

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**

PROCEDURAL DIRECTIVE NO. 2

Review Panel:

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

Registrar:

Julian Bordaçahar
Permanent Court of Arbitration

WHEREAS Article 17 of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (the “**Convention**”) permits members of the Commission of the South Pacific Regional Fisheries Management Organisation (collectively the “**Commission**”, and individually “**Commission Member**”) to object to a decision adopted by the Commission within 60 days of the date of notification of the decision;

WHEREAS the Russian Federation has invoked Article 17, objecting to its share in the total catch of *Trachurus murphyi* in 2023 specified in paragraphs 4 and 9 and Tables 1 and 2 of the Conservation and Management Measure for *Trachurus murphyi* (“**CMM 01-2023**”) as set out in its letter dated 10 April 2023 (the “**Russian Federation’s Objection**”);

WHEREAS the People’s Republic of China had invoked Article 17, objecting to its share in the total catch of *Trachurus murphyi* in 2023 specified in paragraphs 4 and 9 and Tables 1 and 2 of CMM 01-2023 as set out in its letter dated 20 April 2023 (the “**People’s Republic of China’s Objection**”, together with the Russian Federation’s Objection, the “**Objections**”);

WHEREAS the Objections were based on the same grounds;

WHEREAS Article 17 provides for the establishment of a review panel when an objection is presented by any Commission Member;

WHEREAS pursuant to Article 17(5)(c) if two or more Commission 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;

WHEREAS the Russian Federation and the People’s Republic of China agreed to the constitution of a five-member review panel in accordance with paragraph 2 of Annex II to the Convention;

WHEREAS in accordance with paragraph 2 of Annex II to the Convention, the review panel composed of Professor Bernard H. Oxman, Dr. Cecilia Engler, Professor Shuolin Huang, Dr. Erik J. Molenaar, Ms. Olga Sedykh was established on 17 May 2023;

WHEREAS on 23 May 2023, Professor Shuolin Huang advised the Permanent Court of Arbitration (the “**PCA**”) about his withdrawal as a member of the review panel;

WHEREAS on 23 May 2023, the PCA, under the instructions of the Chair of the review panel, advised the Russian Federation, the People’s Republic of China, and the Commission about Professor Huang’s resignation, invited the People’s Republic of China to make a replacement appointment as soon as possible, and invited the Russian Federation and the People’s Republic of China to provide comments on certain administrative matters, including potential hearing dates;

WHEREAS on 24 May 2023, in accordance with paragraph 3 of Annex II to the Convention, the People’s Republic of China appointed Professor Jianye Tang as a member of the review panel;

WHEREAS on 26 May 2023, the Russian Federation provided its comments in connection with the potential hearing dates as indicated in the PCA’s letter of 23 May 2023;

WHEREAS on 29 May 2023, the review panel issued its Procedural Directive No. 1;

WHEREAS noting that by the specified deadline of 31 May 2023, no comments were received from the Organisation and the Commission Members on the review panel’s decision to schedule the hearing (the “**Hearing**”) later than the time indicated in paragraph 5 of Annex II to the Convention;

WHEREAS by letter dated 2 June 2023, the People’s Republic of China withdrew its Objection;

WHEREAS by letter dated 5 June 2023, the review panel requested the Russian Federation and the South Pacific Regional Fisheries Management Organisation (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 will continue to serve along with the member appointed by the Russian Federation and the Chair of the review panel;

WHEREAS 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”;

WHEREAS on 6 June 2023, the Executive Secretary of the Organisation replied to the PCA that the Commission’s Chairperson had contacted the Russian Federation and that the Commission’s Chairperson and the Russian Federation agreed that since there is now only one objection the panel should consist of three members as indicated in that reply, with no change to the timeline;

WHEREAS on 7 June 2023, the review panel decided on the allocation of its expenses attributable in whole or in part to the work of the review panel prior to the adoption of that decision and decided that the review panel henceforth shall be comprised of three members, namely of Professor Bernard H. Oxman (Chair), Dr. Erik J. Molenaar, and Ms. Olga Sedykh (collectively the “**Review Panel**”, and individually “**Member of the Review Panel**”);

WHEREAS all Members of the Review Panel have sent their declarations of independence and impartiality;

WHEREAS paragraph 4 of Annex II to the Convention provides that “[t]he Review Panel shall determine its own rules of procedure”;

The Review Panel issues the following Procedural Directive No. 2:

1. Procedural Timetable

1.1. The Procedural Timetable shall be as follows:

Date	Event
8 June 2023	Written information, documents and material submitted by the Organisation that may assist the Review Panel in its consideration of the Russian Federation’s Objection.
8 June 2023	Written memoranda and documentation submitted to the Review Panel by the Russian Federation in support of its Objection.
14 June 2023	Written memoranda submitted by other Commission Members wishing to do so, which shall indicate whether that Commission Member also requests the opportunity to be heard at the Hearing.
20 June 2023	Written comments (if desired) by the Russian Federation on the information, documents, materials and memoranda submitted to the Review Panel by the Organisation and Commission Members.
21 June 2023	Hearing schedule to be notified to the Russian Federation, other Commission Members and the Organisation.

26 June 2023	Hearing at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands.
27 June 2023	Hearing (if needed).
1 July 2023	Decision on Findings and Recommendations of the Review Panel and transmission to the Executive Secretary of the Organisation.

- 1.2. All time limits set forth in the Procedural Timetable refer to midnight Central European Summer Time in accordance with paragraph 5.2(a) below.

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 it has 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.

3. Form of Written Submissions

3.1. All written submissions shall conform to the following formal requirements:

- (a) Each submission shall be comprised of a written memorandum to which are appended copies of all materials, information, and documents upon which the submitting participant relies (“**supporting materials**”). The memorandum shall be succinct.
- (b) An official stamp or seal of the submitting participant shall be affixed to each submission.
- (c) The memorandum shall have page numbering and be divided into paragraphs, numbered consecutively, with each paragraph being confined to a distinct portion of the subject.
- (d) The memorandum shall be accompanied by a detailed table of contents that describes all of the supporting materials by number, date, type of document, author or recipient, if and as applicable.
- (e) Should a participant wish to submit witness statements or expert reports as part of its supporting materials, each statement or report shall state the name and address of the witness/expert, his or her background, qualifications and/or relevant experience, and a statement of the matters the witness/expert intends to establish.

4. Language of Written Submissions

4.1. All written submissions shall conform to the following language requirements:

- (a) The memorandum shall be submitted in English or Russian by the dates set out in the Procedural Timetable. If the memorandum is submitted in Russian, it shall be submitted together with a translation into English. Where absolutely necessary, the translation may be submitted no more than two business days following the relevant deadline for transmission. The submitting participant shall indicate which language is authentic.
- (b) Subject to sub-paragraph (c), all supporting materials shall be submitted in their original language, together with a translation into English where necessary. When the participant submitting the supporting materials considers that the content of a document is not relevant in its entirety, the English translation may be limited to the relevant passages and such other portions of the document as are necessary to put such passages in context. A full English and/or Russian translation shall be provided if the Review Panel so directs or if another

participant to these proceedings so requests and, in case of objection by the submitting participant, the Review Panel deems it appropriate.

- (c) Except as otherwise determined by the Review Panel, informal English and Russian translations will be accepted as accurate unless contested by another participant, in which case the participants concerned shall attempt promptly to reach agreement on the translation. Any ongoing translation disagreements will be resolved by the Review Panel.
- (d) Each submitting participant will bear the costs of translation of its written memorandum and supporting materials.

5. Communications and Notification of Written Submissions

5.1. The Organisation, the Russian Federation, or any other Commission Member shall not engage in any oral or written communications with any Member of the Panel *ex parte* in connection with the subject-matter of these proceedings.

5.2. All written submissions shall be notified to the PCA in accordance with the Procedural Timetable and in the following manner:

- (a) Unless otherwise provided, all time limits shall refer to midnight Central European Summer Time.
- (b) The memorandum and all supporting materials shall be transmitted as attachments to an e-mail message to the PCA at the following e-mail addresses:

bureau@pca-cpa.org
jbordacahar@pca-cpa.org
jseok@pca-cpa.org
mbatsura@pca-cpa.org

- (c) The memorandum and supporting materials shall be transmitted in searchable PDF format whenever possible.
- (d) The PCA will immediately transmit the memorandum and supporting materials to the Review Panel.
- (e) On the same day as the transmission of the submission by e-mail (or the next business day at the latest), the submitting participant shall upload the memorandum and all supporting materials to a secure online document exchange platform established, administered, and controlled by the PCA, such as Box platform. The document exchange platform shall be accessible to all participants, the Review Panel, and the PCA. Any costs associated with establishing a secure document exchange platform shall be paid from the case deposit established with the PCA.

6. Hearing

6.1. The Hearing shall be held on 26 June 2023 (with 27 June 2023 in reserve) at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands.

6.2. The Russian Federation, the Organisation, and those Commission Members that have submitted written memoranda in accordance with the Procedural Timetable and so request therein shall be permitted to make oral submissions at the Hearing.

- 6.3. Commission Members not having submitted written memoranda in accordance with the Procedural Timetable shall be permitted to attend the Hearing but shall not be permitted to make oral submissions.
- 6.4. The Hearing shall be conducted in English, with simultaneous interpretation into Russian.
- 6.5. The PCA shall arrange for transcription services, IT support, and simultaneous interpretation services at the Hearing.
- 6.6. The Hearing shall be audio recorded and shall be transcribed in English. At the end of the Hearing, or as soon as practicable thereafter, the participants shall be provided with the Hearing transcript.

7. Transparency

- 7.1. The PCA shall publish the fact of the existence of the proceedings, the names of the participants and their representatives, and the names of the members of the Review Panel on its website, along with the following documents:
 - (a) the Objection;
 - (b) Written Submissions made by the Organisation, the Russian Federation, and any other Commission Members;
 - (c) the Review Panel's Procedural Directives;
 - (d) the audio recordings and transcript of the Hearing; and
 - (e) the Review Panel's Findings and Recommendations.
- 7.2. The Hearing shall be held *in camera* unless the Review Panel decides otherwise.
- 7.3. Any participant may request the Review Panel to protect confidential information contained in a document it has submitted in connection with these proceedings prior to making it publicly available, including on the PCA's website.