



CCSBT-EC/0610/11

12. Quota Trading

Purpose

To discuss quota trading in the context of the CCSBT.

Discussion

Quota trading has been discussed at the last two annual meetings of the Extended Commission.

At CCSBT12, Korea indicated that it would submit a proposal to CCSBT13.

To assist discussion on this topic three background documents are attached.

- Independent legal advice was obtained from Bill Edeson, formally senior legal counsel at the FAO.
- Legal advice from New Zealand domestic sources.
- A discussion paper prepared by the Secretariat on operational aspects of potential quota trading systems.

These three documents are attached as Attachments A, B and C respectively.

For information.

Prepared by the Secretariat

Quota Trading under the Convention for the Conservation of Southern Bluefin Tuna

Executive Summary

The purpose of this paper is to assess the trading of quota in the context of the Convention for the Conservation of Southern Bluefin tuna, and in the broader context of international law.

The paper reviews the provisions of the SBT Convention. It finds that the Convention does permit quota trading. In any event, the Commission has the power to provide authoritative interpretations of the Convention.

The paper considers the relationship between cooperating non members and the Extended Commission. It points out that cooperating non members are required to make a formal written statement expressing their commitment to carry out, among other things, the objective of the Convention, abide by the conservation and management measures and all other decisions and measures adopted in accordance with the Convention. They have therefore committed themselves in international law to observing these requirements.

The paper distinguishes between those cooperating non members and non cooperating non members which are Parties to the 1995 UN Fish Stocks Agreement. Those which are not Parties would be obliged to cooperate in accordance with the provisions of articles 64 and 116 to 119 of the 1982 UN Convention. A State which is party would be bound not only those provisions of the 1982 UN convention but also by the provisions of the 1995 UN Fish Stocks Agreement, in particular, the obligation to cooperate only through a competent commission, such as CCSBT (article 8.4 and 17.2).

The paper also considers the nature of allocations made by the Commission. It concludes that the present allocations are tradable. However, a distinction is drawn between the EEZ and the high seas: while a coastal State can grant a right to fish for highly migratory species in its EEZ that is similar to a tradable property right, this is more problematic in respect of high seas stocks. This is because it is difficult to predict which State might choose to exercise the freedom of fishing on the high seas in respect of its nationals.

The study reviews examples available of quota trading in other fisheries bodies. There were only limited precedents. However, where it has been adopted, this had been done without objection even though there was no specific authorisation to do so in the basic Agreement.

The study concludes by indicating the issues the Extended Commission might wish to consider in setting set up a more formal quota trading arrangement. If quota can be traded not only among Members of the Extended Commission and cooperating non members, but also to non cooperating non members, there will be significant monitoring

and compliance issues to be addressed. It suggests that, if the Extended Commission wishes to pursue further the subject of quota trading, then a draft resolution setting out the possible elements of such scheme be prepared for detailed consideration.

TERMS OF REFERENCE

COMMISSION FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA (CCSBT) QUOTA TRADING – LEGAL ADVICE

Terms of Reference

Background

The Convention for the Conservation of Southern Bluefin Tuna provides for the CCSBT to set a total allowable catch and its allocation among members. At the annual meeting the CCSBT set a total allowable catch for members of 14,030 tonnes distributed as follows. The amounts represent quotas for each member:

- | | |
|----------------------------|--------------|
| - Australia | 5,265 tonnes |
| - Japan | 6,065 tonnes |
| - New Zealand | 420 tonnes |
| - Fishing Entity of Taiwan | 1,140 tonnes |
| - Republic Of Korea | 1,140 tonnes |

The CCSBT also set a global allocation for cooperating non-members of 900 tonnes, of which 800 tonnes has been offered to Indonesia and 100 tonnes has been set aside for other countries.

At its annual meeting in October 2003 the CCSBT discussed the issue of quota trading among members. In discussion, the legal implications of quota trading were not clear and the CCSBT agreed that the Executive Secretary would seek independent legal advice from an appropriately qualified person.

Also at the annual meeting in October 2003, the CCSBT agreed to resolution, which established the status of “cooperating non-member” including the rights and responsibilities involved with this status. Under the terms of the resolution, cooperating non-members are required to agree to a catch limit (quota).

This document sets out the terms of reference for the legal advice required by the Executive Secretary.

Terms of Reference

1. Provide a brief overview of the international legal framework governing high seas migratory fish stocks relevant to the issue of quota trading.
2. Within this context provide advice on:
 - The consistency of trading with relevant international law, including the aims of the Convention, allocation principles of the Convention, and the respective rights and duties of states under international law.
 - The nature of national allocations established by the Commission, specifically:
 - o Are allocations “owned” by members?
 - o Does a national allocation create a form of "right" that can be considered sub-divisible and able to be traded?
 - o If allocations are sub-divisible who has lawful authority over allocation and reallocation of access to the stock ie does this authority rest with the member state or the Commission?
 - o Does any "right" to an allocation remain ongoing or is it dependent upon conditions such as a member's capacity to harvest it directly?
 - o How do these issues apply to the “catch limits” for cooperating non-members? Do these limits constitute a different form or nature of “right”?
 - o Are the circumstances different for high seas and exclusive economic zone fishing?
- ..
- 3 Identify where other regional fisheries bodies have implemented quota trading arrangements and within what legal framework these have been developed.
- 4 If satisfied that a quota trading system is consistent with the international legal framework for highly migratory fish stocks and the Convention, provide advice on:
 - The general characteristics necessary for a trading system to be consistent with international law;
 - The conditions that the Commission may wish to apply to ensure the effective functioning, including monitoring, of any trading system; and
 - The process issues that will need to be addressed by the Commission in order to establish a trading system.

Quota Trading under the Convention for the Conservation of Southern Bluefin Tuna¹

Introduction

The relevant international law governing high seas migratory fish stocks is well known. The main uncertainty which arises is which treaty regime applies. In particular, while the 1982 UN Convention on the Law of the Sea (hereafter referred to as the 1982 UN Convention) provides the basic global regime that is accepted by virtually all countries, the situation is less straight forward with 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, (referred to hereafter as the 1995 UN Fish Stocks Agreement). This is so because only a limited number of Parties to the Convention for the Conservation of Southern bluefin Tuna (hereafter referred to as SBT Convention) are also Parties to that Agreement. Likewise, not all actual or prospective cooperating non members are party to the 1995 UN Fish Stocks Agreement.

It is not necessary in this paper to enter into the well known debate on whether parts of the 1995 UN Fish Stocks Agreement are applicable as customary international law. Much has been written on this. It will probably take an authoritative decision of an international tribunal such as the International Tribunal for the Law of the Sea or the International Court of Justice to resolve it. However, as will be seen, the issue underlies the discussion of several issues in this paper.

On the specific subject of quota trading, international law does not have much to say directly on this. Within zones of national jurisdiction, in particular because of the sovereignty and sovereign rights enjoyed by the coastal State, there are several examples of rights based fishing which involve in varying degrees the opportunity for individuals to have a right to a quota and to trade that right.

On the other hand, on the high seas, it is less easy to establish a system of tradable quotas, as no State, or group of States, is in a position to give an unqualified right. It is also much more difficult to predict which States might choose to exercise the freedom of fishing on the high seas in respect of their nationals. Thus, any right granted in respect of fishing on the high seas will at best be an incomplete or imperfect right.

The provisions of the Convention for the Conservation of Southern Bluefin Tuna (SBT Convention)

¹ This report has been prepared by William Edeson, Professorial Fellow, Centre for Maritime Studies, Wollongong University, Australia

The objectives of the SBT Convention are silent on the specific question of trading quota.

Article 3 states the objective of the Convention as being *“to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.”* Terms such as appropriate management, conservation and optimum utilization would not on their face exclude trading of quota. Management, for example, has been defined as *“The art of taking measures affecting a resource and its exploitation with a view to achieving certain objectives, such as the maximization of the production of that resource. Management includes, for example, fishery regulations such as catch quotas or closed seasons.”*² Likewise, “optimum” (in relation to the term yield) has been defined as *“a deliberate melding of biological, economic, social, and political values designed to produce the maximum benefit to society from a stock of fish.”*³

Further, article 8.3 states:

- “(a) the Commission shall decide upon a total allowable catch and its allocation among the Parties unless the Commission decides upon other appropriate measures upon the basis of the report and recommendations of the Scientific Committee referred to in paragraph 2(c) and (d) of Article 9; and*
- (b) the Commission may, if necessary, decide upon other additional measures.”*

It may also be noted that the under paragraph 4 of Article 8, it is stated:

- “In deciding upon allocations among the Parties under paragraph 3 above the Commission shall consider*
-*
- (b) the need for orderly and sustainable development of southern bluefin tuna fisheries;*
-*
- (f) any other factors which the Commission deems appropriate.”*

It would seem, from the wording used in the SBT Convention itself, that quota trading was not in the forefront of the objectives and purposes of the Convention. However, it is not excluded either. Further, the general clauses, such as article 8.3(b) and (f) above, would put it beyond doubt that the Extended Commission could address quota trading should it wish to do so, and to put in place a process for this.

² Cooke, JG Glossary of Technical Terms in Exploitation of Marine Communities RM May (ed) Springer Verlag (1984) quoted in the FAO World Atlas Glossary.

³ Roedel, PM ed Optimum Sustainable Yield as a Concept in Fisheries Management. American Fisheries Society Special Publication 9. Quoted in the World Atlas Fisheries Glossary.

Interpretation of the SBT Convention

Article 8.2 gives the Commission the power to consider “(a) *interpretation or implementation of this Convention and measures adopted pursuant to it;*” and (f) “*other activities necessary to carry out the provisions of this Convention.*”

While the power of the Commission is worded restrictively (i.e. to “consider” as opposed to “decide” as the latter is used in e.g. article 8.4), in effect an interpretation which resulted from that consideration and which had the unanimous support of the Parties (or at the least, an absence of an objection i.e. consensus) would be a very strong consideration in support of that interpretation.

Thus, unless there is a dispute as to its interpretation or implementation among the Parties, which leads to dispute settlement under Article 16, the views of the Commission on its interpretation would be, in effect, final. Leaving aside the rights of States not party to the SBT Convention to argue that the Convention itself might contravene some other rules of international law, such as the 1982 UN Convention, this points to the result that the Commission’s determination of what the SBT Convention does or does not permit would have the effect of being conclusive as between the parties.

This result is supported also by the provisions of the Vienna Convention on the Law of Treaties, article 31 of which states in part that, in interpreting a treaty, certain elements shall be taken into account:

There shall be taken into account, together with the context:

- a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
- b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.*

Thus, provided that there is unanimity (or at the least, consensus), it would be open to the Parties to adopt an interpretation of the Convention as to how it is to be applied.

In view of the fact that it is in effect an alternative means of amending the treaty itself, one which sidesteps the more formal process of amendment set out in article 21 of the Convention, if there is not unanimity or a clear consensus, the approach outlined here would not be effective.

The Extended Commission

The resolution to establish an Extended Commission and Extended Scientific Committee was adopted at the seventh annual meeting in April 2001 in order to

bring the Fishing Entity of Taiwan into an effective cooperation with the Commission.

The crucial part of the resolution reads:

Decides as follows:

1. Acting under Articles 8.3(b) and 15.4 of the Convention, the Commission hereby establishes an Extended Commission for the Conservation of Southern Bluefin Tuna (the Extended Commission) and an Extended Scientific Committee, whose Members shall be comprised of the Parties to the Convention and any entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, that is admitted to membership by the Extended Commission pursuant to this Resolution.

2. The Extended Commission and the Extended Scientific Committee shall perform the same tasks as the Commission and the Scientific Committee including, but not limited to, deciding upon a total allowable catch and its allocation among the Members.

All Members shall have equal voting rights. The provisions of the Convention relating to the Commission and the Scientific Committee (Articles 6 to 9, except for 6.9 and 6.10) shall apply mutatis mutandis with regard to the Extended Commission and the Extended Scientific Committee. Any dispute concerning the interpretation or implementation of this Resolution, including the articles of the Convention specified in the Resolution, or the Exchange of Letters referred to in paragraph 6, shall be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute.

4. The Extended Commission shall report forthwith to the Commission if the latter is in session.....Decisions so reported shall become decisions of the Commission at the end of the session of the meeting to which they were reported, unless the Commission decides to the contrary....

It will be apparent from the wording, especially of paragraph 2, that the Extended Commission can do, in respect of quota allocations, what the Commission itself can do.

So far as interpretation of the Agreement is concerned, the point made above about the Commission interpreting the Convention would also apply in respect of the Extended Commission. For this, there would need to be a decision of the Extended Commission not disagreed to by the Commission (paragraph 4).

Cooperating non members

What is the situation of cooperating non members? Basically, such States, not being a part of the treaty regime itself, would not be able to rely on those provisions in the same way that Parties would.

The position of non parties is not covered directly in the SBT Convention itself, though certain provisions have a bearing on the matter. See Article 13, which requires parties to encourage the accession of other States to the SBT Convention. Article 14 permits the Commission to invite any State or entity whose nationals, residents, or fishing vessels harvest southern bluefin tuna to send observers to meetings of the Commission and of the Scientific Committee.

Article 15 states:

- 1. The Parties agree to invite the attention of any State or entity not party to this Convention to any matter relating to the fishing activities of its nationals, residents or vessels which could affect the attainment of the objective of this Convention.*
- 2. Each Party shall encourage its nationals not to associate with the southern bluefin tuna fishery of any State or entity not party to this Convention, where such association could affect adversely the attainment of the objective of this Convention.*
- 3. Each Party shall take appropriate measures aimed at preventing vessels registered under its laws and regulations from transferring their registration for the purpose of avoiding compliance with the provisions of this Convention or measures adopted pursuant to it.*
- 4. The Parties shall cooperate in taking appropriate action, consistent with international law and their respective domestic laws, to deter fishing activities for southern bluefin tuna by nationals, residents or vessels of any State or entity not party to this Convention where such activity could affect adversely the attainment of the objective of this Convention.*

It will be noted that this does not of itself address how cooperating non members are to be dealt with, nor does it give them any particular status.

The Action plan adopted in March 2000 only “requests” non members catching SBT to cooperate fully with the Commission in implementing the measures applicable to members.

The matter is now governed by the resolution on cooperating non members adopted at the tenth meeting of the Commission in October 2000. This resolution fills the gap not provided for directly in the Agreement. However, the resolution would seem to be supported by article 8, in particular, article 8 2 (b) (“*regulatory measures for conservation, management and optimum utilisation of southern bluefin tuna;*” and (f) (“*other matters necessary to carry out the provisions of the*

Convention.”) Also, article 8 3 (b) (“the Commission may, if necessary, decide upon other additional measures.”).

Unlike the resolution to establish an extended commission, this resolution did not identify the basis on which the Commission acted, apart from a passing reference to article 13.

When it was adopted by the Commission, it was said in the report: “*In adopting the resolution, the Extended Commission noted that cooperating non-member status is not intended as a permanent arrangement and that cooperating non-members should ultimately accede to the Convention.*” (Paragraph 23 of the report.)

It is now necessary to consider the terms of this resolution.

The resolution itself states in its preamble:

CONSIDERING that continued fishing for SBT by States and entities not adhering to conservation and management measures adopted in accordance with the Convention for the Conservation of Southern Bluefin Tuna (the Convention) substantially diminishes the effectiveness of those measures;

Paragraph 1 of the operative part of the resolution establishes the status of “cooperating nonmember” of the Extended Commission and the Extended Scientific Committee.

Paragraph 2

2. *The Executive Secretary of the Extended Commission is instructed to invite every year all non-member States and entities whose fishing vessels harvest SBT or through whose exclusive economic or fishery zone SBT migrates to co-operate with the Commission by acceding to the Convention or, as the case requires, by becoming a member of the Extended Commission or applying to the Extended Commission for the status of a co-operating non-member.*

3. *Any State or entity that receives such an invitation may apply to the Extended Commission to be admitted in the capacity of a Cooperating Non-Member to the Extended Commission. Any applications for such admission should be received by the Executive Secretary of the Extended Commission at least one hundred and twenty (120) days before the Annual Meeting of the Extended Commission.*

4. *When submitting an application for admission in the capacity of a Cooperating Non-Member, the candidate State or entity will give a formal written statement to the Extended Commission of its commitment to:*

- a. carry out the objective of the Convention;*
- b. abide by conservation and management measures and all other decisions and resolutions adopted in accordance with the Convention;*
- c. take appropriate action to ensure that its fishing activities do not diminish the effectiveness of conservation and management measures and all other decisions adopted in accordance with the Convention;*
- d. transmit to the Extended Commission the review of its SBT fisheries and all other data that the members of the Extended Commission are required to submit to the Extended Commission;*
- e. facilitate scientific research and studies of SBT;*
- f. ensure that SBT statistical documents are completed in accordance with requirements of the Commission's Trade Information Scheme;*
- and*
- g. negotiate with the members of the Extended Commission to develop any other criteria for its admission in the capacity of a Cooperating Non-Member specific to its situation.*

Paragraph 4 of the resolution is important because, being a “formal written statement”, it would have the effect of binding the Cooperating Nonmember to the commitments it has undertaken. Thus, while it has not joined the SBT Convention by accession, and consequently is not bound as a party to the SBT Convention, it has arguably nonetheless bound itself in international law by making the formal written statement. To put the point another way, even if there is no binding treaty between the Commission and the cooperating non member, there is an agreement between the Commission and the cooperating non member that the latter will abide by the provisions of paragraphs (a) to (g). Further, the actions of the Commission and the non member would be governed by international law principles of estoppel and acquiescence.⁴

Paragraph 8, however, provides an important restraint on the system set up under this resolution:

8. *At its Annual Meeting the Extended Commission will determine whether the State or entity qualifies to retain the status of co-operating non-member. The Extended Commission will evaluate the performance of the co-operating non-member against the commitments set out in its Exchange of Letters with the Extended Commission.*

⁴ It might also be argued that cooperating non members may have incurred a treaty obligation by expressly accepting in writing the obligations referred to in the resolution. This is based in the possible application of article 35 of the Vienna Convention on the Law of Treaties: “An obligation arises for a third State if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts the obligation in writing.” I have not pursued this argument here on the basis that the obligation arises by virtue of the resolution and the formal written statement rather than the treaty itself, and would thus fall outside the precise terms of article 35.

This lack of permanence for cooperating non members will make it impractical for the Extended Commission to deal with the matter except temporarily, as there would be no legal basis for compelling the State in question to make a longer term commitment short of actually acceding to the Convention.

The effect of the 1982 UN Convention and the 1995 UN Fish stocks Agreement

There is of course another element here: if the cooperating non member is a party to the 1995 UN Fish Stocks Agreement, then the provisions of article 8.3 and 8.4 of that Agreement would be applicable.

3. Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

4. Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

This is backed up by article 17.2 of the same Agreement which requires non members not to authorize its vessels to engage in fishing operations for the stocks subject to the conservation and management measures established by such an organization.

The effect of these provisions is apt to become complex in view of the fact that not all members of the SBT Convention are parties to 1995 UN Fish Stocks Agreement.

As regards cooperating non members, it would place States Parties to the 1995 UN Fish Stocks Agreement under an obligation to act only through the Commission as the competent regional body to deal with SBT. Thus, the fact that the arrangement is only on an annual basis will not make much difference to

them as they would have no choice but to operate through the Commission by virtue of article 8.4.

The situation would be different for non cooperating non members which were not party to the 1995 UN Fish Stocks Agreement. Such States would be under an obligation to cooperate by virtue of the provisions of article 64 of the 1982 UN Convention, and the provisions of articles 116 to 119.

While these provisions impose certain obligations on States, they are not as strong as those found in the 1995 UN Fish Stocks Agreement, especially as regards the duty to cooperate. Such a duty, in the present state of international law, does not involve necessarily an obligation to reach agreement, merely to negotiate in good faith (though this conclusion is by no means certain).

While these provisions in the 1982 UN Convention are much more limited in their effect, they also contain the obligation to “*ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.*” (article 119.3). This obligation could require a non cooperating non member to apply conservation measures in a non discriminatory manner. It could also have the result that if the Commission refused to grant any quota to a State seeking cooperating non members status, this could lead to arguments that there had been discrimination in the implementation of the Commission’s conservation measures.

The overall effect for non cooperating non members that are not parties to the 1995 UN Fish Stocks Agreement is that they would not be under an obligation to work through the Commission to the same extent as parties to the SBT Convention. They would have greater, though certainly not unlimited, freedom of access to high seas resources. They would however be under an obligation to cooperate in accordance with the provisions of articles 116 to 119.

However, as between members of the Extended Commission, given that only Australia and NZ are parties to the 1995 UN Fish Stocks Agreement at this stage, this agreement would not be applicable as between the parties to the SBT Convention.

It needs to be stressed, however, that what has been said about the applicability of the 1995 UN Fish Stocks Agreement is based on a traditional approach which emphasizes the well known rule that treaties do not bind third States: article 34 of the Vienna Convention on the Law of Treaties. However, some may take the view that certain elements of the 1995 UN Fish Stocks Agreement have come to reflect customary international law, in particular the provisions of article 8.3 and 4 and the general principles found in articles 5 and 6. This paper does not enter into this discussion, as it is not an issue that can be easily resolved by legal analysis alone. It has been until now a controversial issue. Instead, it will depend

very much on evolving State practice, and possibly some elucidation through judicial or arbitral decisions.

Matters of rights and ownership

At the October 2003 meeting, the following allocations were made:

51. For the 2003/2004 fishing season, members agreed to:

- *A one year total allowable catch for members of 14,030 tonnes, with individual member allocations for this year as follows:*

- o Australia – 5,265 tonnes;*

- o Fishing Entity of Taiwan – 1,140 tonnes;*

- o Japan – 6,065 tonnes;*

- o New Zealand – 420 tonnes;*

- o Republic of Korea – 1,140 tonnes.*

- *A global allocation for cooperating non-members of 900 tonnes of which 800 tonnes will be offered to Indonesia. The remaining 100 tonnes is to accommodate other non-member countries including the Philippines.*

It is understood that these allocations were made as a decision which was binding on the members under article 8.7 of the SBT Convention.

It will be necessary to distinguish between southern bluefin tuna stocks within EEZs and those on the high seas. So far as the stocks within the EEZ are concerned, these come within the sovereign rights of the coastal State under Part V of the 1982 Convention, however, there is an additional obligation to “*cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone...*”: article 64.1 Article 64.2 adds: “*The provisions of paragraph 1 apply in addition to the other provisions of this Part.*”

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.

So far as the stocks on the high seas are concerned, the situation is different in view of the fact that the resources are high seas resources subject to the freedom of fishing on the high seas, and in the light of the fact that all States have a right to fish on the high seas. It should also be noted that the right is given to States, not to individuals.⁵

Thus, any right to fish on the high seas can never be absolute. It will always be a relative right. Under a treaty regime dealing in part with high seas fisheries, while

⁵ See in particular, arts 116 to 119 1982 UN Convention

the parties to the treaty might wish to grant to their respective nationals a right described as a property right, it can only be at best a relative right.

The provisions of the SBT Convention now need to be considered as to the nature of the right granted.

First, Article 8.3:

For the conservation, management and optimum utilisation of southern bluefin tuna:

(a) 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

(b) the Commission may, if necessary, decide upon other additional measures.

In addition, there is article 8.7:

7. All measures decided upon under paragraph 3 above shall be binding on the Parties.

It will be noted that the Convention does not distinguish between stocks within the EEZ and stocks on the high seas in regard to the exercise of the power to make an allocation in article 8. Further, the objective in article 3 is stated to be to “ensure, though appropriate management, the conservation and optimum utilisation” of SBT. Further, article 1 states: “This Convention shall apply to southern bluefin tuna”. This supports the view that the Convention is capable of applying to all stocks wherever located.

However, that needs to be seen against the background of the preamble to the Convention which notes the sovereign rights of the coastal States over the resources in the EEZ.⁶ In other words, coastal States would retain the right to do what they wish with their quota which has been taken within its own EEZ, unless there was a decision of the Commission to the contrary under article 8. This would of course be subject to any constraints imposed by articles 15.3 and 4.

⁶ *Noting that States have established exclusive economic or fishery zones within which they exercise, in accordance with international law, sovereign rights or jurisdiction for the purposes of exploring and exploiting, conserving and managing the living resources;*

....

Noting that the coastal States through whose exclusive economic or fishery zones southern bluefin tuna migrates exercise sovereign rights within such zones for the purpose of exploring and exploiting, conserving and managing the living resources including southern bluefin tuna;

As the Convention is presently worded, and given that the present allocation decision has nothing to say on the matter, it would leave the allocations to the individual members to deal with as they wish. In this situation, it would fall to be determined by each member how it gave its quota to its nationals. Thus, if one State chose to allocate its quota to nationals in the form of a tradable right as between its own nationals, there would be nothing to stop it.

On the other hand, it would seem that, once a decision has been made which has the consent of all the parties, and has been adopted by the Extended Commission and confirmed by the Commission, then as a matter of international law, it is binding on them. The Extended Commission could, therefore, impose conditions on tradable quotas both in EEZs and on the high seas if it chose to do so.

Does the 1982 UN Convention prevent quota trading with respect to highly migratory species?

One question that needs to be asked is whether the 1982 UN Convention would prevent a State or a group of States from setting up a tradable quota system in respect of highly migratory species.

It has been suggested above, that, at least in the EEZ, a coastal State could give a right to take fish that is similar to a property right. On the high seas, however, in view of the freedom of fishing on the high seas, it would be more difficult to grant such a right to the resources in question. This is because it is difficult to define in any conclusive way which States would be entitled to gain access to the stocks in question.

There is also the consideration that highly migratory species are subject to a particular regime which covers both the EEZ and the high seas, and it could be argued that it points away from allowing a State to trade rights both within the EEZ and on the high seas. This would follow from the requirement of article 64 that States are to cooperate directly or through international organizations with a view to ensuring conservation and promoting the objective of optimum utilization throughout the region, both within and beyond the EEZ. In other words, trading of any quota would be incompatible with the obligations set out there.

However, the view is taken here that there is nothing in the wording of article 64 or articles 116 to 119 of the 1982 UN Convention which precludes trading in quota, so long as the objectives set out in those provisions are observed.

Further, 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 utilization of the species in question, it would be permissible.

The principle constraints found in the 1982 UN Convention on the introduction of such a system would be the need to ensure that such a system did not infringe the right of all States for its nationals to fish on the high seas in accordance with article 116, and the requirement that conservation measures adopted and their implementation do not discriminate in form or in fact against the fishermen of any State (article 119.3)

What restraints does the SBT Convention apply?

It should be noted that article 8.3 (a) of the SBT Convention refers to the Commission deciding upon “*a total allowable catch and its allocation among the Parties*”. This might suggest that trading of any quota allocated could only be between parties. It is suggested, however, that these words do not impose such a limitation on the trading of quota, Indeed, the following words of the same paragraph would contradict such an interpretation (“*unless the Commission decides upon other appropriate measures*”).

The main restraint under the Convention as to what is done with the quota is found in article 15.3 and 4:

3. Each Party shall take appropriate measures aimed at preventing vessels registered under its laws and regulations from transferring their registration for the purpose of avoiding compliance with the provisions of this Convention or measures adopted pursuant to it.

4. The Parties shall cooperate in taking appropriate action, consistent with international law and their respective domestic laws, to deter fishing activities for southern bluefin tuna by nationals, residents or vessels of any State or entity not party to this Convention where such activity could affect adversely the attainment of the objective of this Convention.

It is understood that virtually all members of the Extended Commission have laws in place to give effect to these paragraphs. These provisions could have a bearing on the question of trading of quota if it was traded to nationals or residents of States not party to the SBT Convention, either to avoid compliance with the provisions of the Convention (paragraph 3), or where the fishing activity could affect adversely the attainment of the objective of the Convention (paragraph 4).

The allocation made in October 2003 did not impose any restraints on the trade of the quota. However, it would be subject to the general proscriptions found in articles 15.3 and 4. These provisions do not in their terms actually prevent quota

being traded. They do place an obligation on the parties to ensure that any quota traded does not have the effect of undermining any measures adopted, as required by article 15.3.

Trading of quota has occurred in the past (between Australia and Japan).

It is now proposed to consider three different situations involving quota trading.

Quota traded among Members of the Extended Commission: if quota is traded among the members of the Extended Commission, there would be no problem provided that there remains compliance with the measures adopted under the Convention, and provided that the measures adopted under article 8.3 of the SBT Convention did not prohibit it. At present, it appears that no restrictions are imposed by the Extended Commission.

Quota traded from a member of the Extended Commission to a cooperating non member: if quota is traded from one member to a cooperating non member, the situation could well depend on where the catch is located. For example, if it is in respect of a quota allocated to a member that is found within the EEZ of a member, it would come within the sovereign rights of that State to do as it wishes with it, provided it has respected the conservation objectives of the SBT Convention and any management decisions made pursuant to it, and those found in the 1982 UN Convention.

The cooperating non member, having agreed in writing to commit itself to the conditions set out in paragraph 4 of the resolution on cooperating non members, would be subject to the same restraints as are imposed on members. It could, it seems, trade its quota in the same way as if it were a member. In this regard, clauses (a), (b) and (c) of paragraph 4 of the resolution dealing with cooperating nonmembers would seem to place cooperating nonmembers in the same position as members of the Extended Commission.

However, one important difference is that arrangements for cooperating non member status are subject to review on an annual basis.

Quota traded from a member of the Extended Commission or a cooperating non member to a non co-operating nonmember: this possibility is probably just theoretical at the present. However, it is worth considering briefly.

Provided that the constraints referred to in article 15 of the SBT Convention are respected, (and assuming that the Extended Commission has made no decision on the matter) there appears to be no restraint on such a transfer.

The question would still need to be asked if the non cooperating non member was a party to the 1995 UN Fish Stocks Agreement. If so, the non cooperating non member would have to “agree to apply the conservation and management

measures established' (article 8.4 1995 UN Fish Stocks Agreement) by the Commission. This would put them in a position similar to a cooperating nonmember.

On the other hand, if the non cooperating non member was a party only to the 1982 UN Convention, there would be an obligation to cooperate on the basis of articles 64 and 116 to 119 of that Convention.

What is the difference between an "allocation" for members and a "global allocation" established for cooperating nonmembers?

The wording of the decision of the Commission does not provide much guidance on whether a difference was intended between the "allocations" made to members were substantially different to "the global allocation" for cooperating nonmembers. Apart from the fact that the allocations for members are fixed, while those set for nonmembers are expressed more vaguely, there does not appear to be a substantial difference in effect, once an amount is "offered".

Practice in other regional fisheries bodies

An enquiry has been sent out to the regional tuna fisheries bodies to ascertain their practice, if any.

The only regional tuna body with some practice on quota trading is ICCAT.

Their reply is as follows:

With reference to your email in relation to the trading of quota, this issue was discussed during the drafting of the ICCAT Criteria for the Allocation of Fishing Possibilities, the final adopted version of which states, in Section IV, paragraph 27 that "No qualifying participant shall trade or sell its quota allocation of a part thereof".

However, some transfer of quotas has taken place within ICCAT, with the consent of the Commission. There are basically three types of transfer which have taken place.

1) The transfer of part of the unused quota of a Contracting Party of one stock (northern) on the condition that the Party to which the quota was transferred renounce part of their quota of another stock (southern). Such transfers have included penalties, i.e. one ton of the transferred quota must be offset by two tons of the quota renounced.

2) The bilateral agreement of one Party to transfer part of its quota to another Party, at the start of the fishing year.

3) *The transfer of underages (unused quota) of a stock from one Party to another Party, as laid down by the Recommendation under which the quota shares were allocated.*

Such transfers are effected with the approval of the Commission, and are usually embodied in the relevant Recommendations relating to the stocks concerned.

NAFO (a non tuna body) is the only other body which provides for quota trading. In an email reply from the Secretariat of NAFO, it is said that: “*NAFO has a policy in place for quota transfers and chartering arrangements. With quota transfers a Contracting Party may transfer partly or wholly its quota (for a particular year) to another Contracting Party after it has been approved by a majority mail vote from all Contracting Parties.*”

This is a practice which has evolved and is not the subject of a formal decision. Further, it is not addressed directly in the NAFO Agreement. However, it also has a policy in place to deal with chartering arrangements.⁷ It would appear that there is a close link within NAFO between the quota trading arrangement and the provisions on chartering.

The characteristics of a quota trading scheme

The answer to the points raised in the terms of reference would depend on how elaborate a system the Extended Commission would wish to set up. At one extreme, it may wish to do no more than to require that members of the Extended Commission and cooperating non-members seek the approval of the Extended Commission to trade quota. Such permission might have attached to it certain conditions, for example, that quota can only be traded among members of the extended commission. Or, it might choose to impose conditions on trading quota to chartered vessels.

At the other extreme, the Extended Commission might wish to set up a much more complicated system whereby it set up a regime for all southern blue fin tuna wherever located and allocated the quota directly to those seeking to fish. There is no indication that the Commission is considering in the near future such a scheme.

It is proposed, therefore, to give some general pointers at this stage which is hoped might help in fashioning a more detailed regime should the Commission wish to undertake this task.

For present purposes the assumption will be made that the Commission would want to permit coastal State members to retain the right to trade quota in respect of stocks found within their EEZs.

⁷ see article 14 NAFO Conservation and Enforcement Measures (www.nafo.int)

In regard to such stocks within the EEZ, there would be a responsibility to promote optimum utilisation of the stocks, and a need to ensure that measures allowing any trade in the quota did not lead to the introduction of practices which undermined the conservation and management measures established by the Extended Commission; nor should they undermine the conservation obligations of the coastal State under Part V of the 1982 UN Convention.

As regards high seas stocks, assuming that the Extended Commission wanted to arrive at a Commission wide solution for the high seas, in addition to the points just made in respect of the EEZ, there would be a need to ensure that such a system was not discriminatory in its operation vis a vis non cooperating non members (Article 119.3).

Again, depending on the view taken on article 8.3 of the 1995 UN Fish Stocks Agreement, it would be necessary to ensure that all States with a real interest were given an opportunity to participate along the lines contemplated in article 8.3, and that their participation was dealt with in accordance with article 11 (new members or participants).⁸

On the other hand, if such a scheme were to be set up within the framework of the 1995 UN Fish Stocks Agreement⁹, the emphasis would shift to those States (i.e. non cooperating non members) which had chosen to stay outside the regime to comply with the conservation and management measures in force or not have the right to fish: article 8.4 of the 1995 UN Fish Stocks Agreement.

The most important element will be to ensure that a quota trading system does not result in the abandonment of responsibility for ensuring that the obligations with respect to conservation and management are not observed merely because a quota has been transferred. The most practical means of achieving this would be to permit quota trading only among members and cooperating non members, and to exclude the possibility of trading outside that group.

Elements of a quota trading scheme

If the Extended Commission wanted to set up a full fledged quota trading scheme, with the capacity for quota to be traded, then the following elements would need to be considered:

⁸ There would be a number of obligations arising from the 1995 UN Fish Stocks Agreement if the view is taken that certain parts of it reflect customary international law. For example article 7, on the need for compatibility between the measures adopted in respect of the EEZ and the high seas. However, members of the Extended Commission may take different views on this and other related questions concerning the 1995 UN Fish Stocks Agreement.

⁹ Article 11 of the 1995 UN Fish Stocks Agreement, which deals with new members or participants, does not exclude the possibility of quota trading.

- what criteria would govern the right to apply for a share of the quotas allocated?
- could quota allocated be traded (a) among Members of the Extended Commission only (b) in addition to Members of the Extended Commission to cooperating non members and (c) should it be permitted to trade quota to non cooperating non members? Should the right to trade be confined only to members of the Extended Commission and cooperating non-members in order to increase the possibility of compliance with applicable conservation and management measures?
- if it is decided that quota can be traded to non cooperating non members, it may be necessary to ensure that conditions are attached to that transfer, for example, that conservation and management measures adopted in respect of the stocks have to be observed. It might also be necessary to permit such a transfer only where the flag State is in a position to ensure compliance with those measures. This could suggest that the Extended Commission may need to authorise trading of quota to non cooperating non members.
- further, if quota is traded to non cooperating non members, it would be necessary to monitor how the traded quota is utilised. In particular, it would be necessary to ensure that the requirements of paragraph 4 of the resolution on cooperating non members might be fulfilled by non cooperating non members.¹⁰

¹⁰ For convenience, these are repeated here.

4. *When submitting an application for admission in the capacity of a Cooperating Non-Member, the candidate State or entity will give a formal written statement to the Extended Commission of its commitment to:*

a. carry out the objective of the Convention;

b. abide by conservation and management measures and all other decisions and resolutions adopted in accordance with the Convention;

c. take appropriate action to ensure that its fishing activities do not diminish the effectiveness of conservation and management measures and all other decisions adopted in accordance with the Convention;

d. transmit to the Extended Commission the review of its SBT fisheries and all other data that the members of the Extended Commission are required to submit to the Extended Commission;

e. facilitate scientific research and studies of SBT;

f. ensure that SBT statistical documents are completed in accordance with requirements of the Commission's Trade Information Scheme; and

g. negotiate with the members of the Extended Commission to develop any other criteria for its admission in the capacity of a Cooperating Non-Member specific to its situation.

It is beyond the scope of this study to discuss the FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing. It can be noted, however, that many of the provisions of that Plan would be difficult to implement if there were not some control over quota traded to non cooperating non members in the absence of at least the commitments similar to those imposed on cooperating non members as set out in paragraph 4 quoted here.

- If quota is permitted to be traded to non cooperating non members, it would be desirable to avoid a situation where such States had no choice but to purchase quota as a means of gaining access to southern bluefin tuna. This might give rise to arguments that the system was discriminatory towards such States.
- the length of time during which quota allocated can be traded. At present, quota are set on an annual basis, however, it may be appropriate, if supported by scientific evidence, to establish a longer period. Also, if a longer period is adopted, then it may become necessary to change the period of time in respect of cooperating non members, as allocations for them are also made on an annual basis.
- the circumstances (in addition to duration) in which a quota may lapse.
- The circumstances in which a quota might be reduced or cancelled.
- How bareboat chartering (and probably other forms of chartering) will be managed in relation to traded quota.
- How joint ventures will be managed in relation to traded quota.

In the case of NAFO, there is a close link between the provisions on chartering of vessels to undertake fishing and the policy of permitting quota transfers. The Extended Commission might, therefore, need to consider developing a policy on chartering to accompany a decision to develop quota trading.

It has to be emphasised that the considerations set out here are very basic.

It is suggested that, to take the matter further, what is needed is, first, a decision by the Extended Commission in favour of quota trading, accompanied by an indication of the elements it would like to have included in such a scheme. Second, it would be useful to prepare a draft resolution setting out the elements of such a scheme to provide the basis for detailed consideration by the Extended Commission.

The process to establish a quota trading system

As mentioned above, there is authority under the SBT Convention to provide for quota trading under article 8.2 and 3. The most appropriate method of dealing with this would be to prepare a resolution which set out the conditions under which quota trading could take place, for consideration initially by the Extended Commission.

In view of the fact that such a resolution would involve the application of at least article 8.3 and 5, consideration of such a resolution would need to comply with

the requirements of Rule 5.6 of the Rules of procedure of the Commission. This would in particular require the Executive Secretary *“to prepare explanatory documents to be dispatched to all to members not less than 60 sixty days before the date fixed for the opening of the meeting.”*

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.¹

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.

¹ 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 (UNFSA²).
- 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.³

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.

² 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.

³ 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.⁴

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'.⁵ 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.⁶

(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

⁴ 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.

⁵ W. Edeson (2004); 13.

⁶ 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).⁷

(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'.⁸ 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

⁷ 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.⁷

⁸ 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.⁹

(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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⁹ 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".

COMMISSION FOR THE CONSERVATION OF
SOUTHERN BLUEFIN TUNA

QUOTA TRADING - DISCUSSION PAPER

INTRODUCTION

At CCSBT10 the Extended Commission agreed that the Secretariat would prepare a comprehensive review of quota trading and arrange for independent legal advice on the matter.

Independent legal advice was arranged and has been circulated to members. The broad thrust of that advice was that the Extended Commission could introduce a quota trading system if it so decided by resolution.

This paper discusses the issue of quota trading from an operational perspective in the light of that legal advice. If the legal advice submitted by members provides a contrary view, the matters covered in this discussion paper may lose relevance.

HISTORY

Among regional fisheries bodies there are few examples of quota trading systems.

ICCAT has a system of negotiated trading between members, which must be sanctioned by the Commission. This occurs even though ICCAT has decided formally that quota trading is not permitted. There is no real structure to the arrangements.

NAFO has a quota trading system between contracting parties, which has evolved rather than by a specific decision of the Organisation. Quota trades must be approved by a majority of the contracting parties. Chartering arrangements are comprehended by the system NAFO has developed for quota trading.

Individual tradeable quota systems (ITQ) are operated by many countries for fishing in their EEZs. Some members of the Extended Commission (Australia and New Zealand) have given such arrangements particular

prominence in their fishery administrations. The southern bluefin tuna fishery in Australia is managed using an ITQ system.

There has been some trading among CCSBT members in the past. For a number of years in the late 1980s and early 1990s Australia and Japan entered into a bilateral arrangement for Japan to fish with Australia's quota in the Australian EEZ. New Zealand has approved chartering arrangements where some of New Zealand's quota has been fished by charter vessels

GENERAL CONSIDERATIONS

Coverage

In creating a quota trading system for the CCSBT it would be necessary to determine the range of participants. Potential participants might be classified into four categories.

- members
- formal cooperating non-members
- non-members who are range states for the fishery
- other non-members

The independent legal advice obtained by the Secretariat would suggest that any quota trading system should be confined to members and formal cooperating non-members at most. Restriction of participation to this group would give a framework for maintaining the conservation and management objectives of the CCSBT and would allow a compliance process to be maintained. Members would be bound to whatever arrangements the Extended Commission agreed to. Cooperating non-members would have given formal undertakings to implement the conservation and management measures of the Extended Commission and their status is renewable annually.

Participation could be restricted to members if the Extended Commission considered that involvement should only be available to those countries, which have made the full commitment of accession. Such an arrangement could act as an incentive for cooperating non-members to accede. It would, however, limit the utility of the system by limiting trading opportunities.

Non-members who are range states have some rights in relation to the fishery in their EEZs. South Africa is the principal country in this category. The independent legal advice provided to the Secretariat suggests that South Africa might be bound to the Extended Commission's conservation and management measures because it has ratified the UN Fish Stocks Agreement. However, one country's circumstances should not dictate a general rule for the operation of a fundamental system like quota trading.

Exclusion of this group might also encourage accession to provide a potential pathway for the development of their fishery.

Inclusion in a quota trading system of other non-members outside the categories of cooperating non-members who are range states would seem totally inconsistent with the objectives of the Convention. It would transfer management of the fishery outside the scope of the Convention.

Ownership

The legal advice provided to the Secretariat draws a distinction between EEZ fishing and fishing on the high seas in terms of the extent of the right (often referred to as “ownership”), which could be granted. However, the advice concludes that if the Extended Commission formally decided on a quota trading system that effectively granted a tradable right of some kind to members across the fishery, it would not be inconsistent with international law.

The question for the Extended Commission would therefore seem to be the level of quota, which would be held by members and cooperating non-members and was available for trading. A range of possibilities comes to mind:

- use existing national allocations of the TAC for members and cooperating non-members.
- agree new national allocations, which reflect other allocative principles agreed by the Commission
- limit the scope for trading to a proportion of national allocations, say, 50% of the national allocations of the TAC agreed by the Extended Commission

It might be noted that when sovereign governments have set up ITQs, allocations of quota have mostly adopted some system that recognises the level of past involvement in the fishery. Quite often this process has been fraught because the allocation of quota to individuals inevitably involves the political process and references to domestic courts. For the Extended Commission, these difficulties would not be encountered if there was agreement on the national allocations of the TAC and because the Extended Commission’s trading system would be at the member level.

As a consensus commission, using existing quotas would probably be the easiest option for the Extended Commission to follow at the outset. If the Extended Commission subsequently amended the national allocations, the quota trading system would then use the new national allocations.

Consideration would also have to be given to what would happen in the event of a TAC and national allocations not being agreed by the Extended Commission. A quota trading system managed under the auspices of the Extended Commission and based on quotas set by the Extended Commission would probably be rendered inoperable.

The legal advice provided to the Secretariat indicated that in granting tradable rights to members and cooperating non-members, a quota trading system would need to ensure that the freedom for all States to fish on the high seas was not infringed. This would be achieved by the system only operating among members and cooperating non-members as there would be no impact from the system on other nations' rights. There would, of course, be a need to cooperate with other states engaged in fishing in setting conservation and management measures. This is foreseen in article 64 and articles 116 to 119 of the 1982 UN Convention.

Timing

TACs, national allocations for members and catch limits for cooperating non-members are set annually by the Extended Commission. Normally the decision is taken around October of the year preceding the year to which the national allocations will apply. The bulk of the fishing in the fishery is completed by August of the quota year. This means that any trading would need to be finalised prior to the setting of the TAC and national allocations or soon thereafter to be practical.

Annual setting of a TAC and national allocations would also seem to require a quota trading system that was annual as well. Quota trading, which extended beyond one year, could allocate a right to trade in a quota that did not exist.

Trading Structure

A number of options for a quota trading structure ranging from a simple independent bilateral structure to more complicated systems involving Commission decisions would seem feasible. However a prerequisite for all structures would need to be an initial decision by the Extended Commission on a TAC and national allocations. Otherwise, there would be no tradeable commodity that had the imprimatur of the Commission and was governable against the Extended Commission's conservation and management objectives. Possible structures with increasing complexity could include:

- members with EEZs allow their quota to be fished by other members or cooperating non-members in their EEZs

- members negotiate bilaterally and advise the Commission subsequently through the Secretariat of any agreements reached
- quota trades be initially negotiated by members bilaterally and then be discussed at the Extended Commission's annual meetings with proposed trades requiring the approval of the Commission
- members declare to the Commission an amount of quota they wish to trade for formal approval by the Commission. Quota trades would then be negotiated by the member keeping the Commission informed through the Secretariat.

It would be possible under the last option for the Commission to decide that some of the quota to be traded should be set aside for conservation purposes. This could be done on a case-by case basis or through a formula with general application. For example, a member with 100 tonnes of quota to trade might be restricted to setting aside the 100 tonnes from their catch but only transferring 50 tonnes – the remaining 50 tonnes would be preserved for conservation purposes.

Pricing

Most national quota trading systems allow the market to set the price for fishing quota based on economic rationalistion arguments. Setting prices produces sub-optimal results from an economic perspective.

Any involvement by the Commission in setting prices for quota trades would be very difficult and almost impossible to manage effectively. Commission involvement could not be recommended.

Any payment for quota (if any) would seem to be best left with the two members negotiating the trade where the appropriate price signals and national interests would be considered.

Differentiation Between Fisheries

The Extended Commission might place restrictions on trading between types of fishery for conservation and management reasons. The main issue here would be quota trading leading to transfer of effort between the surface fishery targeting juveniles and the longline fisheries targeting the more mature fish.

One option would be a general rule that when trading quota from the mature fish component of the fishery to the juvenile fish component, the trade would be in fish numbers not weight. For trades the other way, the transfer would be in weight.

Another option might be to use the notion of “adult equivalent” as a switching rule for trades between the two types of fishery. The definition of “adult equivalent” should be the subject of scientific advice based on the relative impact on the fishery.

A third option might be to place a simple absolute limit on the juvenile fishery and allow trading only up to the point where that limit was not exceeded.

Conservation Measures

The Extended Commission might consider the imposition of restrictions on quota trading where the trade might lead to fishing contrary to its management and conservation objectives.

An example would be a ban on any quota trading that would lead to an increase in fishing pressure in the spawning ground.

Reporting

As the quota trading system would be operated under the auspices of the Extended Commission a system of recording trades and reporting against the traded quota would seem necessary. A minimum set of requirements might be:

- any trade to be reported to the Secretariat, which would maintain a register accessible by members
- the receiving member would be responsible for managing the additional quota was not exceeded
- all of the established reporting requirements for fishing against existing national allocations would apply to fishing against additional quota

Review

It would be desirable that any quota trading system and the trade within it was reviewed each year at the Commission’s annual meeting. This would give the Extended Commission the opportunity to consider the impact of the system on the fishery in the context of setting the TAC and the respective national allocations.

EXAMPLES

Two examples of a quota trading systems consistent with the discussion in this paper, are set out below. The examples are not recommendations but have been included in the paper to illustrate what might be possible from a relatively simple system to a more complicated arrangement.

Example A

Example A represents a simple system emphasising bilateral management processes. The features could be:

- System confined to members and formal cooperating non-members
- Existing allocations maintained
- National allocations of the agreed TAC regarded as “owned” and tradable by members
- No differentiation between EEZ and high seas fishing
- Members able to trade up to 50% of the national allocation of the TAC agreed by the Extended Commission
- Traded quota not to be fished in the spawning ground
- Quota trades negotiated by members through bilateral negotiation and advised to the Secretariat for promulgation to other members
- Receiving member includes additional catch in standard reports to Extended Commission

Example B

Example B represents a more comprehensive system with greater engagement by the Extended Commission in the operation of the trading system. The features could be:

- System confined to members and formal cooperating non-members
- Existing allocations maintained
- National allocations of the agreed TAC regarded as “owned” and tradable by members.
- No differentiation between EEZ and high seas fishing
- All of a member’s national allocation is tradable
- Traded quota not to be fished in the spawning ground
- For quota traded where effort is shifted from longlining mature fish to surface fishing of juvenile fish, an “adult equivalent” reduction factor of 3 to be applied
- Commencement of discussions on quota trading advised to the Secretariat
- Quota trades to be negotiated prior to the annual meeting and submitted to the Extended Commission for approval at the annual meeting.
- Receiving member includes additional catch in standard reports to Extended Commission separately identifying details of the catch of the additional quota

Prepared by the Secretariat