack Mackerel, Table 3.

19. In August 2022, the Chairperson of the Commission, Mr Luis Molledo wrote to Members and CNCPs.<sup>10</sup> In that letter, he noted the decision at the 10<sup>th</sup> Annual Meeting of the Commission to roll over the allocations agreed in 2017 for one more year and indicated his expectation that there would be a substantive discussion on allocation at the 11<sup>th</sup> Annual Meeting. He indicated his intention to propose the convening of a working group to address this issue, consistent with past practices.
20. The 11<sup>th</sup> Annual Meeting of the Commission was held in Manta, Ecuador from 13 – 17 February 2023. In advance of that meeting, Korea proposed an amendment to CMM 01-2022. That proposal maintained the same percentages of catch allocation for each of the existing participants and did not respond to the needs of new entrants or Chile’s desire for an increased allocation.
21. At the opening of the 11<sup>th</sup> Annual Meeting, Chile<sup>11</sup> and Ecuador<sup>12</sup> provided statements indicating their expectation that the meeting would enable negotiation of an amended allocation scheme for jack mackerel. Members agreed to a proposal from the Chairperson of the Commission to convene a working group with a mandate to discuss the allocation of the jack mackerel TAC amongst participants. A working group was established, with Mr Michael Brakke as chair. Mr Brakke emphasised the need for negotiations to be led by Article 21 of the Convention, and the need to act fairly having regard to the views of all Members.
22. Agreement was not reached in the working group but there was reasonably broad support for an approach that accommodated the needs of new entrants and increased Chile’s allocation. The Chairperson of the Commission made his own proposal which achieved these outcomes while also increasing the overall TAC by 20%.
23. The Chairperson’s proposal allocated new entrants the same tonnage volume as had previously been allocated to new entrants (1100 tonnes) and increased Chile’s percentage allocation from 64.6% to 66.4% (short of the 68% it sought and well short of its one year, six year, and 10 year proportion of the total catch). The proposal was adopted as CMM 01-2023 by a vote of 13-3, with China, Russia and Peru voting against. Vanuatu<sup>13</sup> made a statement welcoming the CMM. Russia<sup>14</sup> and Peru<sup>15</sup> made statements criticizing the CMM.

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<sup>10</sup> **SM Doc 10:** Letter from Chairperson of the Commission to Members and CNCPs, 27 August 2023.

<sup>11</sup> **SM Doc 12:** COMM11-Report Annex 9b Chile’s statement.

<sup>12</sup> **SM Doc 13:** COMM11-Report Annex 9c Ecuador’s statement.

<sup>13</sup> **SM Doc 14:** COMM11-Report Annex 9f Vanuatu’s statement.

<sup>14</sup> **SM Doc 15:** COMM11-Report Annex 9g Russian statement.

<sup>15</sup> **SM Doc 16:** COMM11-Report Annex 9h Peru’s statement.



24. The tonnage and percentage allocations applied in CMM 01-2023 are set out below, with a comparison to those applied in CMM 01-2022 (based on the percentage allocations agreed in 2017).

#### **Tonnage allocation**

Member / CNCP	Tonnage 2023	Tonnage 2022
Belize	1,100	0
Chile	716,758	581,074
China	63,136	57,129
Cook Islands	1,100	0
Cuba	2,219	2,008
Ecuador	12,570	11,374
European Union	60,758	54,977
Faroe Islands	11,027	9,978
Korea	12,753	11,540
Panama	1,100	0
Peru (HS)	20,175	18,256
Russian Fedn	32,649	29,543
Vanuatu	46,487	42,064
Total	981,832	817,943

#### **Percentage allocation**

Member / CNCP	% 2023	% 2022
Belize	0.1019%	0%
Chile	66.3665%	64.5638%
China	5.8459%	6.3477%
Cook Islands	0.1019%	0%
Cuba	0.2055%	0.2231%
Ecuador	1.1639%	1.2638%
European Union	5.6257%	6.1086%
Faroe Islands	1.0211%	1.1087%
Korea	1.1808%	1.2822%
Panama	0.1019%	0%
Peru (HS)	1.8681%	2.0284%
Russian Fedn	3.0230%	3.2825%
Vanuatu	4.3044%	4.6738%

### **New Zealand's Response to the Questions in Procedural Directive No.2**

#### *Response to question (a)*

25. The decision to adopt CMM 01-2023 is consistent with the Convention and other relevant international law.

26. Article 16 of the Convention encourages consensus decision-making but permits  $\frac{3}{4}$  majority decisions on questions of substance where consensus cannot be reached. It is implicit in that arrangement that a Member's disagreement with a decision is not, on its own, evidence of a breach of any legal rule. That is particularly the case on decisions that involve discretionary judgements on how best to balance the competing interests of Members and CNCPs. Decisions on the allocation of a TAC are archetypal examples of such decisions.
27. The Commission must take decisions on the allocation of a TAC within the framework provided by Article 21 of the Convention. That framework requires the Commission to "take into account" the status of the fishery resource and the existing level of fishing effort for the resource and a prescribed set of criteria "to the extent relevant". In doing so, Members must apply the principles in Article 3 of the Convention and must give full recognition to the special requirements of developing state Contracting Parties in the region in accordance with Article 19.
28. The 2018 Review Panel found that these arrangements were consistent with those in the United Nations Convention on the Law of the Sea ('**UNCLOS**') and 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 ('**the Fish Stocks Agreement**'). It said:<sup>16</sup>

"91. The Review Panel considers it appropriate to start out by noting that the competence of the Commission to take decisions on the allocation of the TAC pursuant to the Convention is not inconsistent with the competence of RFMOs/As to take such decisions as stipulated by the 1982 Convention or the 1995 Agreement. In fact, the Convention implements and builds on the 1982 Convention and the 1995 Agreement in this regard. The 1982 Convention does not explicitly or specifically deal with the allocation of the TAC by regional fisheries bodies, but recognises the special position and interests of developing States in the context of marine capture fisheries more broadly, inter alia, in Articles 61, 62, and 119.

92. The 1995 Agreement explicitly includes allocation of the TAC as part of the functions of RFMOs/As in Article 10(b), and provides guidance on allocation by means of the implicit and explicit allocation criteria incorporated in Articles 7(2)(d) and (e) and 11. Articles 11(f) and 25(1)(a) and (b) implicitly or explicitly refer to the interests of developing States in relation to allocation, and the broader interests of developing States are also prominently reflected in the Preamble and other provisions of the 1995 Agreement. However, this falls short of specific guidance on how these (and other criteria) are to be practically applied with regard to specific fish stocks, such as by prioritising them or giving them weight. The 1995 Agreement thus recognises that RFMOs/As—and thereby their members or participants—have a wide margin of discretion in allocating the TAC.

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<sup>16</sup> **SM Doc 3:** PCA 2018 Review Panel Findings and Recommendations, paragraphs 91 – 94.

93. As the Convention implements and builds on the 1982 Convention and the 1995 Agreement, this wide margin of discretion is also accorded to the Commission pursuant to Article 21 of the Convention. While there are differences between the 1995 Agreement and the Convention with regard to their explicit and implicit allocation criteria, such as their number, order and content, the Review Panel is unable to draw any definitive conclusions from such differences. As neither the 1995 Agreement nor the Convention provide guidance on how these criteria are to be practically applied with regard to specific fish stocks, there is no fundamental difference between them in this regard.

29. New Zealand concurs with the 2018 Review Panel's assessment of the "wide margin of discretion" accorded to the Commission under Article 21 of the Convention. In New Zealand's view, decision making by the Commission pursuant to Article 21 and in accordance with Articles 3 and 19, must be considered as a holistic exercise. The criteria in Article 21 are factors for Commission Members to take into account, to the extent relevant, when making decisions regarding participation in a fishery resource. Each factor will carry greater or lesser weight depending on the context.
30. In this respect, Article 21 does not provide an algorithm permitting only one correct answer. Instead, it provides a framework for decision making which permits a wide range of Convention-compliant answers. Within that range, the details of a particular allocation decision are matters for negotiation, with a view to securing consensus but, if that is not possible, a  $\frac{3}{4}$  majority. Article 21 decisions are not inconsistent with the Convention merely because a Member is able to point to provisions of the Convention which might have justified a different result.
31. It is not in dispute that CMM 01-2017 reflected a Convention-compliant decision on the percentage allocation of TAC among the participants in the fishery. CMM 01-2017 provided the starting point for the negotiation of CMM 01-2023. The negotiation in the working group chaired by Mr Brakke sought to identify what amendments should be made in light of developments since 2017. Those new developments included Chile's desire for a greater allocation to reflect its historic, past and present catch data, and the aspirations of new entrants to the fishery (Belize, Cook Islands and Panama). The solution embodied in CMM 01-2023 reflected:
  - a. a Convention-compliant approach to Chile's aspirations. The Commission was entitled to conclude that an increase in Chile's allocation was justified, having regard to the criteria in Article 21(1) of the Convention, in particular Article 21(1)(a) and (f). In addition, it was entitled to have regard to the fact that Chile's catch was almost exclusively taken from its own EEZ which was under the jurisdiction of SPRFMO's CMMs only by virtue of Chile's consent.<sup>17</sup>

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<sup>17</sup> It is in the interests of all Contracting Parties for Chile's EEZ to be managed collectively with the High Seas resource. The fact that Chile has voluntarily agreed to SPRFMO's management of its EEZ resource is a relevant factor under Article 21(1)(d) of the Convention. The Commission would want to avoid a scenario in which Chile

- b. a Convention-compliant approach to the aspirations of new entrants to the fishery: all new entrants are developing state Contracting Parties. The Commission was entitled to accommodate their aspirations to enter the fishery, having regard to Article 19(3)(b) of the Convention, the criteria in Article 21(1) of the Convention, in particular Article 21(1)(e), and Article 11 of the Fish Stocks Agreement.
32. New Zealand disagrees with Russia’s contention that the Commission was prohibited from taking into account any of Chile’s catch that was attributable to transfers of quota received from other Members of CNCPs. The Russian submission is based on the standard text in jack mackerel CMMs since 2015 which provides:<sup>18</sup>
- “each year a Member or CNCP may transfer to another Member or CNCP all or part of its entitlement to catch up to the limit set out in Table 1, **without prejudice to future agreements on the allocation of fishing opportunities**, subject to the approval of the receiving Member or CNCP.” (emphasis added)
33. New Zealand submits that the text of a CMM cannot vary the obligations of the Commission under the Convention, in particular the Commission’s obligation under Article 21(1)(a) to have regard, to the extent relevant, to historic catch and past and present fishing patterns and practices in the Convention Area. The “without prejudice” text of the jack mackerel CMMs reinforces the right of a transferring party to negotiate future allocation decisions without being bound to accept a proportionate reduction in their allocation as a direct consequence of the transfer. But it does not render irrelevant all catch data or fishing patterns and practices which might be attributable to transferred quota. If the Russian Federation’s interpretation were right, catch data would be irrelevant to allocation decisions because any catch in excess of, or below, quota would be attributable to transfers. That is clearly not consistent with the Convention, in particular the need to review allocation decisions in accordance with Article 21(6).
34. It may be inappropriate to rely on short term or one-off transfers of quota to evidence matters relevant to Article 21(1)(a). That is not, however, what happened in this case. Chile’s catch data (including catch attributable to transfers of quota) evidenced a long term state of affairs rather than a short term anomaly.

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revokes its consent and chooses to manage its resource subject only to the obligation to cooperate to ensure compatibility of measures established for the high seas and those adopted for areas under national jurisdiction: see Articles 3(1)(a)(vi), 4, 20(4)(a)(i), and 21(4)(b) of the Convention.

<sup>18</sup> see paragraph 9 of CMM 4.01, CMM 01-2017, CMM 01-2018, CMM 01-2019, CMM 01-2020, CMM 01-2021, CMM 01-2022.

35. New Zealand also disagrees with Russia’s complaint that the decision to adopt CMM 01-2023 was taken in breach of procedural obligations contained in the Convention. It has been standard practice for the Commission to establish a working group to negotiate aspects of allocation decisions at its Annual Meetings. In August 2022, well in advance of the 11<sup>th</sup> Annual Meeting, the Chairperson of the Commission indicated his intention to do so. At the meeting itself, Members agreed that such a working group should be established. A working group is not a subsidiary body for the purposes of Article 9 of the Convention. The Rules of Procedure do not prevent the Chairperson of the Commission from putting to a vote a proposal arising out of a working group that has not achieved consensus.

Response to question (b)

36. The decision to adopt CMM 01-2023 did not unjustifiably discriminate in form or in fact against the Russian Federation. The 2018 Review Panel explained that discrimination in form means “procedural discrimination” and discrimination in fact means “substantive discrimination”.<sup>19</sup>
37. Although the Russian Federation advances complaints as to procedure, which are addressed above at paragraph 35, none of those procedural complaints allege procedural *discrimination* against the Russian Federation. The 2018 Review Panel found that for there to be unjustifiable discrimination in the procedures relating to allocation, there would for example need to be treatment of one Member which was clearly inconsistent with the treatment of other similarly placed Members, or some unreasonable requirements made of one Member but not applied to other Members in the procedure adopted by SPRFMO.<sup>20</sup> None of the Russian Federation’s complaints meet this test.
38. As to substantive discrimination, the 2013 Review Panel found that there had been substantive discrimination where Russia had been denied an allocation of any part of the TAC and “no convincing argument” had been made to justify that outcome.<sup>21</sup> New Zealand concurs with that test for substantive discrimination in an allocation decision, provided that the word “convincing” is understood as “convincingly justified”. New Zealand does not consider that the argument must be so compelling as to convince the Review Panel that it is the only right outcome; just that it is sufficiently convincing as to be a justified outcome (see paragraphs 28-30 above).
39. Here there was a convincing argument for the approach adopted:

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<sup>19</sup> **SM Doc 3:** PCA 2018 Review Panel Findings and Recommendations, paragraph 99.

<sup>20</sup> **SM Doc 3:** PCA 2018 Review Panel Findings and Recommendations, paragraph 106.

<sup>21</sup> **SM Doc 2:** PCA 2013 Review Panel Findings and Recommendations, paragraph 92.

- a. Chile was entitled to an increase in its allocation for reasons discussed above;
  - b. New entrants were entitled to an allocation for reasons discussed above.
  - c. The increase in percentage allocation to Chile and the allocation to new entrants had to come from the existing allocations for other participants. All other participants had substantially undershot their allocations on a one year, six year and 10 year assessment. There were multiple models available to allocate the necessary reductions across the participants but none secured consensus support:
    - i. The Russian Federation's preferred course of securing the necessary allocations from voluntary donations from other participants would have caused unfairness and relied on generosity rather than the application of Article 21 principles. It did not command a  $\frac{3}{4}$  majority of support in the Commission.
    - ii. The proposal that achieved  $\frac{3}{4}$  majority support was to apply an equal and proportionate reduction to the other participants in the fishery. That proposal was considered by most of the Members to be fair, non-discriminatory and equitable.
40. The Russian Federation maintains that the equal and proportionate reduction was discriminatory to Russia because it was done without regard to each Commission member's historical catch and other relevant provisions of Article 21. New Zealand responds as follows:
- a. As set out at paragraph 16(b) above, the Russian Federation's catch has not, in any year of the 10 year lifetime of SPRFMO, exceeded 2.1% of the TAC (Resource). In CMM 01-2023, it was allocated 3.0230% of the TAC (Resource) and a 9.5% increase in its allocation as compared to 2022. There was no arguable substantive discrimination in that outcome.
  - b. It was not necessary for the Commission to conduct a full assessment of each Member's allocation against the criteria in Article 21(1). That assessment was baked in to the allocations in CMM 01-2017, which formed the basis for CMM 01-2023, and from which there were only minor departures.

Response to question (c)

41. In New Zealand's view, the essential standard for determining whether alternative measures are equivalent in effect is whether the proposed alternative measures are equally consistent with the Convention as the measures objected to, particularly with regard to the objective in Article 2 which is to ensure the long-term conservation and sustainable use of the fishery resources and, in so-doing, to safeguard the marine environment in which they occur.
42. New Zealand considers that for any alternative measure to have equivalent effect to CMM 01-2023 it would be necessary to be satisfied that the measure did not result in the total catch exceeding the TAC (Resource)<sup>22</sup> or TAC (Applicable Area)<sup>23</sup>. The 2018 Review Panel found that Ecuador's proposed alternative measure was not equivalent because it risked increasing the catch throughout the range of the stock above the TAC (Resource).<sup>24</sup>
43. In addition, New Zealand considers that any alternative measure may not adversely affect the rights and interests of other Commission Members under the CMM being objected to, where those Commission Members have not themselves objected to the CMM and therefore remain subject to its terms. The 2013 Review Panel agreed with that analysis, saying:<sup>25</sup>
- "The Review Panel therefore believes 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."
44. As a result the scope for alternative measures to be equivalent in the case of catch allocation is inherently more limited than in relation to measures which specify, for example, the types of fishing gear to be used or specific fishing techniques. In those situations, alternative measures which achieve the same ends by different means, without affecting the rights and interests of other Members may well be more readily available. Modifying a catch allocation or a total allowable catch, would be to change the means and the ends, or else adversely affect the rights and interests of others.

Response to question (d)

45. Russia's proposal to maintain its percentage allocation at the same level as applied between 2017 and 2022 is not an equivalent measure. It will either result in the TAC

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<sup>22</sup> 1,080,000 tonnes: see CMM 01-2023 paragraph 9.

<sup>23</sup> 981,382 tonnes: see CMM 01-2023 paragraph 4.

<sup>24</sup> **SM Doc 3:** PCA 2018 Review Panel Findings and Recommendations, paragraph 118.

<sup>25</sup> **SM Doc 2:** PCA 2013 Review Panel Findings and Recommendations, paragraph 99.

(Resource) and TAC (Applicable Area) being exceeded, or will unjustifiably interfere with the allocations of other participants in the fishery.

46. Russia's reliance on the recommendations of the Scientific Committee are misplaced. The Commission has already taken account of those recommendations in recommending a one-off 20% increase in the TAC. Any further increases as a result of Russia's unilateral alternative measure would be contrary to the precautionary approach would undermine the achievement of the objective of the Convention as set out in Article 2.

Response to questions (e) and (f)

47. For reasons set out above, New Zealand does not consider it necessary to respond to questions (e) and (f).