

**РОССИЙСКАЯ ФЕДЕРАЦИЯ
ФЕДЕРАЛЬНОЕ АГЕНТСТВО
ПО РЫБОЛОВСТВУ
(РОСРЫБОЛОВСТВО)**

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«20» June 2023 г. № 403-291

To: Julian Bordaçahar,
Senior Legal Counsel
Permanent Court of Arbitration,
The Netherlands

E-MAIL: JBORDACAHAR@PCA-CPA.ORG

**Re: PCA CASE N° 2023-33 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**

Dear Mr.Bordaçahar,

Please find enclosed Written comments by the Russian Federation on the information, documents, materials and memoranda submitted to the Review Panel by the South Pacific Regional Fisheries Management Organisation and Members of the Commission of the Organisation, and supporting materials.

With best regards,

A handwritten signature in blue ink, appearing to read 'S. Simakov'.

Sergey V. Simakov
Head of the Department of Fleet,
Ports and International Cooperation

**Written comments by the Russian Federation on the information,
documents, materials and memoranda submitted to the Review Panel
by the South Pacific Regional Fisheries Management Organisation
and Members of the Commission of the Organisation**

The Russian Federation has considered the information, documents, materials and memoranda submitted by the South Pacific Regional Fisheries Management Organisation, the European Union, New Zealand, the Republic of Chile, the Republic of Peru, Chinese Taipei and would like to make the following comments.

I. The Memorandum of the Republic of Chile

1. Referring paragraphs 4-9 of the Memorandum of the Republic of Chile, it's quite clear that Objection of the Russian Federation is based on the substantive nature of the decision of the Commission and not limited by procedure aspects.

2. In paragraph 11 of the Memorandum Chile noted that agreement for having Working Group on jack mackerel to review CMM 01-2022 was adopted at intersessional meeting of the Head of Delegation at 2022. However, intersessional Decision-Making process described in the Regulation 7 of the Rules of Procedure slightly is different and does not include possibility to make formal decision during the HoD meeting. In accordance with paragraph 77 of the 11th Commission meeting Report a jack mackerel working group (WG), chaired by Mr. Michael Brakke (the United States), was established to facilitate discussions on the jack mackerel quota and allocation. In accordance with paragraph 2 of Article 9 of the Convention in establishing such additional subsidiary bodies the Commission shall provide specific terms of reference and methods of work, provided always that such specific terms of reference are consistent with the objective and the conservation and management principles and approaches of this Convention and with the 1982 Convention and the 1995 Agreement.

All subsidiary bodies shall operate under the rules of procedure of the Commission unless otherwise decided by the Commission.

3. Chile insists that the increase of the participation of Chile, adopted by the Commission, was based on the criteria of Article 21 of the Convention, inter alia, the recognition of the interests and needs of this Coastal State, whose economy is dependent on the exploitation of *Trachurus murphyi*

(paragraph 17 of the Memorandum). However, in such a case, the identical interests of another Coastal State are completely ignored by the Commission. A detailed description of this issue is presented in the Memorandum of Peru. Chile's jack mackerel catch quota has increased from 317,300 tonnes in 2017 (CMM 01-2017) to 581,074 tonnes in 2022 (CMM 01-2022).

4. 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 historic catch and past and present fishing patterns and practices in the Convention Area. At the same time, Article 21 of the Convention does not establish as a criteria the historical catch and past and present fishing patterns and practices in the adjacent waters to the Convention Area.

5. We strongly believe that the Commission's decision on the decreased participation in fishing should be adopted on the basis of the consent of the Commission Member concerned.

6. In the SPRFMO COMM5 Report reflected that the Commission convened a WG, chaired by Mr. Frank Meere (Australia) to address the allocation of the additional 33,000 tonnes of catch recommended by the Scientific Committee and endorsed by the Commission. The Chairperson reported on the discussions to the Commission and stated that participants considered Ecuador's and Peru's existing allocations and requests for additional quota to reflect their new status as the Commission Members. In addition, the WG addressed a request from Cuba for an allocation in 2017 and a request from Cook Islands to record their interest for a future allocation. The Working Group noted that changes to paragraph 4 of CMM 4.01 were needed, as two Members who have now been allocated quota in 2017 are not included in Table 1 of CMM 1.01. **The Chairperson of the JMWG highlighted that the results were only possible because of the considerable goodwill of the participants.** The Commission thanked the Working Group and adopted by consensus the amendments to CMM 4.01.

7. Moreover, given the allocation criteria previously applied by the Commission in accordance with the superseded versions of the Conservation and Management Measure for *Trachurus murphyi*, we consider that the interests and the needs of Chile as the coastal State have already been taken into account by the Commission without the increased participation in fishing for the *Trachurus murphyi* in 2023 as provided by CMM 01-2023.

8. As noted above, Article 21 of the Convention includes several criteria serving as a basis for the Commission's decision regarding Members' participation in fishing. However, neither Article 21 of the Convention nor the Convention itself indicate any degree of priority of these criteria. In this regard, 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.

9. In addition, regarding the case of the approving the transfers by another Member of its 2021 *Trachurus murphyi* catch entitlement and the allocation to the artisanal sector, it should be noted that the Russian Federation's objection has been presented to the 2023 CMM.

10. Acknowledging the Convention's legal framework as well as the Commission's functions under the Convention, the Russian Federation underlines the vital role of the principles and approaches set forth in the Convention in allocating a total allowable catch and total allowable fishing effort.

11. The percentage change, established in CMM 01-2023 without taking into account provisions of Article 21 of the Convention and without confirmation of the consent of the Member concerned in favor of another Member of the Commission, demonstrates unjustifiable discrimination in form and in fact against that Commission Member as well as disregard of the provisions of the Convention.

12. As noted in the Russian Federation's materials submitted previously, the impact of the alternative measure has been assessed with the Scientific Committee's recommendations taking into consideration. Following paragraph 4.3.(90) of the 10th SPRFMO Scientific Committee Meeting Report, the estimated biomass of jack mackerel increased from 2021 to 2022. Also, the stock is estimated to be in the third tier of the harvest control rule.

13. Regarding the transfer mechanism, it should be mentioned that CMM 01-2023 and superseded versions provide a Member or Cooperating non-Contracting Party with the possibility to transfer to another Member or CNCP all or part of its entitlement to catch up to the limit. However, the mechanism shall be used without prejudice to future agreements on the allocation of fishing opportunities.

14. The Russian Federation took into account advice on jack mackerel stock status from the Scientific Committee that showed trends with an increasing overall biomass, high recruitments in recent years, and low fishing mortality. It is highly

likely that such an increase in the jack mackerel catch proposed by Russia will not affect the status of the stock. Nevertheless, we agree with the approach set out in the Memorandum of the Republic of Peru that an increase in the Russian quota should imply a decrease in the share of those who increased their quota at the expense of the Russian Federation in 2023.

II. The Memorandum of the European Union

1. Article 21 of the Convention provides that the Commission shall, when appropriate, review decisions regarding participation in fishing for fishery resources, including the allocation of a total allowable catch or total allowable fishing effort, taking into account the provisions of this Article and the interests of new Contracting Parties. Thus, the importance of the criteria of Article 21 of the Convention in decision-making process is confirmed by the Convention. In other words, the Commission's decision on participation in fishing for the *Trachurus murphyi* should be based the criteria of Article 21 as well as the interests of new Contracting Parties.

2. Given the Rule 4.5 of the Rules of Procedure, formal proposals of Members or CNPCs to increase their allocation should be submitted to the Executive Secretary no later than 50 days before the start of the 11th meeting of the Commission and the Executive Secretary should make these proposals available no later than 45 days before the start of the meeting by posting them on the public access area of the SPRFMO website.

3. As noted in the Russian Federation's materials submitted previously, only the Republic of Korea introduced its proposal (COMM11-Prop21) to amend CMM 01 (*Trachurus murphyi*) in advance of the 11th meeting of the Commission. According to the information available, no other proposals, except for the Republic of Korea's proposal, have been submitted before the start of the 11th meeting of the Commission. In addition, any formal document regarding the new entrants' allocation needs were not provided before or during the 11th meeting of the Commission.

4. UNCLOS provides that, among other environmental and economic factors, the requirements of developing States shall be taken into consideration by States when they establish high seas conservation measures. The UN Fish Stocks

Agreement implements these provisions by identifying those requirements as being:

- (a) the dependency of developing States on fisheries for food;
- (b) the need to avoid adverse impacts of conservation measures on, and ensure access to the fisheries by subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States; and
- (c) the need to ensure that the adoption of conservation and management measures for the two types of stocks do not translate into a “disproportionate” burden of conservation action onto developing States. In this regards from remarks of EU unclear what criteria Commission used for new entrants when tried took into account the interests and needs of developing coastal States, and gave full recognition to the interests and special requirements of developing States. Especially realizing that new entrants will transfer their quota to Chile.

5. As described in the EU Memorandum, there is an established practice for the Commission’s decision on allocations without the application of the Rule 4.5 of the Rules of Procedure. Nevertheless, the previous Commission’s decisions on allocations, specified by the EU, constituted a derogation of the Rule 4.5 of the Rules of Procedure in respect to the particular cases of allocations. Moreover, the approach, followed by the Commission in its discussions on the *Trachurus murphyi* allocations in 2023 in accordance with the above-mentioned derogation of the Rule, places the Organisation’s legal framework at risk by neglecting the written regulations. In this regard, a formal proposal was required as a basis for the allocation decision in 2023.

6. Regarding the *Trachurus murphyi* allocations in 2017, the Chairperson of the Working Group on Jack Mackerel allocation, convened by the Commission at its 5th meeting, stated that “the results were only possible because of the considerable goodwill of the participants”. In other words, the *Trachurus murphyi* allocations were adopted on the basis of the consent of the Members and CNPCs.

7. The Working Group on Jack Mackerel allocation, convened by the Commission at its 11th meeting, provided draft allocation tables that included several options (status quo, the Republic of Korea’s proposal/15% increase, 20% increase, etc.). According to the table (*see supporting materials*), taking into account the *Trachurus murphyi* catches increased by 20%, the Russian Federation’s share constituted 35 452 tonnes.

III. The Memorandum of the New Zealand

1. 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. However, 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 historic catch and past and present fishing patterns and practices in the Convention Area**. At the same time, Article 21 of the Convention does not establish as a criteria the historical catch and past and present fishing patterns and practices in the adjacent waters to the Convention Area. However, almost all of Chile's jack mackerel catch in previous years was carried out in adjacent waters to the Convention Area. The existence of Chile's consent to the application of a conservation measure to Chile's exclusive economic zone does not change the content of Article 21 of the Convention.

2. UNCLOS provides that, among other environmental and economic factors, the requirements of developing States shall be taken into consideration by States when they establish high seas conservation measures. The UN Fish Stocks Agreement implements these provisions by identifying those requirements as being:

- (a) the dependency of developing States on fisheries for food;
- (b) the need to avoid adverse impacts of conservation measures on, and ensure access to the fisheries by subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States; and
- (c) the need to ensure that the adoption of conservation and management measures for the two types of stocks do not translate into a "disproportionate" burden of conservation action onto developing States. In this regards from remarks of EU unclear what criteria Commission used for new entrants when tried took into account the interests and needs of developing coastal States, and gave full recognition to the interests and special requirements of developing States. Especially realizing that new entrants will transfer their quota of jack mackerel to Chile.

3. The Russian Federation took into account advice on jack mackerel stock status from the Scientific Committee that showed trends with an increasing overall biomass, high recruitments in recent years, and low fishing mortality. It is highly likely that such an increase in the jack mackerel catch proposed by Russia will not affect the status of the stock. In this context, the Russian Federation follows the precautionary approach.

4. Nevertheless, we agree with the approach set out in the Memorandum of the Republic of Peru that an increase in the Russian quota should imply a decrease in the share of those who increased their quota at the expense of the Russian Federation in 2023.