

**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**

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**Findings and Recommendations of the Review Panel  
5 July 2013  
The Hague, the Netherlands**

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**DEFINED TERMS USED HEREIN**

<b>1982 Convention</b>	United Nations Convention on the Law of the Sea of 10 December 1982
<b>1995 Agreement</b>	Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 December 1995
<b>Acting Executive Secretary</b>	Acting Executive Secretary of the SPRFMO
<b>CMM 1.01</b>	Conservation and Management Measure for <i>Trachurus murphyi</i> adopted by the Commission on 1 February 2013
<b>CNCP</b>	Cooperating Non-Contracting Party
<b>Commission</b>	Commission of the Organisation
<b>Convention</b>	Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean of 14 November 2009
<b>Convention Area</b>	Area to which the Convention applies pursuant to Article 5
<b>Decision</b>	Provisions of CMM 1.01 to which the Russian Federation objects
<b>GT</b>	Gross tonnage
<b>Interim Secretariat</b>	Secretariat during the Preparatory Conference
<b>Member</b>	Member of the Commission
<b>Objection</b>	Objection by the Russian Federation made pursuant to Article 17 of the Convention and dated 19 April 2013
<b>Participants</b>	The Organisation and Members taking part in the Review Panel proceedings
<b>PCA</b>	Permanent Court of Arbitration
<b>Secretariat</b>	Secretariat of the Organisation based in Wellington, New Zealand
<b>SPRFMO or Organisation</b>	South Pacific Regional Fisheries Management Organisation
<b>SWG</b>	Science Working Group

## I. INTRODUCTION

1. This Review Panel is convened pursuant to Article 17 and Annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (“**Convention**”).
2. Having considered the information supplied by and the views of the Participants described herein concerning the Objection of the Russian Federation (hereinafter “**Russia**”), the Review Panel now transmits to the Acting Executive Secretary its findings and recommendations pursuant to Article 17(5)(e) and Annex II, paragraph 9 of the Convention.

## II. PROCEDURAL HISTORY

3. By letter dated 19 April 2013, Russia invoked Article 17 of the Convention which permits Members of the Commission of the South Pacific Regional Fisheries Management Organisation (“**Commission**”) to object to a decision adopted by the Commission within 60 days of the date of notification of the decision. As set out in more detail below, Russia objects to its exclusion from the established shares in the catch limit of *Trachurus murphyi* in 2013 as specified in the Commission’s Conservation and Management Measure for *Trachurus murphyi* (document “**CMM 1.01**”).
4. By letter dated 30 April 2013, Russia informed the Acting Executive Secretary of the SPRFMO of the appointment of Professor Kamil A. Bekyashev as a member of the Review Panel. Sra. Valeria Carvajal was then appointed to the Review Panel by the Chairperson of the Commission. On 21 May 2013, by agreement between Russia and the Chairperson of the Commission, Professor Bernard H. Oxman was appointed as the third member and chair of the Review Panel. The Review Panel was therefore established on 21 May 2013. On 12 June 2013, the Commission Members and the Organisation were provided with copies of the Review Panel members’ *curricula vitae* and signed declarations of independence and impartiality.
5. On 27 May 2013, the Review Panel transmitted a message to Commission Members in which it noted that the Permanent Court of Arbitration (“**PCA**”) in The Hague, the Netherlands would provide administrative assistance during these proceedings. The message included a Procedural Timetable in which the Review Panel fixed time limits for written submissions from Russia, the South Pacific Regional Fisheries Management Organisation (“**SPRFMO**” or “**Organisation**”) and the other Members of the Commission (together, the “**Participants**”).
6. On 7 June 2013, the Review Panel issued Procedural Directive No. 1, including the following instruction for the content of written submissions:

### 1. Substance of Written Submissions

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 subparagraph (b) below, the decision with respect to CMM 1.01 to which the Russian Federation has objected is inconsistent with the provisions of the Convention 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 to make that decision, and the competence of the Review Panel with regard to that decision.

- (b) Whether the decision with respect to CMM 1.01 to which the Russian Federation has objected unjustifiably discriminates in form or in fact against the Russian Federation, 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 alternative measures are equivalent in effect to the decision with respect to CMM 1.01 to which the Russian Federation has objected, and the relevance in this respect of paragraphs 5, 6, 7, and 11 of CMM 1.01.
  - (d) Whether, with reference to subparagraphs (a) and (j) of paragraph 10 of Annex II of the Convention, the catch limit specified by the Russian Federation in its letter objecting to the decision with respect to CMM 1.01 is an alternative measure that is equivalent in effect to that decision. The Review Panel requests that the question of alternative measures be included in the matters addressed by the Russian Federation in its memorandum due by 14 June 2013.
  - (e) Whether, with reference to subparagraph (b) of paragraph 10 of Annex II of the Convention, there are specific modifications to the catch limit referred to in sub-paragraph (d) above that would render it an alternative measure that is equivalent in effect to the decision with respect to CMM 1.01 to which the Russian Federation has objected.
  - (f) Whether, with reference to subparagraph (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 1.01 to which the Russian Federation has objected.<sup>1</sup>
7. On 13 June 2013, the SPRFMO Commission Chairperson and Acting Executive Secretary submitted an Information Paper and supporting materials.
  8. On 14 June 2013, Russia submitted additional information in support of its 19 April 2013 letter.
  9. On 21 June 2013, the Review Panel received written submissions from the Republic of Chile (hereinafter “**Chile**”), Chinese Taipei, the European Union Delegation to the SPRFMO, and New Zealand. Russia and Chile requested an opportunity to be heard at the Hearing scheduled for 1 July 2013 in The Hague. Chinese Taipei requested the opportunity to attend the Hearing without being heard.
  10. By e-mail communication dated 26 June 2013, the Review Panel established the schedule for the 1 July Hearing.
  11. On 27 June 2013, Russia submitted comments in response to the written submission of New Zealand.
  12. A Hearing was held at the Peace Palace in The Hague on 1 July 2013. Delegations from Chile, Chinese Taipei, Russia, and the Organisation attended the Hearing. Oral interventions were made by representatives of Russia and Chile, and by the Chairperson of the Commission and the Acting Executive Secretary of the Organisation.

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<sup>1</sup> “**1982 Convention**” refers to the United Nations Convention on the Law of the Sea of 10 December 1982, and “**1995 Agreement**” refers to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 December 1995.

### III. FACTUAL BACKGROUND

13. Recognising that it is the first Review Panel to be convened under the Convention since the Convention's entry into force, the Review Panel first addresses the relevant history of the Convention, the Organisation, and the issues posed.
14. The following summary is based on the Organisation's Information Paper, the written submissions, and statements made at the Hearing.

#### *The Convention*

15. The Convention, adopted 14 November 2009 after several years of international consultations, and which came into effect 24 August 2012, endeavours to ensure the "long-term conservation and sustainable use of fishery resources in the South Pacific Ocean and . . . [to safeguard] the marine ecosystems" there.<sup>2</sup>
16. The Convention creates the SPRFMO, comprised of a Commission, several committees, and a Secretariat ("**Secretariat**").
17. The Commission currently has eleven Members (Australia, Belize, Chile, Cook Islands, Republic of Cuba (hereinafter "**Cuba**"), EU, Kingdom of Denmark in respect of the Faroe Islands (hereinafter "**Faroe Islands**"), Republic of Korea (hereinafter "**Korea**"), New Zealand, Russia, and Chinese Taipei).<sup>3</sup> It held its first meeting 28 January to 1 February 2013. At this meeting, the Commission adopted four conservation and management decisions, one of which focused on the conservation and management of the Chilean jack mackerel (*Trachurus murphyi*).

#### *Trachurus murphyi*

18. The sustainable management of *Trachurus murphyi* was of high concern to the negotiating parties during the drafting of the Convention. Catches of the species had increased throughout the 1980s and reached their peak in 1995, totaling five million tonnes.<sup>4</sup> After declining for the following four years and then stabilising until 2007, they again declined and have continued to drop through the present.<sup>5</sup>
19. In light of these trends, while international negotiations leading up to the conclusion of the Convention were ongoing, the negotiating parties undertook initiatives to study and manage the fishery. As an initial step, at the first international consultations meeting in 2006, the participants established a Science Working Group ("**SWG**") to provide scientific data on the stock.<sup>6</sup> At the 2007 international consultations, the participants adopted Interim Measures, pursuant to which, participants were to verify the effective presence of their vessels in the area prescribed by the measures and to communicate appropriate data to the Interim Secretariat.<sup>7</sup>

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<sup>2</sup> Convention, Preamble, first recital. See also Article 2, describing the Convention's objective.

<sup>3</sup> The People's Republic of China becomes a Member on 6 July 2013.

<sup>4</sup> Organisation Information Paper, para. 9.

<sup>5</sup> Organisation Information Paper, para. 9.

<sup>6</sup> Report of the First International Meeting on the Establishment of the Proposed South Pacific Regional Fisheries Management Organisation held on 14-17 February 2006.

<sup>7</sup> Organisation Information Paper, paras. 7, 10-11; 2007 Interim Measures Adopted by Participants in Negotiations to Establish South Pacific Regional Fisheries Management Organisation, p. 1.

20. By 2008, the SWG had indicated it had concerns about the declining state of the *Trachurus murphyi* stock.<sup>8</sup> In the absence of agreed stock assessments, in 2009, the SWG carried out a comprehensive review of the fishery and other indicators as a basis for advice to the ongoing international consultations.<sup>9</sup> At that time, the fishery was suffering from low biomass, recruitment, and spawning, suggesting that urgent and adequate measures limiting fishing were required.<sup>10</sup> Further, the SWG advised that the fishing mortality was likely to have exceeded sustainable levels since at least 2002 and would continue to do so.<sup>11</sup>
21. In response to the SWG's advice, at the final international consultations in 2009, the participants adopted Revised Interim Measures, in which they agreed to voluntarily restrain their catches beginning in 2010 until the Convention entered into force to the levels they recorded in 2007, 2008, or 2009.<sup>12</sup> The responsibility for reviewing these measures was passed to the Convention Preparatory Conference with the suggestion that they be reviewed and revised by 31 December 2010, taking account of the forthcoming stock assessment the SWG proposed.<sup>13</sup>
22. In the first stock assessment by the SWG carried out in 2010, data indicated that immediate catch reductions were required to prevent further biomass decline.<sup>14</sup> The key management message from the SWG was that if catches continued at 2010 levels, it was certain that the biomass would continue to decline at a rapid pace.<sup>15</sup> At the opening meeting of the Preparatory Conference, the Chair stated:

Between the time of our First Meeting in 2006 and the end of . . . 2010, jack mackerel total biomass is estimated to have declined by 65 percent to its historically lowest level—only 11 percent of the estimated unfished biomass level. Spawning biomass is estimated to have declined to only 3 percent of the unfished level, quite possibly making this the most depleted major fish stock under the responsibility of a[] [regional fisheries management organisation] anywhere in the world. Immediate and substantial Measures are required to reverse this decline. . . . [F]ailing to implement such Measures will result in continued decline in a stock that was once the largest fish stock in the South Pacific Ocean, but is now reaching levels which are almost uneconomical to fish.<sup>16</sup>

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<sup>8</sup> Hearing transcript, p. 16:1-6.

<sup>9</sup> Hearing transcript, p. 16:7-14.

<sup>10</sup> Organisation Information Paper, paras. 12-13.

<sup>11</sup> Hearing transcript, p. 16:15-17.

<sup>12</sup> Organisation Information Paper, para. 14.

<sup>13</sup> Hearing transcript, p. 17:5-11.

<sup>14</sup> Organisation Information Paper, para. 15.

<sup>15</sup> Organisation Information Paper, para. 15; Hearing transcript, p. 18:13-17; Report of the 9<sup>th</sup> SWG meeting, p. 3.

<sup>16</sup> Hearing transcript, pp. 17:16-18:11.

23. The second Preparatory Conference adopted additional Interim Measures in 2011, providing that participants would limit 2011 catches to 60 percent of those in 2010.<sup>17</sup> In principle, 2012 catches would then be reduced to 40 percent of those in 2010. Four delegations (Cuba, Faroe Islands, Korea, and the Bolivarian Republic of Venezuela) advised they could not accept the decision; the People's Republic of China (hereinafter "**China**") subsequently advised it would reduce its 2010 catch by 30 percent in 2011.<sup>18</sup>
24. In the absence of any significant improvement in the status of the stock, the participants at the following and last Preparatory Conference unanimously affirmed a reduction to 40 percent of 2010 catches for 2012.<sup>19</sup>

*Controversy surrounding the vessel Lafayette*

25. On 22 July 2009, Russia advised the Interim Secretariat that it had authorised four vessels to fish in the area covered by the Convention ("**Convention Area**") in 2009.<sup>20</sup>
26. On 16 September 2009, Russia confirmed that those four vessels had all been active in the Convention Area during 2009. On 5 November 2009, however, Russia informed the Interim Secretariat that it had authorised more vessels to fish in 2009 but that they had not yet "entered fisheries."<sup>21</sup>
27. On 17 November 2009, Russia informed the Interim Secretariat that the vessel *Lafayette* would fish in the Convention Area in the 2009 season for "horse mackerel," a name often used to refer to the Chilean jack mackerel.<sup>22</sup> After seeing a news item suggesting that the *Lafayette* was a mother ship or processing vessel rather than a fishing trawler, the Interim Secretariat asked Russia to confirm that the *Lafayette* would fish as a midwater trawler during 2009.<sup>23</sup> On 10 December 2009, Russia replied that the *Lafayette* would fish as a midwater trawler.<sup>24</sup>
28. In late January 2010, French authorities in Papeete conducted an inspection of the *Lafayette*. After the inspection, the authorities communicated to the Executive Secretary of the Preparatory Conference: "The captain of the vessel considers that he is a master of a 'fishing vessel' but we did not find any fishing gear or fishing equipment on board."<sup>25</sup> Further communication with these authorities led the Executive Secretary to conclude that the vessel could not have fished in December 2009.
29. In February 2010, the Executive Secretary requested that Russia confirm the presence of the *Lafayette* in the Convention Area in 2009 using appropriate records. When that confirmation was not received, the Executive Secretary chose not to include the *Lafayette* in the list of vessels actively fishing at the time.<sup>26</sup>

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<sup>17</sup> Organisation Information Paper, para. 16.

<sup>18</sup> Hearing transcript, p. 19:5-10.

<sup>19</sup> Organisation Information Paper, para. 16.

<sup>20</sup> Organisation Information Paper, para. 17.

<sup>21</sup> Organisation Information Paper, para. 18.

<sup>22</sup> Organisation Information Paper, para. 18.

<sup>23</sup> Organisation Information Paper, paras. 18-19.

<sup>24</sup> Organisation Information Paper, para. 19.

<sup>25</sup> Organisation Information Paper, para. 24.

<sup>26</sup> Organisation Information Paper, paras. 27-28.



30. On 3 April 2010, Russia sent the Interim Secretariat more detailed records for the *Lafayette*, prompting the Executive Secretary to include the *Lafayette* on the list of vessels actively fishing *Trachurus* species in 2009.
31. In June 2010, the *Lafayette* was the only vessel authorised by Russia to fish for *Trachurus murphyi* in the Convention Area for 2010.<sup>27</sup> On 13 July 2010, Russia provided monthly catch reports for its catches of *Trachurus murphyi* in the Convention Area for December 2009 to June 2010.<sup>28</sup>
32. On 23 July 2010, the Preparatory Conference adopted a report in which delegates expressed concern at a lack of compliance with the Interim Measures in respect of complete and fine-scale data.<sup>29</sup>
33. In October 2010, Russia's Annual Report to the Organisation for 2009 contained information about its vessels that appeared to the Secretariat to be spatially and temporally inconsistent with the records provided earlier in respect of the *Lafayette*.<sup>30</sup> None of the tow-by-tow records found therein showed fishing during December 2009.
34. In December 2010, Russia sent the Interim Secretariat its monthly catch data on *Trachurus murphyi* in the Convention Area for the remainder of 2010, totaling 41,315 tonnes.<sup>31</sup>
35. The 2011 Interim Measures adopted in January 2011 included a footnote stating that Russia noted that it would not apply paragraph 11 (committing participants to the submission of tow-by-tow data for trawlers to verify annual catch reports) for its 2010 catch data; rather, Russia would observe the 2009 Revised Interim Measures commitment to provide all data covering January to December of the previous year by 30 June.<sup>32</sup>
36. On 23 March 2011, the French authorities in Papeete advised the Executive Secretary that they considered the *Lafayette* to be a former oil tanker converted into a processing vessel, not operating as an active trawler in 2009.<sup>33</sup>
37. On 30 March 2011, the Executive Secretary circulated a summary of the French inspection of the *Lafayette* to the participants in the Preparatory Conference.<sup>34</sup> After receiving requests and expressions of concern from certain participants, the Executive Secretary asked Russia to provide additional data.<sup>35</sup>

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<sup>27</sup> Organisation Information Paper, para. 31.

<sup>28</sup> Organisation Information Paper, para. 31.

<sup>29</sup> Organisation Information Paper, para. 32.

<sup>30</sup> Organisation Information Paper, para. 33.

<sup>31</sup> Organisation Information Paper, para. 34.

<sup>32</sup> Organisation Information Paper, para. 35.

<sup>33</sup> Organisation Information Paper, para. 36.

<sup>34</sup> Organisation Information Paper, para. 37.

<sup>35</sup> Organisation Information Paper, para. 38.

38. The Executive Secretary also requested that the Republic of Peru (hereinafter “Peru”) provide unloading or transshipping data involving the *Lafayette* for 2010.<sup>36</sup> Peru provided data showing that four of its vessels transshipped 31,275 tonnes to the *Lafayette* in 2010.<sup>37</sup> Further correspondence from participants between May and August 2011 raised additional doubt about the status of the *Lafayette*; the Executive Secretary was asked to investigate further.<sup>38</sup>
39. On 23 September 2011, the Interim Secretariat presented detailed data submissions that it had received, showing Russia’s reported monthly catch in 2010 of 41,315 tonnes and Peru’s of 40,516 tonnes. Russia’s presentation to the SWG reflected the same total, but did not contain any detailed information for 2010 activities (although its report made clear that in 2010 there were no other Russian fishing vessels in the Convention Area with which the *Lafayette* could have pair-trawled).<sup>39</sup>
40. At the same meeting, some participants expressed concern at the possible double-counting of Russian and Peruvian reported catches in 2010.<sup>40</sup>
41. In accordance with the 2011 Interim Measures, on 28 October 2011, the Executive Secretary asked Russia and Peru to verify the 2010 data they had provided.<sup>41</sup>
42. On 8 January 2012, the Executive Secretary circulated a report with the results of the 2010 verification exercise. It noted that the Interim Secretariat was not able to verify the catches of Peru and Russia based on detailed operational information. Thereafter, Peru provided its operational catch data.<sup>42</sup>
43. Later that month, the EU provided the Executive Secretary with a report concerning an inspection of the *Lafayette* carried out by the Kingdom of Spain during December 2011 which, according to the EU, confirmed the findings of the French authorities that it was highly unlikely that the *Lafayette* could have acted as a pair trawler.<sup>43</sup>
44. On 30 January 2012, the Executive Secretary circulated to the Preparatory Conference a letter from Chile expressing concern about non-compliance with the 2011 Interim Measures and highlighting the situation of the *Lafayette*. Other delegates expressed a similar concern about the credibility of the *Lafayette* data. Russia stated that it had been unable to launch a full scale investigation, but that the vessel had not been authorised to fish in the Convention Area in 2011.<sup>44</sup>
45. After further discussion, but without reaching agreement on how to handle the matter, the Preparatory Conference adopted the following footnote to accompany Table 1 of the 2012 Interim Measures (listing the 2010 GT for participants):

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<sup>36</sup> Organisation Information Paper, para. 39.

<sup>37</sup> Organisation Information Paper, para. 40.

<sup>38</sup> Organisation Information Paper, paras. 41-48.

<sup>39</sup> Organisation Information Paper, para. 49.

<sup>40</sup> Organisation Information Paper, para. 49.

<sup>41</sup> Organisation Information Paper, para. 51.

<sup>42</sup> Organisation Information Paper, para. 51.

<sup>43</sup> Organisation Information Paper, para. 54.

<sup>44</sup> Organisation Information Paper, para. 59.

This total includes the vessel *Lafayette*. Operational fishing data, in accordance with the consolidated data standards, has not been supplied to the Interim Secretariat in respect of this vessel and information supplied by some delegations indicates that the vessel probably was not capable of fishing in either 2009 or 2010. Some delegations requested the GT for this vessel (49,173 GT) should be held in abeyance pending receipt of operational fishing information. The Russian delegation stated that vessel *Lafayette* has duly obtained all certificates from the Russian Maritime Register of Shipping to be qualified for the fishing class; the vessel has undergone initial physical inspections and subsequent annual surveys to confirm its ability to be engaged in direct fishing operations.

46. On 6 March 2012, the data section of the SPRFMO website was updated to note that for Russia, aggregated annual catch data were provided for a single vessel, but the data were not included in the data table, pending receipt of operational fishing information.<sup>45</sup> Thereafter, the data report prepared for the SWG meeting in October 2012 did not include Russia's reported catch for 2010. The data paper prepared for the first meeting of the Commission also did not contain the 2010 reported catch for Russia but rather made reference to the footnote to Table 1 of the 2012 Interim Measures set out above.<sup>46</sup>
47. Russia's position on the data it has given in respect of the *Lafayette* is that it met its obligations to provide overall catch data, consistent with the 1982 Convention and the 1995 Agreement. It disputes the view of some Members of the Commission that the data reporting standards agreed by the participants in 2007 were obligatory. Further, Russia asserts that the data it has provided indicates that the *Lafayette*'s catch was received by the *Lafayette*.<sup>47</sup> The Federal Agency for Fisheries investigated and confirmed this to be accurate.<sup>48</sup> In response to a question at the Hearing regarding the distinction between catch taken from the sea and catch transferred by another vessel, the representative of Russia stated (as transcribed from simultaneous translation into English):

According to Russian legislation, each vessel has a quota. A quota is allocated per vessel which operates and fishes in the high seas. In this situation — in this case the situation often arises as follows, and there are plenty of examples like that, including in the 200-mile coastal zone of the Russian Federation, where a vessel obtains a large quota and, for various reasons, is unable to fill the quota. What it does then is that it brings in other vessels which supply the shortfall, and the fish butt against the vessel's bigger quota. So, in the grand scheme of things, the quota belongs to the original vessel. So, what a vessel can do is obtain fish in the sea and hire other vessels, help it fill the quota, and, of course, it pays the other vessels. Essentially, it leases or rents the other vessels' services.<sup>49</sup>

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<sup>45</sup> Organisation Information Paper, para. 61.

<sup>46</sup> Organisation Information Paper, para. 63.

<sup>47</sup> Hearing transcript, p. 62:5-6. The transcription of the English interpretation of this statement as given at the Hearing is: "The reports received by the Russian Federation from *Lafayette* highlight that the catch of 2010 was, in fact, produced by this particular vessel." The original statement given in Russian was: "Отчеты, полученные Российской Федерацией с судна «Лафайет» уточняют то, что улов 2010 года был получен этим судном".

<sup>48</sup> Hearing transcript, p. 62:5-6.

<sup>49</sup> Hearing transcript, pp. 84:25-85:13.

Perhaps in 2010, actually, yes, in 2010, we did have certain problems regarding this. And I think the questions we have now been asked regarding Lafayette must have had to do with that because for 200-mile economic zones we did even at that time have fairly strict rules. We ran our own — we gathered our own statistics. However, for vessels that operated outside the 200-mile economic zones, we had them operate under somewhat more lax rules, such as they were not expected to submit data exactly on a daily basis and to provide data in a very detailed manner, such as tow-by-tow, such as the amount of catch. Now the situation has changed. They submit data both by the area where they have been fishing by their daily catch. And if we have any additional request, they will give us information on a tow-by-tow basis, and these fishes break down and everything else. So, the situation in Russia has changed dramatically in what concerns the high seas; that is the vast expanses of the ocean outside of the 200-mile Economic Zone. That is, we, compared to a couple of years ago, gather probably ten times as much information as we used to on the one hand. It's a major burden, and there's a lot of information to process. On the other hand, we have information as to where, who, what, and when. And immediately on a computer screen, essentially in realtime, we can find out where a specific vessel is and what it is doing at the time. All of this information is available electronically. At this time, any information that is being requested, we can easily transmit, should there be a request.<sup>50</sup>

#### IV. THE ADOPTION OF CMM 1.01

48. Adopted at the first meeting of the Commission, CMM 1.01 sets out conservation and management measures for *Trachurus murphyi*.
49. A draft of CMM 1.01 prepared by a working group was finalised on 1 February 2013. This draft as presented to the Commission included a total allowable catch and individual catch limits for certain Members and Cooperating Non-Contracting Parties (“CNCPS”) for 2013. No catch was accorded to Russia.
50. The text of the relevant provisions as finally adopted state:

5. Members and CNCPS shall limit the total gross tonnage (GT)<sup>1</sup> of vessels flying their flag and participating in the *Trachurus murphyi* fisheries in the Convention Area to the total tonnage of their flagged vessels that were actively fishing in 2007 or 2008 or 2009 in the Convention Area and as set out in Table 1. Members and CNCPS may substitute their vessels as long as the total level of GT for each Member and CNCPS does not exceed the level recorded in Table 1.

6. In 2013 the total catch of *Trachurus murphyi* in the area to which this CMM applies in accordance with paragraph 1 shall be limited to 360,000 tonnes. Members and CNCPS are to share in this total catch in the same proportions as their 2010 catches as reported to the Executive Secretary in the area to which this CMM applies and in the tonnages set out in Table 2.

7. However, having regard to the current specific circumstances of the *Trachurus murphyi* fishery, on a one-off basis 10 % of the tonnages set out in Table 2 [see below] of Belize, China, European Union, Faroe Islands, Korea, Peru and Vanuatu are to be transferred to Chile. As a consequence, the catch limits to be applied in 2013 in the areas to which this CMM applies shall be those set out in Table 3 [see below].

[...]

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<sup>50</sup> Hearing transcript, pp. 86:16-87:17.

11. Notwithstanding paragraphs 6 and 7, Members and CNCPs agree, having regard to the advice of the Scientific Working Group that fishing mortality of *Trachurus murphyi* in 2013 throughout the range of the stock [that is, including areas under the national jurisdiction of States other than Chile] should be maintained at or below 2012 levels, that total catches of *Trachurus murphyi* in 2013 should not exceed 438,000 tonnes – the total catch for 2012 reported to the Executive Secretary by 20 January 2013.

**Table 2: Tonnages in 2013 fishery as referred to in paragraph 6<sup>4</sup>**

Members / CNCP	Tonnage
Belize	1,145
Chile	237,551
China	32,507
European Union	34,496
Faroe Islands	5,950
Korea	4,182
Peru	20,707
Vanuatu	23,462
<b>Total</b>	<b>360,000</b>

**Footnote 4 to Table 2:** The Russian Federation notified the Commission that it considers it had a legitimate right to a share in the fishery notwithstanding the situation referred to in footnote 3 and asserts its right to participate in the fishery in 2013 in a proportion calculated by a reference to the fishing activities it reported to the Executive Secretary in 2010.

**Table 3: Catch Limits in 2013 as established in paragraph 7**

Members / CNCP	Catch Limit
Belize	1,031
Chile	249,796
China	29,256
European Union	31,046
Faroe Islands	5,355
Korea	3,764
Peru	18,636
Vanuatu	21,116
<b>Total</b>	<b>360,000</b>

51. At the adoption of CMM 1.01, Russia made the following statement:

The Russian Federation held position that the CMM for *Trachurus murphyi* and the calculation for financial contributions to the Organization were based on incomplete data in that those data not include data reported by the Russian Federation to the Interim Secretariat in 2010.

We are not in the position to support the decision unjustifiably discriminates in form or in fact against the member of the Commission, or is inconsistent with the provisions of this Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.

The Russian Federation, based on its *Trachurus murphyi* catch data for 2010 reported in the Interim Secretariat in the amount of the 41 315 tons, will limit its catch in 2013 within the total allowable catch recommended by the Science Working Group. The Russian Federation will notify the SPRFMO Secretariat about its limitations in due course.

We also do not support budget of the Commission without full reflections of Russian catch data for 2010 in the budget calculation.<sup>51</sup>

52. In response to a question from a member of the Review Panel, the Acting Executive Secretary advised that monthly reports for this year pursuant to the aforementioned provisions of CMM 1.01 had been received from Chile, China, the Republic of Ecuador, and the EU.<sup>52</sup>

## V. RUSSIA'S OBJECTION

53. In its letter of 19 April 2013, Russia states:

[W]e present the objection in respect of established shares in the catch limit of *Trachurus murphyi* in 2013 specified in [CMM 1.01].

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

The Russian Federation is guided by the fact that the Commission has neither grounds nor competence to review the data presented by the Parties by the date the Convention took effect.

We also note that the Russian Federation duly presented to the Secretariat of the Organization data on the Russian catch of *Trachurus murphyi* in 2010 amounting to 41,315 tonnes.

However, CMM 1.01 proves that these data have been disregarded in the course of establishing *Trachurus murphyi* catch limit in 2013.

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<sup>51</sup> Annex K to the Report of the First Meeting of the Commission from 28 January 2013 – 1 February 2013.

<sup>52</sup> In response to a subsequent request from the Review Panel, the Acting Executive Secretary transmitted the monthly catch reports for *Trachurus murphyi* up to May 2013 that had been circulated to all Commission Members and CNCPs on 18 June 2013. In addition to the Commission Members listed by the Acting Executive Secretary at the Hearing, the monthly catch reports included reports for 2013 from the Faroe Islands, Korea, Peru and Vanuatu (some of which were zero reports).

In accordance with paragraph 6 of CMM 1.01 the Parties agreed that the total catch of *Trachurus murphyi* in 2013 shall be limited to 360,000 tonnes whereas the countries are to share in this total catch in the same proportions as their 2010 catches.

With the view to the above and following the principle of shares distribution in the catch of *Trachurus murphyi* in 2013 the Russian Federation establishes *Trachurus murphyi* catch limit in the Convention area in respect of the Russian fisheries equal to 19,944 tonnes.

54. For the purposes of these Findings and Recommendations, the Review Panel refers to the above as the “**Objection**” and to Russia’s reference to “the distribution on shares in the total allowable catch of *Trachurus murphyi*” as the “**Decision**.”

## VI. SUMMARIES OF THE ARGUMENTS OF THE PARTICIPANTS

55. The Review Panel summarises the arguments of the Participants in these proceedings that are of particular relevance to its Findings and Recommendations. These summaries are without prejudice to the complete written and oral submissions which the Review Panel has considered in their entirety.

### *Procedural validity of the Objection*

56. Article 17(2) of the Convention provides that:

- (a) Any member of the Commission may present to the Executive Secretary an objection to a decision within 60 days of the date of notification “the objection period”. In that event the decision shall not become binding on that member of the Commission to the extent of the objection, except in accordance with paragraph 3 and Annex II.
- (b) A member of the Commission that presents an objection shall at the same time:
  - (i) specify in detail the grounds for its objection;
  - (ii) adopt alternative measures that are equivalent in effect to the decision to which it has objected and have the same date of application; and
  - (iii) advise the Executive Secretary of the terms of such alternative measures.
- (c) The only admissible grounds for an objection are that the decision unjustifiably discriminates in form or in fact against the member of the Commission, or is inconsistent with the provisions of this Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.

57. Russia maintains that it has met the requirements of Article 17(2).<sup>53</sup>

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<sup>53</sup> Russia’s argument in respect of alternative measures is described *infra* at para. 83 *et seq.*

58. Chile submits that Russia's Objection fails to meet the requirements of Article 17(2).<sup>54</sup> First, with respect to the timeliness of the Objection under Article 17(2)(a), Chile argues that the Objection is only validly made in respect of the non-use of its data but not in respect of using 2010 as a reference year.<sup>55</sup> According to Chile, the "time period to present an Objection . . . expired when the second document submitted by the Russian Federation was presented. Therefore, the Objecting Party could only present arguments to support its formal presentation" and not add new facts.<sup>56</sup>
59. Chile further contends that Russia's Objection does not "specify in detail the grounds for its objection" as required by Article 17(2)(b)(i) because in Russia's first letter (19 April 2013), it objected on the grounds that its catch date of 2010 was wrongfully excluded from the calculation for 2013, "thus constituting the unjustified discrimination on which the objection is based"; whereas in its submission of 14 June 2013, Russia argues that the 2010 data should not be considered for the 2013 calculation. Chile submits that these arguments are contradictory and of a different nature, and cannot be said to "specify" the grounds of the Objection in detail. The second submission cannot widen the first, and, in any event, is untimely.<sup>57</sup>
60. Turning next to Article 17(2)(b)(ii), Chile contends that Russia fails to "adopt alternative measures that are equivalent in effect to the decision to which it has objected and have the same date of application." According to Chile, Russia's offer of an alternative measure based on consideration of 2010 data is contradictory to its initial position that 2010 data should not be considered.<sup>58</sup>
61. Finally, Chile contests Russia's Objection on the ground that Russia did not question the use of the 2010 catch data as a basis for the calculation of catch limits during the drafting of CMM 1.01. Chile concludes that the Commission appropriately adopted the application of 2010 data for determining the 2013 limits and that Russia has waived its opportunity to object, or, in the alternative, that Russia has no legitimate basis for its Objection.<sup>59</sup>

#### *Inconsistency with the Convention*

62. Russia submits that the Decision is inconsistent with the Convention. It argues that the Commission wrongfully only took into account 2010 data and failed to consider, *inter alia*, Russia's historical catch and significant contribution to scientific research as the Commission was obliged to do under Article 21(1) of the Convention.<sup>60</sup> Russia insists that CMM 1.01 concerns both conservation and management, including the distribution of quotas, and therefore engages Article 21(1).<sup>61</sup> Russia also contends that the 2010 catch data are not an appropriate basis for determining national catch limits as they were obtained when the Revised Interim Measures were in force and that, because the Revised Interim Measures were voluntary and non-binding, those measures could "in no way . . . serve as a precedent or as a reference for future management decisions of the Commission."<sup>62</sup>

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<sup>54</sup> Chile, 21 June 2013, para. 6.

<sup>55</sup> Hearing transcript, p. 48:9-19.

<sup>56</sup> Hearing transcript, p. 41:16-21.

<sup>57</sup> Chile, 21 June 2013, paras. 4, 26.

<sup>58</sup> Chile, 21 June 2013, para. 5.

<sup>59</sup> Chile, 21 June 2013, paras. 25, 29.

<sup>60</sup> Hearing transcript, pp. 28:7-29:13; p. 34:6-16; p. 37:17-23; p. 39:14-19. See also *infra* para. 92.

<sup>61</sup> Hearing transcript, pp. 102:11-103:3.

<sup>62</sup> RF, 14 June 2013, p. 3.



63. In addition, Russia contends that the Commission was not competent to review the 2010 catch data before the Convention entered into force.<sup>63</sup> Russia also argues that the Revised Interim Measures so limited the catch and “effort” that the 2010 catches do not reflect the real potential catch abilities of the participants.<sup>64</sup> Russia states that no other regional fisheries management organisation uses a particular year as a basis for allocating the total allowable catch into national catch limits.<sup>65</sup>
64. The Chairperson of the Commission asserts that the adoption of the measures in CMM 1.01 did not implicate Article 21(1) of the Convention.<sup>66</sup>
- [P]articipants were quite clear that in developing the measures [in CMM 1.01], they were not engaged in an Article 21 decision-making exercise; rather, they were attempting to find an acceptable means of urgently and severely reducing current catches to allow the potential of a stock rebuild to a level at which an Article 21 exercise could reasonably be undertaken.<sup>67</sup>
65. According to the Chairperson, negotiating an Article 21 allocation process was simply not feasible for the Commission’s first meeting; that would have been a highly complex process and there was already much that needed to be done.<sup>68</sup> Participants were aware that they were adopting a one-year measure in response to an urgent need to reduce catch without prejudice to future allocation or other decisions under Article 21(1) relating to participation in the fisheries.<sup>69</sup> The reference to Article 21(2) in the preamble to CMM 1.01 concerns the possibility of the application of the measures to a straddling stock in areas within a coastal State’s national jurisdiction as would occur in the implementation of CMM 1.01, and was not intended to invoke the criteria set out in Article 21(1).<sup>70</sup>
66. The Chairperson maintains that when establishing the measures under CMM 1.01, the Commission exercised its broad functions under Article 8 of the Convention.<sup>71</sup> CMM 1.01 was not an allocation of participation in fisheries but a temporary “distribution of limits.”<sup>72</sup> The common intention of the participants was to redistribute limits on catch without entering into a formal allocation process; it was covered, in legal terms, by the general powers and functions of the Commission, and by the statements in the Interim Measures referring to the lack of precedential effect, particularly in any future allocation process.<sup>73</sup>

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<sup>63</sup> Objection; RF, 14 June 2013, pp. 2-3. In this regard, the Russian Federation notes that para. 6 of CMM 1.01 does not contain any reference to the need to confirm the specified data by the Interim Secretariat (Hearing transcript, p. 35:1-3).

<sup>64</sup> RF, 14 June 2013, p. 3.

<sup>65</sup> RF, 14 June 2013, p. 3.

<sup>66</sup> Hearing transcript, p. 53:16-22; p. 56:12-14, 20-22; p. 72:2; p. 73:4-8; p. 74:8-10.

<sup>67</sup> Hearing transcript, p. 23:9-15.

<sup>68</sup> Hearing transcript, pp. 53:23-54:11.

<sup>69</sup> Hearing transcript, p. 23:2-8; p. 54:11-15.

<sup>70</sup> Hearing transcript, p. 53:5-12; p. 54:20-24; see also Hearing transcript, p. 66:13-19.

<sup>71</sup> Hearing transcript, p. 81:16-20.

<sup>72</sup> Hearing transcript, p. 81:21-22.

<sup>73</sup> Hearing transcript, p. 82:12-17.

67. Chile supports the view of the Chairperson that the adoption of CMM 1.01 was not a decision taken under Article 21; the Commission adopted the measure in conformity with Article 8 of the Convention which empowers the Commission to, *inter alia*, exercise any function and take any decision that may be necessary to achieve the objective of the Convention.<sup>74</sup>
68. It is the EU's position that the legal basis for the CMM 1.01 was the Convention and not the Interim Measures or Revised Interim Measures.<sup>75</sup> Article 21(1) of the Convention is the main provision governing participation and does not include potential catch as a criterion.<sup>76</sup> In contrast, the EU stresses the fact that "historic catch and past and present fishing patterns and practices in the Convention Area" is a criterion to be applied when determining participation.<sup>77</sup>
69. Finally, Chile contends that the Organisation had an extensive interim period during which there was full consensus regarding the need for regulation and information.<sup>78</sup> Chile submits that in accordance with Article 3(1)(a)(iv) of the Convention, the Commission has the power and duty to verify data.<sup>79</sup> Notwithstanding that the Convention came into force in August 2012, the adoption of measures was to be based on prior data and does not constitute a retroactive application of the Convention;<sup>80</sup> the Commission was at liberty to use data from 2010 or any other year.<sup>81</sup>

*Inconsistency with other relevant international law*

70. Russia submits that the Decision constitutes a violation of Articles 87, 116, and 119 of the 1982 Convention as well as Article 8 of the 1995 Agreement, which, like Article 119 of the 1982 Convention, conveys a principled commitment in international law prohibiting discrimination in conservation.<sup>82</sup>
71. Chile submits that CMM 1.01 is consistent with international law because it was adopted in accordance with the terms of the Convention—namely Article 8—at a time when the Convention was in force.<sup>83</sup> Further, the Convention is consistent with related international law instruments.<sup>84</sup>
72. New Zealand states that the Decision is consistent with Article 119 of the 1982 Convention,<sup>85</sup> and the 1995 Agreement, particularly paragraphs (a), (b), (c) and (e) of Article 5.<sup>86</sup>

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<sup>74</sup> Hearing transcript, p. 67:3-10.

<sup>75</sup> EU, 21 June 2013, p. 1.

<sup>76</sup> EU, 21 June 2013, p. 2. The EU points out that the use of potential catches as a reference point could be in contradiction with the precautionary approach of Articles 2 and 3 of the Convention.

<sup>77</sup> EU, 21 June 2013, p. 2.

<sup>78</sup> Hearing transcript, pp. 46:20-47:7.

<sup>79</sup> Hearing transcript, p. 47:9-11; Chile, 21 June 2013, para. 18. Chile joins New Zealand on this point (Hearing transcript, p. 47:17-22 referring to New Zealand, 21 June 2013, para. 2).

<sup>80</sup> Hearing transcript, p. 47:11-13; Chile, 21 June 2013, paras. 20, 30e.

<sup>81</sup> Hearing transcript, p. 47:13-15.

<sup>82</sup> Hearing transcript, p. 34:13-16; p. 60:11-21; RF, 27 June 2013, para. 5.

<sup>83</sup> Hearing transcript, p. 94:17-24.

<sup>84</sup> Hearing transcript, p. 95:18-21, referring to the 1982 Convention and the 1995 Agreement (referred to by Chile as the New York Agreement).

<sup>85</sup> NZ, 21 June 2013, para. 5.

<sup>86</sup> NZ, 21 June 2013, para. 6.

*Discrimination in form or in fact*

73. In respect of the calculation of the 2013 catch limits, it is Russia's position that the omission of its 2010 data on the basis of their incompleteness<sup>87</sup> unjustifiably discriminates against Russia considering that the Russian delegations to the meetings of the Preparatory Conference, Working Groups, and the Commission provided detailed, reasonable explanations for the missing data as reflected in the decisions issued following those meetings.<sup>88</sup> Further, Russia states that its delegations have consistently commented that "lack of a part of data cannot serve as a reason for exclusion of the Russian 2010 catches taken in 2010 from the calculation."<sup>89</sup>
74. To the extent that its exclusion was based on allegedly missing data, Russia maintains that since 2007, other States have failed to report appropriate data but were not excluded in the same way.<sup>90</sup> In any event, Russia asserts that it provided all necessary data at the appropriate time.<sup>91</sup>
75. Further, Russia contends that the Commission's choice of applying the 2010 catch data in the course of calculating catch limits was an additional form of unjustifiable discrimination. In its view, the use of a single year's data to calculate its catch limit is discriminatory toward any State not fishing in the Convention Area that year.<sup>92</sup> According to Russia, the actual catch quota allocated to it for 2013 should be 19,944 tonnes based on its 2010 catch of 41,315 tonnes, rather than zero tonnes.<sup>93</sup>
76. New Zealand, Chile, and the EU dispute Russia's position.
77. New Zealand argues that the Commission took the appropriate steps under Article 3 of the Convention in deciding not to take into account the data provided by Russia in light of the Secretariat's conclusion that the information provided was insufficient.<sup>94</sup> Thus, according to New Zealand, the Commission was entitled to discount data submitted by Russia where that data did not meet the standards set out over the course of the Preparatory Conference and there was no unjustified discrimination.<sup>95</sup>

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<sup>87</sup> RF, 14 June 2013, p. 1.

<sup>88</sup> RF, 19 April 2013, p. 1; RF, 27 June 2013, para. 7.

<sup>89</sup> RF, 19 April 2013, p. 2; RF, 14 June 2013, p. 1; RF, 27 June 2013, para. 7.

<sup>90</sup> RF, 27 June 2013, para. 6.

<sup>91</sup> Hearing transcript, p. 32:7-15.

<sup>92</sup> Hearing transcript, p. 58:17-19; see also RF, 14 June 2013, para. 5.

<sup>93</sup> RF, 19 April 2013, p. 2.

<sup>94</sup> NZ, 21 June 2013, para. 3.

<sup>95</sup> NZ, 21 June 2013, para. 7.

78. Likewise, in Chile's view, the exclusion of Russia's 2010 data is justified by the facts described above as set out by the Secretariat demonstrating the unreliability of the figures submitted. Chile points in particular to Russia's failure to submit information on monthly catches within 30 days after the end of each month throughout 2010 in contravention of paragraph 15 of the 2009 Interim Measures in force at that time.<sup>96</sup> It notes also that Russia did not comply with the data standard set out in paragraph 14 of the 2009 Interim Measures by not submitting information on its 2010 fishing activities on a tow-by-tow basis.<sup>97</sup> Chile maintains that evidence shows that the *Lafayette* was not capable of performing catches and that this is uncontested by Russia.<sup>98</sup> It states that, of the 41,315 tonnes reported by Russia for 2010, 31,275 tonnes were catches transshipped from Peruvian vessels; thus, to consider 41,315 tonnes as part of Russia's catch of 2010 would be partly duplicative.<sup>99</sup>
79. The EU agrees with Chile and maintains that the Decision does not discriminate unjustifiably against Russia because Russia failed to provide information that would "underpin the reliability" of the data it put forward.<sup>100</sup> According to the EU's understanding of the inspection reports, the *Lafayette* was neither equipped for fishing nor could have acted as a pair trawler as no other Russian vessel was authorised to fish jack mackerel in the reference period. The EU submits that there was an "absence of reliable data" from Russia for 2010.<sup>101</sup>
80. In respect of Russia's view stated at the Hearing that the selection of 2010 data as a baseline also constituted discrimination, New Zealand and Chile assert that, at the time of the adoption of CMM 1.01, Russia did not raise any objection to the use of 2010. Thus, the Commission understood the use of 2010 as a reference year to be agreed.<sup>102</sup>
81. In New Zealand's opinion, the use of the 2010 catch data to make the 2013 limits was "a legitimate decision" in the context of the negotiations over the prior Interim Measures. New Zealand highlights that in the Interim Measures adopted in 2011 and 2012 as well as in CMM 1.01, the participants and the Commission agreed that 2010 should be used as a reference year for those particular measures.<sup>103</sup>
82. Finally, Chile also disputes the legitimacy of Russia's discrimination arguments in these review proceedings considering that Russia signed the Convention in January 2011 and that, in Chile's view, under Article 18 of the Vienna Convention on the Law of Treaties, States may not frustrate the objective of an international instrument after having signed.<sup>104</sup>

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<sup>96</sup> Chile goes further to argue that "it can be concluded that from the 41,315 tonnes reported by the Russian Federation for 2010, 31,275 tonnes correspond to catches transshipped by Peruvian vessels." Chile, 21 June 2013, para. 11.

<sup>97</sup> Chile emphasises that the Russian Federation has not provided any evidence to contradict the inspection evidence presented by the European Union and France regarding the vessel *Lafayette*'s lack of capability to take catches itself. Chile, 21 June 2013, para. 15.

<sup>98</sup> Chile, 21 June 2013, paras. 10, 16.

<sup>99</sup> Hearing transcript, p. 44:13-19; Chile, 21 June 2013, paras. 11, 15.

<sup>100</sup> EU, 21 June 2013, p. 1.

<sup>101</sup> EU, 21 June 2013, p. 1.

<sup>102</sup> NZ, 21 June 2013, para. 10; Chile, 21 June 2013, paras. 24-25, 30d, 30f.

<sup>103</sup> NZ, 21 June 2013, para. 10.

<sup>104</sup> Hearing transcript, pp. 68:24-69:1.

*Alternative measures*

83. In its Objection, Russia articulated its alternative measures as follows:

[F]ollowing the principle of shares distribution in the catch of *Trachurus murphyi* in 2013 the Russian Federation establishes *Trachurus murphyi* catch limit in the Convention area in respect of the Russian fisheries equal to 19,944 tonnes.<sup>105</sup>

84. On 14 June 2013, Russia submitted that “[t]he calculation of the Russian jack mackerel’s catch limit for 2013 totaling to 19 944 tonnes is given in the table below.”<sup>106</sup> In the table, based on a total catch figure of 41,315 GT for 2010, Russia calculated that it had a right to a 5.54 percent percentage of the total allowable catch of 360,000 GT (*i.e.*, 19,944 GT), and in doing so, adjusted down the proportions assigned to the other Commission Members and CNCs in Table 2 to CMM 1.01.

85. On 27 June 2013, in response to New Zealand’s submission of 21 June 2013, Russia stated that:

The alternative nature of the measure proposed by the Russian Federation is that irrespective of the actual catch of jack mackerel by the Russian fishing vessels in 2013, in case the TAC of 360,000 tons of *Trachurus murphyi* is fished by the members of the Commission, the Russian Party will cease fishing for *Trachurus murphyi* in the Convention Area.<sup>107</sup>

86. At the Hearing, Russia described its alternative measures in the following terms:

Being guided by the principle of the distribution of the amounts of jack mackerel catch for 2013 established in CMM. 1.01, the Russian Party establishes a restriction on the jack mackerel catch for Russian fishing vessels in the Convention Regulation Area in 2013 at the level of 19,944 tons. The Russian Federation . . . does not suggest review of the overall catch for other countries for 2013. In 2013, when the level of 360,000 tons is reached in the region covered by CMM 1.01, the Russian Federation, irrespective of the amount of the quorum used until then of the national quota, will stop fishing. Taking into account this approach, the applicable limits should be seen as equivalent to Measure CMM 1.01 and also being in line with the objectives of the Convention.<sup>108</sup>

**VII. ANALYSIS**

87. The Review Panel finds that the letter dated 19 April 2013 from Russia to the Acting Executive Secretary complies with the requirements of Article 17(2) of the Convention. Russia was not estopped by its prior positions or statements from exercising its right to object under that provision, nor is it precluded from making arguments in the alternative. Its subsequent explanations and arguments are not understood by the Review Panel to constitute amendments to the Objection precluded by the sixty-day time limit specified in Article 17(2)(a).

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<sup>105</sup> Objection, p. 2.

<sup>106</sup> RF, 14 June 2013, p. 1.

<sup>107</sup> RF, 27 June 2013, para. 13.

<sup>108</sup> Hearing transcript, pp. 38:11-39:1.

88. Russia made clear to the Review Panel that fishing by vessels of Russian registry for *Trachurus murphyi* in the Convention Area in 2013 would cease when the total allowable catch of 360,000 tonnes specified in CMM 1.01 is reached.<sup>109</sup> It is therefore evident that the Objection is not directed to the failure to include Russia's reported catch in 2010 in the calculation of the total allowable catch.
89. The Objection is directed to only one aspect of CMM 1.01. That is the absence of any catch allocation to Russia. In that respect Russia challenges the legality of the Decision and asserts that the Decision unjustifiably discriminates against Russia within the meaning of paragraph 2(c) of Article 17 of the Convention. In this connection, bearing in mind the suggestion of Chinese Taipei that the use of various terms be clarified, the Review Panel notes its agreement with the representatives of Chile and Russia that paragraphs 6, 7, and 11 of CMM 1.01 apply to catch taken directly from the sea and not to catch transferred from another vessel.
90. The adoption of a total allowable catch limit reasonably likely to protect the dramatically depleted stock of *Trachurus murphyi* from further deterioration and to lay the foundation for its sustainable rehabilitation was and remains an urgent objective. The Review Panel understands that no comprehensive effort to effect comparative allocations on the basis of Article 21 was undertaken or possibly could have been pursued without disrupting the conservation effort that culminated in CMM 1.01.
91. The Review Panel also accepts that the result of allocating no catch to Russia for 2013 was an unplanned consequence of the confluence of the decision to rely on 2010 data for the purpose of calculating 2013 catch limits with the decision to decline to take into account the reported catch of the *Lafayette* for 2010 in light of uncertainty as to the extent to which that catch had actually been transshipped to the *Lafayette*. For its part, given the information presented in these proceedings, the Review Panel considers that it does not have sufficient basis to determine the source of the portion of the *Lafayette's* reported catch that is not attributable to the Peruvian vessels.
92. Chile, the EU, and New Zealand contend that the reliance on 2010 data for the purpose of fixing both the total allowable catch and catch limits for individual Members and CNCPs for 2013 was justified. That contention may well survive scrutiny in most circumstances. However no convincing argument has been made in the written or oral submissions to justify the failure to allocate any catch to Russia. Russia is accorded an effort tonnage by paragraph 5 of CMM 1.01. The Chairperson of the Commission stated during the Hearing:

The Russian Federation is a major State with a significant historical connection to fishing for jack mackerel in the Pacific as well as more recent activity in the fishery in this century. It actively participated from the beginning in the Consultations that resulted in the adoption of the Convention, in all three meetings of the Preparatory Conference, and in the First Meeting of the new Commission. Their delegates also played their part in the work of the Science Working Group and the Data and Information Working Group.<sup>110</sup>

Moreover, no convincing argument has been made in the written or oral submissions to justify the resultant potential windfall to others that are accorded allocations, including those that may have entered the fishery only after the date on which negotiation of the Convention commenced.

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<sup>109</sup> Hearing transcript, pp. 38:11-39:1; pp. 60:22-61:6; p. 63:18-22; see also RF, 27 June 2013, para. 13.

<sup>110</sup> Hearing transcript, pp. 26:19-27:4. See also Hearing transcript, pp. 91:16-92:9 and pp. 59:20-60:10.

93. The Review Panel accordingly concludes that the failure to allocate any catch to Russia resulted in unjustifiable discrimination against Russia. For many of the reasons articulated in the written submissions and oral presentations, and in light of the alternative grounds for objection specified by Article 17(2)(c), and the differing consequences set forth in paragraph 10 of Annex II, the Review Panel also concludes that the Decision is not inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.
94. There remains the question of alternative measures that are equivalent in effect to the Decision to which Russia has objected.
95. In its written submission, New Zealand asserts that any catch allocation to Russia would alter either the total allowable catch, or the allocations to other Members and Cooperating Parties, or both. Such an allocation therefore could not have equivalent effect to the Decision.
96. Without in any way minimising the practical difficulties apparent from New Zealand's analysis, the Review Panel concludes that paragraphs 1 and 2 of Article 17 cannot be read in isolation from each other and that both apply to decisions on catch allocation.
97. In this respect the Review Panel notes that in the context of these proceedings, the statement of Russia that fishing by Russian vessels would cease when the total allowable catch is reached largely eliminates concern about the impact of its Objection on the total allowable catch as such.
98. But within that constraint, an additional allocation to Russia could, as a practical matter, affect the allocations to one or more other Members or CNCs. Given Chile's statement during the Hearing that it would be a matter of days before it reached its catch limit, the likely effect would be on other participants in the fishery that have justified expectations during the current fishing season based on the allocations in CMM 1.01.
99. 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.

## VIII. FINDINGS AND RECOMMENDATIONS

100. In light of the foregoing, pursuant to Article 17(5)(e) of the Convention, the Review Panel:

- a. *Finds* that the Decision to which objection has been presented unjustifiably discriminates in form or in fact against Russia;
- b. *Finds* that the alternative measures adopted by Russia are not equivalent in effect to the Decision to which objection has been presented by Russia;
- c. *Recommends* the following alternative measures as equivalent in effect to the Decision to which objection has been presented:

Russia will authorise vessels registered in the Russian Federation to catch *Trachurus murphyi* in the Convention Area in 2013:

- (i) only after Russia concludes from data reported by the Organisation, and in accordance with Article 3, paragraph 1(a)(v) of the Convention, that it is likely that the total catch in 2013 will not reach the total allowable catch of 360,000 tonnes referred to in paragraph 6 of CMM 1.01, and
  - (ii) only until the Organisation reports that this total allowable catch has been reached;
- d. *Finds*, without prejudice to the foregoing, that the Decision to which objection has been presented by Russia is not inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.

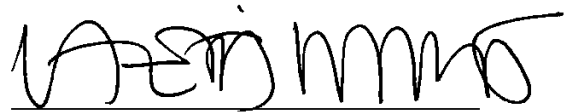
101. The costs of these proceedings shall be borne as provided in paragraph 7 of Annex II of the Convention, and shall be paid upon issuance of the final Statement of Account from the PCA.



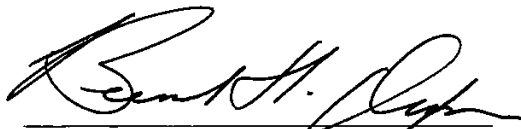
Done in English, accompanied by an unofficial Russian translation prepared by the PCA, at the PCA's facilities in the Peace Palace in The Hague, this 5th day of July, 2013, and transmitted to the Acting Executive Secretary in accordance with Article 17(5)(e) and paragraph 9 of Annex II of the Convention,



Prof. Kamil A. Bekyashev



Sra. Valeria Carvajal



Professor Bernard H. Oxman  
Chairman

### **Separate Opinion of Sra. Valeria Carvajal dated 5 July 2013**

With respect to the alternative measure recommended by the Review Panel today, I would have preferred to recommend such alternative measure under the circumstances described in paragraphs 10 (i) or (j) of Annex II. However, the possibility that the Review Panel recommends alternative measures without finding that the decision unjustifiably discriminated in form or in fact against the Russian Federation is not available under paragraph 10 of the Annex II. Accordingly, because the only basis for arriving at what I consider to be a reasonable outcome that might promptly replace the catch limit adopted by the Russian Federation requires the application of paragraph 10(c) of Annex II, I have reluctantly refrained from requesting a separate vote on the first finding of the Review Panel in spite of my personal view that there was no discrimination against the Russian Federation resulting from the implementation of CMM 1.01.

The alternative measure recommended by the Review Panel establishes the obligation of Russia to act in accordance with Article 3, paragraph 1(a)(v) of the Convention. After long discussions with the other members of the Review Panel, it is my understanding that Russia, before authorizing its vessels to fish in the Convention Area, shall ensure that the TAC has not yet been reached and if so, that the participants in the fishery that have not yet fully utilized their catch limits (as reflected in Table 3 of CMM 1.01) will not utilize them.