

## **Convention for the Conservation of Southern Bluefin Tuna “Quota Trading”**

### **New Zealand legal advice provided pursuant to Agenda Item 12: Quota Trading, paragraph 55-56, Report of the Extended Commission of the Tenth Annual Meeting of the Commission, October 2003**

The purpose of this opinion is to assess whether a member of the Convention on the Conservation of Southern Bluefin Tuna (CCSBT) can unilaterally sub-divide and transfer its allocation to a member or non-member without a decision of the Commission on the question of allocation transfer.

This opinion is provided taking into account the legal opinion prepared by Professorial Fellow, William Edeson, as circulated by the Secretariat to members in June 2004.

The term ‘quota transfer’ is used in this opinion as a generic term to include the transfer of quota by sale, lease or other mechanism, including transfer without consideration. It is hoped the use of a broad term will enable the discussion to focus on the principle of transferring an allocation per se, rather than on secondary issues such as consideration or financial return under a trading or leasing system, particularly given that such specifics may be premature in this discussion. This opinion is not concerned with foreign vessel access arrangements or chartering of foreign vessels by members.

Pursuant to the Resolution to Establish an Extended Commission and an Extended Scientific Committee, adopted at the Seventh Annual Meeting of the Commission for the Conservation of Southern Bluefin Tuna in April 2001, references in this paper to the “Commission” may be read to include the Extended Commission.

### **Can a member of CCSBT unilaterally sub-divide and transfer its allocation of the total allowable catch to another member or non-member?**

#### Summary

1. The Commission has sought advice on, inter alia, the nature of national allocations established by the Commission, specifically whether a member enjoys ‘rights’ in its allocation that can be considered sub-divisible and able to be traded.<sup>1</sup>

2. New Zealand is of the opinion that:

- The Commission retains the capacity to decide national allocations pursuant to the Convention’s article 8(3), which provides that ‘for the conservation, management and optimum utilisation of SBT the Commission shall decide upon a total allowable catch and its allocation among the Parties unless the Commission decides upon other appropriate measures on the basis of the report of and recommendations of the Scientific Committee referred to in paragraph 2(c) and (d) of Article 9’.
- A member does not, under the current legal CCSBT framework, have the capacity to unilaterally divide and transfer its allocation to another member or non-member.

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<sup>1</sup> Terms of Reference; Commission for the Conservation of Southern Bluefin Tuna; Quota Trading; Legal Advice. See page 3 of Secretariat Paper, June 2004, covering the opinion prepared by William Edeson, Professorial Fellow, Wollongong, Australia.

- A decision of the Commission would be required in order to permit any quota transfer system. Any such decision of the Commission would have to be in accordance with its decision-making capacity under article 8(3) and would have to be in accordance with members' obligations under CCSBT, United Nations Convention on the Law of the Sea (UNCLOS), and where applicable the United Nations Fish Stocks Agreement (UNFSA<sup>2</sup>).
- UNCLOS and UNFSA do not explicitly preclude the Commission from taking a decision to establish a quota transfer system, however, both agreements place limits on the extent to which any transfer system may provide for quota trading or quota leasing (e.g. flag state responsibilities; coastal state rights; compliance and enforcement responsibilities; and obligations to non-members and new members).

3. In reaching this conclusion New Zealand suggests that determination of the extent to which a member enjoys 'rights' in its national allocations does not ultimately answer the key question, that is, whether a member of the CCSBT has the legal capacity to unilaterally sub-divide and transfer its allocation. Analysis of the extent to which a member possesses 'rights' in its allocation is simply one dimension of this much broader question, which must be looked at alongside other considerations, specifically the Convention text and relevant international legal principles. This paper therefore approaches the issue from a perspective which is broader in scope than the Secretariat's terms of reference but which is intended to provide a comprehensive answer to the question of the permissibility of quota transfer within the current legal context of the Commission.

4. This opinion does not seek to canvas the factors the Commission would have to take into account if it does decide to establish a quota transfer system between members but notes that any such system would be limited by the competing obligations imposed upon members under the Convention, UNCLOS and, where applicable, UNFSA.

#### **I. The current context: the Convention text and relevant international legal principles**

5. If a member wishes to sub-divide and transfer an allocation to another member or non-member it would first need to establish that it had sufficient legal capacity to unilaterally manage, dispose and transfer that allocation.

6. The CCSBT text does not specifically address the issue of quota transfer within its provision on the determination and allocation of the total allowable catch (article 8). Both UNCLOS and UNFSA are silent as to whether a member's allocation is sub-divisible and able to be transferred. In addition, there is no precedent for the unilateral transfer of quota in regional fisheries management organisations.<sup>3</sup>

7. In the absence of specific direction on the permissibility of quota transfer in the CCSBT text, a discussion of a member's legal capacity to transfer its allocation therefore requires an analysis of the extent to which the Convention text might imply that a member has that capacity, supplemented by an analysis of relevant international legal principles.

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<sup>2</sup> 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.

<sup>3</sup> The two organisations which do permit quota transfer, NAFO and ICCAT, have established a transfer system under the authority of their respective commission. Neither the NAFO nor the ICCAT agreements provide for unilateral transfer of quota without the prior consent of the commission.

### The text of the CCSBT

8. The Convention's objective is to ensure through appropriate management, the conservation and optimum utilisation of SBT. Article 8(3) of the Convention provides that 'for the conservation, management and optimum utilisation of southern bluefin tuna: (i) the Commission shall decide upon a total allowable catch and its allocation among the Parties unless the Commission decides upon other appropriate measures on the basis of the report and recommendations of the Scientific Committee referred to in paragraph 2(c) and (d) of Article 9; and (ii) the Commission may, if necessary, decide upon other additional measures'. Pursuant to article 8(7) all measures decided under article 8(3) are binding on the Parties.

9. Article 8(4) provides that the Commission will consider the following factors in its allocation of the TAC: a) relevant scientific evidence; (b) the need for orderly and sustainable development of southern bluefin tuna fisheries; (c) the interests of Parties through whose exclusive economic or fishery zones southern bluefin tuna migrates; (d) the interests of Parties whose vessels engage in fishing for southern bluefin tuna including those which have historically engaged in such fishing and those which have southern bluefin tuna fisheries under development; (e) the contribution of each Party to conservation and enhancement of, and scientific research on, southern bluefin tuna; (f) any other factors which the Commission deems appropriate.

10. In addition, pursuant to article 5, each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under article 8(7).

11. A further provision relevant to this issue is article 8(2), which provides, inter alia, that the Commission shall consider the interpretation or implementation of this Convention and measures adopted pursuant to it; shall consider regulatory measures for conservation, management and optimum utilisation of SBT; and other activities necessary to carry out the provisions of this Convention.

12. A brief survey of the Convention's relevant provisions indicates that the Commission, with the consent of members, has extensive management capacity with respect to the TAC and its decisions are necessarily complex given the multiple considerations and competing legal obligations an allocation decision reflects. It is suggested that the nature of the obligations the Convention imposes on members is such that there is a prima facie duty upon members to recognise the competency of the Commission to allocate the TAC and to abide by decisions of the Commission.

13. The subdivision and allocation of the TAC is a conservation measure, the implementation of which has a direct impact on the orderly and sustainable development of the resources.

14. Members of the Commission recognise the exclusive competency of the Commission to determine SBT conservation measures, including the setting of the TAC and its allocation, in accordance with the inherently dynamic factors listed in article 8(4). In agreeing to abide by the Commission's management and conservation measures, members effectively limit their right to access the high seas, as conferred by UNCLOS article 116, such that their nationals can access the SBT fishery only to the extent permitted by the Commission. Further, members have agreed that the Commission should have the capacity to determine what is and what is not appropriate through its consideration of the interpretation and implementation of the Convention (article 8:2).

15. In the current CCSBT legal context, it has not been established that members enjoy an 'entitlement' in an allocation, where entitlement is an absolute right to a benefit granted immediately upon meeting a legal requirement. The Commission is not obliged to set a TAC

and provision is made in article 8(3) for the adoption of alternative measures based on the recommendations of the Scientific Committee, which could, for example, include a blanket restriction on access to the SBT fishery. In practical terms, this means that the Convention permits the Commission to withdraw, limit, amend or reallocate the TAC at any time. For example, under the current CCSBT legal framework members do not enjoy ownership rights in an allocation in that they are not entitled to compensation from the Commission if the allocation were revoked or reallocated, or if their actual catch is less than their national allocation permits.

16. The allocation by the Commission of the TAC creates a relationship by which it could be argued a member enjoys a legitimate right to access the high seas SBT fishery but is under a corresponding duty to ensure that its nationals refrain from catching more SBT than the amount permitted by the Commission through its allocation of the TAC. The right a member enjoys in its allocation is therefore a right to access the SBT fishery only in respect of its own nationals and to the extent permitted by the Commission. The allocation itself is a limit on a member's right to access the fishery as opposed to an entitlement in a resource.

17. It is concluded that a member does not, in the present CCSBT legal context, have the capacity to unilaterally sub-divide and transfer its allocation to another member or non-member. With respect to determination of appropriate management of the resource there is a prima facie assumption that it is the Commission, not individual members, which is best placed to determine whether quota transfer is an appropriate measure in accordance with the function specifically recognised in article 8(2) and pursuant to article 8(3). In addition, a quota transfer system would need to establish conditions on transfer to ensure its consistency with international law. As noted below in paragraph 21, a collective decision of the Commission would be required to determine such conditions.

#### UNCLOS

18. Two key principles of international law, as set out in UNCLOS, support the conclusion that members of CCSBT may not in the current legal context, unilaterally subdivide and transfer their national allocations to other members and non-members: flag state responsibilities; and the duty to cooperate.

19. Article 116 of UNCLOS provides that all states have a right for their nationals to engage in fishing on the high seas, subject to: their treaty obligations; the rights and duties and interests of coastal states; and the provisions of Section 2 of Part VII of UNCLOS (conservation and management of living resources of high seas). That right is granted to states in respect of their nationals, and it is through their nationality that individuals and vessels access the resources of the high seas. The concept of flag state responsibilities is essential to the operation of international law regulating the high seas. The establishment of a direct compliance relationship between the Commission and the flag state of those fishing against the TAC is essential to the proper management of resources under the jurisdiction of an organisation of states. Unilateral transfer beyond ones own nationals, in the absence of a compliance relationship between the Commission and the flag state would be inconsistent with members' obligation to respect flag state responsibilities.

20. Pursuant to article 118 of UNCLOS, states are required to cooperate with each other in the conservation and management of living resources in the areas of the high seas, and to establish subregional or regional fisheries organisations to take measures to conserve the living resources concerned. In addition, article 64 of UNCLOS obliges coastal and fishing states to cooperate, directly or through a sub-regional or regional organisation, in respect of highly migratory species. An essential element of the duty to cooperate with the Commission is the need to adhere to the Commission's conservation measures, including its decision on the allocation of the total allowable catch. In the absence of an allocation decision by which

the Commission permits quota transfer, unilateral sub-division and transfer of an allocation to another member or non-member would be inconsistent with the UNCLOS duty to cooperate because, as noted in paragraph 13 above, a collective decision of the Commission would be required to determine the necessary conditions of transfer.

Conclusion: Part I

21. The Commission has not transferred sufficient management and disposal rights to its members and has not set up the necessary conditions under which quota transfer could operate. In the absence of an indication otherwise, the presumption is that the Commission retains the capacity to manage the TAC, part of which is the management of national allocations, in the collective interest of the Commission members. In an environment in which members have agreed to abide by decisions of the Commission, and have agreed to the application of the factors listed in article 8(4) it would be inconsistent with the management capacity vested in the Commission, through article 8(3) and the UNCLOS duty to cooperate, for a member to unilaterally sub-divide and transfer its allocation. Further, in the absence of conditions designed to ensure continued adherence to the allocation principles, application of competing obligations and enforcement of the Commission's conservation and management measures, any such unilateral transfer would be inconsistent with members' competing legal obligations.

22. Until such time as the Commission agrees on the conditions under which quota transfer would be permitted, any unilateral sub division and transfer of a national allocation would be contrary to members' obligation to abide by decisions of the Commission, particularly its conservation and management measures. As outlined in Part II of this opinion, it is suggested that there is no legal reason to prevent the Commission establishing a quota transfer system, specifying the conditions under which the system would operate.

23. It is important at this point, for the sake of clarity, to differentiate two issues from the question of quota transfer which were raised in the opinion prepared by William Edeson: the status of coastal state members and the existence of domestic quota trading amongst a member's own nationals.

(i) Coastal state members: Pursuant to the Convention's article 3, the Commission has competence over SBT whether it is within a member's EEZ or in the high seas. Its competence is, however, subject to the Convention's preamble in which it notes the sovereign rights of coastal states through whose EEZs SBT migrate. In contrast to non-coastal state members, a coastal state has management rights reinforced by Part V of UNCLOS, article 8 of UNFSA and the Preamble and the Convention text itself. The greater rights a coastal state member enjoys are however only in respect of access to its EEZ and its management, consistent with international law. A coastal state member of CCSBT does not, in the current legal context, have the capacity to subdivide and transfer its SBT allocation to another member or non-member simply because it is a coastal state. To do so would undermine the Commission's capacity to determine and manage allocations under the Convention's article 8(3).

A coastal state member may provide for foreign vessel access to its EEZ, for example, to give effect to its obligation pursuant to article 62(2) of UNCLOS (that where it does not have the capacity to harvest the entire allowable catch it shall give other States access to any surplus allowable catch). Foreign vessel access would not amount to a transfer of an allocation to another member because the other member would be fishing either against its own quota or against the coastal state's quota but would not itself enjoy any additional quota.

(ii) Domestic quota transfer: A member may divide and assign its allocation amongst its own nationals, provided it retains authority over the allocation in its entirety. A member cannot unilaterally transfer part of its allocation to another state through its domestic quota trading system because the right to fish in the high seas, as provided in article 116 of UNCLOS, is a right vested in states in respect of their own nationals. That right is in turn devolved by each state to its vessels and individuals by virtue of their nationality.<sup>4</sup>

The basis upon which a party may permit quota trading internally is a matter for each member to determine in accordance with its own legislation, provided that it retains authority over the allocation such that it can comply with any revision of the TAC or any other conservation and management decision of the Commission at any time. In his opinion Edeson states that 'in the EEZ, [therefore] a coastal state could, consistently with the sovereign rights that are provided for in Part V (the EEZ), grant to individuals or vessels rights to fish that are similar to a tradable property right'.<sup>5</sup> As noted above, the right would however be subject to a member's continued responsibility to ensure that its obligations with respect to the conservation and management of the SBT fishery were respected in any such arrangement.

## **II. Quota transfer: a decision for the Commission**

24. New Zealand is of the opinion that a member cannot unilaterally sub-divide and transfer its allocation to another member or non-member, but there is nothing in the CCSBT that would preclude the Commission from taking a decision to establish a quota transfer system between its members. New Zealand reserves its position as to the need for the Commission to permit quota transfer, but notes that if the Commission does take such a decision that a quota transfer system would have to be in compliance with the Commission's obligations under article 8, members' competing obligations under the Convention, UNCLOS, and where applicable, UNFSA.

25. Although he does not state it explicitly, Edeson seems to come to the same conclusion that a member cannot individually divide and trade its allocation but that a group of states, i.e. the Commission, collectively can. This interpretation seems to be confirmed by Edeson when he sets out the characteristics of a quota trading scheme as a decision of the Extended Commission rather than of individual members.<sup>6</sup>

### (i) How would the Commission establish a quota transfer system?

26. It is suggested that the Commission has authority to consider a decision whether quota transfer is a permissible measure for the conservation, management and optimum utilisation of SBT under:

- (i) Article 8(3)(a) as part of its capacity to decide upon the TAC and its allocation among the Parties, or on the basis of a report and recommendation of the Scientific Committee, subject to article 8(6);
- (ii) Article 8(3)(b) on the basis that it is a necessary 'additional measure'.

27. Any decision under article 8(3) would not only have to take into account the factors listed in article 8(4) but would also have to be based on or at least take full account of any

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<sup>4</sup> Consistent with Article 116 of UNCLOS and Articles 5 and 15 of the Convention, each member is obliged to ensure that its own nationals comply with the terms of the Convention and decisions of the Commission, including the TAC. If a member unilaterally transferred its allocation or part of its allocation it would preclude the establishment of a compliance relationship in respect of the allocation transferred.

<sup>5</sup> W. Edeson (2004); 13.

<sup>6</sup> W. Edeson (2004); 19.

report and recommendations of the Scientific Committee (article 8(6)) and would be binding on the members of the Commission (article 7).<sup>7</sup>

(ii) What limits would be placed on a quota transfer system?

28. If the Commission did choose to establish a quota transfer system pursuant to article 8(3), it would have to balance its, and its members', competing obligations through the imposition of conditions on transfer. It is beyond the scope of this opinion to analyse the extent of these competing obligations but the following are noted:

CCSBT

In setting the TAC and deciding upon its allocation, the Commission is obliged to consider the factors listed in article 8(4), inter alia: relevant scientific evidence; the need for orderly and sustainable development of the SBT fisheries; the contribution of each party to conservation and enhancement of scientific research on SBT; and any other factors which the Commission deems appropriate. The dynamic nature of these considerations is such that allocations are not static and will necessarily be subject to adjustment in accordance with the factors listed in article 8. Any decision on a quota transfer system would have to accommodate these factors.

UNCLOS

Although it does not explicitly address quota transfer, UNCLOS does effectively, through a number of competing obligations, place limits on the extent to which quota may be transferred between members. On this point, New Zealand notes Edeson's statement that 'the view is taken here that there is nothing in the wording of article 64 or articles 116 to 119 of the 1982 Convention which precludes trading in quota, so long as the objectives set out in those provisions are observed'.<sup>8</sup> Further, Edeson comments that 'if a group of states wishes to set up a treaty regime to manage particular highly migratory species, then, as between themselves, they can do so. In doing so, if they wish to set up a tradable quota system among themselves, then, provided it does not lead to defeating, for example, the conservation or the optimum utilisation of the species in question, it would be permissible'.

It is suggested, however, that a quota transfer system would have to do more than simply 'observe the objectives' set out in UNCLOS, in that members would have to be able to effectively implement their competing obligations in UNCLOS. Those of particular note are the obligation to ensure that any conservation measure is non-discriminatory (article 119), does not undermine the conservation measures of the Commission (article 118), takes into account the interests of coastal states through whose EEZ SBT migrate (article 64) and is reinforced by a compliance relationship with the Commission based on flag state responsibilities and enforcement (articles 116 and 119).

UNFSA

Members party to UNFSA would be under an additional obligation to ensure that any quota transfer system did not preclude any state with a real interest in the fishery from participating in the Commission (article 8). Other obligations which would limit the flexibility of a quota transfer system are those relating to: flag state responsibilities; coastal state rights; compliance and enforcement responsibilities; and obligations to non-members and new members. An analysis of these competing

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<sup>7</sup> The decision-making capacity of the Commission under Article 8(3)(a) is limited to (i) allocation among Parties; or (ii) the basis of a report and recommendation of the Scientific Committee. If the Commission permits a quota transfer system under this provision it is suggested this would be limited to transfer between parties.<sup>7</sup>

<sup>8</sup> W. Edeson (2004); 15.

obligations is beyond the scope of this opinion but should be addressed comprehensively if the Commission decides to establish a quota transfer system.

29. It is noteworthy that the two organisations which have provided for quota transfer, ICCAT and NAFO, require the consent of the respective commission and both provide very limited circumstances in which a member can trade part of its quota. In his opinion, Edeson records that ICCAT addressed the issue in its decision on the *Criteria for the Allocation of Fishing Possibilities* in which it stipulated, “No qualifying participant shall trade or sell its quota allocation or a part thereof”, although quota transfer has occurred in the past with the consent of the ICCAT Commission. NAFO permits a quota transfer once it has been approved by a majority mail vote from all Contracting Parties.<sup>9</sup>

(iii) What rights would a member enjoy in its allocation?

30. As noted above, in establishing a quota transfer system the Commission would have to impose conditions to ensure that allocation transfers were consistent with international law, including the conservation and management decisions of the Commission. The nature of the rights a member would enjoy in its national allocation would be determined by the extent of the conditions imposed by the Commission. For example, if the Commission permits quota transfer only between members, then the nature of the right a member enjoys in its allocation, specifically the transferability of the right, would be accordingly limited. In the same way, if the Commission limited quota transfer to a particular timeframe then the durability of the right a member enjoys in its allocation would be accordingly limited. This paper does not canvas what the conditions of transfer would be, and therefore the nature and strength of the right the Commission would transfer to members. It is suggested that further thought needs to be given specifically to the need for a quota transfer system before resources are spent determining the conditions of any such system and the consequent nature of the rights a member would enjoy in its allocation.

Conclusion

31. Under the current CCSBT legal framework, a member does not have the capacity to unilaterally sub-divide and transfer its allocation to another member or non-member. The ability to sub-divide and transfer an allocation requires that the allocation-holder has the legal capacity to unilaterally manage, dispose and transfer the allocation. It is evident within the context of the CCSBT that a member does not have the capacity to sub-divide and transfer its allocation to a member or non-member because the Commission has not, in any of its allocation decisions, devolved to its members the legal capacity provided in article 8(3) to sub-divide and transfer allocations.

32. The Commission retains the legal capacity to manage, dispose and transfer the total allowable catch. Whether to permit a quota transfer system between members is a matter for the Commission to decide pursuant to the Convention’s article 8(3). If the Commission does decide to establish a quota transfer system, it would need to impose conditions on transfer to ensure the system is consistent with members’ competing obligations under the CCSBT Convention, UNCLOS and, where applicable, UNFSA.

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<sup>9</sup> W. Edeson (2004); 19. Reprinted response from ICCAT and NAFO secretariats: NAFO also provides for chartering arrangements (Article 14). ICCAT addressed the issue in its decision on the *Criteria for the Allocation of Fishing Possibilities*. In that decision the Commission stipulated that “No qualifying participant shall trade or sell its quota allocation or a part thereof”.