Rights and Obligations of New Entrants into the Southern Bluefin Tuna and Other International Fisheries

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A thesis submitted for the degree of Doctor of Philosophy of The Australian National University
This thesis is entirely my own original work.
Abstract

This thesis analyses the legal issues arising when a fully exploited or overexploited international fishery cannot, because a significant part of the fishing takes place on the high seas where there is a customary and conventional right of all States for their national to fish on the high seas, readily be closed to new entrants. If the complete collapse of the fishery predicted by the economics literature (and in many instances borne out by real-world examples) is not to ensue, some way must be found of circumventing this problem of open access. Drawing largely on the documented history of the interactions among the States (and Taiwan) involved in the southern bluefin tuna (SBT) fishery, supplemented where relevant by reports of meetings of treaty-based commissions managing other international fisheries, the thesis traces, and attempts to explain, the development of a property-rights mentality among existing participants in the fisheries implicit in the arguments they employ to minimise newcomers’ catch or keep them out altogether. Though at odds with the formal rule, to which they nonetheless continue to appear attached, some accommodation of the property concept will be needed if the recovery of the stocks to the biomass that generates the maximum sustainable yield is ever to take place. At present the participants in the SBT and other depleted international fisheries have insufficient incentive to insist on the catch reductions necessary to permit this recovery and thereby, it is argued, are collectively in breach of their obligations to all other States that are potential new entrants. Among the possible solutions explored are the development of trading in fishery commission quotas – these, as shown by an analysis from first principles, are negative obligations (for catch not to exceed given limits) and thus lack the positive characteristics of truly tradable assets, but, as also demonstrated, they can even so be made to fulfil asset-like functions if the commission as a whole is willing. The well developed system of accounting for catch that any worthwhile trading mechanism would require in turn gives rise to the conclusion that this, in the form of State responsibility – in terms of both attribution of fishing activities on the high seas to the flag State and the secondary obligation to wipe out the consequences of breach of a primary obligation that occurs when limits are exceeded – has hitherto been a neglected area of international fisheries law that invites further research. Meanwhile, the paradoxical result is that the freedom to fish is not just the source of the overfishing problem but potentially also a necessary part of its solution, in that a small number of new entrants may be the only ones with a sufficient economic interest to enforce the obligation to permit the stocks’ recovery.
Acknowledgements

That this thesis, begun for bad reasons, could be finished for good ones is testimony to the unfailing encouragement and persuasion of my supervisor Dr J-P Fonteyne and the team of advisers. Particular mention must be made of Dr Bill Edeson who was always willing to entertain the less orthodox ideas developed herein and provide the reassurance when needed that the sometimes uncomfortable conclusions reached and remedies proposed were not simply flights of legal fancy or wishful thinking, but rather the hitherto neglected consequences of the existing rules. Heartfelt thanks are also due to Joy Caisley of the Hartley Library at the University of Southampton and the Inter-Library Loans desk, as well as their equivalents in the first half of the decade at the Law Library of the Australian National University, and not least to the passing parade of research assistants in the Institute of Maritime Law at the University of Southampton, notably Johanna Hjalmarsson, Despoina Aspragkathou, Samantha Diggory and Alexander Sandiforth, who between them uncomplainingly and with remarkable perseverance managed to track down almost all of the obscure reports and documents referred to herein to which I lost access on leaving Canberra in 2005. I further express my gratitude to Geoff Williams of the Bureau of Rural Sciences in Canberra and John Mills of the Ministry of Foreign Affairs and Trade in Wellington who gave me access to the unpublished documents from the 1983-94 period, without which the history of the new entrants problem in the southern bluefin tuna fishery would not have been able to begin until nearly halfway through. Finally, I acknowledge an enormous debt that I can scarcely hope to repay for the patience and support of Makiko Yonenaga, who at least now has the consolation of being able at long last to reclaim her husband.
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<td>ABT</td>
<td>Atlantic bluefin tuna</td>
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<tr>
<td>AFMA</td>
<td>Australian Fisheries Management Authority</td>
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<td>AFZ</td>
<td>Australian Fishing Zone</td>
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<td>AJIL</td>
<td><em>American Journal of International Law</em></td>
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<td>ATS</td>
<td>Australian Treaty Series</td>
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<tr>
<td>CCAMLR</td>
<td>Commission for the Conservation of Antarctic Marine Living Resources</td>
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<td>CCSBT</td>
<td>Commission for the Conservation of Southern Bluefin Tuna</td>
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<tr>
<td>CPUE</td>
<td>catch per unit of effort</td>
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<td>CSIRO</td>
<td>Commonwealth Scientific and Industrial Research Organisation</td>
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<td>DPIE</td>
<td>Department of Primary Industry and Energy</td>
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<td>EEZ</td>
<td>exclusive economic zone</td>
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<td>EFP</td>
<td>experimental fishing program</td>
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<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<td>GRT</td>
<td>gross registered tons</td>
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<td>IAC</td>
<td>Industries Assistance Commission</td>
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<td>IATTC</td>
<td>Inter-American Tropical Tuna Commission</td>
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<tr>
<td>IBSFC</td>
<td>International Baltic Sea Fisheries Commission</td>
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<tr>
<td>ICCAT</td>
<td>International Commission for the Conservation of Atlantic Tunas</td>
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<tr>
<td>IJMCL</td>
<td><em>International Journal of Marine and Coastal Law</em></td>
</tr>
<tr>
<td>ILM</td>
<td><em>International Legal Materials</em></td>
</tr>
<tr>
<td>IOFC</td>
<td>Indian Ocean Fishery Commission</td>
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<td>IOTC</td>
<td>Indian Ocean Tuna Commission</td>
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<td>ITQ</td>
<td>individual transferable quota</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>IWC</td>
<td>International Whaling Commission</td>
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<td>MEY</td>
<td>maximum economic yield</td>
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<td>MSY</td>
<td>maximum sustainable yield</td>
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<td>NAFO</td>
<td>Northwest Atlantic Fisheries Organization</td>
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<tr>
<td>NEAFC</td>
<td>North-East Atlantic Fisheries Commission</td>
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<td>NZTS</td>
<td>New Zealand Treaty Series</td>
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<td>ODIL</td>
<td><em>Ocean Development &amp; International Law</em></td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>OUP</td>
<td>Oxford University Press</td>
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<td>PBT</td>
<td>Pacific bluefin tuna</td>
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<td>SEAFO</td>
<td>South-East Atlantic Fisheries Organization</td>
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<td>southern bluefin tuna</td>
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<tr>
<td>TAC</td>
<td>total allowable catch</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNCED</td>
<td>United Nations Conference on Environment and Development</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>VPA</td>
<td>virtual population analysis</td>
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<td>WCPFC</td>
<td>Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean</td>
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<td>World Trade Organization</td>
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INTRODUCTION

In the more than forty years since Johnston wrote that “In a positive doctrinal sense, there is no international law of fisheries”,¹ the fish species *Thunnus maccoyii*,² known in English as southern bluefin tuna (SBT), has played a larger part than most in the recent development of just such a corpus of law. Among its other distinctions, a dispute over the fishing of this species between Australia and New Zealand on the one hand and Japan on the other was the subject of the first ever hearing by a tribunal constituted under Annex VII to the United Nations Convention on the Law of the Sea³ (hereinafter UNCLOS). Fishing for the species is potentially governed not only by UNCLOS and the related 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 Stocks⁴ (hereinafter the UN Fish Stocks Agreement) but also by one of the relatively few fisheries conventions dealing with a single species – the 1993 Convention for the Conservation of Southern Bluefin Tuna⁵ (hereinafter the 1993 Convention) – and three other multi-species Conventions: the 1966 International

⁴ Opened for signature at New York, 4 December 1995; 2167 UNTS 3; ATS 2001 No 8; (1995) 34 *ILM* 1542.
⁵ 1819 UNTS 359; ATS 1994 No 16.
Convention on the Conservation of Atlantic Tunas\(^6\) (hereinafter the 1966 Convention), the 1993 Agreement for the Establishment of the Indian Ocean Tuna Commission\(^7\) (hereinafter the IOTC Agreement) and the 2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (hereinafter the Honolulu Convention).\(^8\) SBT is also mentioned, albeit only in the privative sense that it was not to be fished by one party, in the 1987 Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.\(^9\)

Not all treaties having some conceivable application to the SBT fishery are considered. An example is the Agreement Establishing the Indo-Pacific Fishery Council\(^10\) – since, although the main objectives of the body it creates (now known as the Asia-Pacific Fisheries Commission) as set out in Article IV of the Agreement give it a broad mandate to formulate and recommend conservation and management measures, it has no regulatory powers.\(^11\) In the light of the biological information given below on SBT and other tunas, it is also not necessary to dwell on the Convention on Biological Diversity.\(^12\) This is because, while severe overfishing may well put the State responsible for it in breach of the generally worded obligation under Article 8 of that Convention to “(f) promote the recovery of threatened species, \textit{inter alia}, through the development and implementation of plans or other management strategies”, a much lesser degree of overfishing will already be in

\(^{6}\) Done at Rio de Janeiro, 14 May 1966; 673 UNTS 63.  
\(^{7}\) Adopted by the Council of the FAO at its Hundred and Fifth Session, Rome, 25 November 1993; 1927 UNTS 329; ATS 1996 No 20.  
\(^{8}\) Done at Honolulu on 5 September 2000; 2275 UNTS 43; [2004] ATS 15; (2001) 40 \textit{ILM} 278.  
\(^{9}\) Done at Port Moresby on 2 April 1987; ATS 1988 No 42; (1987) 26 \textit{ILM} 1048.  
\(^{10}\) Done at Baguio (Philippines), 26 February 1948; 120 UNTS 59; ATS 1949 No 4.  
\(^{11}\) See the main objectives set out in Article IV of the Agreement. It covers all living marine and living inland aquatic resources in an area of competence specified by Article VI as “the Asia-Pacific Area”, not given any precise definition by lines of longitude and latitude.  
\(^{12}\) Done at Rio de Janeiro, 5 June 1992; 1760 UNTS 79; ATS 1993 No 32.
breach of the many more specific obligations discussed in this work, and with far
more concrete legal consequences. Similarly, despite the theoretical possibility that
SBT could be listed under the Convention on International Trade in Endangered
Species of Wild Fauna and Flora\textsuperscript{13} or the Convention on the Conservation of
Migratory Species of Wild Animals,\textsuperscript{14} these are not in themselves worthy of
investigation, as even in its depleted state the SBT stock still consists of several
hundred thousand individuals and is thus not in any danger of extinction.

Despite this proliferation of legal texts affecting the SBT fishery, for the past twenty
years it has been in a deepening crisis, manifested in the unconcealed reluctance with
which existing participants in the fishery act to reduce their catch despite obvious
signs that the stock is being overfished. This in turn is attributable at least in part to
the absence of a mechanism to prevent the entry of new participants into the fishery.
What the Secretariat of the Food and Agriculture Organization of the United Nations
(hereinafter FAO) described in 1992 as “The Fundamental Problem of Open Access”
remains true today:

\begin{quote}
  The single most important issue that must be resolved to deal with the current
  massive waste in fisheries, is controlling open access. The extension of jurisdiction
  was a necessary, but insufficient, step in this process.\textsuperscript{15}
\end{quote}

The residual freedom of fishing on the high seas is also an obstacle to the efficacy of
any intergovernmental entity endowed with jurisdiction over the particular area of
ocean or fish stocks concerned. Voluntary acceptance of regulation by some States
through a fisheries commission suffers from the defect that those remaining outside
the commission are, under the pure form of the principle, at liberty to disregard any
regulation, gaining the advantage of the member States’ restraint and thus creating a

\textsuperscript{13} Done at Washington, 3 March 1973; 993 UNTS 243; ATS 1976 No 29; (1973) 12 *ILM* 1085.
\textsuperscript{14} Done at Bonn, 23 June 1979; 1651 UNTS 333; ATS 1991 No 32.
\textsuperscript{15} FAO, *Marine Fisheries and Law of the Sea: A Decade of Change* (FAO Fisheries
Circular No 853; Rome: FAO, 1993), at 31 (the quotation is the heading under which the
extracted text appears).
disincentive for the latter to accept that very restraint at all.\textsuperscript{16} As the Special Rapporteur on the High Seas of the International Law Commission (hereinafter ILC) put it:

La protection des richesses de la mer fait l’objet d’un grand nombre de conventions entre les États intéressés…Cette manière de légiférer présente le grave inconvénient qu’un accord survenu entre deux ou plusieurs États intéressés risque de devenir inefficace au cas où un seul ou plusieurs autres États refusent de s’y conformer.

Généraliser les mesures prévues dans les traités bilatéraux ou multilatéraux en les appliquant à des États qui ne seraient pas parties à ces conventions et se trouveraient ainsi liés par des stipulations inter alios, ne semble pas compatible avec les principes généraux du droit.\textsuperscript{17}

If all States were bound to abide by a commission’s measures, the problem would be largely solved. Together with the principle \textit{pacta tertiis nec nocent nec prosunt}\textsuperscript{18} alluded to by the Special Rapporteur, however – that States absent their consent are not bound by treaties to which they are not party – the desire of States within a commission to exclude new entrants irrespective of their political and legal claims to a share in the fishery explains why the law has neither progressed to this point, nor is likely to do so without significant qualification.

How the law governing States’ efforts to overcome this dilemma has affected the SBT fishery, the beginning of whose international management roughly coincided with the publication of this paragraph.


\textsuperscript{18} The principle is embodied in Article 34 of the Vienna Convention on the Law of Treaties (done at Vienna, 23 May 1969; 1155 UNTS 331, ATS 1974 No 2).
with the adoption of UNCLOS, is the subject of this thesis. It will canvass the legal problems to which the tragedy of the commons phenomenon that characterises high seas fisheries has led among the States whose nationals and vessels exploit the species and venture some suggestions as to how these problems might be resolved or lessened in significance.

A purely legal approach to such questions, however, relying on abstract exegesis of the pertinent treaty texts, would not be likely to be fruitful. International fisheries law can only be fully understood against the background of the combined effect of the biological and economic factors operating on international fisheries. It is not possible to define these problems away by, for example, simply mandating that States must follow scientific advice in setting catch limits, as that offers them no guidance as to how to act when scientists, as often occurs, disagree with each other, or when the scientific advice itself proves overly optimistic. Equally, failure to take account of economic forces is among the main reasons for the legal regime having repeatedly shown itself inadequate to prevent stock collapses. In short, for any legal argumentation to make a worthwhile contribution to policymaking of States and the international institutions through which they operate, the lawyer offering it must first master the necessary scientific and economic briefs.

Accordingly, Chapter I introduces the factors at work in the SBT stock and fishery, and how they interrelate. It begins with the basic biological facts of tunas in general and SBT in particular, then moves to the economic concept known as the tragedy of the commons, namely that under open access, hitherto the rule in high seas fisheries, depletion of a stock is inevitable, even though it is contrary to the collective interest, because that is rational behaviour for each individual participant in the fishery. At the national level the most successful antidote to this has been the introduction of property rights, most fully through individual transferable quotas (ITQs), which is how the Australian and New Zealand SBT fisheries are managed. Two further complicating factors – the notions of discounting of future earnings and game theory
complete the first half of the chapter. The second half offers a historical overview of the SBT fisheries in Australia, Japan, New Zealand and elsewhere, relating first how they each developed in isolation and then began to interact with each other. The chapter ends with a description of the current state of the SBT stock.

Chapter II opens with an account of how the trilateral (Australia/Japan/New Zealand) management mechanism that governed the SBT fishery from 1983 to 1994 came into being. Thereafter it is devoted to cataloguing and discussing the issues surrounding new entrants into the fishery from outside these States that arose in that period. Having established and then reduced quotas under the trilateral arrangements because the SBT stock was being overfished, as well as settled on a formula for adjusting their catch shares as the stock recovered, the three States found their expectations of that recovery frustrated in part by the appearance on the scene of these newcomers. Examination of the unpublished documents of the period reveals the new entrants as a principal motivating factor behind the creation by treaty – the 1993 Convention – of an international organisation, the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) to manage the fishery. It was at this stage also that the three States developed a rudimentary policy on new entrants aimed at limiting their catch; the reasons for its ineffectiveness are canvassed. The last part of the chapter deals with the 1993 Convention’s negotiation and assesses what difference it made to the management of the fishery. It looks in particular at the degree of prescriptiveness in the Convention as to what form management measures should take, discerning preference for catch limits over effort limits and for allocated shares in the fishery. Yet a supposed innovation – instead of the (qualified) majority rule coupled with an objection procedure common in other fisheries commissions, the 1993 Convention operates by consensus decisions – is shown merely to shift the locus of the veto on decisions implicit under the system it replaced to an earlier stage of the process. It has thus not led to more efficient decision-making.

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19 Supra n 5.
Chapter III places the new entrants problem in the context of the principles guiding
the allocation of access rights to fisheries in successive legal instruments,
culminating in the UN Fish Stocks Agreement. Beginning with the very sketchy
treatment accorded the subject in the two relevant treaties that emerged from the First
High Seas\textsuperscript{20} and the Convention on Fishing and Conservation of the Living
Resources of the High Seas\textsuperscript{21} – it moves on to consider the more elaborate provisions
of UNCLOS, namely Articles 64 (along with Annex I) and 116-119 and then those of
the UN Fish Stocks Agreement. The last is sufficiently detailed for a hypothetical
example to be essayed of what the most prominent remaining non-member of the
CCSBT exploiting SBT, South Africa, might expect if it were to pursue the route of
litigation as a means of achieving an allocation greater than the CCSBT has been
prepared to offer it. The next part of the chapter examines the first attempt at solving
the new entrant problem – the abstention doctrine of the 1950s – and the reasons for
the concerted and ultimately successful opposition it provoked. This is then
compared with the more balanced provisions of the UN Fish Stocks Agreement,
which have nonetheless prompted a number of fisheries commissions to purport to
exclude non-members peremptorily from access to stocks considered “fully fished”.
Procedural considerations have made some non-members already fishing reluctant to
join the commissions, but the analysis here reveals that States wholly new to the
fisheries have largely accepted their exclusion. It is concluded that the reason for
this, in contrast to the failure of abstention, is that enough of them now have a stake
in some international fishery somewhere for a subconscious property rights mentality
to have developed. That is, the benefit of ensuring that newcomers cannot perturb a
fishery in which the State already participates is perceived to outweigh the burden of
exclusion from all other fisheries in which it does not.

\textsuperscript{20} Done at Geneva, 29 April 1958; 450 UNTS 11; ATS 1963 No 12.
\textsuperscript{21} Done at Geneva, 29 April 1958; 559 UNTS 285; ATS 1963 No 12.
In Chapter IV the narrative returns to the CCSBT and relates on the basis of the reports of its meetings over the years the legal history of its dealings with non-members in an attempt to reduce their catch of SBT. Initially a formula was adopted without consultation with them, which they ignored and allowed their catches to grow further. There followed fitful and then sustained negotiations backed by the threat of trade restrictions by CCSBT members to enforce non-member cooperation. This yielded the desired results in 2001 and 2002 in the case of Korea and Taiwan, which accepted quota offers and joined the Commission (complicated in Taiwan’s case by its unique international status, which required a detailed arrangement to overcome). Indonesia, though, took much longer and its membership dates only from 2008. The position of the remaining significant non-members (South Africa, the Philippines and the European Community) is also considered, as are resolutions the CCSBT has adopted on flags of convenience and on a new category of participants also seen in other commissions, “Cooperating Non-Members”. There then follows a broader examination of legal aspects of documentation of trade in SBT, namely the Trade Information Scheme the CCSBT has run since 2000 and its relationship with the General Agreement on Tariffs and Trade (GATT). The chapter concludes with an analysis of how the arguments made by members and non-members of the CCSBT fit into the wider debate in other fishery commissions as part of the trend towards exclusion of the latter from the fisheries.

By way of a possible solution to the problems addressed thus far, Chapter V introduces and analyses the idea of trading in CCSBT quota. First, national allocations are found in the context of the residual freedom of fishing rule not to be tradable assets but limiting obligations owed to every other member of a fishery commission. Thus (unless there are only two members) simple agreement between “vendor” and “purchaser” is not sufficient; rather, a generalised waiver mechanism is

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22 Since 1995 GATT has been maintained in force among Members of the World Trade Organization pursuant to the Agreement Establishing the World Trade Organization, done at Marrakesh, 15 April 1994, 1867 UNTS 3, 1995 ATS No 8, 33 ILM 13 at 15.
needed. It is found that the treaties governing specific marine living resources do not in general place any obstacles in the way of such a mechanism, although there is one prominent exception. In fact several fisheries commissions permit trading already, by either ad hoc or blanket advance approvals; these are analysed. The focus then reverts to the CCSBT’s own recent consideration of quota trading, with a number of significant documents having been generated and a debate of sorts having taken place, although it did not lead to any concrete outcome. Since placing quota trading onto a systematic basis would raise the matter of accounting for catches to a more sophisticated level than has been necessary to date, the foreseeable issues are enumerated. These notably include rules for the treatment and consequences of overcatch and undercatch, and the problem of bycatch and discarding. It is suggested that if national allocations expressed as a proportion of the total allowable catch (TAC) were to become permanent, even in the absence of trading this would reinforce the trend towards property rights in high seas fisheries.

Finally, conclusions are offered in Chapter VI. These can be summarised by saying that, with one possible exception – a reinvigorated application of the disciplines of State responsibility to international fisheries – any solution to the new entrants problem will have to rely on legal policy rather than principle. The many setbacks in the long struggle to develop a management strategy for SBT illustrate that, leaving aside the risks of failing to heed scientific advice, various allocative rules are possible. The choice among them, as well as of the level of risk to be run in setting a TAC, are inevitably decisions of a political and therefore management character. Even in the absence of a substantive rule on allocation, the procedural device of dispute settlement, or more precisely its compulsory availability, can act as as the necessary incentive to political compromise. Although economists argue in favour of ignoring the history of the fishery and closing it to new entrants unwilling to buy their way in, the applicable legal principles nonetheless require that the full history be taken into account. The CCSBT itself exemplifies this: its management of the
SBT stock has reached a point where the members are collectively no longer seriously attempting to comply with the UNCLOS obligation to restore depleted stocks to the level that can generate the maximum sustainable yield (MSY). Here the various facets of State responsibility – especially the trend towards attribution of all high seas fishing to the flag State itself, and the rules on reparation for damage to injured States, which is argued to include any State that could profitably fish a stock restored to the level capable of generating the MSY – are the way forward. Despite the freedom of fishing on the high seas being at the root of the new entrants problem, therefore, it would be undesirable to act on calls to abolish the freedom, since paradoxically the residue of it turns out to be a necessary element of any solution.

There are four appendices. The sequence in which they appear is not significant, simply matching that in which each is first mentioned in the main text. Appendix A sets out new entrant aspects of the dispute about Japan’s experimental fishing for SBT. Prefaced by an account of the origin of the dispute, it moves to the relevant written and oral arguments of the disputant parties in both phases of the dispute and ends with the salient features of the dispute’s resolution and a conspectus of the issues left unresolved because the case did not go to the merits. Appendix B explains the principal elements of fishery science pertinent to SBT: MSY as a construct of the surplus production model of fisheries, as well as its shortcomings, the technique of “virtual population analysis” and a summary of the scientific advice given to SBT managers over the years. Grouped in Appendix C are the most important extended treaty texts. Part I is the full Convention for the Conservation of Southern Bluefin Tuna, while Article VIII of the International Convention for the Conservation of Atlantic Tunas and Article 20 of the Convention for the Conservation and Management of Highly Migratory Fish Stocks of the Western and Central Pacific Ocean form Parts II and III respectively. Appendix D reproduces in full a document not directly of treaty status: the CCSBT’s 2001 Resolution to Establish an Extended
Commission and an Extended Scientific Committee, together with its Annex on the Rules of Procedure of these bodies.

The law is stated as at 1 December 2008, with the technical exception that any developments evidenced though reports of the meetings of fisheries commissions must reckon with the delay, typically of several months, in their publication. No account is therefore taken of meetings whose reports were at that date not yet in the public domain, which in practice, given that annual meeting cycles culminate towards the end of the calendar year, means any meeting held since 1 January 2008.

With that, it is possible to turn to the eponymous fish of the title and the influence it and its close relatives’ biology, and in turn the economics of the fisheries targeting them, have had on modern international fisheries law.
CHAPTER I

Tunas and the bioeconomics of high seas fishing:
new entrants and the tragedy of the commons

A The fish

Along with all but two of the 14 tuna species thought to exist, SBT is listed in Annex I to UNCLOS as a highly migratory species to which Article 64 applies.23 Ten of

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23 See infra Ch III, text accompanying nn 475-491, the negotiating history of Article 64 and Annex I. The fourteen species make up the tribe Thunnini in the family Scombridae and are grouped into four genera – Auxis, Euthynnus, Katsuwonus and Thunnus – to the last-named of which SBT belongs: J.S. Nelson, Fishes of the world 2nd edn (New York: Wiley, 1984), at 364; Collette and Nauen, supra Introduction n 2, at 87; J. Majkowski, “Global Resources of Tuna and Tuna-like Species”, in FAO, Review of the State of World Fishery Resources: Marine Fisheries (FAO Fisheries Circular No 920) (Rome: FAO, 1997), 118 at 118. These authorities all identify thirteen species, but one of the thirteen has since been found to be in fact two species: P.J. Smith, L. Griggs and S. Chow, “DNA identification of Pacific bluefin tuna (Thunnus orientalis) in the New Zealand fishery”, (2001) 35 New Zealand Journal of Marine and Freshwater Research 843 at 844. Tunas generally prefer oceanic habitats; six of the eight species of the genus Thunnus have a wide distribution and migrate extensively: Collette and Nauen, supra n 2, at 3; the two species omitted are blackfin tuna (T. atlanticus) and longtail tuna (T. tonggol), calling into question the former’s listing in Annex I. The other tuna species are more neritic (living in the water column superjacent to the continental shelf). Apart from blackfin tuna they are black skipjack (Euthynnus lineatus) – the only other omission from UNCLOS Annex I – kawakawa (E. affinis), little tunny (E. alletteratus), bullet tuna (Auxis rochei) and frigate tuna (A. thazard).
these are found in waters off or near Australia, including SBT, which is also one of the seven tuna species occurring in New Zealand waters. Although the bluefin tunas have been recognised as a specialised group within the genus Thunnus, the FAO nomenclature followed by the drafters of Annex I to UNCLOS in listing the eleven tuna species they deemed highly migratory has been somewhat unstable as far as these species are concerned. In Annex I, Thunnus thynnus appears simply as “Bluefin tuna”, though by 1983 the FAO English name had changed to “Northern bluefin tuna”. Although there is no single universally accepted classification of fishes or any other living species, the weight of evidence or of scientific opinion may lead to one classification of a particular species being

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24 Nine (all but blackfin tuna, black skipjack, little tunny, Atlantic bluefin tuna and Pacific bluefin tuna (hereinafter PBT)) are found under Scombridae in D.F. Hoese, D.J. Bray, J.R. Paxton and G.R. Allen, Fishes, in P.L. Beesley and A. Wells (eds), Zoological Catalogue of Australia Vol 35.3 (Collingwood: CSIRO Publishing, 2006), 1769-1778, but this work does not cite Smith et al, supra n 23, and the regulation for some years by Australia of PBT catches along with SBT – see infra n 31 – would not have been necessary were this species not present in Australian waters.

25 The others being albacore, bigeye, frigate, skipjack and yellowfin: L.J. Paul, New Zealand Fishes: An Identification Guide (Auckland: Reed Methuen, 1986), at 124; and in small numbers PBT (ibid., at 125; Smith et al, supra n 23, at 843).

26 Collette and Nauen, supra Introduction n 2 at 3, corroborated by the systematic catalogue (at 21-23) which divides northern bluefin tuna, SBT, albacore and bigeye tuna from the remaining tunas and further subdivides the two resulting groups, such that northern bluefin tuna and SBT form one subgroup, albacore and bigeye tuna another.

27 FAO species names, each unique to one species, are selected on the basis of vernacular names or parts of names already in existence within the areas where the species is fished, in order to overcome the confusion caused by the use of a single name for multiple species, or several names denoting the same species: ibid., at 2. An example of the latter is that “northern bluefin tuna” is also used in Australia to refer to Thunnus tonggol (longtail tuna): T.C. Roughley, Fish and Fisheries of Australia, 6th edn (Sydney: Angus and Robertson, 1966), at 102 (giving its old scientific name of Kishinoella tonggol, an example of the taxonomic mutability over time discussed infra n 28); E.M. Grant, Fishes of Australia (Scarborough, Qld: E.M. Grant Pty Ltd, 1987), at 365.
replaced by another over time. Thus the common names of tunas and similar species may reflect changing views over time of what is a tuna and what is not.

The consequence of the foregoing is a tendency to take the expression “bluefin tuna” as encompassing not only SBT but also Atlantic bluefin tuna (ABT) and Pacific bluefin tuna (PBT) even when it is clear from the context that it is being used in its UNCLOS sense, in other words to treat SBT erroneously as covered by references to “bluefin tuna”. In Australia, PBT was from 1994 to 2002 regulated under the

28 The name “northern bluefin tuna” has since itself been rendered obsolete by scientific advance, as in 1999 it was established that the Atlantic and Pacific stocks of this fish are in fact separate species. With the scientific name Thunnus thynnus now reserved for the Atlantic species ABT, a previously discarded name Thunnus orientalis has been revived for PBT: Smith et al., supra n 23, at 844. Another example of this phenomenon is yellowfin tuna, mentioned by name in Article II(1) of the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission (done at Washington, 31 May 1949; 80 UNTS 3), followed by “Neothunnus” in parentheses, whereas in UNCLOS the Latin name is Thunnus albacares. One 1950s authority gives six genera of tunas: Thunnus (bluefin), Neothunnus (yellowfin), Parathunnus (bigeye), Germo (albacore), Katsuwonus (skipjack) and Sarda (bonito), with which this nomenclature is consistent: W.F. Royce, “A Statement on the Ecology of Tunas” in UN doc A/CONF.10/7, Papers Presented at the International Technical Conference on the Conservation of the Living Resources of the Sea, Rome, 18 April to 10 May 1955 (New York: UN, 1956), 118 at 118.

29 The Eastern Pacific Ocean Tuna Fishing Agreement (done at San José, Costa Rica on 15 March 1983, not in force; reprinted in FAO, Compendium of Basic Texts Concerning International Management and Development of Tuna Fisheries (FAO Fisheries Circular No 842) (Rome: FAO, 1992), 113; available online at <www.intfish.net/treaties/epfa.htm> (visited on 11 April 2008)) lists in Article II(C) the “species of tuna subject to this Agreement” in which are included, apart from eight species of the tribe Thunnini, Eastern Pacific bonito (Sarda chilensis) and Indo-Pacific bonito (Sarda orientalis).

30 Misidentification also introduces an element of unreliability into the catch statistics and the stock assessments to which they are an input. As SBT and the other bluefins sell for roughly the same price per unit of weight, in past years catches of fish of one species were regularly recorded under another: W.L Klawe, Long-line catches of tunas within the 200-mile economic zones of the Indian and Western Pacific Oceans (Rome: FAO, 1980), at 7. Though this still occurs – see Report of the Eighth Annual Meeting, 15-19 October 2001, Miyako, Japan (hereinafter CCSBT8 Report), in CCSBT, Reports of the Meetings for the Seventh and Eighth Year of the Commission (including Financial Statements) (hereinafter CCSBT Blue Book 2002),
Southern Bluefin Tuna Management Plan under the *Fisheries Management Act 1991* (Cth)\(^{31}\) and a similar treatment of catches of this species occurred in New Zealand from 1995 to 2002.\(^{32}\)

61 at 71 (paragraph 85) – in recent years it may have become less of a problem as both SBT and ABT have come under international management with their catches systematically monitored: see the ICCAT and CCSBT trade information schemes, *infra* Ch IV nn 870 and 879 respectively, and as Japanese fishing for SBT has been increasingly confined to the Indian Ocean, where PBT occurs only sporadically: Klawe, *supra* this n, at 7. In the case of SBT the small scale of the problem is shown by the fact that PBT represented less than 0.3% of the combined catch of the two species in New Zealand’s EEZ in the 1990s: Smith *et al*, *supra* n 23, at 843.

\(^{31}\) Catches of PBT were counted against the SBT quota by virtue of the definition of SBT in cl 3.1 of the *Southern Bluefin Tuna Fishery Management Plan 1995* (Cth), made pursuant to s. 17(1) of the *Fisheries Management Act 1991* (Cth), as “fish of the species *Thunnus maccocyii* (Castelnau) or *Thunnus thynnus*.” This is not because of the converse error to that in the text at n 30 *supra*, but for a subtler reason. According to the Explanatory Statement accompanying the *Fisheries Management Regulations (Amendment)* (Cth) (Statutory Rules 1994 No 419), persons charged with catching SBT in contravention of the Act could previously dispute whether the Act applied to them by claiming that the relevant fish were PBT rather than SBT. Faced with such a defence, it was difficult for prosecuting authorities to prove their case because of the “expense, inconvenience and uncertainty involved” in testing to distinguish the species from each other, and difficulties in obtaining samples for those tests. The result was that catches of PBT were debited against SBT quota both domestically (that is, against individual operators’ entitlements) and internationally (in that the SBT catch tonnages reported by Australia to the CCSBT in subsequent years represented not just SBT but also PBT). PBT was removed from the definition in 2002 after a genetic testing procedure was developed to enable positive identification of both species: see *Southern Bluefin Tuna Fishery Management Plan Amendment 2002* (No. SBT 04).

\(^{32}\) Regulation 2 of the Fisheries (Southern Bluefin Tuna) Regulations 1995 (Statutory Regulations 1995/117) made under the Fisheries Act 1983 (NZ) provided that “Southern bluefin tuna means the fish with the scientific name Thunnus maccocyi [sic]; and includes the fish with the scientific name Thunnus thynnus.” In June 2002 the Fisheries (Southern Bluefin Tuna Quota) Amendment Regulations 2002 (Statutory Regulations 2002/150) amended the then governing instrument under the Fisheries Act 1996 (NZ), the Fisheries (Southern Bluefin Tuna Quota) Regulations 2000 (Statutory Regulations 2000/79), to reverse the change. See also “Review of New Zealand SBT Fisheries for CCSBT-8” (Attachment K-4 to CCSBT8 Report), in CCSBT Blue Book 2002, *supra* n 30, 134 at 134; and the Regulatory Impact Statement on the Ministry of Fisheries website at <www.fish.govt.nz en-nz/Publications/Historical+Documents/Environment+and+Sustainability+Archive/Regulatory+Impact+Statements+and+Business+Co
SBT is an epipelagic fish,\textsuperscript{33} ranging widely across the high seas regions of the southern temperate oceans, particularly between 30\degree and 45\degree South, but also traversing the exclusive economic zone (EEZ) and territorial sea of several States including Australia, New Zealand, Indonesia and South Africa, as shown on Map 1 on the next page. This makes it the most widely dispersed stock of all the tunas.\textsuperscript{34} It spends most of its life cycle in waters whose temperature is between 5\degree and 20\degree C; spawning fish and larvae, however, are encountered in waters with surface temperatures between 20\degree and 30\degree C.\textsuperscript{35}

It is generally accepted that the global population of SBT comprises a single stock, with a single spawning ground situated in the tropical waters south of the Indonesian islands from Java to beyond Sumba and extending at its eastern end well into the

\begin{footnotesize}
\begin{enumerate}
\item That is, it lives or feeds at the ocean surface or in the water column at depths at which photosynthesis can take place (to a maximum of about 200 metres): Paul, \textit{supra} n 25, at 174.
\item Collette and Nauen, \textit{supra} Introduction n 2, at 87.
\end{enumerate}
\end{footnotesize}
Australian EEZ in the vicinity of the Western Australian port of Broome. The spawning season extends throughout the southern summer from September to April, after which the growing fish migrate down the coast of Western Australia. Wintering in deeper oceanic waters, some fish then veer west into the Indian Ocean, where in the past they could be found in significant numbers off Cape Town from Map 1: Main Australian fishing grounds for southern bluefin tuna

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37 From – but in mid-2008 no longer available at – <www.afma.gov>, the website of the Australian Fisheries Management Authority (hereinafter AFMA), visited on 24 July 2002.
May to August, while others swim east through the Great Australian Bight and around the southern tip of Tasmania, from where they may go up the coast of New

Collette and Nauen, supra Introduction n 2, at 88. Japan’s first proposal for experimental fishing, annexed to CCSBT, Report of the First Special Meeting, 3 – 6 October 1995, Canberra, Australia (hereinafter CCSBTS1M1(1) Report, available on the CCSBT website at <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_2/report_of_special_meeting1_part1.pdf> (visited on 13 June 2008), indicated that in the past fishing for SBT was conducted in an area extending well beyond the Cape of Good Hope, at least as far west as 15°W.
South Wales or onwards across the Tasman Sea to New Zealand and beyond. SBT continue to live off southern and south-eastern Australia until six to nine years of age; thus those reaching New Zealand are aged five or more, with an average age of about ten. By maturity, most fish have dispersed into the deeper waters of the Indian, South Atlantic and south-west Pacific Oceans. SBT tend to school in order to feed, making them susceptible to capture by longlining. Historically, adult fish were predominantly caught off New Zealand, Tasmania and on the spawning ground; fish aged five or more are seldom found in near-shore surface waters.

The SBT is well adapted for this migration of over 5000 kilometres. Like other large tunas it maintains a stable body temperature that is generally warmer than the water because of its high metabolic rate. It can swim at high speed, due to the abundance of respiratory pigment in the muscles, which gives the flesh its dark red colour.

SBT can grow up to 220 centimetres in length and weigh 200 kilograms, though weights vary considerably with the condition of the fish, and can live over 40 years (the oldest known individual was 42 years old when caught). There is some uncertainty as to when it reaches maturity and can begin spawning, but the mean age

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39 Collette and Nauen, supra Introduction n 2, at 87.
41 Kennedy, Davies and Cox, supra n 40, at 3. SBT is an opportunistic feeder on cold- and warm-water fish species from different depth strata, crustaceans and molluscs, and is preyed upon in turn by sharks, dolphins, seals and billfishes: Collette and Nauen, supra Introduction n 2, at 87.
42 Collette and Nauen, supra Introduction n 2, at 88; Attachment 6 to CCSBT-ESC3 Report, supra n 34, at 204.
43 Nelson, supra n 23, at 363; Collette and Nauen, supra Introduction n 2, at 3.
44 Paul, supra n 25, at 127.
45 Attachment 6 to CCSBT-ESC3 Report, supra n 34, at 204.
for maturity is thought likely to be 11 or 12 years. Precisely because of its longevity coupled with life-long exposure to fishing pressure, however, SBT has been prone to overexploitation. A consequence of this is that, once its numbers are depleted, they would not be expected to recover until some time after reduction in fishing effort. As section D shows, just such a depletion of the SBT stock has been the driving factor behind much of the effort to resist entry of newcomers into the SBT fishery that is the focus of this study. The next section demonstrates that the weak legal and institutional disciplines on high seas fishing made this depletion almost inevitable.

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46 This was an element in the scientific and subsequently legal controversy of the 1990s: see Appendix A infra. The report of the 1994 scientific meeting defined the parental stock as fish of age 8 and older, on the basis that although some 7-year-old fish were mature while not all 9-year-old fish were mature, 50% of SBT were thought to be mature at age 8: Report of the thirteenth meeting of Australian, Japanese and New Zealand Scientists on southern bluefin tuna: Report to Management, Wellington, New Zealand, 20-29 April 1994 (hereinafter 13th Trilateral Scientific Meeting Report; unpublished, copy held by author extracted from files of the former Australian Government Department of Primary Industries and Energy (hereinafter DPIE)), at 8 (Appendix 1, “Status of the stock and fishery indicators”, paragraph 4). In 2001 the independent Advisory Panel found that the formerly agreed estimated age of 8, on which Japan had continued to insist in the face of newer evidence to the contrary, was “unlikely” and recommended the use of alternative hypotheses, ages 10 and 12: Report of the Second Meeting of the Stock Assessment Group, 19-28 August 2001, Tokyo, Japan (hereinafter CCSBT-SAG2 Report), in CCSBT Blue Book 2002, supra n 30, 181 at 184-185 (paragraph 14); see also “Working paper for maturity age group” (Attachment 4 to CCSBT-SAG2 Report), ibid., 209. By implication the scientists settled on age 10 the following year, defining “adult mortality” by reference to that age in Report of the Third Meeting of the Stock Assessment Group, 3-7 September 2002, Canberra, Australia (hereinafter CCSBT-SAG3 Report), in CCSBT, Reports of the Meetings for the Ninth Year of the Commission (including Financial Statements) (hereinafter CCSBT Blue Book 2003), 167 at 172 (paragraph 22).

47 Majkowski, supra n 23, at 125; see also infra Appendix 2. Stocks of shorter-lived species, including most other species of tuna, recover much faster from depletion. For example, yellowfin and skipjack tunas, caught primarily for the canned tuna market, reach maturity at a young age (less than 2 years) and are highly productive: Caton et al, supra n 36, at 10.
B  The tragedy of the commons and its solutions

1  The core of the problem: open access

To the extent that SBT is fished on the high seas,\textsuperscript{48} it is subject to the economic phenomenon known as the tragedy of the commons, which is a consequence of the absence of property rights concomitant with the freedom of fishing on the high seas\textsuperscript{49} – in other words, of the open access to the fishery. Hardin, the originator of the phrase, illustrated the tragedy by way of a pastoral example, in which a rational newcomer considering keeping cattle (or owner of an existing herd) would calculate that there were benefits to be gained from adding an extra beast. Even if these benefits were outweighed by the marginal costs of doing so in terms of degradation of the land, those costs would be distributed among all users of the commons and the newcomer’s own share of them would be less than the benefits. The same incentive would lead all existing and potential users to keep and add animals irrespective of the carrying capacity of the land. Hardin concluded:

Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own interests in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.\textsuperscript{50}

In the international or even domestic fisheries context, it suffices to substitute “catch” in the first sentence above for “herd”. Until the emergence of the EEZ in the 1970s – a wide band of ocean whose outer limit lay 200 nautical miles from the coastal State’s territorial sea baseline – fishery resources beyond the territorial sea and a narrow band of exclusive fisheries jurisdiction were, in the economic sense, common property. From the point of view of the coastal State’s regulators, new operators, and from that of international law, new States, could continue to enter a

\textsuperscript{48} In most years 50-60% of the global catch of SBT is taken on the high seas: see infra Ch III, text following n 444.

\textsuperscript{49} The freedom of fishing on the high seas is set out in Articles 87 and 116 of UNCLOS, reproduced infra Ch III, text following nn 492 and 495 respectively.

\textsuperscript{50} G. Hardin, “The Tragedy of the Commons”, (1968) 162 Science 1243 at 1244.
fishery and those already in it could continue to increase their effort until the stock’s carrying capacity (that is, its sustainable yield) were exceeded. After that, any additional effort would tend to deplete the stock, “ultimately reaching a point where it becomes economically disadvantageous to engage in fishing at all because of the very small size of the catch.” In a 1997 study, the Organisation for Economic Co-operation and Development (OECD) concluded that “[t]he open access nature of marine fisheries is the fundamental cause of poor economic performance and biological overexploitation.”

There are two classic solutions to the tragedy of the commons. One is to distribute the land among individual herders, so that, while the benefit of adding one beast remains, whoever does so must bear the full cost, “thus working a natural constraint on the herdsman’s tendency to destroy the grazing capacity of his private property.” Since the high seas are not subject to appropriation, this option of private property rights has no equivalent in international fisheries. The other is to keep the commons as public property but impose restrictions on it, including limitation and regulation of access. This entails control by some governmental body over the right to enter, and a system of allocation designed to ensure that the carrying capacity of the commons is not exceeded. For fisheries, in theory, an international organisation could be created with power to regulate access to high seas fisheries, and indeed the ILC briefly advocated this idea in draft articles it formulated and refined in the early 1950s.

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51 The concept of maximum sustainable yield is explained infra in Appendix B.
54 Knight, supra n 52, at 3-4.
55 Article 89 of UNCLOS, supra Introduction n 3, provides that “No State may validly purport to subject any part of the high seas to its sovereignty.”
In the ILC’s 1951 Draft Articles on the Continental Shelf and Related Subjects, article 2 on “Resources of the Sea” was in the following terms:

Competence should be conferred on a permanent international body to conduct continuous investigations of the world’s fisheries and the methods employed in exploiting them. Such body should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves.56

Paragraph 3 of the accompanying commentary stated that:

This system [i.e. of regulation being left to the States concerned] might prove ineffective if the interested States were unable to reach agreement. The best way of overcoming the difficulty would be to set up a permanent body which, in the event of disagreement, would be competent to submit rules which the States would be required to observe in respect of fishing activities by their nationals in the waters in question. This matter would seem to lie within the general competence of the United Nations Food and Agriculture Organization.57

In the ILC’s 1953 report the text of draft article 3, as it now was, read:

States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State.58

There was more opposition to this from a minority within the ILC who “contended that the proposal to give an international authority power to issue regulations binding


57 ILC Yearbook 1951/II, supra Introduction n 17, at 143.

on the nationals of States was in conflict with the basic principles of international law”, than from governments:

[I]t is significant of the present state of opinion and of the widely felt need for the removal of what is considered by many to be a condition approaching anarchy, that in the replies sent by governments, no opposition was voiced against the proposals then advanced by the Commission.\(^59\)

In its comprehensive overhaul of the draft articles in the wake of the 1955 International Technical Conference on the Living Resources of the Sea,\(^60\) however, the ILC abandoned the idea of an international organisation in favour of compulsory arbitration.

In the view of Knight, writing in the 1970s at the time of the Third UN Conference on the Law of the Sea, the fishery commissions of the day, though imperfect, had by and large achieved their objectives for a time, but in the past decade unrestrained increases in fishing effort had

> seriously reduced certain fish stocks in spite of the conservation regulations. It seems abundantly clear that some new device is needed - a means of controlling fishing effort and effectively enforcing regulations on all those fishing common resources.\(^61\)

As to what that means might be, Knight discerned an evolutionary process applying to the whole law of the sea, moving through four phases: (1) unrestricted and

\(^{59}\) Ibid. (paragraphs 97 and 99); see also at 241-269 Annex II to the 1953 report, “Comments by Governments on the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951”.

\(^{60}\) The Conference was convened by the UN General Assembly in its Resolution 900(IX) of 14 December 1954 in order to “study the problem of the international conservation of the living resources of the sea and to make appropriate scientific and technical recommendations.” Based on this report, García Amador, a Cuban member of the ILC who had been Deputy Chairman of the Rome Conference, submitted to the ILC’s 1955 session new draft articles which were adopted with minor amendments: Report of the International Law Commission covering the work of its seventh session, 2 May-8 July 1955 (UN doc A/2934), reprinted in UN, Yearbook of the International Law Commission 1955, Vol II (New York: UN, 1960) 19 at 29-31; Oda, supra n 56, at 86.

\(^{61}\) Knight, supra n 52, at 48.
unregulated freedom; (2) reasonable use; (3) regulated use; (4) establishment of property rights, but appeared unsure of what stage the process had reached. He saw that, when overcrowding begins to result in conflict or economic waste, and regulation is insufficient or unattainable, property rights would be required for rational and efficient management. Allocation of harvesting rights among participating States would be a theoretical solution to the open access problem, Knight wrote, and there were instances on record where States had accepted the need to establish quotas and done so by negotiation, each pressing “within the context of its own national priorities for the maximum allocation of the stocks in which it has the greatest interest”. There was, however, no legal barrier to entry of new States to the fishery, which “usually renders ineffective the conservation and allocation system agreed on by the parties”. He correctly foresaw that the problem of the new entrant is likely to become more severe in the next two decades as a result of developing countries’ emphasis on fishery industries coupled with technical assistance from F.A.O. and other organizations.

The enclosure of the EEZ was a necessary if not sufficient condition for controlling fishing effort, bringing with it some if not all of the advantages of property rights, and assisting the creation of the latter by coastal States that were so minded. Acknowledging the EEZ as a major step in this direction, Knight nonetheless doubted whether isolated property systems would be sufficient without some interlinking set of international standards to govern the national regulation of activities within each zone. This doubt is particularly apposite for stocks such as SBT, which move back and forth between EEZs and the high seas, since for such stocks reduction of the area of the high seas was the major outcome of the Third UN Conference on the Law of the Sea, and within that reduced area the tragedy of the commons continued unabated.

62 Ibid., at 27.
63 Ibid., at 28 (just entering the third phase) and 95 (“well into” the fourth phase).
64 Ibid., at 42-44.
65 Ibid., at 29.
From the empirical evidence gathered for its 1997 study, the OECD concluded that: management regimes which limit the total catch, or the number of fishing vessels, or which restrict the efficiency of the harvesting sector, including technical measures and TACs, have generally yielded poor results when used in isolation…The main reason …is that these regimes do not give the fisher the incentive to account for all the costs of his fishing activity.66

The findings of the study supported the introduction of “rights-based management systems” such as individual quotas, despite this requiring governments to establish and maintain a legal framework for the rights, with a possible increase in administrative costs and the possibility of “structural adjustment consequences, including lower employment opportunities and distributional conflicts.”67 The recommended objective of regulation was to create economic incentives or legal sanctions to reduce externalities.68

The OECD elaborated:

From an economic point of view, the basic reason why government regulations of the use of living marine resource [sic] are needed is that, in an unregulated fishery, the decisions made by individual fishers and groups of fishers result in economic overexploitation. …[B]ecause each fisher does not…pay for the resource he uses, he tends to use them to the point at which additional use would be of no additional value to him. This excludes higher valued uses by others, including the protection of the future abundance and productivity of the resource.69

The applicability of this reasoning to the SBT fishery was confirmed by the Industries Assistance Commission (IAC), as it then was, in report of an inquiry set up by the Minister for Industry and Commerce on 30 November 1983.70 The open

66 OECD, supra n 53, at 9-10.
67 Ibid., at 10.
68 Ibid., at 12. Where costs are able to be imposed on others, they are known in economic terms as “externalities”. In this case they are imposed on other fishing operators, the rest of society and the environment: ibid., at 11.
69 Ibid., at 62.
access nature of the SBT resource to this point, the report stated, had both economic and biological consequences. While property rights over other natural resources were a long-established part of the legal landscape, the high cost of delineating and enforcing marine property rights meant that fisheries had remained unaffected by this development, with open access still prevailing. Yet, unless the costs of enforcing title to the resources were so high that they would outweigh the gains, open access represented an inefficient use of the fishery. In the absence of delineated rights to a fish stock such as SBT, individuals could neither capture all the benefits of their actions nor be made to bear all the resulting costs, and access to the fishery remained “unpriced”. In such a situation, the resources allocated to the catching of fish, the quantity of fish taken and the average cost of catching them would increase to levels beyond those which were economic in social terms, even though fishing activities might remain profitable for individual operators. Moreover, individuals would have little or no incentive to engage in conservation measures, increasing the risk that the stock would be exploited to the extent of becoming biologically incapable of sustaining itself as a commercial resource. Should that happen, the income forgone which could otherwise have been derived in future years from the fishery would represent a loss to the community.

On the international plane too, externalities occur. New entrants and non-parties weaken international conservation efforts, since States agreeing to subject their fishing to conservation measures cannot reap the full benefits from them even though they bear the costs. The evidence suggests that fisheries commissions have not

71 It is noteworthy that the evidence to the inquiry of the Bureau of Agricultural Economics, that the SBT fishery was heavily overcapitalised, was accepted by the industry as correct: *ibid.*, at 25.


73 OECD, *supra* n 53, at 18 and 140. Vessels face the costs of compliance with mandatory requirements such as carriage of observers, modification of gear and use of particular equipment; in addition there are public administration costs in monitoring and controlling the fleet, for example mounting air and sea patrols and paying the salaries of port inspectors: at 142.
effectively conserved and managed their stocks due to failure to control effort, exacerbated for straddling and highly migratory stocks by the presence of new entrants and non-parties, with the consequence that measures tend not to be adopted until long after the resource has become overexploited, and then are insufficient to deal with the problems.\textsuperscript{74}

The OECD identified a tendency for resources exploited by fleets under the authority of different States to be overfished. New forms of international collaboration were needed to “provide all actors with a stake in the success of the management effort by benefiting those who abide by the rules and penalising those who do not.” Acknowledging that there were “no universal solutions to fisheries management problems”, it called for political decisions to give stakeholders “a modest degree of secure tenure in the resource” as a powerful incentive to control their exploitation of it.\textsuperscript{75}

2 Economic and biological models of fisheries

The points made by the OECD and Knight are illustrated by the simple fisheries model depicted in Figure 1 on the next page. The upper diagram represents the sustainable harvest from a fishery (measured in units of yield), and the costs of

\textsuperscript{74} Ibid., at 18 and 143.

\textsuperscript{75} Ibid., at 20-21.
Figure 1 – the simple economic model of fisheries

After World Trade Organization (WTO) doc WT/CTE/W/111 (11 March 1999), “On the Environmental Impact of Fisheries Subsidies: A short report by the Icelandic Ministry of Fisheries”. The paper argues that fisheries subsidies, whether in the form of cost reduction or of price support, exacerbate the common property problem on the high seas by encouraging increased fishing effort and frustrating attempts to remedy the heavy overcapitalisation that is characteristic of depleted fisheries, and which in turn impedes authorities’ efforts to conserve the resource: T. Bjørndal and G. R. Munro, “The Economics of Fisheries Management: A Survey”, in T. Tietenberg and H. Folmer (eds), The International Yearbook of Environmental and Resource Economics 1998/1999: A Survey of Current Issues (Cheltenham: Edward Elgar, 1999), 153 at 154. The paper asserts that, if the same level of capital efficiency in terms of yield per unit fleet capacity as achieved in Icelandic and several other fisheries around the world based on property rights could be replicated on average worldwide, the fleet size required to take a sustainable yield of 80 million tonnes would be just a fifth of its then current size, implying that nearly 80 per cent of the capacity of the world’s fishing fleets was surplus to requirements, and that the yield could be achieved with a commensurate reduction in fishing effort. See also FAO Fisheries Circular No 853, supra Introduction n 15, at 21-23.
obtaining it, as a function of fishing effort. The yield initially increases with rising fishing effort, but at a declining rate as the fish stock is reduced in biomass. It reaches a maximum, usually referred to as the maximum sustainable yield or MSY, at effort level \( e_{\text{MSY}} \). Any increase in fishing effort above this level merely reduces the sustainable yield until finally, at effort level \( e_\infty \), the fishery collapses.

Revenue is directly proportional to weight if the market price of fish is assumed to be unaffected by scarcity, so that fish from a more abundant stock will fetch the same price per kilogram as when the stock is depleted. This is why it was formerly thought that a depleted fishery would be abandoned for economic reasons long before the stock became threatened by extinction. Though that is still true, if scarcity makes the price rise – a more realistic assumption – then it remains profitable for longer for fishing fleets to target the depleted stock, reducing it even

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77 It will be noted that the cost curve is almost linear; linearity (i.e. the cost of fishing is directly proportional to the effort) was assumed by H.S. Gordon, “Economic Theory of a Common Property Resource: The Fishery”, (1954) 62 Journal of Political Economy 124 at 129. M.B. Schaefer, “Some Considerations of Population Dynamics and Economics in Relation to the Management of Commercial Fisheries”, (1957) 14 Journal of the Fisheries Research Board of Canada 669 at 676 described this as no “very serious departure from reality”, since most elements of the costs will be dependent on the conditions in the general economy external to the fishery sector.

78 See e.g. the statement in Report of the Extended Commission of the Eleventh Annual Meeting of the Commission, 19-22 October 2004, Busan, Republic of Korea (hereinafter CCSBT-EC3 Report; Appendix 3 to Report of the Eleventh Annual Meeting of the Commission, 19-22 October 2004, Busan, Republic of Korea (hereinafter CCSBT11 Report)), in CCSBT Blue Book 2005, supra n 34, 15 at 19 (paragraph 27) that “even in the low productivity scenarios, SBT spawner biomass would not be expected to decline to zero as most fisheries, particularly longline fisheries, would be forced to withdraw from the fishery for economic reasons before this occurred.” Accord Knight, supra n 52 at 8, who says that extinction by overfishing is impossible for most species, though it can reduce them to levels from which recovery takes a very long time.

79 Fish was once a cheap source of protein, but its overall price trend has been to increase more rapidly than other protein sources, though it is possible that demand for it will stabilise when its price reaches that of those other sources: OECD, supra n 53, at 32; FAO Fisheries Circular No 853, supra Introduction n 15, at 25 and 37.
further before economic factors force a cessation of fishing. The two diagrams in Figure 1 can also be combined to produce a model for the biological yield function, if revenues on the vertical axis are replaced by yield in weight, and the biomass on the vertical axis in the lower diagram is placed on the horizontal axis, as in Figure 2 in Appendix B.

In terms of exploitation, the curve is traced from right to left: it starts at virgin biomass where the stock is in equilibrium at the carrying capacity of the environment and on average generates no surplus, and proceeds along the curve through what is known as a fishdown phase. The law relating to how far this curve may be followed has undergone an evolution. UNCLOS Articles 61 and 119 call for movement to a point near, but not beyond, the top of the curve, and for movement back to the top in fisheries that have already passed it. By Article 61(3), the coastal State’s conservation and management measures in its EEZ are to be “designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors…”; Article 119(1)(a) uses exactly the same words to describe the conservation measures to be taken by States on the high seas. The references to economic factors suggest that the catch at which economic yield is maximised (maximum economic yield, MEY) rather than MSY may be pursued by the coastal State in the EEZ.80 There is no legal impediment to its use on the high seas either, although the cost structures of fleets from different States, and possibly also different prices for the product in the markets in which in they sell, will mean that MEY for one State will probably not be the same as that for another.81

By contrast, paragraph 7 of Annex II to the UN Fish Stocks Agreement treats the top of the curve as a limit not to be exceeded rather than as a target to be aimed for:

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81 For this reason Schaefer, supra n 77 at 680, regarded MEY as an unsuitable basis for managing an international fishery.
The fishing mortality rate which generates maximum sustainable yield should be regarded as a minimum standard for limit reference points. For stocks which are not overfished, fishery management strategies shall ensure that fishing mortality does not exceed that which corresponds to maximum sustainable yield, and that the biomass does not fall below a predefined threshold. For overfished stocks, the biomass which would produce maximum sustainable yield can serve as a rebuilding target.

Paragraph 5 of that Annex states that:

Fisheries management strategies shall ensure that the risk of exceeding limit reference points is very low. If a stock falls below a limit reference point or is at risk of falling below such a reference point, conservation and management action should be initiated to facilitate stock recovery.

The promptness with which this needs to be done is indicated in the second sentence of Article 6, paragraph 2 of the Agreement, embodying the precautionary approach to fisheries.82 This makes clear that, if the conditions for such action are met, “[t]he absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.”

On the other hand, a fishery’s economic performance is maximised when the stock is maintained at a level where its natural rate of productivity is equal to the economy’s rate of interest plus a cost dividend. The fish resource can be viewed as a valuable asset that yields a rate of return (its natural rate of growth each period) and a dividend (in the form of lower harvesting cost at higher stock sizes)...If the resource’s rate of return plus dividend is higher than the economy’s rate of interest, the stock should be allowed to grow and increase in value. The capital and labor that would be used to harvest the resource would be best used elsewhere in the economy. On the other hand, if the resource’s rate of return plus dividend were lower than the economy’s rate of interest, economic performance can be improved by removing more fish, reducing the stock and investing some or all of the revenue elsewhere in the economy.83

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82 Article 6 bears the heading “Application of the precautionary approach”.

83 OECD, supra n 53, at 62-63. This statement has profound implications for very long-lived, slow-growing stocks such as orange roughy, which on this view it will always pay to “mine” as they though they were a non-renewable resource. If the costs of fishing are zero or negative – a condition that ceases to be absurd when the effects of subsidies are taken into account – the economically optimal policy is to drive the stock to extinction: C.W. Clark,
The fishing effort that maximises net profits from the fishery is at $e^*$ in the diagram. By definition, MEY is always less than MSY, because, as Figure 1 shows, at the latter point effort and thus costs are increasing while yield is stagnant, hence at the margin catching extra fish leads to loss, while increasing effort beyond MSY merely reduces the yield and thus returns while adding to costs, so deepening the loss.\footnote{Schaefer, supra n 77, at 677-678 for a formal proof and two further propositions necessarily derived from the quadratic nature of the yield function (see infra Appendix 2, text at nn 1498-1501): (a) MSY is achieved when the fishing effort is half that required to reduce the stock to zero; and (b) if costs are proportional to effort, MEY must occur at half the fishing effort that would prevail in an open access fishery.}

The “bionomic” equilibrium for the fishery occurs at $e_{eq}$. At this level of fishing effort, costs equal revenues, leaving no net profits in the fishery. This is generally at a much higher fishing effort level than the optimal one. Due to the forces of competition, this is the point at which most fisheries operate unless they are subject to an efficient management system based on property rights. If the price per unit of weight fetched by the fish is high enough, then under open access the effort may be greater than that required to take the MSY; in that case yield can be increased by restricting fishing effort to that level, even if it is not held down to the optimum. The increase in revenue and decrease in cost will be an economic yield that can benefit society if it is not dissipated by an increase in unit costs (though precisely that is the effect of maintaining open access when catch or effort is restricted, since the prospect of profit will draw newcomers into the fishery).\footnote{Ibid., at 678-680.}

The lower diagram in Figure 1 illustrates the relationship between fishing effort and biomass, showing that biomass declines steadily as fishing effort increases. Thus the
bionomic equilibrium fishing effort, $e_{eq}$, corresponds to a relatively low biomass level, while the profit-maximising fishing effort level, $e^*$, corresponds to a relatively high biomass level greater than that corresponding to the MSY, which from the diagram must fall between $B_{eq}$ and $B^*$. It follows that a policy aimed at maximising profits from a fishery is likely to pose less risk of depleting the stock than one aiming to extract the MSY from it.

3 A possible solution: individual transferable quotas

Merely limiting catch without limiting entry can initially cause the number of participants in a fishery to fall, but in the long run no resource rent is generated, because it is dissipated by the new entrants and overinvestment attracted by the initially improved conditions. Nor is a simple overall quota sufficient to solve the overcapitalisation problem, as individual operators would still have an incentive to invest in upgrading their vessels and equipment in order to catch a greater share of the quota – and the overcapacity leads to pressure to authorise unsustainable TACs, so as to avoid economic problems in the short term. Input control as practised by governments tends to shorten seasons – in Canada to the point where “fishermen had to fish continuously when allowed, regardless of weather and safety.” Only by making the quota specific to each individual or boat – an individual transferable

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86 OECD, supra n 53, at 73.
88 S. Cunningham, “Outcome of the workshop on individual quota management”, in OECD, The Use of Individual Quotas in Fisheries Management (Paris: OECD, 1993), 7 at 12; according to the Canadian Department of Fisheries and Oceans, “Individual Quota Management: Canada’s Experience Featuring the Pacific Halibut Fishery”, ibid., 145 at 149, before ITQs, the Pacific halibut season shrank to 6 days in 1990 from 61 in 1982, causing supply gluts on the fresh fish market, so that most of the catch went to less the valuable frozen fish market instead.
quota (hereinafter ITQ) – could this incentive to “rush to fish” be negated. ITQs give fishermen an incentive to view the fishery resources as long-term assets whose conservation is in their own interests; will discount future returns at a rate far below that of returns when property rights are ill-defined.

ITQs can be placed within a much broader trend or phenomenon seen in the development of administrative law, in which regulation of some economic activity typically begins with a licence to engage in that activity issued by a governmental authority, backed by a prohibition on doing so without a licence, although, as formerly in the Commonwealth fisheries, such licences might be freely available. Licences might be valid for only a short period, and possibly – subject to the requirements of natural justice – terminable on very little notice or perhaps even without notice. On expiry of the licence, the holder would have to reapply for it –

89 IAC, supra n 70, at 18-19 and 25. See also OECD, supra n 53, at 78, where other beneficial consequences of the elimination of the race to fish are listed. Despite this, the spread of ITQs in domestic fisheries has not been rapid: the FAO Secretariat has noted (FAO Fisheries Circular No 853, supra Introduction n 15, at 1) that “many states are reluctant to take the necessary steps to assign and allocate exclusive use rights among their own fishermen.”

90 Bjørndal and Munro, supra n 76, at 178-179. Accord Cunningham, supra n 88, at 13: ITQs give fishermen an interest in the health of the fishery as whole, not just in their own catch; moreover, with the realisation that cheating is now at the expense of fellow owners, not the public, there is increased preparedness to accept enforcement of the law.

91 See J. Waugh, Australian Fisheries Law (Melbourne: University of Melbourne Law School, 1988), at 87. Subsection 13(1)(a)-(c) of the former Fisheries Act 1952 (Cth) prohibited fishing and related activities unless done by or on behalf of a person holding a valid licence.

92 See R v. City of Melbourne; ex parte Whyte [1949] VLR 257, a case about the cancellation of a taxi-driver’s licence.

93 Subsections 9(1) to (3) of the Fisheries Act 1952 authorised the granting of licences by the Minister or the Secretary of the administering Department, which by subsection 9(6) had a maximum duration of 12 months (or to the end of the following calendar year if issued in December). Subsection 9(8) permitted but did not require fees to be payable for the grant. According to Waugh, supra n 91, at 41-42 it was “standard administrative practice” for the licence to be renewed on expiry even though this was discretionary by subsection 9(6B); amendments made in 1987 allowed extension of licences by regulation.
and policies aimed at fairness such as ensuring a wide distribution of opportunities to engage in the activity may dictate that there be not only no presumption in favour of renewal, but perhaps even a deliberate bias against it. Yet, since both law and economics favour certainty and predictability, both are served by the development over time of a practice whereby, provided the licence holder has a good record of compliance with the conditions, there should in fact be a presumption of renewal, so that economic activity is not unnecessarily interrupted. This in due course may lend itself to the creation and recognition of a legitimate expectation as regards renewal of the licence, or further statutory measures to circumscribe the authorities’ discretion to cancel or suspend licences. From this point the logical next step is for the licences to become permanent. As long as the licensing system remains, however, the government will want to retain control over entry and exit by each individual or firm (and of the possibility of cancellation of the licence for misdemeanours), for example with a view to ensuring that holders have the necessary qualifications and skills, and will not countenance trading, which would allow anyone to commence the activity licensed. But if entry is limited, as is by definition the case for ITQs (as well

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95 Section 9A on cancellation and suspension of licences was added to the *Fisheries Act 1952* in 1973. By section 16A, inserted in 1984, the Administrative Appeals Tribunal was able to review decisions on grant, renewal, cancellation and suspension of licences (but not for failure to comply with licence conditions, infringements of fisheries notices or false statements in applications). The discussion of management plans in Waugh, *supra* n 91, at 43 indicates that their purpose was originally to provide guidance and predictability for the exercise of discretionary powers. Subsection 7B(8), inserted in 1985, provided that “While a plan of management is in force for a fishery, the Minister and the Secretary shall perform their functions, and exercise their powers, under this Act in relation to the fishery in accordance with the plan of management, and not otherwise.” See now the *Fisheries Management Act 1991* (Cth), subsection 17(10), which replaces the reference to the Minister and Secretary with a reference to AFMA and omits the words “and not otherwise”.

as often with the taxi licences favoured as illustrations in the economic literature),
scarcity gives the licences a value, and thus pressures grow to allow trading. If the
government concedes this, its role may come to be gradually reduced to registry
functions, recording who has the rights at any given moment, and gatekeeper
functions, perhaps insisting on certain qualifications in the purchaser, but provided
those are met, it will not intervene to prevent the transaction. This is the stage
reached by the ITQ.

As explained by the OECD, several practical questions need to be answered once the
decision to move to an ITQ system is taken in principle:

When individual quotas are first implemented, several issues confront managers:
Whether to sell or give away quota rights. If sold, by what means? If given away,
how to select recipients? How to specify the basic characteristics of individual
quotas, including the extent and duration of the right, divisibility, transferability.
How to distribute quota shares among recipients…The initial allocation of individual
quotas is…one of the most difficult, time consuming and costly aspects of
implementing an [ITQ] regime. The initial allocation of quota shares is often
problematic and controversial because it determines who will receive many of the
benefits from the programme, creating a valuable asset for some and excluding
others.\footnote{OECD, supra n 53, at 77.}

\footnote{Transfer of licences under the \textit{Fisheries Act 1952}, subsection 9(7) could be done only by
the Minister or Secretary on the joint application of the holder and the proposed transferee.
Waugh, \textit{supra} n 91, notes at 46 that in the mid-1980s fishing capacity units were made
transferable subject to certain conditions under the Northern Prawn Fishery Management Plan,
but his analysis of a possible constitutional challenge to a compulsory reduction plan as an
acquisition of property other than on just terms (see Commonwealth of Australia Constitution
Act 1900 (Imp), Schedule, s.51 (xxxi)) led him to conclude that the units’ resemblance to
property rights was only superficial, since under the system based on licensing the holder’s right
was enforceable only as against the grantor authorities, not against all the world: at 46-47.
(Prepared to concede at 86 that “modern fisheries regulation, which tends increasingly to grant
exclusive rights to fish, has many resemblances to an exercise of proprietary rights”, Waugh
nevertheless maintains that the units bought and sold for value had a legal existence only as
preconditions to the grant of a licence under a management plan: at 88.)}
Allocation commonly occurs on the basis of catch history, but this varies. Once the TAC is allocated among individuals, most producers will initially possess less quota than desired for their fishing operation. If quota is not transferable, some will be unable to cover their variable costs and thus be induced to leave the fishery. If it is transferable, trading will take place and quota can be expected to end up in the hands of the lowest-cost producers.\footnote{Ibid., at 77.}

Industry resistance can be expected as ITQs will displace the marginal and less profitable producers, many of whom receive significant non-monetary benefits from participating in the fishery – although ITQs also allow those leaving fishery to liquidate the value of their rights.\footnote{Cunningham, \textit{supra} n 88, at 12.} There will also be wider concerns about the fairness of reserving a public resource for a privileged few with capital investment in the fishery and excluding all others, whereas under open access all can try their luck at making a living. It should, however, be possible for the government to capture some of the resource rent generated and use it to compensate the public as previous owner of resource.\footnote{OECD, \textit{supra} n 53, at 79.} Ownership restrictions such as limits on concentration of quota holdings can be imposed if desired to take account of these social considerations, though at some cost to the value of the right; there are trade-offs between economic efficiency and accommodation of restrictions.\footnote{I. Clark, “Individual transferable quotas: the New Zealand experience” (1993) 17 \textit{Marine Policy} 340 at 341-342.}

The most often cited disadvantages of ITQs are the high monitoring and enforcement costs and the incentive to engage in highgrading (the practice of throwing small fish back into the sea in order to maximise the average weight – and value per kilogram – of retained fish).\footnote{These were the reasons cited by Japan in 1996 for not intending to introduce ITQs in the near future when the Australian SBT industry presented to the CCSBT’s Third Meeting a paper advocating use of ITQs by all participants in the fishery, endorsed by Australia, which averred} While the former is undeniable, and means that low-value
fisheries will rarely be good candidates for placing on an ITQ basis, the latter criticism is not necessarily well founded. The mid-1990s Japanese practice of discarding SBT under 25kg,\footnote{Infra Ch V, text at nn 1153-1156.  A change in the regulations applicable to Japanese vessels fishing for SBT in the Australian Fishing Zone in 1991 under a 1979 treaty (infra n 265 and accompanying text), so that all hooked fish must be retained on board, was instituted in order to prevent the highgrading reported by observers on board: Polacheck, supra n 34, at 279.} which Australia has never followed despite having ITQs, indicates however that this is by no means an inevitable outcome. By contrast, where there is a particular need to protect small fish, ITQs can provide a positive incentive in this respect, whereas a race to fish discourages having regard to the size of individual fish caught.\footnote{OECD, supra n 53, at 73; see also reference at 19 to a study that found no discernible increase in discards under an ITQ system over the previous limited effort management scheme, and Cunningham, supra n 88, arguing at 12 that highgrading is not a problem of ITQs per se but is related to the limited hold capacity of vessels, and thus occurs under any management system.}

Under the ITQ system, one benefit of a market in quota, in theory at least, is that the prohibitive amount of detail about the economics of individual operators needed to optimise quota, which they are unlikely to yield willingly, is contained in the most

recent sale price of quota, which is equivalent to the net present value of the future economic rent from the fishery. For the management authority, it is sufficient to monitor and maximise that price:

[T]he prevailing quota market price reflects all relevant information about the current and future conditions in the fishery available to the fishing firms, or, more generally, the participants in the quota market. It follows that the quota authority has only to monitor the quota market to become privy to the same information.\(^\text{105}\)

4 Two further complexities

The models presented in Figure 1 do not fully capture the economic factors at work in an open-access international fishery. Two particular sources of complexity are now explained.

(a) Discount rate

States participating in international fisheries will often have different discount rates, which measure the relative value of a monetary unit in future compared with the present. The concept of the discount rate is known to most legal systems from the necessity of calculating the present value of future losses in quantification of damages in tort or delict.\(^\text{106}\) A low discount rate means a future value is given nearly the same weight as the same value in the present, while a high discount rate places much lower weight on it. Applying this to fisheries for depleted stocks, a zero discount rate (that is, participants are willing to exchange a dollar of sacrifice today for a dollar of gain in future) would result in fast rebuilding through greater sacrifices in the short term in exchange for future gains. With a positive discount rate, the participants are not willing to sacrifice as much in the present for the sake of future gains.


gains, slowing the rebuilding of the stock and leaving its ultimate absolute size lower than with a zero discount rate.\textsuperscript{107}

The lower a fishing State’s discount rate, the greater its desire to invest in the resource and thus the more conservative the harvesting policy it can be expected to favour.\textsuperscript{108} Most fisheries commissions, however, behave as if they have high discount rates. Uncertainty and imperfect information about the present and future states of the stock,\textsuperscript{109} markets and technology make managers and participants in the fishery reluctant to accept substantial present sacrifices for uncertain or distant\textsuperscript{110} future gains. Moreover, maximisation of economic performance is rarely the sole or even principal objective pursued by a commission.\textsuperscript{111}

An example of the trouble this causes is an unreported judgment of the New Zealand High Court\textsuperscript{112} in a case discussed by Burke where evidence had been led that\textsuperscript{113} in

\textsuperscript{107} OECD, supra n 53, at 63. C. Costa Duarte, A. Brasão and P. Pintassilgo, “Management of the Northern Atlantic Bluefin Tuna: An Application of C-Games” (2000) 15 Marine Resource Economics 21 at 24n apply a 4\% per annum discount rate to the real data used in their model, based on International Monetary Fund reports. Balkin and Davis, supra n 106, give at 396n-397n a range of discount rates in various jurisdictions, from 2.5\% per annum (United Kingdom) to 7\% (Tasmania). G.R. Munro and A.D. Scott, “The Economics of Fisheries Management”, in A.V. Kneese and J.L. Sweeney (eds), Handbook of Natural Resource and Energy Economics, vol II (North-Holland: Amsterdam, 1985), 623 at 642 point out that once discount rates are taken into account, changing the bioeconomic model from a static to dynamic one (i.e. one that takes explicit account of the passage of time), the inequality $B^* > B_{\text{MSY}}$ (the biomass that produces MSY), a truism under the static model, no longer necessarily holds.

\textsuperscript{108} OECD, supra n 53, at 141.

\textsuperscript{109} Unreliability of supply is highlighted by G. Pontecorvo, “Insularity of scientific disciplines and uncertainty about supply: the two keys to the failure of fisheries management”, (2003) 27 Marine Policy 69 at 69 as reasons for attitudes reflecting implicit low discount rates.

\textsuperscript{110} For example, the Norwegian spring-spawning herring stock, fished almost to extinction before a moratorium on harvesting in the late 1960s, took over 20 years to recover: Bjørndal and Munro, supra n 76, at 161.

\textsuperscript{111} OECD, supra n 53, at 63.

\textsuperscript{112} New Zealand Fishing Industry Association and Ors v. Minister of Fisheries and Ors (High Court of New Zealand, reversed on other grounds in the Court of Appeal 1997).
the New Zealand snapper fishery a yield of 92 per cent of MSY was being produced by a biomass that was only 50 per cent of that generating MSY ($B_{\text{msy}}$). The Court held that, as a matter of construction of the Fisheries Act 1983 (NZ), which enacted in different words the relevant provisions of UNCLOS, the Minister of Fisheries had discretion as to the pace at which to rebuild to $B_{\text{msy}}$, but not about whether to do so at all. It upheld his decision to do so over 20 years, for which a 39 per cent cut of the TAC was required. While Burke’s criticism that this will lead to greater risk of depletion is hard to understand, the case does illustrate the economic point that a fishery in this position would need a substantial drop from the current level of catch in order to rebuild the stock to $B_{\text{msy}}$, but participants would not be rewarded by much more catch in future. Even a low discount rate might not justify this in cost-benefit terms (though a reduction in unnecessary effort might).

The CCSBT now provides its own quantified illustration of this phenomenon. In 2005 a cut in the TAC for 2006 of 5,000 tonnes, which was to have been the first step in a management procedure aimed at reaching a particular stock size by 2014, was delayed by a year. Still wanting to meet that goal, the Members accepted the Scientific Committee’s advice that the delayed cut would instead have to be 7,160 tonnes. In other words, 5,000 tonnes “borrowed” from the stock for a year and then repaid over eight years would result in a total repayment of $8 \times (7160 - 5000) =$


17,280 tonnes. This implies a discount rate, assuming net returns of a fixed price per
tonne of SBT in 2005 dollars, of no less than 40.3268 per cent per annum.115

(b) Game theory

Effective joint management of fish stocks by States is hampered by the differences
among them in both management objectives and the willingness and ability to make
short-term sacrifices in exchange for long-term gains. Management conflicts can
arise among States due to different discount rates, risk perceptions, production costs
and consumer tastes, which all influence the optimal consumption rate and hence
stock size.116

As a consequence of the tragedy of the commons, each State in competing with
others for high seas fish stocks tends to neglect the impact of its own harvesting on
the capital (fish) stock and its future productivity. In game theory,117 the tragedy of
the commons falls within a wider class of game in which there is a

strategy…that produces better results for each player no matter what strategy the
other player follows. When both players act in their own self-interest, both do worse
than if each had shown restraint…[W]ithout co-operation players are driven to adopt
strategies which both recognise as injurious. Unless the countries reach a binding

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June 2008), the result obtained by filling in the first, second and fourth boxes with 5000, 8 and 1
respectively and manipulating the figure in the third (interest rate) box in order for the result
displayed in the fifth (annual repayment) box to be exactly 2160.00.
116 OECD, supra n 53, at 141.
117 Game theory is a branch of mathematics that models strategic behaviour, that is, actions
influenced by expectations of the actions of others, and has applications in a variety of fields,
including economics, evolutionary biology, political science and military strategy. See generally
(Princeton: Princeton University Press, 1953). When studied from an abstract mathematical
viewpoint it is conventional to call the resulting interactions “games”. Cooperative games are
those “economic (or other) situations involving individuals whose interests are neither
completely opposed nor completely coincident”: J. Nash, “Two-Person Cooperative Games”,
(1953) 21 Econometrica 128 at 128.
agreement to conserve and manage the resource, both countries will inevitably decide to deplete the resource.\textsuperscript{118}

Resources exploited non-cooperatively thus yield lower economic returns than if managed cooperatively. Non-member fishing imposes either loss of revenue on complying fleets by reducing the allowable catch if a given stock size is targeted, or reduction of the stock in any other case.\textsuperscript{119}

The economic analysis of the exploitation of straddling and highly migratory fish stocks has only recently developed beyond that of the simpler case of shared stocks (those occurring in two or more adjacent EEZs but not on the adjacent high seas).\textsuperscript{120}

The analysis of cooperation currently relies on the theory of coalitions, but the complexity of the issue forces the use of restrictive assumptions.\textsuperscript{121} Hannesson has

\textsuperscript{118} OECD, \textit{supra} n 53, at 140.

\textsuperscript{119} Ibid., at 141-142.


\textsuperscript{121} OECD, \textit{supra} n 53, at 142.
shown that, if the stock’s growth rate is higher than the discount rate (though the latter may itself be influenced by uncertainty about the former), any cooperative solution will have the property that no player can benefit by changing strategy while the other players keep their strategies unchanged, but the higher the number of players, the less likely the cooperative solution is to be sustainable, because of the high reward from cheating and low risk of punishment. More recently, Pintassilgo has demonstrated that under some conditions – where the benefits of cooperation are exceeded by the sum of the benefits each participant would derive if it alone were to cheat – no possible allocation can motivate all participants to abide by that allocation. For this a legal framework is required that prevents fishing outside the cooperative regime. Such a framework exists, however, only in fragmentary form. Munro attributes non-cooperative management of straddling stocks such as the Grand Banks cod and Bering Sea pollock to the “vagueness and imprecision” of the UNCLOS high seas fisheries articles.

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122 R. Hannesson, “Fishing on the High Seas: Cooperation or Competition?” (1995) 19 Marine Policy 371 at 373. Accord OECD, supra n 53, at 162: as the number of States increases, depletion becomes more likely because the relative attraction to each of being the “sole cheater” rises.

123 P. Pintassilgo, “A Coalition Approach to the Management of High Seas Fisheries in the Face of Externalities”, (2003) 16 Natural Resource Modeling 175 at 193-194; G. Munro, A. van Houtte and R. Willmann, The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects (FAO Fisheries Technical Paper No 465; Rome: FAO, 2004), at 45. Kaitala and Munro (1993), supra n 120, at 325 concur that a binding agreement removes the threat of breakdown in cooperation from future shifts of relative bargaining power, which depends for each player on what it stands to lose if there is no cooperative solution – the more it stands to lose, the weaker its position: at 323.

For reasons of game theory, even in the context of general concern about an overfished stock, if any single participant voluntarily restrains its catch without reliable commitments of similar restraint by all other relevant players, it incurs a short-term loss while the entire benefit of its action accrues to those other players. In other words, catch reductions can only be successfully undertaken in concert. An example of this is seen in Australia’s 1989 proposal for a moratorium on SBT catch being conditional on it applying to all three States in the trilateral arrangement. In the late 1990s game theory similarly explains both why Australia, despite growing catches of third parties, merely opposed an increase in TAC rather than positively advocating a decrease, and why New Zealand, which did advocate a cut, did not, and could not have been expected to, accept Japan’s cynical invitation to act unilaterally on its view of the SBT stock as depleted and requiring immediate reductions in catch. This is a practical illustration of the “tragedy of the commons” affecting high seas fisheries; with open access, all players’ incentive is to maximise their own catch irrespective of the damage they thereby do to the stock (and of their knowledge


In “Southern Bluefin Tuna Quotas Set” (Media Release PIE 89/328K, John Kerin MP, Minister for Primary Industries and Energy, 24 November 1989), the Minister not only stated that “A unilateral moratorium by Australia was never proposed and would not have made any sense either for conserving the stock of SBT or for promoting Australian industry’s interests.”, but lauded the reduced national allocations actually achieved that year as “a significant increase in the proportion taken from the surface [i.e. Australian] fishery.”

See Report of the Fourth Annual Meeting, First Part, 8-13 September 1997, Canberra, Australia (hereinafter CCSBT4(1) Report), in CCSBT, Reports of the Meetings for the Fourth Year of the Commission (including Financial Statements) (hereinafter CCSBT Blue Book 1999), at 10: “the decisions of both Australia and New Zealand on voluntary catch restrictions should reflect their respective views on stock status.”) For all its superficial “put your money where your mouth is” appeal, for New Zealand to have accepted this challenge would have increased the other parties’ share with no guarantee that its own restraint would be rewarded in the medium term with a larger share if the stock recovered. Indeed the stock might well not recover at all if Japan and non-members declined to follow suit or even took advantage of New Zealand’s reduction to increase their own catch in the light of their own scientific projections.
of that damage) because, as Gordon put it in his pioneering article on fisheries economics, “the fish in the sea are valueless to the fisherman, because there is no assurance that they will be there for him tomorrow if they are left behind today.”

With stocks occurring in the EEZs of two or more States but not on the high seas, mutual access agreements increase the likelihood of a cooperative solution, because States are assured of access to the benefits of their conservation efforts despite the stock’s uncertain movement across the boundary. For straddling and especially highly migratory stocks, however, such a solution is unlikely to emerge, since inviting any given number of distant-water fleets into the EEZ to fish the stock would still leave an indefinite number of participants able to fish it on the high seas. Making a range of arbitrary assumptions about discount rates and costs of fishing as a proportion of the price fetched, Hannesson finds the prospects of stocks shared between neighbouring EEZs “not too discouraging”, but is much more pessimistic about stocks outside 200 miles, for which he demonstrates that low-cost players may be tempted to fish down stocks to drive out high-cost ones, and that the effect of cost heterogeneity is seen to be substantial: it does not take a great difference in costs to reduce [the maximum number of self-enforcing participants] to a number not much higher than two, irrespective of the discount rate, cost level or productivity of the fish stock.

As the next section shows, however, the SBT stock as a whole has never been managed to maximise the overall economic benefit from the fishery, despite a 1988 recommendation from scientists of the States concerned to do so (which they thought

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127 Gordon, supra n 77, at 135; see also E.A. Keen, “Common property in fisheries – Is sole ownership an option?” (1983) 7 Marine Policy 197 at 203 who expresses it thus: “the harvest for any particular day must be maximized lest the resource be taken by someone else.”
128 Hannesson, supra n 122, at 375.
129 Hannesson, supra n 120, at 313.
130 Ibid., at 315-316.
131 Ibid., at 316. Cooperation is much more likely, though, if the stock is assumed to migrate sequentially through the States’ EEZs rather than redistributing itself instantaneously: at 318-319.
would be at a parental biomass of between 30 per cent and 50 per cent of its unexploited size). The reason for this may lie in the discount rate: one study found that a cooperative solution in the SBT fishery could bring about a rapid increase in parental biomass, resulting in significant reduction in harvesting costs – but would require that catches be cut by almost half for the first three years, approaching 15,000 tonnes again only after 20 years. Since the reduction would only materialise in the form of lower effort through tackling the overcapitalisation, implying that many vessels would have to leave the fishery, implementation of such a solution is less politically palatable than risking the stock’s collapse by persevering with the overly large fleet. The same study concluded that continuation of the 1997 harvesting effort would be “barely sustainable on either biological or producer rent grounds”, generating small profits for Australia and New Zealand, but losses for all others.

The levels of effort in the various national fleets are now considered seriatim.

C Overview of the SBT fishery

Seven of the tuna species are considered by the FAO as principal market tuna species because of their global economic importance and their international trade for canning and sashimi, raw fish being regarded as a delicacy in Japan and more recently also in other countries. As one of these principal market tunas, SBT, though of only

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133 Kennedy, Davies and Cox, supra n 40, at 15.

134 Ibid., at 18.

135 Majkowski, supra n 23, at 118, adjusted for the split of northern bluefin tuna into two species. The principal market tunas of the genus Thunnus are albacore (T. alalunga), bigeye tuna (T. obesus), northern bluefin tuna (T. thynnus and T. orientalis), SBT (T. maccoyii) and yellowfin
minor significance in terms of volume, realises high prices in the sashimi trade. The flesh is very red and firm in texture, with high fat and low moisture. Large, good quality, fatty individuals sold for sashimi can sometimes fetch prices above US$200 per kilogram if they are properly handled after capture. Until relatively recently there was little interaction between the States in whose waters SBT is found and those whose nationals or vessels fish for SBT, as their fisheries developed independently of each other. In Australia, an early indication that commercial fishing of SBT might be possible occurred in June 1907 when large schools of it were observed off Port Jackson and Port Hacking in New South Wales. Though this was confirmed in 1936, significant commercial harvest of SBT did not begin until the early 1950s. Catches of SBT since then are set out in Table 1 on the next page. In 1961, the global SBT catch peaked at over 81,000 tonnes. 73 per cent of the catch has been taken in the Indian Ocean, 21 per cent in the Pacific and 6 per cent in the Atlantic, mostly off the southern tip of Africa.

tuna (T. albacares). Skipjack tuna (Katsuwonus pelamis) is the seventh principal market tuna species. Longtail tuna (T. tonggol) is another species of tuna that is becoming increasingly important for canning and is a subject of substantial international trade.

136 Ibid., at 124.
137 Ibid., at 118; Paul, supra n 25, at 127. Market prices vary considerably with the fat content of the meat, high fat being considered high quality. The average price for SBT in the Yaizu fish market in Japan in 1990 was seven times that of bigeye tuna, the next most valuable species fished in the Australian Fishing Zone: Australian Bureau of Agricultural and Resource Economics (hereinafter ABARE), Japanese Access to the Australian Fishing Zone: A Report to the Australian Fisheries Service (Canberra: ABARE, 1991), at 1.
138 Roughley, supra n 27, at 100.
139 Ibid., at 99.
140 Attachment 6 to CCSBT-ESC3 Report, supra n 34, at 205.
Table 1: Estimated catches of SBT by calendar year, in tonnes\(^{141}\)

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<th>Taiwan</th>
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a  Possible minor discrepancies from the 1990s onwards due to method of accounting for farmed fish (see infra Ch V subsection E4).
b  Subject to significant doubt as underestimates from the late 1980s onwards based on Japanese market data (see infra Ch V, text at n 1109).
c  Probably estimates accurate only to the nearest 5 or 10 tonnes.
d  These figures (NB: those that are multiples of 100 are in all likelihood only very rough estimates) are taken from the table in Caton et al, supra n 36, at 9; in the Scientific Committee report table they are zero and the total for the year is correspondingly lower.
e  Total differs by 1 tonne from that given in the Scientific Committee report table, possibly due to rounding.
f  Total includes mortalities of 4 tonnes in 2001 and 17 tonnes in each of 2002, 2003 and 2004 not attributable to country sources, e.g. taken under the CCSBT Scientific Research Program (see infra Appendix A, text at nn 1466, 1467 and 1470).
g  Figures taken from individual member reports to the CCSBT subsequent to the Scientific Committee report table; the figures for Japan in the relevant years are for the fishing year instead of the calendar year; the 2005 figure for Korea is processed weight rather than whole weight and it is not clear whether this also applies to the 2006 figure; Taiwan’s 2006 figure is a preliminary estimate.

* Not available/not calculable.
1 The Australian fishery

Most tuna fishing activity in Australian waters has been directed at SBT. Catches were reported as early as the 1920s, but the fishery began in the 1940s off Eden in New South Wales and Port Lincoln in South Australia, taking advantage of the fact that at certain times of year, juvenile SBT form large surface schools off New South Wales and in South Australian coastal waters. From the 1950s, the surface fishery expanded rapidly, after the New South Wales fishery moved onto a commercial footing with the introduction of pole and live-bait techniques from the United States. Operating between Sydney and Bass Strait from September to January, the New South Wales fishery caught about 2900 tonnes per annum on average during the 1960s, while the South Australian fishery, working from December to June, averaged around 3800 tonnes per annum in the same decade. In the 1970s the New South Wales operators began to search farther offshore as a result of fewer fish being found in the hitherto fished areas, despite the use of long-range spotter aircraft. The introduction of larger pole boats and large purse-seine vessels led to an increase in the size (and age) of fish caught, so that by the end of the decade the New South Wales fishery was taking over half the Australian catch. A Western Australian fishery based in Albany and Esperance targeting 2- and 3-year-old fish in the Great Australian Bight also came into being, with an average annual catch of 550 tonnes in the years 1969 to 1977. With the success of purse seining threatening to induce a further rapid increase in effort, in 1975 the number of such

142 Caton et al, supra n 36, at 7.
143 “Update of the Australian Southern Bluefin Tuna Fishery for the 2002-03 Season” (Attachment 8-1 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, supra n 34, 60 at 60; IAC, supra n 70, at 8.
144 Caton et al, supra n 36, at 7; Collette and Nauen, supra Introduction n 2, at 88.
145 Caton et al, supra n 36, at 7-8; Collette and Nauen, supra Introduction n 2, at 88.
146 Polacheck, supra n 34, at 272.
147 Caton et al, supra n 36, at 12.
vessels was frozen at six and at the State Government’s request the Commonwealth authorities prohibited purse-seining in the Western Australian SBT fishery. In 1976 a similar ban on entry of additional pole fishing vessels in the south-eastern fishery was instituted. These measures were largely ineffective, however, because they did not restrict the type and size of vessels replacing those retired from service, and in 1981 they were removed.\textsuperscript{148}

By the early 1980s, both the South Australian and Western Australian fisheries had expanded beyond the continental shelf, in the latter case leading to a substantial increase in the average size of the fish caught,\textsuperscript{149} though this trend reversed in the later years of the decade.\textsuperscript{150} In New South Wales, on the other hand, the catch fell in 1983 to less than half of the 1978-1982 mean, while the average size of fish caught rose, the areas in which fishing took place contracted and the season itself was shortened.\textsuperscript{151} A quota was set for the first time in the 1983 season of 21,000 tonnes, slightly below the previous season’s record catch, with minimum size limits of 54 centimetres in the Western Australian fishery and 70 centimetres elsewhere.\textsuperscript{152}

These were designated as temporary measures, pending the report of the IAC’s inquiry.\textsuperscript{153} Actual catch, however, fell almost 25 per cent short of the quota,\textsuperscript{154} and even at this early stage it was evident that a quota of this magnitude, added to the

\textsuperscript{148} Ibid., at 31-32.
\textsuperscript{149} Ibid.
\textsuperscript{150} Ibid., at 22-23.
\textsuperscript{151} Ibid., at 12.
\textsuperscript{152} In conjunction with any fixed quota, minimum sizes increase the average size of fish caught, bringing about a concomitant decrease in the number of fish making up the quota, so that more fish can survive to maturity and reproduce: \textit{ibid.}, at 13.
\textsuperscript{153} \textit{Supra}, text accompanying n 70. The inquiry’s terms of reference included “whether changes to the management program would be necessary for adequate conservation of the resource and efficient development of the tuna industry and, if so, the nature and extent of such changes”: IAC, \textit{supra} n 70, at 69.
\textsuperscript{154} Caton \textit{et al}, \textit{supra} n 36, at 32; Table 3 \textit{infra}. 
expected Japanese catch, would result in a total take above that required to reduce the risk of a stock collapse to tolerable levels.\textsuperscript{155}

After the inquiry reported in 1984, the \textit{Southern Bluefin Tuna Fishery Management Plan} was introduced under the \textit{Fisheries Act 1952 (Cth)}\textsuperscript{156} and over the following years the quotas were progressively reduced under the Plan to 6250 tonnes for the 1989 season. The size limits, however, were abandoned as impractical; instead a permanent closure was imposed off the Western Australian coast north of 34\degree South to protect smaller fish.\textsuperscript{157} The reduced quotas in turn gave operators an incentive to target larger fish for the Japanese sashimi market which yielded much higher prices than the low-value domestic canning market, at which the Australian SBT fisheries had hitherto been mainly directed (though some of the catch was exported, principally to Italy, for further processing). In 1989 the South Australian fishery was reported to be “virtually dependent” on 3- and 4-year-old fish.\textsuperscript{158} By then over half the South Australian catch was exported to Japan as frozen or fresh sashimi, some transhipped to Japanese freezer vessels in the Great Australian Bight.\textsuperscript{159}

\textsuperscript{155} IAC, \textit{supra} n 70, at 24.

\textsuperscript{156} The Plan survived the repeal of the 1952 Act by virtue of s. 6(1) of the \textit{Fisheries Legislation (Consequential Provisions) Act 1991 (Cth)}, until it was replaced by the \textit{Southern Bluefin Tuna Fishery Management Plan 1995, supra} n 31.

\textsuperscript{157} Caton \textit{et al}, \textit{supra} n 36, at 33. The surface fishery off Western Australia had ceased altogether by 1996: “Review of Australia’s SBT Fisheries–1996” (Attachment J to CCSBT3(1) Report, \textit{supra} n 102).

\textsuperscript{158} \textit{Report of the Eighth Meeting of Australian, Japanese and New Zealand Scientists on Southern Bluefin Tuna, Shimizu, Japan, September 4-10, 1989} (hereinafter 8th Trilateral Scientific Meeting Report), in Trilateral Scientific Meeting Reports Compendium, \textit{supra} n 132, 47 at 47.

Perhaps the most innovative element of the 1984 Management Plan was the introduction of ITQs.\textsuperscript{160} As proposed by the IAC\textsuperscript{161} and implemented in 1984, these were in effect a new form of property right entitling the owner to a given share in perpetuity of whatever quota might henceforth be legislated for a season.

The SBT quota units were allocated as to 75 per cent on catch history (an individual’s best annual catch in the qualifying period expressed as a share of the sum of all individuals’ best catches) and as to 25 per cent on the current market value of vessels including fishing and navigation equipment. The latter was a proxy for investment in the fishery, designed to make ineligible those who had recently ceased fishing for SBT.\textsuperscript{162} Although the alienability of the rights was at first subject to restrictions, these were soon lifted, so that they could be transferred to any person (including by way of lease or encumbrance) irrespective of whether the acquirer owned a fishing vessel or had any history of participation in the SBT fishery.

The SBT fishery bears out the OECD’s conclusion that an ITQ system allows the same amount of fish to be harvested with less labour and capital, but is likely to create severe structural adjustment pressures.\textsuperscript{163} Despite the reduced quota, the 1985 to 1987 seasons failed altogether in New South Wales as a consequence of the near-disappearance of surface schools. This led to a major restructuring of the SBT fleet, with a considerable reduction in the number of vessels, most now based in South Australia, and the sale by New South Wales quota holders of most of their ITQs to ITQs remain in existence to this day as statutory fishing rights under the \textit{Fisheries Management Act 1991} (Cth), s 21 and cl 8 of the \textit{Southern Bluefin Tuna Fishery Management Plan 1995}, supra n 31. See also the definition of ITQ at <www.afma.gov.au/information/glossary.htm>, visited on 11 June 2008.

\textsuperscript{160} ITQs remain in existence to this day as statutory fishing rights under the \textit{Fisheries Management Act 1991} (Cth), s 21 and cl 8 of the \textit{Southern Bluefin Tuna Fishery Management Plan 1995}, supra n 31. See also the definition of ITQ at <www.afma.gov.au/information/glossary.htm>, visited on 11 June 2008.

\textsuperscript{161} IAC, supra n 70, at 36-37 and 44-45.

\textsuperscript{162} G. Geen, W. Nielander and T.F. Meany, “Australian Experience with Individual Transferable Quota Systems” in OECD, supra n 88, 73 at 79 and 81.

\textsuperscript{163} OECD, supra n 53, at 20. ITQs were soon extended to other species: Geen \textit{et al}, supra n 162, at 75.
South Australian operators.\textsuperscript{164} Since 1985 Australian catch has been close to the negotiated limit, demonstrating the effectiveness of the system in restraining catch.\textsuperscript{165}

Despite the stock’s poor condition, within two years of introduction of ITQs the number of vessels fell by 70 per cent and by 1989 the catching cost per tonne had fallen by 25 per cent.\textsuperscript{166} Resource rent was generated, the value of quota rising by “an order of magnitude” in a decade.\textsuperscript{167}

The introduction of ITQs also acted as an incentive to development of SBT mariculture. The incentive lay in the fact that no quota was needed to cover the weight gained by fish in the farms, since the amount removed from the parental biomass (and thus debited against the quota) through catching fish for farming is their weight when caught.\textsuperscript{168}

From 1990 to 1994 approximately half of the Australian quota was taken by Japanese longliners using Australian quota under a joint venture. A progressive increase in the proportion of SBT taken for the farms at Port Lincoln, whose intake of the species started in 1990-91 with 20 tonnes, began in 1992. The last disturbance to the stability of the Australian fishery was the ending of the joint venture in 1995. After this Australian catches again focused on the surface fishery in the Great Australian Bight from November to March, with poling operations supplying the sashimi market and purse seiners providing SBT to the Port Lincoln farms, which accounted by the 2001-02 season for over 99 per cent of the Australian quota.\textsuperscript{169} The number of

\textsuperscript{164} Caton \textit{et al.}, supra n 36, at 13, 34; see also \textit{infra} Ch V, text accompanying nn 1157-1159 for the SBT bycatch problems in the late 1990s of longliners operating off New South Wales.

\textsuperscript{165} Caton \textit{et al.}, supra n 36, at 33.

\textsuperscript{166} Geen \textit{et al.}, supra n 162, at 87.

\textsuperscript{167} \textit{Ibid.}, at 91; OECD, supra n 53, at 152.

\textsuperscript{168} A fuller description of how catch is accounted for is given \textit{infra} Ch V, text accompanying nn 1086-1184.

\textsuperscript{169} Attachment 8-1 to CCSBT-EC3 Report, \textit{supra} n 143, at 62; “Update of Australian Southern Bluefin Tuna Fishery for the 2001-02 Season” (Attachment 8-1 to \textit{Report of the Extended Commission of the Tenth Annual Meeting of the Commission}, 7-10 October 2003,
vessels involved is very small, having fluctuated between six and eight since the 1996 season. Domestic longline vessels, commonly 20-30 in number, are generally not dedicated SBT catchers and usually fish SBT predominantly in winter along with other tuna species in the area between the east coast of Tasmania and northern New South Wales.

2 The Japanese fishery

Offshore fishing operations began to receive official encouragement from the Japanese authorities in the 1880s, so that there would be adequate food supplies in years when the harvest of rice and other crops failed. Longline fishing developed in the late nineteenth century. Demand for tuna was low, however, and fishing for it was conducted close to Japan’s coast. Severe food shortages recurred in the 1940s and into the 1950s because of the loss of manpower and of 60 per cent of the Japanese tuna fleet in the Second World War. The Government therefore took measures to stimulate food production, including bringing the tuna fisheries under

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170 Attachment 8-1 to CCSBT-EC6 Report, supra n 141, at 8 (Table 4).

171 From 1992 to 1998 longliners operating off Tasmania and New South Wales took 5-10\% of the catch: Attachment 8-1 to CCSBT-EC3 Report, supra n 143, at 61. By 2006 there was no fishing for SBT off Tasmania: Attachment 8-1 to CCSBT-EC6 Report, supra n 141, at 11.

172 N. Fujinami, “Development of Japan’s Tuna Fisheries”, in D.J. Doulman (ed), Tuna Issues and Perspectives in the Pacific Islands Region (Honolulu: Pacific Islands Development Program, 1987), 57 at 57.

173 Ibid., at 58.

174 According to a chronicler of life in old Edo, tuna was formerly held in such low esteem that not even the poor would eat it, possibly because its warm flesh (see supra text at n 43) spoils quickly: S. Williams, “Understanding Japanese Seafood Markets” (1992) 51(2) Australian Fisheries 32 at 35n.
military control in 1942, and after 1945 fisheries production recovered rapidly as the Government promoted expansion of fishing grounds and subsidised vessel construction.

Starting from a complete prohibition on movement of Japanese fishing vessels in the aftermath of Japan’s surrender, the occupation authorities progressively extended the high seas areas in which Japanese vessels were permitted to fish. By 1950 the fish resources of the area within the outermost of these “MacArthur lines” were fully exploited. After this last spatial restriction ended in 1952 with the entry into force of the peace treaty with the Allied Powers, Japanese policy moved to encourage the development of distant-water fishing, including transfer of licences from the fully exploited offshore fisheries and encouraging construction of larger vessels. Catches of tuna rose quickly. By 1964 Japan’s distant-water tuna fleet was operating throughout the world, licensed vessel numbers reaching 3000 in 1965, of which about 1300 pole-and-line and longline vessels had no restrictions on their area of operation. The enlargement of the fleet and improvements in efficiency were driven by technological advances in boatbuilding, fish detection, vessel positioning,

175 Y. Matsuda, “Postwar Development and Expansion of Japan’s Tuna Fishery”, in Doulman (ed), supra n 172, 71 at 71.
176 Fujinami, supra n 172, at 58.
177 Matsuda, supra n 175, at 72. H.N. Scheiber, “Origins of the Abstention Doctrine in Ocean Law: Japanese-U.S. Relations and the Pacific Fisheries, 1937-1958”, (1989) 16 Ecology Law Quarterly 23 at 40ff describes how, as part of the general program of economic revival, the resumption of fisheries was actively encouraged by occupation authorities, not only to promote self-sufficiency in food which was one of its priorities, but later also, with the onset of the Cold War, for geopolitical reasons.
178 Treaty of Peace with Japan (done at San Francisco, 8 September 1951) 136 UNTS 45; ATS 1952 No 1.
179 Fujinami, supra n 172, at 58-59. Licensing requirements applied to longliners and pole-and-line vessels of more than 20 gross registered tons (GRT) and purse seiners above 40 GRT. Other than longliners and pole-and-line vessels of more than 120 GRT, the Government restricted tuna vessels’ area of operation in order to ensure their safety, avoid concentration of fishing effort and assist orderly marketing of the catch: ibid., at 65.
navigation, ship-to-shore communication and post-harvest handling. In the late 1960s improvements in freezing technology enabled the fleet to shift from supplying canneries to production of sashimi-grade tuna. Soon afterwards, however, the longline fleet became uneconomic at its then size owing to a number of factors: rising fuel and (because of Japan’s rapid post-war economic growth) crewing costs, declining catch rates and changing food consumption patterns. A specifically legal factor exacerbating this trend was the extension of coastal State jurisdiction under the new concept of the EEZ, resulting in closure of many areas to fishing and payments for access to those areas that remained open. Distant-water vessel numbers were reduced by 20 per cent in 1980, accounting for much of the fall between 1970 and 1984 from 997 to 762, though proportionately an even greater fall was recorded in offshore longliners.

The first Japanese vessels to fish for SBT began doing so in 1952, south of Java on the SBT spawning grounds, as soon as the last MacArthur line was lifted. The Japanese longline fishery spread gradually into most areas of the southern Indian, Pacific and Atlantic Oceans, extending at its peak from 10ºE to 170ºW with concentrations off Western Australia, South Africa, Tasmania, New Zealand where SBT could be found. The main longline fishing grounds shifted seasonally in line with changes in ocean conditions. After monthly sea surface temperature charts were introduced as an aid in locating fish, the efficiency of fishing operations rose.

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180 Ibid., at 59.
181 Ibid., at 60-61. In the case of SBT the shift to sashimi grade took place in 1972; until then SBT was used for teriyaki and fish sausages: IAC, supra n 70, at 87 (evidence of the Executive Director of the Federation of Japan Tuna Fisheries Co-operative Associations).
182 According to Matsuda, supra n 175, at 86, in 1977 48% of Japan’s catch of tunas other than skipjack was taken within 200 nautical miles of other States’ coasts.
183 Ibid., at 77; Fujinami, supra n 172, at 61-63.
184 Matsuda, supra n 175, at 84.
185 Ibid., at 78; Caton et al, supra n 36, at 13; Collette and Nauen, supra Introduction n 2, at 88.
186 Collette and Nauen, supra Introduction n 2, at 88.
both 1960 and 1961 catches in excess of 75,000 tonnes were recorded, after which the catch fluctuated for the next decade around 40,000 tonnes with occasional spikes to 50,000 or 60,000 tonnes.\textsuperscript{187} By 1970 the fleet was 1200 vessels strong, including over 300 specialist SBT boats that shifted between the Indian and South Atlantic Oceans depending on where fishing conditions were better,\textsuperscript{188} but the decade that followed saw further decline in annual catch to around 30,000 tonnes and falling economic returns, together leading to a reduction in vessel numbers by 20 per cent.

The decline in the catch rate of SBT (catch per unit of effort, hereinafter CPUE) was even greater. From 1961 to 1987 Japanese effort rose from 30 million to 110 million hooks, meaning that the catch rate declined by around 95 per cent over that period.\textsuperscript{189} The fall in abundance may have been greater still once the fleet’s growing efficiency is taken into account.\textsuperscript{190} After Japanese scientists reported that the mean density of spawning adults had been decreasing since the early 1960s and by 1967-68 had fallen by nine tenths on the spawning ground itself, in 1971 the Japanese fleet voluntarily.

\begin{itemize}
\item \textsuperscript{187} See Table 1 supra.
\item \textsuperscript{188} Caton \textit{et al}, supra n 36, at 13; \textit{Reports of the Standing Committee on Research and Statistics (SCRS), Puerto de la Cruz, Tenerife, November 5-10, 1981} (Annex 8 to \textit{Proceedings of the Seventh Regular Meeting of the Commission}), in International Commission for the Conservation of Atlantic Tunas (hereinafter ICCAT), \textit{Report for biennial period, 1980-81 (Part II 1981)}, 108 at 138. A significant part of Japan’s catch continues to be taken in the south-east Atlantic in some years, e.g. 1,205 tonnes in 2000: “National Report of Japan”, in ICCAT, \textit{Report for biennial period, 2002-03 Part II (2003) - Vol.3} (hereinafter ICCAT Green Book 2004/3), 53 at 61 (Table 3). The table shows that 2,506 tonnes of SBT were caught in the Atlantic in 1981, and over 1,000 tonnes in ten of the next twenty years, the highest figure being 1,688 tonnes in 1993, and the lowest 301 tonnes in 1997.
\item \textsuperscript{189} According to Caton \textit{et al}, supra n 36, at 17, CPUE is frequently used as a surrogate measure of fish abundance, although it is not necessarily directly proportional to it. The Japanese longline fishery expresses its CPUE as the number of SBT caught per 1,000 hooks set.
\item \textsuperscript{190} \textit{Ibid.}; on the increase in efficiency over time see also the oral submissions to ITLOS of Professor Crawford, Counsel for Australia, on 18 August 1999: ITLOS doc ITLOS/PV.99/21/Rev.2, available online at \texttt{<www.itlos.org/case_documents/2001/document_en_140.pdf>} (hereinafter Transcript for afternoon of 18 August), at 15.
\end{itemize}
adopted a seasonal closure south of the spawning area in order to protect migrating spawning fish.\textsuperscript{191} In line with the scientists’ views that the exploitation of younger fish was too high, similar closures were observed in areas off southern New South Wales, South Australia and South Africa where immature fish were predominant.\textsuperscript{192} Of greater concern to Japanese scientists, on the feeding grounds effort continued to grow during the 1970s, though there too catch rates declined.\textsuperscript{193} Japanese regulation was less effective than expected, with recruitment maintained to the surface fisheries but declining to the longline fishery harvesting fish four years and older.\textsuperscript{194}

In response, the Japanese vessels began to concentrate their effort spatially, fishing only the historically more productive locations, an additional factor tending to make raw CPUE figures overestimate actual abundance. The Japanese industry was unable to fill its quota despite the marked downward trend in the quota allocations to Japan when they commenced in 1985. Data from the Japanese and joint venture longline


\textsuperscript{192} Caton et al, supra n 36, at 31; Collette and Nauen, supra Introduction n 2, at 88.

\textsuperscript{193} Caton et al, supra n 36, at 19, 31.

\textsuperscript{194} Annex 9 to ICCAT5 Report, supra n 191, at 150. Recruitment is defined as the amount of fish added to the fishery each year by becoming vulnerable to the fishing gear through growth or migration into the fishing area “Definition of Technical Terms” (Appendix 12 to Report of the Standing Committee on Research and Statistics (SCRS) (Madrid, October 9-13, 1995)), in ICCAT, Report for biennial period, 1994-95 Part II (1995) - Vol.2 (hereinafter ICCAT Green Book 1996/2), 158 at 162.
fishery\textsuperscript{195} within the Australian Fishing Zone (AFZ) also showed hook rates down in the late 1980s to only half their level of a decade earlier. Although a 50 per cent increase was reported in the AFZ in the later years of the decade, possibly a result of the fall in fishing mortality from the Australian surface fishery as a consequence of the sharply reduced Australian quotas,\textsuperscript{196} the evidence was inconclusive. This was because no similar improvement in the numbers of small fish occurred in the New Zealand fishery,\textsuperscript{197} and oceanographic conditions of the time or behavioural changes owing to the reduced abundance cannot be ruled out as causes.\textsuperscript{198}

The catch composition of the longline fishery substantially changed in the 1990s; fish larger than 120cm made up the bulk of the catch (by number) in previous decades (74 to 88 per cent), but in the early 1990s fish of that size accounted for only 48 per cent of the catch.\textsuperscript{199} The number of Japanese vessels fishing for SBT has continued to fall since the 1990s. In successive fishing seasons from 1998 it was 257, 227, 199, 227, 224, 221, then 222 in 2004 and fell sharply to 168 in 2005.\textsuperscript{200} In 2003 Japan reported a severe decline in the price of tuna, caused by a fall in demand as a consequence of Japan’s long economic recession and the continued high level of tuna imports.\textsuperscript{201} From 1 April 2006, in response to the revelations of persistent past overcatches, Japan instituted a system of individual vessel quotas, allocating them to

\begin{itemize}
\item \textsuperscript{195} See text following n 165 \textit{supra}.
\item \textsuperscript{196} Caton \textit{et al}, \textit{supra} n 36, at 20.
\item \textsuperscript{197} \textit{Ibid.}, at 22.
\item \textsuperscript{198} \textit{Ibid.}; see also the oral submissions of Professor Crawford, Counsel for Australia, to ITLOS on 18 August 1999 (\textit{supra} n 190, at 21).
\item \textsuperscript{199} 13th Trilateral Scientific Meeting Report, \textit{supra} n 46, at 9 (Appendix 1, “Status of the stock and fishery indicators”, paragraph 6).
\item \textsuperscript{200} “Review of Japanese SBT Fisheries in the 2005 Fishing Season” (Attachment 12-5 to CCSBT-EC5 Report, \textit{supra} n 102), at 2.
\item \textsuperscript{201} “Review of Southern Bluefin Tuna Fisheries of Japan in the 2003 Fishing Season” (Attachment 8-3 to CCSBT-EC2 Report), in CCSBT Blue Book 2004, \textit{supra} n 32, 74 at 74.
\end{itemize}
142 vessels for that year, of which 133 actually fished, with landing of SBT restricted to eight designated ports.\textsuperscript{202}

\section{The New Zealand fishery}

SBT is seasonally present in New Zealand waters from March or April until July.\textsuperscript{203} The New Zealand domestic SBT fishery began much later than those of Australia and Japan: not until 1980 was a small specialised winter fishery developed off the South Island’s west coast for sashimi-grade fish chilled and air-freighted to Japan.\textsuperscript{204} SBT were caught by trolling and handlines from small vessels in inshore waters.\textsuperscript{205} Catch was limited at first by a quota of 5,000 fish up to 1982 and then of 10,000 fish in 1983 to 1985. Although a development quota of 1,000 tonnes was reserved for New Zealand in the 1985 trilateral negotiations\textsuperscript{206} and came into effect for 1986, actual take peaked at 305 tonnes in 1982 and fell below 100 tonnes every year from 1984 to 1988.\textsuperscript{207} The substantial increase to 437 tonnes in 1989 is attributed to the start of a longlining joint venture with Japanese interests that yielded 290 tonnes, and the introduction of monofilament longlining from small vessels.\textsuperscript{208}

Surface longlining accounted for 96 per cent of fishing in the 1990s. At first much of it was carried out by Japanese longliners using Japanese quota, but declining catch rates, shortened seasons of availability and increased operating costs resulted in the

\textsuperscript{202} Appendix 3 to Attachment 12-5 to CCSBT-EC5 Report, \textit{supra} n 102; Attachment 8-3 to CCSBT-EC6 Report, \textit{supra} n 141, at 1.

\textsuperscript{203} “Review of New Zealand SBT Fisheries” (Attachment 8-4 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, \textit{supra} n 34, 75 at 75.


\textsuperscript{205} Caton \textit{et al}, \textit{supra} n 36, at 16.

\textsuperscript{206} See \textit{infra} Ch II n 335 and accompanying text.

\textsuperscript{207} See Table 1 \textit{supra} and Caton \textit{et al}, \textit{supra} n 36, at 21 (table) and 32.

\textsuperscript{208} Caton \textit{et al}, \textit{supra} n 36, at 9 (table) and 16.
cessation of such operations in the middle of the decade. Since then, the domestic fishery has comprised a wide range of vessel types from small owner-operated boats to a number of longliners chartered by a New Zealand company that are otherwise part of the Japanese distant-water fleet. All fish of suitable quality are exported to the Japanese sashimi market, domestic consumption of SBT being negligible.\(^{209}\)

In the 1996 season around 60 operators were active, mostly small owner-operated vessels which caught less than three tonnes. These did not venture far from their home ports and supplied the fresh SBT markets in Japan. In addition, several medium-to-large domestic longliners, some with freezer capacity, entered the fishery. This led to an expansion in both areas and seasons fished, although in 1997 over 90 per cent of domestic landings were still made from June to August. Only 30 domestic vessels were active in 1997 despite the reactivation of charter arrangements between New Zealand and Japanese companies. From the early 1990s nearly all fishing was conducted either off the west coast of the South Island or off East Cape on the North Island, though SBT is also taken as bycatch in the bigeye tuna fishery in the Bay of Plenty.\(^{210}\) By 2002 the number of vessels targeting tunas had increased to over 150, mostly small, though in 2003 it fell to 132.\(^{211}\)

In 2003 New Zealand announced that SBT would come under its Quota Management System – a form of ITQ – on 1 October 2004.\(^{212}\) Its 420-tonne allocation from the CCSBT was split among commercial catch of 413 tonnes, recreational take (4

\(^{209}\) “Review of New Zealand SBT Fisheries for CCSBT-7” (Attachment F-3 to CCSBT7 Report), in CCSBT Blue Book 2002, \textit{supra} n 30, 40 at 42.

\(^{210}\) “Review of SBT Fisheries – New Zealand” (Attachment I to CCSBT3(1) Report, \textit{supra} n 102), at 1; “Annual Review of New Zealand SBT Fisheries” (Attachment N to CCSBT4(1) Report), in CCSBT Blue Book 1999, \textit{supra} n 126, 41 at 41; Attachment F-3 to CCSBT7 Report, \textit{supra} n 209, at 41.

\(^{211}\) CCSBT-ESC2 Report, \textit{supra} n 32, at 114 (paragraph 13); “Review of New Zealand SBT Fisheries for the 10\(^{th}\) Annual CCSBT Meeting” (Attachment 8-4 to CCSBT-EC2 Report), \textit{ibid.}, 78 at 79; Attachment 8-4 to CCSBT-EC3 Report, \textit{supra} n 203, at 77.

\(^{212}\) Attachment 8-4 to CCSBT-EC2 Report, \textit{supra} n 211, at 78.
tonnes), customary take by Maori (1 tonne, despite no estimates being available of past catches of this nature) and other fisheries-related mortality (2 tonnes). As a result a rationalisation of fishing effort took place, with the number of fishing vessels catching SBT falling to 58 in the 2005 fishing year and 57 in that of 2006 (with only two chartered vessels), and the fishing season shifting to slightly later in the year to target SBT when they were in the best condition, particularly off East Cape.

4 Catches by others

The CCSBT Scientific Committee estimated in 1997 that catch in 1996 by States not party to the 1993 Convention was between 4136 and 4937 tonnes. Limiting the catches by these new entrants to the SBT fishery became a notable preoccupation of Australia, Japan and New Zealand. Their prolonged inability to do so was a significant factor contributing directly to their disagreement over the TAC in the second half of the decade and indirectly to the dispute of 1998-2001, in which it also became an issue.

In the middle and late 1970s, Korean and Taiwanese distant-water longline operators entered the sashimi fishery targeting bigeye and yellowfin tuna, often purchasing Japanese vessels second hand or with support from Japanese trading companies. Incidental catches of SBT by vessels from Indonesia, the Republic of Korea, South Africa and Taiwan were recorded up to the 1980s but in the 1990s the catches of

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213 Attachment 8-4 to CCSBT-EC3 Report, supra n 203, at 76 and 79.
214 “Review of New Zealand SBT Fisheries” (Attachment 12-4 to CCSBT-EC5 Report, supra n 102), at 2-3 and 6 (Table 2); Attachment 8-4 to CCSBT-EC6 Report, supra n 141, at 7 (Table 2).
216 Discussed in Appendix A infra.
217 M.J. Riepen, “Distant-Water Tuna Longline Fishery”, in Doulman (ed), supra n 172, 161 at 164.
218 IAC, supra n 70, at 7.
all but South Africa increased considerably. Although SBT’s range extends far enough for it perhaps to be vulnerable to fisheries based on the east coast of South America, such catches in this region are poorly documented and are likely to have been insignificant, although the mean catch of 38 tonnes of undifferentiated bluefin reported by Brazil between 20° S and 35° S in 1956-71 could well have been SBT.

Korea began exploratory distant-water longlining for tuna in the Indian Ocean in 1957 and its fleet reached 200 vessels in 1975. Its catches of SBT were significant in the early and mid-1970s but were almost nil in the 1980s. The Korean sashimi fleet reached a maximum size of 219 vessels in 1980 before the Japanese Government introduced restrictions on the export of second-hand vessels. In 1985 60 of the 156 vessels still operating worked in the Indian Ocean. Korean longliners shifted southwards from tropical tuna fisheries and began to target SBT in the southern Indian Ocean from 1991; their numbers fluctuated between one and three until 1995, grew to eight in 1996 and 19 in 1998 before declining to 16 in 1999, 13 in 2000 and ten in both 2001 and 2002, while catches reached a maximum of 1,562 tonnes in 1998. The decline after 1998 was attributed to voluntary regulation of fleet size to respect the CCSBT catch limits, but also to the shift of Korean longliners from the Indian to the Pacific Ocean where fishing for other

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219 See Table 1 supra.


221 Riepen, supra n 217, at 167.

222 See Table 1 supra. Caton, supra Introduction n 16, at 362 doubts the low 1980s catches because other fleets caught SBT in the areas and months where the Korean fishing took place.

223 Riepen, supra n 217, at 168.

224 “Korean SBT Longline Fishery” (Attachment 8-5 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, supra n 34, 83 at 85 (Table 1); “Annual Review of SBT Fisheries by Republic of Korea” (Attachment K-3 to CCSBT8 Report), in CCSBT Blue Book 2002, supra n 30, 115 at 115.
species was more profitable.\textsuperscript{225} By 2003 the number of vessels had declined to four and catch to 254 tonnes.\textsuperscript{226} There were six vessels in 2004, seven in 2005 and nine in 2006, but the catch fell further to 33 tonnes (processed weight) in 2005, most of their catch being of other species, before recovering somewhat to 130 tonnes in 2006.\textsuperscript{227} SBT had represented 95.2 per cent of the catch of the vessels targeting it in 1999 and 90 per cent of those doing so in 2002.\textsuperscript{228}

Until 1993 most fishing was in the south-eastern Indian Ocean, but from 1994 some longliners extended their operations to waters off the southern tip of Africa and further west into the south-eastern Atlantic. Fishing was broadly concentrated in three areas: one in November and December off Western Australia between the latitudes of 35°S and 45°S and longitudes 90°E and 110°E, a second off South Africa between the same latitudes and longitudes 25°E and 50°E from March to July or August, and a third occasionally also between the latitudes of 40°S and 45°S and

\textsuperscript{225}“Annual Review of Korea’s SBT Fisheries for the Annual Commission Meeting” (Attachment 8-5 to CCSBT-EC2 Report), in CCSBT Blue Book 2004, \textit{supra} n 32, 84 at 84; Attachment 8-5 to CCSBT-EC3 Report, \textit{supra} n 224, at 83.

\textsuperscript{226}Attachment 4 to CCSBT-ESC4 Report, \textit{supra} n 141.

\textsuperscript{227}Attachment 12-2 to CCSBT-EC5 Report, \textit{supra} n 141, at 1-2; Attachment 8-5 to CCSBT-EC6 Report, \textit{supra} n 141, at 1-2.

longitudes 5°E and 10°E, catches in the last two areas being taken as late as October in 2004 and 2005.229

Taiwanese vessels did not move to the Indian Ocean until the mid-1970s, but concentrated their fishing effort for sashimi-grade tuna there from the late 1970s.230 Numbering 130-140, they caught SBT mostly in the Indian Ocean between the latitudes of 20°S and 40°S, that is, on grounds somewhat to the north of those favoured by the Japanese fleet, where both SBT and less valuable tropical tuna species are to be found. Their catches reached 1000 tonnes in 1989 and averaged 1387 tonnes per annum in the years 1996 to 2000.231 In 1994 41 vessels caught more than 10 tonnes and in 1995 49 vessels did so. After 1993, Taiwan’s SBT landings were estimated based on sales records and certified weight reports from the Japanese surveyors’ association. Catches of SBT were reported as “bluefin tuna” before 1994 and Taiwanese logbooks began to use the term SBT only at the end of that year.232 Fishing on the spawning ground is prohibited.233 Vessels targeting SBT tended to do so around latitude 35°S in two distinct seasons annually.234 In 2002 71 per cent of the annual quota was allocated to the seasonal directed fishery vessels, and the remainder to bycatch vessels; the 2002 catch was taken by 60 vessels although 152 were registered for 2003, of which 101 took the catch for that year, with 134

229  Ibid., at 2; Attachment 8-5 to CCSBT-EC2 Report, supra n 225, at 85.
230  Riepen, supra n 217, at 169-170.
232  “Review of SBT Fisheries – Taiwan” (Attachment K to CCSBT3(1) Report, supra n 102), at 1-2.
registered for 2004. Some of the fish reported by Taiwan as SBT were caught off the South American coast, which the CCSBT’s Scientific Committee considered were likely to be ABT, a matter it asked Taiwan to investigate further. In 2006 only 36 vessels caught SBT, the preliminary estimate of their catch being 963 tonnes, up from 941 tonnes in 2005. 93 per cent of this was from the southern and central Indian Ocean and the remainder from its south-western extremities.

In the case of Indonesia, its take of SBT, though largely on the spawning ground, has been as bycatch in its bigeye tuna fishery, described as a “minor longline fishery” tending to catch “very large” SBT. In recent years, however, some targeting of SBT by vessels owned by Taiwanese interests has taken place. Catches by Indonesia are monitored through port sampling, including exports to Japan, which

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235 Attachment 8-2 to CCSBT-EC3 Report, supra n 233, at 68; Attachment 8-2 to CCSBT-EC2 Report, supra n 231, at 70-71.
236 CCSBT-ESC3 Report, in CCSBT Blue Book 2005, supra n 34, 164 at 166 (paragraph 11). Catch data submitted to ICCAT in 2002 indicated that a portion of Taiwan’s catch of SBT was taken in the Atlantic: the highest was 472 tonnes in 1993, but in six out of the following eight years was in the range 150-250 tonnes: “National Report of Chinese Taipei”, in ICCAT Green Book 2003/3, supra n 228, 112 at 114 (Table 1). In 2004 the figures underwent substantial revision, to show 1995 as the peak year for SBT catch in the Atlantic of 584 tonnes, one of only four years since 1991 in which it was over 100 tonnes, the most recent being 2001 (223 tonnes): Fisheries Agency, Council of Agriculture, “Annual Report of Chinese Taipei”, in ICCAT, Report for Biennial period 2004-05 Part I (2004) - Vol.3, 135 at 142 (Table 1). A fifth such year, 2003 (170 tonnes) appears in the equivalent table in Fisheries Agency, Council of Agriculture, “Annual Report of Chinese Taipei”, in ICCAT, Report for Biennial period 2006-07 Part II (2007) - Vol.3, <www.iccat.int/Documents/BienRep/REP_TRI%20LINGUAL_06-07_H1_3.pdf> (visited on 26 October 2008), 195 at 204 (Table 1).
239 In Attachment F-5 to CCSBT7 Report, supra n 234, at 47, Taiwan attributed 274 tonnes of its catch in 1999 and 241 tonnes in 2000 to SBT “in fresh form probably from those small longliners that have entered into fisheries cooperation with Indonesia”.

are cross-matched against Japanese import statistics. There are frequently discrepancies, and the size of Indonesia’s catch became one of the major disagreements among the parties after the end of the 1998-2001 dispute. In recent years there have been indications that some Indonesian vessels have moved to the high seas, and that since 2004 as a first step towards controlling its catches Indonesia has begun monitoring them in collaboration with a number of Australian Government and international bodies.

In South Africa, commercial longlining for tunas started in the early 1960s, with combined catches of up to 1,800 tonnes of albacore, SBT and bigeye tunas, but this fishery ceased within the decade because tunas at that time fetched poor prices and development of other fisheries was more lucrative. Catches of SBT in coastal

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240 For example, in 1995 catches as monitored were estimated at 724 tonnes, of which 361 tonnes were exported to Japan, but only 221 tonnes were recorded by Japan as imports of SBT from Indonesia: Report of the Second Meeting of the CCSBT Scientific Committee, Hobart, Australia (26 August – 5 September 1996), Report to the Commission, 23 September 1996 (Attachment N to CCSBT3(1) Report, supra n 102, hereinafter CCSBT-SC2 Report), at 3.

241 CCSBT-EC6 Report, supra n 141, at 35 (paragraph 186).

waters totalled over 1,500 tonnes from 1960 to 1968. South Africa submitted very brief annual reports on its tuna fisheries to the International Commission for the Conservation of Atlantic Tuna Commission (hereinafter ICCAT) in the 1970s and 1980s, which mostly laconically recorded the catch of all species combined as “well below 1000 tonnes”; the proportion of “bluefin” (which may be assumed to be SBT) was specified only in one year, as 1 per cent; more often the preponderance of other species was noted. Even when the catch grew markedly in 1979, no SBT were recorded. In 1991 ICCAT was advised by its Standing Committee on Research and Statistics that South Africa’s catch of SBT was 13 tonnes in 1980, 6 tonnes in 1981, less than half a tonne in 1982, then nothing until 1 tonne in 1989; there were again no SBT caught in 1990-96. In the early 1990s the local fleet began to express interest in developing a South African fishery for sashimi-grade tunas and swordfish. A single experimental longline permit was issued to a South African and Japanese joint venture; in 1997 30 such permits were allocated, 23 in both 1998 and 1999, 27 in 2000, 25 in 2001, with 22 vessels active in South African waters, rising to 23 in

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243 “Opening Statement by the Republic of South Africa” (Attachment 5-2 to CCSBT-EC6 Report, supra n 141), at 1.
244 Only 1% of the tuna catch in the austral summer of 1974-75 of “well below 1,000 metric tons”, was SBT: “Review of National Fisheries and Research Activities – South Africa” in ICCAT, Report for Biennial period 1974-75 Part II (1975) (hereinafter ICCAT Green Book 1976), 216; if the 1% figure is taken as rounded to the nearest whole number, then the SBT catch must have been “well below” 15 tonnes.
2002-04, since when the fishery has been operating commercially.\(^{246}\) From 1997 to 2001 total SBT catch was only 6.7 tonnes (of which more than half occurred in 2000), rising to 17.8 tonnes, 14.7 tonnes and 19.0 tonnes successively in 2002-04.\(^{247}\)

The Philippines fishing industry first took SBT as bycatch in 1997, and in 2002 45 tonnes were recorded as imports into Japan, while in the first half of 2005, of the 25 vessels licensed to catch SBT, only three did so, resulting in export to Japan of about 24.5 tonnes.\(^{248}\) Its take of SBT (43 tonnes in 2006\(^ {249}\)) is all bycatch, a side-effect of incentives provided by the Philippines Government since 1998 to domestic operators to fish in the outer reaches of the Philippines EEZ, which also encouraged them to venture into the Atlantic and Indian Oceans.\(^ {250}\) Since it became a cooperating non-member of the CCSBT in 2004, the Philippines’ catch has been subject to a quota.\(^ {251}\)

In 2004 there was an unconfirmed report of a small catch (5 tonnes) by European vessels.\(^ {252}\) This was revised to between 1 and 3.4 tonnes (all bycatch) when the


\(^{247}\) CCSBT-EC6 Report, supra n 141, at 10 (paragraph 56).


\(^{249}\) CCSBT-EC6 Report, supra n 141, at 9 (paragraph 55).

\(^{250}\) “Report of the Philippines” (Attachment 8-6 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, supra n 34, 88 at 88.

\(^{251}\) See infra Ch IV, text at n 789.

\(^{252}\) CCSBT-ESC3 Report, supra n 236, at 174 (paragraph 51).
European Community attended its first CCSBT meeting in 2006, at which it sought cooperating status and, noting that it did not target SBT, asked for “cooperation quota” sufficient to allow it to continue its southern ocean shark and swordfish fisheries in which the “unavoidable” bycatch occurred. It was granted that status and accepted a quota of 10 tonnes.  

Vessels of other nationalities that have taken SBT in quantities sufficient to cause concern in the past to the major participants in the fishery are Belize, Cambodia, Equatorial Guinea and Honduras.

**D First interactions**

In the late 1960s Japanese scientists began to express concern in the Indo-Pacific Fisheries Council (as the Asia-Pacific Fishery Commission then was) and later the Indian Ocean Fishery Commission (IOFC) and both bodies’ tuna management committees that the Australian SBT fishery developing on juveniles was an obstacle

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253 CCSBT-EC5 Report, *supra* n 102, at 15-17 (paragraphs 82 and 91-94); see also Attachment 6-1 (“Opening Statement by the European Community”).


255 Established by the Agreement for the Establishment of the Indo-Pacific Fisheries Council, done at Baguio (Philippines) on 26 February 1948; 120 UNTS 59; ATS 1949 No 4.

to their own proposals to increase the size of fish caught in the Japanese longline fishery.\textsuperscript{257} Initially this did not lead to action by any State, but a “special southern bluefin tuna working party” of Australian and Japanese scientists was convened at Japan’s Far Seas Fisheries Research Laboratory in June 1975,\textsuperscript{258} which led the following year to a cooperative study of Australian and Japanese scientists.\textsuperscript{259} A special Working Group on Stock Assessment of the two commissions concluded that longline fishing intensity was high and the stock was being heavily exploited.\textsuperscript{260}

membership of IOFC to all Member Nations and Associate Members of FAO. With the IOTC’s establishment, the IOFC lost much of its raison d’être and in June 1999 was abolished by Resolution 1/116 of the FAO Council (reprinted at paragraph 124 of the \textit{Report of the Hundred and Sixteenth Session of the Council, Rome, 14-19 June 1999} (FAO doc CL 116/REP).<\texttt{www.fao.org/docrep/X2372E/X2372e02.htm#A}> (visited on 11 June 2008).

\textsuperscript{257} \textit{Caton et al, supra n 36}, at 18, 31. Institutional arrangements for the management of tuna fisheries in the Indian Ocean were first discussed in 1970 and sporadically thereafter, though it was not until the mid-1980s that serious consideration of the issue began in the Committee on Management of Indian Ocean Tunas (CMIOT) of the now defunct IOFC, prompted by the rising catches and increased fishing by vessels from distant-water fishing States and the growing availability of scientific information on which to base management measures. IOFC did not have regulatory powers, but was merely a forum for the exchange of scientific information and making non-binding recommendations to member governments. Its meetings were relatively rare and discussion of SBT haphazard, though at the Eighth and Ninth Sessions Australia reported on some of the developments mentioned in this chapter: \textit{Report of the eighth session of the Indian Ocean Fishery Commission, Bangkok, 2-6 July 1985} (FAO Fisheries Report No 341; Rome: FAO, 1985), at 7 (paragraph 47); \textit{Report of the ninth session of the Indian Ocean Fishery Commission, Mahé, Seychelles, 2-6 October 1989} (FAO Fisheries Report No 436; Rome: FAO, 1990), at 16 (paragraph 105). CMIOT’s subsequent meetings were more notable for the fact that it was largely here that the IOTC Agreement had its genesis. See generally J.J. Kambona and S.H. Marashi, \textit{Process for the Establishment of the Indian Ocean Tuna Commission} (FAO Fisheries Circular No 913; FAO: Rome, 1996), at 6-8 (paragraphs 17-22).


\textsuperscript{260} \textit{Ibid.}, at 102.
The interactions of the Australian and Japanese fisheries were complex. Composed of immature fish, Australia’s large surface fishery catches did not immediately affect the parental biomass, as it took several years for the removal of young fish to be reflected as reduced survival to maturity. Conversely, the benefit of a surface fishery catch restriction would not have been observed as an improvement in parental biomass for several years. In contrast, because the longline fishery catch, which comprised predominantly adult SBT, had an immediate impact on parental biomass, reducing longline catches would have reduced in severity or prevented the further decline in parental biomass. The mid-1980s trilateral scientific reports showed that each tonne of surface fishery catch was then having roughly the same impact on parental biomass as 2.25 tonnes of longline catch because of the far greater number of fish per tonne of surface catch. Australian scientists denied, however, that the low level of parental biomass was solely attributable to surface fishery catches, arguing that since the fishery commenced, the longline fishery had cumulatively caused almost twice the decline attributable to the surface fishery.\textsuperscript{261}

The decisive factor in internationalising the management of the fishery was the expansion in the 1970s of coastal State jurisdiction during the Third UN Conference

\textsuperscript{261} Caton \textit{et al}, \textit{supra} n 36, at 28. The ratio of 2.25:1 is consistent with the slope of the dotted line in Figure 1 in \textit{Report of the 5th Meeting of Australian, Japanese and New Zealand Scientists on Southern bluefin tuna (SBT), Shimizu, Japan, June 10-14, 1986}, in Trilateral Scientific Meeting Reports Compendium, \textit{supra} n 132, 25 at 30. The scientists’ equation in the two previous years of the effect on the parental biomass of surface catch of 11,000 tonnes and 26,000 tonnes of longline catch given the 1981 age composition of the stock, with 14,500 tonnes each of surface and longline catch (\textit{Report of the Third Tripartite Scientific Meeting on Southern Bluefin Tuna, Canberra, 28 May 1984} (hereinafter 3rd Trilateral Scientific Meeting Report), in Trilateral Scientific Meeting Reports Compendium, \textit{supra} n 132, 11 at 15) implies a ratio of roughly 3.3:1 at the margin, and subsequently of 13,500 tonnes of surface catch and 27,000 tonnes of longline catch with 18,000 tonnes each of surface and longline catch (\textit{Report of the Fourth Tripartite Scientific Meeting on Southern Bluefin Tuna, Wellington, 15-18 July 1985}, \textit{ibid.}, 19 at 20) of 2:1.
on the Law of the Sea, ultimately finding its expression in Part V of UNCLOS on the EEZ. The declaration of the New Zealand EEZ in 1977,262 followed in 1979 by Australia’s proclamation of the AFZ,263 meant that the Japanese SBT fleet could henceforth operate in those zones only by agreement of the coastal States. In 1978 New Zealand and Japan negotiated a fisheries treaty providing for access of Japanese longliners to the New Zealand EEZ; originally of four years’ duration, it was extended by a series of exchanges of notes until 1997.264 A similar Agreement on Fisheries followed in 1979 between Australia and Japan, along with the first of a long series of annual Subsidiary Agreements setting out the terms on which Japanese longline fishing vessels could fish for tuna in the AFZ.265

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262 Territorial Sea and Exclusive Economic Zone Act 1977 (NZ), s 9.
263 Commonwealth of Australia, Gazette S189 (26 September 1979), Schedule, taking effect on 1 November 1979. The legislative authority for this proclamation was created a year earlier by ss 3 and 6 of the Fisheries Amendment Act 1978 (Cth).
265 Agreement on Fisheries between the Government of Australia and the Government of Japan and Subsidiary Agreement between the Government of Australia and the Government of Japan concerning Japanese Tuna Long-Line Fishing (Canberra, 17 October 1979; 1217 UNTS 3 (Head Agreement), 19 (Subsidiary Agreement); together published as ATS 1979 No 12). They entered into force on 1 November 1979, the day on which the AFZ came into effect (supra n 263). A further 17 subsidiary agreements covering individual fishing seasons were negotiated in most of the succeeding years up to 1997, all entitled Subsidiary Agreement concerning Japanese Tuna Long-Line Fishing and all done at Canberra except where otherwise noted:

(i) 30 October 1980 (1217 UNTS 40; ATS 1980 No 21)
(ii) 29 October 1981 (1342 UNTS 3; ATS 1981 No 22)
(iii) 28 October 1982 (1342 UNTS 41; ATS 1982 No 18)
Under these new arrangements, small SBT were targeted in the Great Australian
Bight south of 35°S in April and May, fish of varying sizes off the south coast of
New South Wales and off New Zealand from June to September and large fish off
Tasmania from November to January. With complete closure of some areas and
seasonal closures or limits on vessel numbers in others under the new arrangements,
less than 20 per cent of Japan’s total catch was taken in the AFZ, while catches
through the 1970s in or near what became New Zealand’s EEZ averaged about 5,500
to 100,000 fish. Over the course of the 1980s these area closures were
gradually tightened, the Tasmanian component being least affected. 266

After preliminary scientific discussions that Australia held separately in the early
1980s with Japan and New Zealand, the three States began trilateral scientific and
management discussions in 1982. 267 Illustrating the point that the game theoretical
conditions influencing the domestic fishery apply equally at the international level, in
1984 the IAC was prepared to endorse the Government’s belief that a unilateral catch

(iv) 31 October 1983 (1424 UNTS 85; ATS 1983 No 11)
(v) 30 October 1984 (1426 UNTS 29; ATS 1984 No 29)
(vi) 31 October 1985 (1430 UNTS 9 (title page) and 22 (text); ATS 1985 No 26)
(vii) 30 October 1986 (1459 UNTS 197; ATS 1986 No 28)
(viii) 29 October 1987 (1487 UNTS 115; ATS 1987 No 20)
(ix) 27 October 1988 (1536 UNTS 331; ATS 1988 No 31)
(x) 15 December 1989 (1573 UNTS 3; ATS 1989 No 33)
(xi) 30 November 1990 (1598 UNTS 341; ATS 1990 No 40)
(xii) 10 December 1991 (1680 UNTS 407; ATS 1991 No 47)
(xiii) (done at Melbourne) 21 December 1992 (1736 UNTS 115; ATS 1992 No 42)
(xiv) (done at Hobart) 24 December 1993 (1770 UNTS 457; ATS 1993 No 41)
(xv) (done at Melbourne) 21 December 1994 (1889 UNTS 191; ATS 1994 No 38)
(xvi) 4 June 1996 (1945 UNTS 275; ATS 1996 No 11)

Caton et al, supra n 36, at 16; Collette and Nauen, supra Introduction n 2, at 88; Paul,
supra n 25, at 127. Japan’s catch of SBT in New Zealand’s EEZ was over 7,000 tonnes when the
EEZ was first established, but less than 100 tonnes by the start of the 1990s: Caton, supra
Introduction n 16, at 355.

Caton et al, supra n 36, at 26, 31.
reduction by Australia was in its own interest, recommending a quota of 14,000 tonnes. It warned, though, that Australia might capture only a small part of the economic benefits from doing so, and that “international agreements reached with the Japanese to date are not sufficient to ensure that Australia would benefit significantly from further unilateral reduction in the Australian catch.” The conclusion it drew was that:

If no agreement could be reached with the Japanese and the Japanese catch increases, while the Australian quota may need to decline to protect the parental biomass, strategically it may be in Australia’s interest to increase the Australian quota.

Subsequently, in 1985, Australia, Japan and New Zealand entered into a voluntary trilateral arrangement which established a TAC for SBT, divided into national allocations. This mechanism is the subject of Chapter II. The industries also began to interact, one of the factors that brought about the large quota reductions being the lease of 770 tonnes of quota by its Australian owners to twenty Japan longliners participating in a joint venture between them and the Japanese industry.

In July 1989, the Australian Prime Minister, Mr Hawke, proposed a moratorium on the taking of SBT, but this was rejected by Japan. Instead, a TAC of 11,750

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268 IAC, supra n 70, at 35.
269 Ibid., at 38.
270 Caton et al, supra n 36, at 26, 31.
271 The Hon R.J.L. Hawke AC, Our Country, Our Future: Statement on the Environment, (Canberra: Australian Government Publishing Service, 1989) at 25; see also infra Ch II, text at nn 363-370. While there was scientific justification for a moratorium, the language used (“Some of Australia’s scientists are already arguing that we need to stop fishing for SBT altogether to avoid wiping out the species”) appears to misrepresent the scientists – see infra text accompanying n 288 – by confusing commercial extinction with total extinction. Although commercial extinction occurs at a more severe level of depletion than previously thought – see supra text accompanying nn 78 and 79 – total extinction of a fish species by overfishing is very rare: see the oral submissions of Professor Crawford, Counsel for Australia, to ITLOS on 18 August 1999 (supra n 190, at 13), also M.S. McDougal and W.T Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea (New Haven: Yale University Press, 1962), at 467-468 and sources there cited; commercial extinction of a species is said to have
tonnes was agreed in that year, with national allocations of 6,065 tonnes, 5,265 tonnes and 420 tonnes to Japan, Australia and New Zealand respectively.\textsuperscript{272} From 1989 to 1993 the three States negotiated the Convention for the Conservation of Southern Bluefin Tuna and in 1994 the Commission established under that treaty confirmed the 1989 TAC and national allocations.\textsuperscript{273} Although from 1998 to 2002 no TAC and national allocations were set because of disagreement between Australia and New Zealand on one hand and Japan on the other over Japan’s demand for additional catch, in 2001 the Republic of Korea acceded to the Convention, having negotiated with the existing parties a national allocation \emph{per annum} of 1,140 tonnes,\textsuperscript{274} and the Fishing Entity of Taiwan joined a specially created subsidiary body of the Commission in 2002, also with a national allocation of 1,140 tonnes.\textsuperscript{275} The impasse was broken in 2003 when, principally as a result of a glut of tuna on its market, Japan abandoned its demand and a TAC of 14,030 tonnes was set, divided into the following national allocations expressed in tonnes:\textsuperscript{276}

<p>| | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Australia</td>
<td>5265</td>
</tr>
<tr>
<td>Japan</td>
<td>6065</td>
</tr>
<tr>
<td>Korea (Republic of)</td>
<td>1140</td>
</tr>
<tr>
<td>New Zealand</td>
<td>420</td>
</tr>
<tr>
<td>Taiwan (Fishing Entity of)</td>
<td>1140</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>14030</strong></td>
</tr>
</tbody>
</table>

occurred when its numbers have become so low as to make targeting it uneconomic (though it might still occasionally be taken as bycatch). This, together with its appearance in a document dealing with the environment, appears to have persuaded Japan that the moratorium was being proposed for political rather than resource management reasons.\textsuperscript{272} See \textit{infra} Ch II, text following n 338.


\textsuperscript{274} CCSBT8 Report, \textit{supra} n 30, at 63 (paragraph 11).

\textsuperscript{275} See \textit{infra} Ch IV, text following n 857.

\textsuperscript{276} A further 900 tonnes was reserved for non-members: \textit{infra} Appendix A, text at n 1482.
That is, the national allocations of the original parties to the 1993 Convention were exactly the same as when the TAC was last set in 1997.

The current position as to TAC and national allocations dates from the 2006 meeting, when the same nominal figures were retained for three years but Japan’s “allocated catch” was cut to 3,000 tonnes \textit{per annum} up to 2011 as a result of its past overcatch that had come to light that year.\footnote{Supra n 102.} Adjusting for this and adding a total of 845 tonnes for Indonesia, the Philippines, South Africa and the European Community as cooperating non-members, the TAC for 2007-09 is 11,810 tonnes.\footnote{CCSBT-EC5 Report, supra n 102, at 13-14 (paragraphs 60, 64 and 65).}

\section{E The state of the stock

The effect the fishery was having on the stock is shown by the fall in the average size of SBT caught from 55 kg in 1961 to 29 kg in 1971 and further to 23 kg in 1981.\footnote{H. Campbell, S.F. Herrick Jr and D. Squires, “The Role of Research in Fisheries Management: The Conservation of Dolphins in the Eastern Tropical Pacific and the Exploitation of Southern Bluefin Tuna in the Southern Ocean”, (2000) 31 \textit{Ocean Development \\& International Law} (hereinafter ODIL) 347 at 350.}

As early as 1979 Australian scientists had reported that the global SBT fishery was fully exploited, so that any further increase in effort would bring little if any extra catch, in that any further increase in exploitation by Australian fishermen would reduce the Japanese catch, while any significant rise in Japan’s catch might reduce that of Australia.\footnote{Caton \textit{et al}, supra n 36, at 18; IAC, supra n 70, at 10.} A first meeting of scientists from the three States took place in 1982 and thereafter such trilateral meetings were held annually. The 1982 meeting confirmed earlier estimates by the Commonwealth Scientific and Industrial Research Organisation (CSIRO) of the decline in the parental biomass and concluded that the stock had been fished down to half, a third or even less of the original level. The 1983 meeting predicted unavoidable further short term decline as the year classes affected by the large surface catches of 1981-83 came to maturity. The participants
concluded that urgent steps needed to be taken to avert parental biomass falling significantly below the 1980 level, beyond which they believed there was significant risk that satisfactory numbers of recruits could not be produced.\textsuperscript{281} The next year they warned that the longer remedial action was deferred, the more severe the eventual catch reductions would need to be to keep the spawning stock at a satisfactory level.\textsuperscript{282}

In 1985 the scientists expressed the view that managers should in the short term adopt a conservative approach to the SBT fishery and by 1987 they regarded this as imperative, warning that there was risk associated with maintaining the then catch limits.\textsuperscript{283} For the fishery as a whole CPUE fell by half from 1983 to 1986 and by a further 5 per cent in 1987.\textsuperscript{284} This, coupled with various refinements to the analytical models that had taken place over the years, resulted in 1988 in a significant proportion of the analyses suggesting that recruitment had been in decline since the mid-1970s (though the first results pointing to this possibility were produced in 1986). Participants at the 1988 meeting concluded that even by 1979 the parental biomass may have been reduced to too low a level, so it was vital to prevent any further decline. To achieve this and safeguard the long-term viability of the fishery, there would need to be substantial further reductions in catches until the parental biomass and the recruitment from it had demonstrably recovered to much higher levels. The only safe catch was zero, but even with zero catch biological mechanisms preventing a recovery could not be ruled out.\textsuperscript{285}

\begin{flushleft}
\textsuperscript{281} Caton \textit{et al.}, supra n 36, at 26.
\textsuperscript{282} 3rd Trilateral Scientific Meeting Report, supra n 261, at 16.
\textsuperscript{283} Caton \textit{et al.}, supra n 36, at 27.
\textsuperscript{284} \textit{Ibid.}, at 19.
\textsuperscript{285} 7th Trilateral Scientific Meeting Report, supra n 132, at 42-44. This recommendation was criticised by Mr Greig, counsel for Japan, before ITLOS on 19 August 1999 (“How much unnecessary socio-economic damage would have been caused had this plea been heeded?”): ITLOS doc ITLOS/PV.99/22/Rev.1 (hereinafter “Transcript for morning of 19 August”, available online at <www.itlos.org/case_documents/2001/document_en_141.pdf>, at 25), though he did
\end{flushleft}
The scientific disagreement which was to mark the next decade became apparent in 1989 when Australian and Japanese scientists presented projections of future parental biomass assuming the indefinite continuation of the 1988 quotas (Australia 6,250 tonnes, Japan 8,800 tonnes, New Zealand 450 tonnes). All Japanese projections depicted rising trends while the Australian projections were mixed, depending on whether recruitment after 1981 was assumed to return to the average level for the assumed stock-recruitment relationship or remain at more recent low estimates. As a consequence, there was no agreement on future parental biomass and recruitment trends from the projections. Australian and New Zealand scientists took the view that, once other indicators from the fishery were taken into account, recovery of the SBT stock was less probable than its continued decline. Japanese scientists alleged that the Australian projections were deliberately pessimistic and unreasonable. The Australian scientists rejoined that the projected recovery depended on optimistic assumptions about recruitment, but did not deny the scope for much larger catch from the SBT stock if the parental biomass could be rebuilt to a sufficiently high level. By 1990 Australian scientists were warning that, assuming the then current

not mention that the Japanese scientists too supported this recommendation. While the effects of overfishing are usually reversible if catch is sufficiently reduced, instances have been recorded where a stock has failed to recover because the depletion of its numbers has allowed an offsetting increase in the population of another species with which it competes for the same prey, creating a new equilibrium between the two, e.g. the non-recovery of the sardine population off California: A.W. Koers, *International Regulation of Marine Fisheries: A Study of Regional Fisheries Organizations* (West Byfleet and London: Fishing News (Books) Ltd, 1973), at 49, or where the stock is itself preyed upon by some other species – e.g. predation by the grey seal has been advanced as an explanation for the non-recovery of Canadian cod stocks despite the closure of the fishery since 1993, and even though overfishing was the prime cause of the collapse: C. Fu, R. Mohn and L.P. Fanning, “Why the Atlantic cod (*Gadus morhua*) stock off eastern Nova Scotia has not recovered”, (2001) 58 *Canadian Journal of Fisheries and Aquatic Sciences* 1613 at 1622.

Caton *et al*, *supra* n 36, at 27; see also the more detailed defence of Australian assumptions and critique of Japanese ones at 29.

The necessary implication of this is that the parental biomass was – and presumably still is – well below the level that would produce the maximum sustainable yield: see the diagram in
trends continued, SBT could be described as commercially threatened and might be facing commercial extinction.\textsuperscript{288}

Over the 1990s this divergence of scientific views between Australia and New Zealand on one hand and Japan on the other became entrenched. It related much less to the present state of the stock than to its prospects for recovery in the short to medium term – which became crucial once the CCSBT, soon after it was set up, adopted a management goal of rebuilding the parental biomass to its 1980 level by 2020.\textsuperscript{289} This state of affairs was the main reason why no consensus to alter the quotas fixed in 1989 could be reached among the three States, a pattern developing of Japanese proposals for increases which Australia and New Zealand did not accept.

Appendix B \textit{infra}. Although Australia said at the CCSBT’s 1996 annual meeting (CCSBT3(1) Report, \textit{supra} n 102, at 17) that the 1980 level “corresponds to commonly used thresholds for biologically safe parental biomass”, it is described in T. Polacheck, N.L. Klaer, C. Millar and A.L. Preece, “An initial variation of management strategies for the southern bluefin tuna fishery”, (1999) 56 \textit{ICES Journal of Marine Science} 811 at 824 as “a minimum level for rebuilding and not the target level around which the stock is to be maintained”. It can hence be concluded that the MSY is some way below the 1981 catch of 45,000 tonnes, though if the proportion of young fish in the catch were reduced, the total could move closer to that figure. This is corroborated by two studies cited by Campbell et al, \textit{supra} n 279, at 360, one of which found that global catch of 32,000 tonnes could be sustained by a population in equilibrium at its 1980 level, while the other describes notional Australian and Japanese catches of 11,000 tonnes and 28,000 tonnes respectively as having equal impact on the parental biomass and consistent with maintaining it at an “assumed safe level”.

\textsuperscript{288} Caton \textit{et al}, \textit{supra} n 36, at 19.

\textsuperscript{289} Report of the Second Special Meeting, Canberra, 29 April - 3 May 1996 (hereinafter CCSBTSM2 Report, available on the CCSBT website at <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_2/report_of_special_meeting2.pdf>), at 1. At the 1993 management meeting New Zealand had argued that no increase in catch should be permitted until the 1980 parental biomass was again reached; there was a need for shorter term goals to be developed to provide a means to assess progress in meeting the overall goal. Australia agreed that there ought to be no increase in catch levels, for scientific purposes or not, until that goal was achieved: \textit{Southern Bluefin Tuna Trilateral Management Discussions – Second Session – Draft Summary Record, Canberra, 22-26 November 1993} (unpublished, copy held by author extracted from DPIE files; hereinafter November 1993 Draft Summary Record), at 4.
The concomitant frustrations on both sides caused by this impasse culminated in the Japanese experimental fishing programs of 1998 and 1999 and the related dispute which lasted until 2001.290

At its Sixth Meeting in 2001, the CCSBT’s Scientific Committee reported that at current catch levels, the probability of the parental biomass being larger in 2020 than in 2001 was about the same as of its being smaller, adding that “there is little chance that the SBT spawning stock will be rebuilt to the 1980 levels by 2020, and substantial quota reductions would be required to achieve that goal.”291 The Scientific Committee concluded that the risk of further recruitment declines, while not possible to determine quantitatively, was not particularly high, so that an immediate reduction in total removals was “not recommended as a necessary action to prevent stock collapse…a policy of maintaining current removals would most likely enable the CCSBT to react in a timely fashion to future stock trends.” Nonetheless there was a risk of further stock declines if current removals are maintained, and depending upon members [sic] aversion to this risk, differing levels of catch reductions would be appropriate forms of insurance for the sustainability of the current fishing industries.”292

A year later the Scientific Committee saw no need to update its advice, with the 2000 catch level of approximately 15,500 tonnes being close to the replacement yield.293 Though there was again no dramatic change in the status in 2002 and 2003 warranting a change in the advice, there were worrying signs in 2002 from the

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290 See Ch II infra.
292 Ibid., at 239-240 (paragraph 30).
increased search effort required in the Australian surface fishery and marked decline of smaller fish in 2003 in the Japanese longline fishery.\textsuperscript{294} The 2003 meeting of the Stock Assessment Group reported that “...it was clear that under current catches there is a low probability of realising the existing management objective of recovery [of the parental biomass] to the 1980 level by 2020.”\textsuperscript{295} Indeed, with current catches close to replacement yield, any rebuilding was unlikely, regardless of relative stock productivity assumptions.\textsuperscript{296}

In 2004 the same body found that the parental biomass was between 3 per cent and 14 per cent of its average before fishing began and between 14 per cent and 59 per cent of the 1980 level, with the models suggesting a marked decline in recruitment for the 2000 and 2001 cohorts, confirming earlier indications of this at the previous year’s meeting\textsuperscript{297} and being a source of serious concern.\textsuperscript{298} The projection results suggested that the probability of a fall in the spawning stock biomass by 2020 if catches continued at their current level was around 72 per cent.\textsuperscript{299} Although the most recent estimates of recruitment were low and models showed stability of parental biomass and recruitment since the early 1990s, the change in stock status since the 2001 assessment was not large.\textsuperscript{300} A paper submitted by Australia concluded that, given the low spawning stock, even a few years of low recruitment would have

\textsuperscript{294} CCSBT-ESC2 Report, supra n 32, at 113 (paragraphs 8 and 9 (Australia) and 11 (Japan)).
\textsuperscript{296} Ibid., at 175 (paragraph 25).
\textsuperscript{297} See e.g., ibid., at 172 (paragraph 11).
\textsuperscript{298} Report of the Fifth Meeting of the Stock Assessment Group, 6-11 September 2004, Seogwipo City, Jeju, Republic of Korea (hereinafter CCSBT-SAG5 Report), in CCSBT Blue Book 2005, supra n 34, 227 at 236 (paragraph 48).
\textsuperscript{299} Ibid., at 231-232 (paragraph 21).
\textsuperscript{300} Ibid., at 232 (paragraph 23).
important implications for the sustainability of current catches. The sharp fall in
Indonesian catch on the spawning ground to less than a third of the previous six
years’ mean, accompanied by a lower average age of SBT caught, pointed to a
possible decline in abundance. Since the stock was well below the level that
produces MSY, rebuilding it would “almost certainly increase” sustainable yield and
provide security against unforeseen environmental events. Agreeing, the Extended
Scientific Committee advised that “[i]f reduced recruitment continues into the future,
then under current catch levels the stock would certainly decline”, but if it were to
return to the level of the mid-1990s, then a management procedure could be adopted
that allow for a “reasonable probability of stock rebuilding”. If indicators in 2005
suggested an ongoing marked reduction in recruitment, the CCSBT would need to
consider TAC reductions “as soon as possible” which “would likely be substantial
and the size of the reduction would be designed to arrest stock decline and lead to
rebuilding.”

Given the uncertainty in recruitment trends, the Committee said it
was unable to “advise on what level of TAC reduction would provide for specified
probabilities of rebuilding”, but added that “any TAC reduction would increase the
probability of stock recovery under all possible recruitment scenarios.”

Despite this, the CCSBT at its 2004 annual meeting declined to make the reduction
in catches for which the scientists were calling, claiming that it lacked the “clear
scientific advice” to decide on the appropriate level for reduction, which it defined as

301 Ibid., at 233 (paragraph 31).
302 Ibid., at 236-237 (paragraphs 49 and 50).
303 Ibid., at 240 (paragraph 62).
304 CCSBT-ESC3 Report, supra n 236, at 169 (paragraphs 24 and 25).
305 Ibid. (paragraph 27).
306 Ibid., at 170 (paragraph 28). Scientific advice to a mid-year management workshop was
that a new reference case model predicted with near-certainty that spawning stock and CPUE
would both decline under current catches, contrary to the advice provided during 2001-2003:
Report of the Third Meeting of the Management Procedure Workshop, 19-24 April 2004, Busan,
Republic of Korea, (hereinafter CCSBT-MPW3 Report) in CCSBT Blue Book 2005. supra n 34,
291 at 303 (paragraph 52).
“evaluations of the likely effect of various alternate levels of reduction, and estimates of uncertainty around these predictions.”

Although the Extended Commission recognised that the next year would be “critical to the state of the fishery” and asserted its “prepared[ness] to make the necessary decision(s)” for a large reduction in TAC, it was worried about the possible “serious impacts on industry and related communities”, Members wanting an increased level of certainty about the scientific advice before making such a decision. It thus left TAC and national allocations unchanged from the previous season. The risk of even graver impact from possible collapse of the stock through failure to heed the advice was not mentioned.

Given what has been said above about discount rates as well as other consequences of the tragedy of the commons, it is far from a foregone conclusion that any reduction, let alone one sufficient to begin rebuilding the SBT parental biomass, will be adopted in the years to come. Although interest rates have been very low in Japan for well over a decade, its effective discount rate is high because the immobile capital of Japan’s fishing industry, coupled with its poor profitability, provides an incentive to forgo distant gains in favour of current revenues. Japan’s indication at the 2005 annual meeting that it was not yet ready to implement the management

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307 CCSBT-EC3 Report, supra n 78, at 20 (paragraph 27). This was despite the Extended Scientific Committee’s advice that any TAC reduction would improve the stock’s prospects: CCSBT-ESC3 Report, supra n 236, at 170 (paragraph 28).

308 CCSBT-EC3 Report, supra n 78, at 20-21 (paragraph 28). See also ibid., at 21-22 (paragraph 35): “Any decision to reduce the TAC…could not…be taken lightly and must be taken on the best scientific advice.”

309 Ibid., at 22 (paragraph 36). Australia, however, recalled (paragraph 37) that at the previous annual meeting 12 months was considered a suitable lead time for implementing TAC changes, and that reductions made at the Twelfth Meeting should be made immediately if the recruitment continued to be low. New Zealand took a similar stance (paragraph 38).

procedure was always on the cards, and it is only the revelation of its persistent overcatch in 2006 that left it without any pretext to resist a steep cut at the next annual meeting. It thus remains no less true today than it was in 1988 that “the current catches of SBT, in both weight and value, are only a small fraction of what could be taken if the stock returns to an optimal level.” The next chapter returns to the beginning of the cooperative phase of the SBT fishery to look more closely at how the new entrants issue influenced the participating States’ attitudes and prompted them to negotiate the 1993 Convention.

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311 Although in the discussion on TAC at paragraphs 47 to 66 of CCSBT-EC4 Report, supra n 248, only New Zealand (paragraphs 55 and 60) and Korea (paragraph 58) expressed an unambiguous preference for making the 5,000-tonne cut in 2006 over a 7,160-tonne cut in 2007, Japan was alone in not making a commitment even to the latter; it would merely “seriously consider” it (paragraph 59).

312 Supra, text at n 277.

313 7th Trilateral Scientific Meeting Report, supra n 132, at 43. This remains true even after adjusting for the substantial overcatches revealed in 2006, with the Chair of the CCSBT’s Scientific Committee reporting that the spawning stock is still thought likely to be at no more than 10-13% of its original level: CCSBT-EC5 Report; supra n 102, at 8 (paragraph 46).
CHAPTER II

New entrant issues under the trilateral (Australia/Japan/New Zealand) management mechanism that governed the SBT fishery from 1983 to 1994

A Introduction

Although Articles 63 and 64 of UNCLOS expressly permit States interested in transboundary stocks to cooperate directly as well through an international organisation, examples of direct cooperation are rare. The two best known are the joint management by Australia and New Zealand of orange roughy on the high seas part of the South Tasman Rise, and the informal arrangements since 1997 among the European Community, the Faroes, Iceland, Norway and the Russian Federation on North-East Atlantic herring. A hybrid example is the management of Bering Sea pollock, where there is a binding treaty among the States concerned, which


nevertheless relies on direct cooperation among its parties for its efficacy since it does not create an international organisation.\textsuperscript{316} Although other instances of \textit{ad hoc} cooperation may have gone unrecorded, until the CCSBT was formed in 1994, the trilateral direct cooperation among Australia, Japan and New Zealand was the only systematised form of direct cooperation in managing a highly migratory species.

This chapter briefly introduces the trilateral arrangements before proceeding to consider how the gradually increasing take of SBT by other participants in the fishery was perceived by the three States in relation to their own interests in the stock, legal and otherwise. It covers the introduction and progressive reduction of quotas and analyses whether the catch limits accepted by the three States in this period were binding at international law. Attention is drawn to the unusual formula by which New Zealand indicated its limited commitment to its own quota, and to whether or not it resulted in any legally meaningful distinction from the position of Australia and Japan. Through reference to the unpublished reports of trilateral management meetings,\textsuperscript{317} it shows the extent to which the outsiders’ presence contributed to their decision to negotiate a treaty to formalise their management of the SBT stock – the 1993 Convention. Finally, the negotiation of the 1993 Convention is traced and its main innovation, decision-making by consensus in lieu of the hitherto usual majority voting coupled with an objection procedure, is assessed for its efficacy in leading to binding catch limits.

\textbf{B Background: the first quotas and their subsequent reduction}

Following the CSIRO’s 1981 warning of the extent of decline in the SBT parental biomass and the consequent high risk to recruitment,\textsuperscript{318} Australia approached Japan


\textsuperscript{317} It should be noted that few of the meeting reports in the trilateral period were formally adopted; most were left as rapporteurs’ drafts and should thus be treated with a degree of caution.

\textsuperscript{318} For the definition of this term see \textit{supra} Ch I n 194.
and New Zealand to suggest a tripartite scientific review of the state of the SBT stock and exploring the need for the fishery to be managed globally. In October 1982 Australian officials met Japanese Embassy and New Zealand High Commission officials in Canberra. They decided that there would first be a scientific meeting to consider the status of the stock, then managers would meet to discuss the sustainable yield, the objective for and degree of urgency of SBT management, the framework for the negotiations and the form the agreement would take. In this regard Japan thought a treaty would be “ideal”, but more difficult to achieve; the FAO had written to Australia and New Zealand seeking involvement in the negotiations, but this was not pursued after Japan said that it knew of no third-party interest in the fishery.

With papers from Australia and New Zealand both showing that parental biomass would continue to decline under the then prevailing level of fishing pressure, the scientists agreed that “it would be wise to take steps now to stabilise the stock at approximately present levels and to have in place mechanisms to further reduce the catches should recruitment begin to falter.” At the first management meeting, held in Wellington in 1982, the three States indicated their concern at the decline of the stock but did not set catch limits. New Zealand voiced a preference for a treaty and all three States agreed the eventual management framework should be binding, but Japan wanted a better understanding of all aspects of the resource, especially the stock/recruitment ratio, as well as a standardised database, before committing itself.

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319 Caton et al, supra Ch I n 36, at 32.
321 1st Trilateral Scientific Meeting Report, supra Ch I n 141, at 3.
322 Ibid., at 2.
Australia said it would have to contemplate unilateral action if the trilateral gathering failed to produce a management strategy.  

If the overall catch were to be reduced to avoid endangering the fishery, the question of allocating the catch among the three States would almost inevitably arise. New Zealand expressed a preference for a system of zonal quotas (that is, one quota for the AFZ, another for the New Zealand EEZ and a third for the high seas). Australia preferred country quotas, while Japan was silent on the question. Consideration was given within the New Zealand Government to arguing that the reduction in the overall catch should come from the high seas component, given that management in the AFZ and New Zealand EEZ was a matter for the two coastal States, and that the different treatment of stocks inside and outside the zones accords with the fact that New Zealand and Australia have sovereign rights over the SBT in their zones with the Japanese being given access to the surplus catch, whereas outside the zones the Japanese are simply exercising a high seas freedom to fish.

The anonymous author of the document concerned recommended against adopting this line of argument, however, since an equitable reduction was more likely to achieve agreement. Japan would resist restraint being applied on the high seas only and the suggestion could prompt it to seek instead to maximise its short-term returns

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323 Cable No 4569 of 23 December 1982 from the New Zealand High Commission in Canberra to the Ministry of Foreign Affairs in Wellington, in NZMFA file 40/12/10, supra n 320, Part 22. It is not clear whether this was intended as a threat by Australia, since it would have been open to Australia to limit its own catch unilaterally at any time, and in 1983 it proceeded to do so: supra Ch I, text at nn 152 and 153. The only other measure it could have taken unilaterally that would affect other States would be to end the access of Japanese vessels to the AFZ which had been accorded to them under the 1979 Agreement and its annual subsidiary agreements: see supra Ch I n 265 and accompanying text.

324 Division of a total allowable catch into national allocations is not inevitable, but has certain advantages: see infra, text at nn 418-420.

325 Cable No 1038 of 25 March 1983 from the New Zealand High Commission in Canberra to the Ministry of Foreign Affairs in Wellington, in NZMFA file 40/12/10, supra n 320, Part 22.
from the fishery, whereas, in that author’s opinion, Japan needed to be persuaded of its own long-term interest in the fishery.  

Visiting Wellington in April 1983, a Counsellor of the Japan Fisheries Agency, Mr Noda, tried to persuade New Zealand officials that Australia must be “convinced” or “forced” to reduce its catch, but Japan itself could not agree to further restrictions on its own activity in view of its own sacrifices in avoiding the spawning ground since 1971 and a 20 per cent cut in vessel numbers in 1981-82. New Zealand, repeating its preference for a trilateral arrangement, pointed out that Australia could not be forced into any action in its EEZ, where it had sovereign rights. When Mr Noda pressed the point, saying that by contrast there was no need for New Zealand to introduce equivalent restrictions in its own EEZ, Mr Mackay of the Foreign Ministry confirmed New Zealand’s willingness to apply trilateral decisions in its own EEZ.

Thereafter the pattern of scientific meetings preceding management meetings continued on a roughly annual cycle, the venue rotating among the three States. At the next meeting later in 1983, Australia and Japan expressed willingness to restrain growth in their fisheries pending final agreement on an overall management arrangement. In 1984 all three States reaffirmed the desire to work towards

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326 Ibid. Oddly, Article 63(1) rather than 64 of UNCLOS was cited as the basis for this view. Though this provision opens with the words “Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States…”, and is usually thought of as referring to stocks distributed over neighbouring EEZs, note that it does not actually require the zones to be adjacent to each other. Even so, this is clearly the circumstance in which its application is contemplated, since it is very unlikely that a stock would occur in two EEZs separated by an area of high seas without the stock also being present in the latter area, making it a straddling stock to which Article 63(2) would instead apply – and if not, the two stocks would be separate and no cooperation between the coastal States would be necessary.

327 Supra Ch I, text following n 188 and at n 191.

328 The exchanges at the meeting are reported in Cable No 659 of 14 April 1983 from the Ministry of Foreign Affairs in Wellington to the New Zealand Embassy in Tokyo, in NZMFA file 40/12/10, supra n 320, Part 22.

329 Trilateral Scientific Meeting Reports Compendium, supra Ch I n 132, at iii.
management measures for the fishery that would sustain the spawning (parental) stock at a satisfactory level. Australia proposed to limit its own and Japan’s catch, but Japan, not yet ready to accept a quota as the basis of restraint of its catch, undertook only to keep its fishing effort at such a level that the impact of Australia’s management measures was not dissipated, while maintaining its own recent 20 per cent reduction in vessel numbers. Australia nevertheless reduced its own quota and established a long-term catch-limiting mechanism through the institution of ITQs, a new form of property right entitling the owner to a given share in perpetuity of whatever quota might henceforth be legislated for a season.

The Australian policy of linking Japanese access to the AFZ to global quotas was also first given effect in 1984. Under the 1984 Subsidiary Agreement Japanese vessels were excluded from most waters south of 34º South, partly in order to reduce their total catch and partly because it was felt that, at a time when the Australian industry was subject to stringent management measures, Japanese fishing activity in the AFZ ought not to continue unrestricted. This bore fruit in 1985, when Japan accepted a limit on its global SBT catch of 23,150 tonnes and in return was permitted under the next Subsidiary Agreement to resume fishing for SBT around Tasmania, though waters between 34º and 40º South remained closed to its vessels. Australia’s quota was 14,500 tonnes and New Zealand’s quota of 1,000 tonnes was expressed to be for development purposes, given that its actual catch was far below this figure.

From 1985 quotas were negotiated each year based broadly on advice from the trilateral scientific meetings. In 1986 and 1987 Australia and Japan nominally

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330 Ibid.; Caton et al, supra Ch I n 36, at 32.
331 Caton et al, supra Ch I n 36, at 32; IAC, supra Ch I n 70, at 20 and 44-45.
332 See infra n 433.
333 Supra Ch I n 265, item (v) listed, Article II. Some smaller areas south of 34º South had previously been closed to Japanese fishing; see the 1983 Subsidiary Agreement, ibid., item (iv) listed, Article II and Appendices I and II.
334 Caton et al, supra Ch I n 36, at 32-33.
335 Ibid., at 21 and 33.
maintained their 1985 quotas but agreed that their national catches would not exceed 11,500 tonnes and 19,500 tonnes respectively. This was made possible by the Japanese industry providing funds in 1986 to the Tuna Boat Owners’ Association of Australia, at the latter’s initiative, in lieu of 3,000 tonnes of catch, assisting the Australian industry to reduce pressure on the small fish.336

These cuts proved insufficient to halt the stock’s decline; the report of the 1988 scientific meeting advised that the only safe catch would be zero, but if agreement on a moratorium on catch could not be reached, then quotas should be reduced by at least half. The management meeting accepted this advice, reducing quotas to 6,250 tonnes (Australia), 8,800 tonnes (Japan) and 450 tonnes (New Zealand), a cut of 52 per cent overall from their 1987 total. In part this was facilitated by a joint venture between the Australian and Japanese industries, under which Japanese vessels fished Australian quota for some years; this served in the short term palliative of the perennial problem of allocation. To accommodate two new joint ventures, one between Australia and Japan and the other between New Zealand and Japan, Australia’s and New Zealand’s national allocations were divided into domestic and joint venture quotas as follows: Australia 5,480 tonnes domestic, 770 tonnes joint venture; New Zealand 150 tonnes domestic, 300 tonnes joint venture.337

336 Ibid.
337 Caton et al, supra Ch I n 36, at 21 and 34. The following year, [t]he three parties agreed that there is a place within the management framework for joint venture operations. The Australian Government has agreed not to impede the joint venture between Australian and Japanese industries of SBT quota in the 1989/90 SBT quota management year, for a number of reasons including the encouragement of the Australian SBT fishery to move towards longlining in the longer term. While details were primarily for respective industries consideration it was noted that continued Australia – Japan joint venture operations were subject to the provision of data and tangible benefits from the relevant joint venture. Australia noted that the joint venture would also be subject to domestic considerations. All parties agreed that, if appropriate, their respective Governments should make very endeavour to facilitate joint venture operations consistent with their impact on the SBT stock. See untitled document (ca 1989, unpublished, copy held by author extracted from DPIE files), at 2. Since documents from this source generally have no clear indication that they were ever provided to Japan and New Zealand for comment – or, in the case of statements, that they were
When Japanese longlining vessels resumed operations off New South Wales in 1989 as part of the joint venture, however, their catch rates were only a third of those recorded in 1980 and 1981. Further cuts were made that year, the three States agreeing on a total allowable catch of 11,750 tonnes, 24 per cent down on the 15,500 tonnes of 1988, but while Australia and Japan took respective “national allocations” of 5,265 tonnes and 6,065 tonnes, what New Zealand accepted was a “voluntary catch limit”, which it saw as less binding than a national allocation, of 420 tonnes. There was some confusion about the circumstances in which New Zealand’s national allocation would become binding. New Zealand believed that it would not occur until such time as the stock had recovered sufficiently for its quota to reach 1,000 tonnes, while Australia and Japan saw the threshold as being much lower:

As I heard it, New Zealand insisted that the New Zealand agreed catch limit of 420 tonnes for the 1989/90 quota year was on the understanding that no formal quota, in the sense that it applied to Australia and Japan, will be applied to New Zealand until New Zealand’s southern bluefin tuna catch exceeds 1000 tonnes.

While I know that this is a position New Zealand has stated before, I feel it must be underlined that we do not see this as a position that has been agreed.

The resolution of 1989/90 agrees that when there is an increase in global quota, the New Zealand catch limit of 450 tonnes would be reinstated before any other allocations are made, but goes on to say that any additional tonnages would be allocated between the three parties through the process of trilateral discussion.

It is not clear whether any legal significance can attach to this differentiation of wording. A threshold requirement for significance would be that national allocations themselves must be binding – not an obvious conclusion at a time when the 1993 Convention had yet to be concluded and UNCLOS, though soon afterwards accepted by the three States as reflecting custom, was not yet in force and contained in any delivered in the form written – they should be treated as no more than Australia’s written record of the proceedings with only commensurately qualified confidence to be placed in their accuracy.

Caton et al, supra Ch I n 36, at 23.

"25 September 1990 Opening Statement – Australia” (unpublished, copy held by author extracted from DPIE files), at 12.
event no positive obligation beyond that to cooperate. The implication of binding
effect in Australia’s opening statement is contradicted by one of the previous year on
“the need for management decisions to be binding on all parties in international law”,
when it seemed to suggest that a treaty was required to bring this about.\textsuperscript{340} Thus at
their 1990 management meeting the three States passed a resolution in which:

The three parties confirmed their intentions to set a global quota of 11750 metric
tonnes for 1990/91 with the following national allocations:

Australia 5265 tonnes

Japan 6065 tonnes

New Zealand confirmed its intention to limit its own catch to 420 tonnes, noting that
Australia and Japan had expressed the view that in the circumstances where the
global quota was increased, New Zealand would lift its own catch to 450 tonnes.\textsuperscript{341}

The tension resurfaced in 1990 when Australia sought to move its share of the quota
towards parity with Japan, a stance greeted with hostility by Japan, which observed
that in circumstances where the Australian industry was not capable of catching its
nominal quota, it should not profit from use of a quota as an asset while other
participants were having to accept severe restrictions:

The Australian side asks for increased quota [share] to catch fish under charter…We
feel that beneath this is an intention by Australian industry to sell quota at very high
prices.

In allocation of quota one must consider socio-economic factors and the fishing
situation. National allocation of quota not based on the size of the fishing industry is
not rational utilisation of the resources.

Japan believes it is irrational to insist on equal quota allocation while the Australian
catch is declining.

… Japan doubts the Australian attitude and believes it is acting against the
international principles of good faith.

\textsuperscript{340} “Draft Opening Statement – Australia” (unpublished, 1989, copy held by author
extracted from DPIE files), at 9.

\textsuperscript{341} “SBT Trilateral Management Discussions – Resolution” (ca 1990, unpublished, copy
held by author extracted from DPIE files), at 1.
Australia insists that 3500 tonnes of Australian quota would not be taken by Australian fishermen, it would be chartered, leased or not taken at all. Japan demands that Australia drop the idea, which does not utilise catch effectively, and allow other nations to utilise it more effectively.342

Japan was worried that extremely small quotas would be disruptive, and not conducive to recovery of the Japanese SBT industry, and asked that in setting the quota, the meeting consider socio-economic factors.343 In its opening statement Japan had said that

\[
\text{[t]here is no single way to promote recovery of SBT stock; we should adopt the method which causes least socio-economic friction. The reality is that extreme measures may look good and be welcomed by the average person but can cause tremendous economic loss to fishery operators.}^344
\]

In the end agreement was reached on having the 1989 catch limits do duty again for 1990, despite them having been expressed to be only for one year.345 As no agreement to vary these figures has ever subsequently been reached, there is much irony in hindsight in the qualification attending the decision to set them as default limits for 1991 also:

\[
\text{Unless there is clear scientific evidence of recovery in the parental biomass, or scientific evidence that required further reductions to be made in quota levels, the global quota and national allocations will remain unaltered for the following year. All parties shared the view that there was a need to avoid being locked into an inappropriate global catch limit.}^346
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342 P. Enright (Australian Fisheries Service), Draft Summary Record Trilateral Management Meeting for SBT, Canberra 25 September – 26 October 1990 (unpublished, copy held by author extracted from DPIE files; hereinafter Draft 1990 Summary Record), at 28-29. Japan did however say that it wished “to actively support the plan to convert Australian industry to longlining” and would support increasing Australia’s share of the quota if this occurred: at 29.

343 Ibid., at 25.


345 Kerin, Media Release PIE 89/328K, supra Ch I n 125, at 2.

C  The 1990 catch share adjustment formula and its frustration

Possibly believing the need for quota reductions was past and that the next change would be upwards, in their 1990 Resolution the three parties settled on a formula for adjusting the shares in the global quota, as it was increased, of the national allocations to Australia and Japan, and New Zealand’s voluntary catch limit. The formula was set out in detail in an annex:

1. As soon as the global quota is increased, New Zealand will raise its present voluntary catch limit of 420 tonnes to 450 tonnes.

2. As the global quota is increased, Australia will move to equality of national allocations with Japan. At the same time, New Zealand will raise its catch limit to either 1,000 tonnes or 6% of the global quota, whichever is greater.

These adjustments will take place in four steps, upon the condition that at least 90% of the quota allocated to Australia and New Zealand in the year prior to each adjustment being made (excluding any frozen portion) is caught. Should any of the trilateral partners fail to qualify for movement to a subsequent step in any one year, this will not prejudice that country’s aspirations [sic] to complete the four steps. Catches of Australian or New Zealand quota by vessels operated by nations outside the trilateral group will not count as part of the 90%. If catches by such nations exceed 10% in any one year the implications of these developments will be reviewed.

3. The four steps will be taken as follows:

Step 1: New Zealand will raise its catch limit to the equivalent of 4.161 per cent of the global quota. After calculating the Japanese and Australian allocations according to the ratio between the two allocations for the previous year, the difference between the Australian and Japanese allocations will be reduced by 1/4; namely an amount of 1/8 of the difference will be moved from the Japanese allocation to the Australian allocation.

Step 2: New Zealand will raise its catch limit to the equivalent of 4.861 per cent of the global quota. After calculating the Japanese and Australian allocation according to the ratio between the two allocations for the previous year, the difference between the Australian and Japanese allocations will be reduced by 1/3; namely an amount of 1/6 of the difference will be moved from the Japanese allocation to the Australian allocation.
Step 3: New Zealand will raise its catch limit to the equivalent of 5.469 per cent of the global quota. After calculating the Japanese and Australian allocations according to the ratio between the two allocations for the previous year, the difference between the Australian and Japanese allocations will be reduced by 1/2; namely an amount of one quarter of the difference will be moved from the Japanese allocation to the Australian allocation.

Step 4: New Zealand will raise its catch limit to the equivalent of six per cent of the global quota, or 1,000 tonnes, whichever is greater. When the New Zealand catch exceeds 1,000 tonnes, then New Zealand will subject itself to a quota in the same way as Australia and Japan. This will in no way diminish New Zealand’s determination to adhere to the agreed voluntary catch limits. After calculating the Japanese and Australian allocations according to the ratio between the two allocations for the previous year, the difference between the two will be eliminated; namely an amount of 1/2 of the difference will be moved to the Australian allocation.

4. The first adjustment will occur when the global quota [has] reached or exceeded 12,750 tonnes and subsequent adjustment steps will only occur when the increase in global quota since the last adjustment is at least 1,000 tonnes. If the increase since the last adjustment is greater than 5,000 tonnes, then a two step adjustment will be made at one time.347

Despite encouraging early signs that the catch reductions of the 1980s were having a positive effect on the stock’s prospects of recovery, new information in 1992 on the growth rates of SBT showed that previous evidence of recovery was misleading:

Under all interpretations of growth, the analyses show that the parental biomass is expected to remain below the 1980 level for many more years, so that the risk of

347 *Ibid.*, at 3-4 (Annex 1, “Future Adjustments to Quota Allocation”). At the 1992 and 1993 management meetings the mutual understanding of the three States was reaffirmed: *Southern Bluefin Tuna Trilateral Management Discussions, Tokyo, October 1992, Conclusion* (unpublished, copy held by author extracted from DPIE files; hereinafter 1992 Conclusion) at 1; *Southern Bluefin Tuna Trilateral Management Discussions, Canberra, October-November 1993, Conclusion* (unpublished, copy held by author extracted from DPIE files; hereinafter 1993 Conclusion), at 1. Annex 1 to 1992 Conclusion and Attachment B to 1993 Conclusion (at 11-12) are identical to the equivalent 1990 document apart from some trivial editorial changes, except that “agreed” is omitted in step 4, presumably in order to underline the non-binding nature of New Zealand’s commitment.
abrupt recruitment decline remains high. Similar to last year, from a biological viewpoint a decrease in catch level is highly desirable.\textsuperscript{348}

Failing that, catch levels should not be increased from the present level until such time as the parental biomass returns to at least the 1980 level, unless this is part of an agreed stock rebuilding strategy that can be shown to have a high probability of returning the stock to biologically safe levels.\textsuperscript{349}

Commenting on catches by other participants in the fishery, the scientists said they remained high, and increases in them would “worsen the prospects for recovery.” Since the trilateral scientific group analyses were based on total global catch, with non-trilateral catches taken into account in the projections, the future level of the latter, which was attended by considerable uncertainty, “could substantially affect the results”. They recommended improved monitoring of non-trilateral catches.\textsuperscript{350}

The catch limits thus were left at the level agreed in 1989 for the rest of the trilateral period. Table 2 below sets out the catch limits in the trilateral years and actual catches in the years to 1988.

\begin{table}
\centering
\caption{SBT catch limits from 1984 to 1994 negotiated among Australia, Japan}
\end{table}


\textsuperscript{349} 12th Trilateral Scientific Meeting Report, supra n 348, at 17-18 (paragraph 22).

\textsuperscript{350} 13th Trilateral Scientific Meeting Report, supra Ch I n 46, at 4 (paragraph 21) and 6 (paragraph 36). Less than realistically, in the preceding two years they had recommended reducing catches by those outside the trilateral framework: 11th Trilateral Scientific Meeting Report, n 348, at 5 (paragraph 18); and that Australia, Japan and New Zealand “endeavour to ensure that global SBT catches do not exceed the catch level agreed to by [them]”: 12th Trilateral Scientific Meeting Report, supra n 348, at 18 (paragraph 24).
and New Zealand or unilaterally adopted, in tonnes except where indicated
(with amounts caught in subsequent quota years to 1989 in parentheses)\textsuperscript{351}

<table>
<thead>
<tr>
<th>Year</th>
<th>Australia</th>
<th>Japan</th>
<th>New Zealand</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>21000 (15843)</td>
<td>- (23323)</td>
<td>10000 fish (93)</td>
<td>(39169)</td>
</tr>
<tr>
<td>1985</td>
<td>14500 (13486)</td>
<td>- (20393)</td>
<td>10000 fish (94)</td>
<td>(33973)</td>
</tr>
<tr>
<td>1986</td>
<td>14500 (13237)</td>
<td>23150 (15522)</td>
<td>1000 (82)</td>
<td>38650 (28841)</td>
</tr>
<tr>
<td>1987</td>
<td>11500 (11308)</td>
<td>19500 (13955)</td>
<td>1000 (59)</td>
<td>32000 (24904)</td>
</tr>
<tr>
<td>1988</td>
<td>11500 (10976)</td>
<td>19500 (10821*)</td>
<td>1000 (93)</td>
<td>32000 (21890*)</td>
</tr>
<tr>
<td>1989</td>
<td>6250 (5985)</td>
<td>8800 (***)</td>
<td>450 (424)</td>
<td>15500 (***)</td>
</tr>
<tr>
<td>1990-1994</td>
<td>5265</td>
<td>6065</td>
<td>420</td>
<td>11750</td>
</tr>
</tbody>
</table>

* estimated in source or dependent on figure so estimated
** not available in source or not calculable

The issue has never gone away. In 2003, when after a six-year gap the CCSBT again
adopted a TAC and national allocations, at the urging of New Zealand, which feared
that relative catch levels might become “cemented in” through a management
procedure,\textsuperscript{352} the Extended Commission acknowledged that there was an outstanding
issue with respect to allocations as set out in the 1994 mutual understanding which it
needed to resolve no later than the next meeting in the context of future consideration

\textsuperscript{351} After Caton \textit{et al.}, \textit{supra} Ch I n 36, at 21, with unilaterally adopted limits in italics. Note
that the catches of Australia and Japan differ from those in Table 2 because their quota years do
not coincide with the calendar year. The three States would negotiate in one year the quotas for
the following quota year. In the years treated singly in the Table, Australia’s quota year ran from
1 October of the year of negotiation to 30 September of the following year: “Update of the
Australian Southern Bluefin Tuna Fishery for the 1999/00 and Preliminary 2000/01 Seasons”
(Attachment K-1 to CCSBT8 Report), in CCSBT Blue Book 2002, \textit{supra} Ch I n 30, 108 at 110
(Attachment A, “Domestic southern bluefin tuna catch by Australian state, gear and quota year,
1988/89 to 2000/01”). New Zealand’s fishing year extends from 1 October to 30 September
of the following year, while Japan’s quota year runs from 1 March of the following year to the last
day of February in the year after that: see \textit{infra} Ch V n 1168.

\textsuperscript{352} “Opening Statement by New Zealand” (Attachment 4-4 to CCSBT-EC2 Report), in
CCSBT Blue Book 2004, \textit{supra} Ch I n 32, 48 at 50.
of TAC, national allocations and management procedure decision rules “taking full account of the [1993] Convention and the relevant principles in international law.” The Commission invited New Zealand to prepare a paper in advance of the 2004 Meeting exploring how the principles reflected in the 1994 understanding might be accommodated given the current CCSBT environment, including the admission of Korea and Taiwan and the moves towards a management procedure.\textsuperscript{353}

At the next meeting, New Zealand put its case in the following terms:

[I]t has been the ongoing concern about the status of the SBT stock and the need to ensure that all fishing for SBT occurs within the ambit of the CCSBT that has stopped New Zealand at previous meetings from pressing for the entitlement to an increase in our national allocation that was acknowledged by the Commission as far back as the Mutual Understanding reached at CCSBT1 in 1994.

New Zealand has adhered to a 420 tonne allocation since national allocations were first agreed in 1994, even though in doing so we have severely constrained the ability of the New Zealand industry to develop the fishery in the New Zealand EEZ, or utilise the resources of that industry to build its catch more widely – at a time when others were engaged in just such expansion of their catch. New Zealand has been a responsible member of this Commission. The price of such restraint on our part has been a continuing inequity in New Zealand’s allocation.

…

[T]his Commission must address…the outstanding claim that New Zealand has over the level of its allocation. This allocation does not reflect our status as a coastal state, our past conservation efforts, and the available catch within our EEZ – all important allocation principles reflected in the [1993] Convention itself and in international law.\textsuperscript{354}

New Zealand proposed that national allocations for members and cooperating non-members of less than 500 tonnes not be reduced if the TAC is between 10,000 and 15,000 tonnes. If the TAC were to go below 10,000 tonnes, they would be reduced

\textsuperscript{353} CCSBT-EC2 Report, \textit{ibid.}, 14 at 24-25 (paragraphs 52-54).

\textsuperscript{354} “Opening Statement by New Zealand” (Attachment 4-4 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, \textit{supra} Ch I n 34, 47 at 47-48.
in the same proportion as other members’ for the difference between the reduced
TAC and 10,000 tonnes “or according to any other decision the Commission takes”,
with the CCSBT1 Understanding to be applied only if the TAC is set above 15,000
tonnes. These rules would apply even if no management procedure were adopted at
the 2005 meeting.\footnote{355} The decision was, however, again deferred for a year, although
it was recognised that rules for dividing the TAC derived from the management
procedure would need to be in place by the time that procedure was adopted.\footnote{356}

It is submitted that New Zealand has a legitimate grievance. Since the essence of its
2004 proposal is that New Zealand now accepts 4.2 per cent of a small TAC, while
not entirely abandoning its hope of 6 per cent of a large one, it certainly cannot be
accused of failing to cooperate or compromise with the other CCSBT Members. So
far, however, these others have continued to find reasons not to redress the situation.

D New entrants’ influence on institutional arrangements
for SBT management

After only a few years of their trilateral arrangement, the three States realised that the
need to deal collectively with other actual and potential participants in the fishery
made the formalisation of their relationship in a treaty desirable. This was impelled
by the first moves in the Indian Ocean Fishery Commission’s Committee on the
Management of Indian Ocean Tunas towards the possible establishment of a
management body for Indian Ocean tunas.\footnote{357} At Australia’s suggestion a working
group on formalising the institutional arrangements was set up in 1987.\footnote{358} Formation
of a wider Indian Ocean body for all tunas under FAO auspices, Australia said in its
opening statement at the 1988 trilateral meeting, “places on us a considerable
international obligation to ensure that the trilateral group develops responsible

\footnote{355} “New Zealand Proposal for Decision Rules concerning Allocation of TAC” (Attachment
11 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, \textit{supra} Ch I n 34, 95.

\footnote{356} CCSBT-EC3 Report, \textit{supra} Ch I n 78, at 23 (paragraphs 44 and 45).

\footnote{357} See Kambona and Marashi, \textit{supra} Ch I n 257, at 8 (paragraphs 22 and 23).

\footnote{358} “Draft Opening Statement – Australia”, \textit{supra} n 340, at 9.
management arrangements for both short-term and long-term conservation of the SBT stock.”

New Zealand stated:

359 “Opening Statements by Delegations” (Attachment C to Southern Bluefin Tuna Trilateral Management Discussions Seventh Round (hereinafter 7th Trilateral Management Meeting Report), unpublished, copy held by author extracted from DPIE files), Australian statement at 5. Similar pressures were felt in succeeding years: see e.g. in 1989 “Draft Opening Statement – Australia”, supra n 340, at 2 (“those countries presently harvesting SBT, but not party to this management group, were also watching our actions closely”) and 10:

Mr. Gorrie reminded the meeting that discussions on the possible establishment of a body responsible for the management of Indian Ocean Tuna fisheries are scheduled to commence in two weeks, and this meeting needed to maintain our present standing with the Indian Ocean forum.

Mr. Gorrie felt it was important that all participants continue to…stress that the trilateral group is the appropriate body to provide management advice to whatever arrangement is put in place on SBT.

Mr. Gorrie was sure that the Indian Ocean meeting would be reviewing the outcome of these trilateral management discussions very closely.

In “Opening Statement by New Zealand Delegation” (1989, unpublished, copy held by author extracted from DPIE files), at 2, New Zealand spoke in similar terms:

Work towards finalising an agreement has been lent some urgency because of the involvement of other nations with SBT. Some other countries are catching increasing amounts of SBT and threaten to add significantly to the overexploitation of the stock, and there are other initiatives concerned with management of tuna in the Southern Hemisphere. … [I]t will be in our best interests to conclude an international instrument that recognises our commitment to the fishery and provides responsible conservation and management of the resource. However, for other countries to accept this role, the trilateral partners need to demonstrate that we are capable of ensuring the long term sustainability of the stock by making the necessary management decisions.

New Zealand’s position had evolved subtly by 1990: whereas in 1989 the instrument was to be one that “provides responsible conservation and management”, it was now described as one that “maintains our control over” the SBT resource – see “Southern Bluefin Tuna Management Discussions Ninth Round, Canberra, 25-28 September 1990 – Opening Statement by New Zealand Delegation” (unpublished, copy held by author extracted from DPIE files; hereinafter New Zealand September 1990 Opening Statement), at 3, where New Zealand added that it was:

…concerned to achieve some substantial progress towards agreement to a final arrangement for the conservation and management of SBT. Work towards finalising an agreement is urgent because of the erosion of our respective positions by the uncontrolled catches of other countries which threaten to undermine our sacrifices to conserve the stock.
The trilateral partners can ill afford to be seen to be incapable of conserving and managing the SBT resource. Other non-SBT catching nations are interested in the future management of SBT.

There is an obvious self-interest for catching nations to maintain control over the conservation and management of the stocks but to do so requires demonstrable responsiveness to the state of the resource and pressing management issues.

...While the current ad hoc management arrangement has its merits...the high ground in negotiating with others who also wish to be involved in conservation and management of the SBT resource will inevitably be held by those that can get their act together first. 360

Later in the meeting Australia pointed to the need to take into account catches of those outside the trilateral group, and indicated that it understood the Taiwanese catch to be at least 280 tonnes. Japan observed that, since SBT migrate through the EEZs of Indonesia and South Africa, their future participation as coastal States would need to be contemplated. The meeting also “recognised the need to take into account the activities of distant water fishing nations such as Taiwan and Korea.” 361

In 1989 the three States continued to voice their concerns in familiar terms:

360 Ibid., New Zealand statement at 2. Accord “Opening Statement – Australia, Reconvened SBT Trilateral Management Session 23 October 1990” (unpublished, copy held by author extracted from DPIE files), at 1:

[In] discussions held earlier, we agreed on the need to control catches by other nations outside of the agreed arrangements we have for management of SBT. Yet there appears to be little point in trying to impose any restrictions on other nations if we are unable to agree on control of our own industries.

Accord also the opening statement at the 1993 meeting (“Opening Statement – New Zealand (October 1993)”) (Attachment C to Southern Bluefin Tuna Trilateral Management Discussions – First Session – Draft Summary Record, Canberra, 21-23 October 1993 (unpublished, copy held by author extracted from DPIE files; hereinafter October 1993 Draft Summary Record)), at 2:

“…catches [by parties] outside the trilateral arrangement continue to be of grave concern. We cannot reasonably seek their cooperation in reducing fishing on the stock if we do not ourselves demonstrate reasonable management.”

361 7th Trilateral Management Meeting Report, supra n 359, at 9.
All parties expressed their concern at catches by fishers not subject to any conservation and management measures. They further agreed to encourage fishers outside the trilateral group to subject their operations to management controls and provide information on their catches. The trilateral parties undertook to continue to use their best endeavours to determine the extent of catches by others using the fishery and to exchange any data obtained.  

For Australia, the moratorium on take of SBT it proposed that year drove home the need for a treaty. It was convinced that the “long term benefits to be derived from a short term moratorium were very large, both from biological and economic points of view.” Further, “it was necessary to consider formulation of arrangements that could include those outside of the trilateral management body who are fishing for SBT.” In their absence, Australia merely “hoped that other fishing nations outside of this forum would respect and adhere to such a moratorium on SBT catches.”

By contrast, among Japan’s reasons for rejecting a moratorium were that it would do nothing to encourage other catchers of SBT to accede to the future treaty. Indeed Japan saw the catch of third parties as an additional reason not to cut the trilateral partners’ own catch at all. With SBT prices already rising markedly, it argued, there was a real risk that, by cutting catch levels further, the trilateral group would only fuel the rise, encouraging others to “fill the void” by increasing their catches or entering the fishery. Japan also claimed that it could not retain the confidence of its industry in the trilateral arrangements if it followed a policy of increasing cuts on its fleet only to the advantage of Taiwan or Korea. Accordingly, Japan was in favour of

362 Untitled document, supra n 337, at 2.
363 Supra Ch I n 271 and accompanying text.
365 Ibid., at 9.
366 Ibid., at 5.
retaining the status quo. New Zealand responded that the need to encourage other countries to participate in the management arrangements through formation of an international convention was the best way to remove the threat of market and fishing “voids” mentioned by Japan.

New Zealand supported Australia’s call for a moratorium in the 1989 management meeting as its preferred position, but added a significant caveat should agreement on a moratorium not be achieved:

[I]t is our position that the current stressed state of the SBT stock is a result of the large catches by Australia and Japan in earlier years and consequently the relatively small New Zealand industry should not be further restricted. Substantial catches of SBT are taken within the New Zealand [EEZ] and when the stock recovers we expect our current small scale domestic fishery will expand to take a greater share of the resource harvested within our waters.

In 1990 the scientists reported to the managers that catches by nations other than Australia, Japan and New Zealand pose an additional risk to the stocks that increased with magnitude of those catches. … It is essential

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368 Southern Bluefin Tuna Trilateral Management Discussions Eighth Meeting 18-21 September 1989 Summary Record (unpublished, copy held by author extracted from DPIE files; hereinafter September 1989 Summary Record), at 25-26. Australia joined New Zealand in expressing interest in whatever data Japan could provide on Taiwan’s catch and marketing of SBT: at 26.

369 Draft Summary Record Reconvened Trilateral Management Meeting for SBT Canberra 8 – 18 October 1989 (unpublished, copy held by author extracted from DPIE files; hereinafter October 1989 Draft Summary Record), at 2. Japan rejoined that it was worried about Taiwanese and Korean fishermen negating any benefit further reductions by Australia, Japan and New Zealand may have – particularly with a number of Japanese skippers proposing to operate on Taiwanese and Korean boats: at 3. The Japanese industry feared that the lack of agreement on quotas even after two rounds of meetings “could mean other countries like Taiwan and Korea would move into the fishing grounds, which would be chaotic in terms of the stock.”: ibid., at 14.

370 “Opening Statement by New Zealand Delegation”, supra n 359, at 2. In the equivalent statement in 1990 (New Zealand September 1990 Opening Statement, supra n 359, at 2) New Zealand rather than speaking of an expected expansion of its fishery said that it was “confident it can expand”.

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that reliable data on past and future catches and catch length composition of SBT taken by all countries be collected and made available for inclusion in the VPAs.\textsuperscript{371}

Australia noted in the management meeting that, for as long as Japan’s national allocation had been set too high to require closure of the Japanese season in order that it not be exceeded, third-party catch had effectively been ignored because it did not take the global catch above the TAC. Now this slack was no longer available:

It is extremely important to note that, until 1989, catches by other nations had been contained within the global quotas set – but, when quotas first restricted Japanese longline operations in 1989, we were faced with all catches by other nations being outside the level of global quotas.

It is essential this issue is addressed immediately – agreed quotas leave no scope for quota limitations being exceeded, particularly when the stock is in such a grave situation.\textsuperscript{372}

New Zealand, however, now wanted to postpone the admission of new States to the completion of a treaty:

New Zealand is concerned by recent indications of substantial increases in catch by vessels from outside the trilateral arrangements. New Zealand believes that it is important that other nations that fish the stock be drawn into arrangements for the conservation and management of the stock. But equally we are of the firm view that institutional arrangements should first be thoroughly discussed and if possible set in place between the trilateral parties, before involving further parties.\textsuperscript{373}

\textsuperscript{371} Report of the Ninth Meeting of Australian, Japanese and New Zealand Scientists on Southern Bluefin Tuna, Hobart, Australia, 17-22 September 1990 (unpublished, copy held by author extracted from DPIE files), at iii. VPA stands for virtual population analysis, a fish stock assessment technique described infra in Appendix 2, text at nn 1515-1520.

\textsuperscript{372} “25 September 1990 Opening Statement – Australia”, supra n 339, at 9.

\textsuperscript{373} New Zealand September 1990 Opening Statement, supra n 301, at 2. It appears to have had its way for the next year at least, as there was no discussion of third parties recorded in the report of the 1991 trilateral management meeting. Although in the treaty text ultimately adopted, the criteria for eligibility to accede were not at all stringent (see Article 18 of the 1993 Convention, reproduced at Appendix C, Part I infra), the three States appeared to believe, for reasons that are unclear, that they could impose conditions on prospective new entrants:

Concern was expressed by all three countries that the trilateral framework established for the conservation and management of SBT could be adversely affected by nations not party to
The general resolution adopted by the three States embodying the outcome of their management meeting that year included the following passage:

The three parties noted the serious concern at the current level and possible increase of SBT catches by other parties outside of the trilateral framework, and have recorded their views on the issue of catches by other parties in Annex 3 to this resolution. It was recommended that the scientific group extend invitations to scientists from other parties to participate as observers at the next trilateral scientific meeting.

…it was recognised that a formal agreement was most important in addressing the activities of other parties.374

A resolution-within-a-resolution dealt specifically with new entrants:

Noting that Australia, Japan and New Zealand, the three traditional southern bluefin tuna (SBT) fishing nations, have been taking voluntary regulatory measures of self restraint for the purpose of conserving the SBT resource since 1982 under the trilateral co-operative management framework;

Also taking note of the particular importance of maintaining and developing the co-operative management framework which is serving to help bring about the recovery of the SBT resource;

Taking into account the advice of the three nation’s [sic] scientists that given the status of the parental biomass currently at historically low levels, cautious management measures for the three nation’s [sic] fisheries should be continued;

Being conscious of their shared responsibilities to ensure continuing efforts to achieve recovery of the SBT resource;

Australia, Japan and New Zealand,

Reaffirmed at the 1990 trilateral SBT management meeting their readiness to take voluntary regulatory measures during the next fishing season;

Expressed their increasing concern over catches by third parties, which unless properly regulated, could possibly jeopardise the extensive effort so far exerted by the three nations; and

those arrangements. All three countries agreed that other nations with significant catches of SBT should be invited to accede to the Convention as soon as it is ratified, but that the terms and conditions of such access remained to be considered.

See November 1993 Draft Summary Record, supra Ch I n 289, at 3.

Reconfirmed their intention to use their best endeavours to encourage such third parties to be cognisant of the efforts of the three nations and pay due respect to the conservational aspect of the SBT fisheries.\textsuperscript{375}

Though the self-serving description of themselves as “traditional” participants suggests that the three States were laying an inchoate claim to historic rights to the SBT fishery, it was rather half-hearted in that no attempt appears to have been made to bring this text to other States’ attention – concerted engagement with them was in 1990 still some years off.

Third States became involved in the negotiations in an additional and unusual way. Pursuing its standard insistence on conditioning access of Japanese fishing vessels to the AFZ on prior agreement on the TAC and national allocations against which their catch would be counted,\textsuperscript{376} Australia warned that Japan was not the only State to which it was prepared to give access to the AFZ:

If the trilateral negotiations are broken off, I must make it absolutely clear that there will be no bilateral access whatsoever for Japanese vessels to the Australian Fishing Zone in 1990/91. This includes port visits, with the only possible exceptions being for surveillance and agreed research vessels.

[If Japan walks away from agreement on global quotas this year…that would leave the Australian industry no choice but to pursue negotiations with other countries.\textsuperscript{377}

One of the arguments used by Japan in opposing leasing and charter arrangements was that they “will increase catches by other nations, against our common goal of

\textsuperscript{375} Ibid., at 6 (Annex 3, “Resolution on Catches by Other Parties”).

\textsuperscript{376} Supra, text at nn 332-334.

\textsuperscript{377} “Southern Bluefin Tuna Trilateral negotiations – Australian Statement to plenary session on 10 October 1990” (unpublished, copy held by author extracted from DPIE files, hereinafter Australian 1990 trilateral statement), at 2-3, corroborated by Draft 1990 Japanese Opening Statement, supra n 344, at 2: “[S]ome Australian fishing operators propose to sell/lease some 3000 tonnes of quota to Japan, ROK or Taiwan.”
restricting catch by other nations in the interests of stock management”. Japan asked
that Australia “voluntarily restrict” such arrangements. New Zealand went further:
New Zealand believes arrangements to catch SBT should be limited to the trilateral
partners at least until such time as formal institutional arrangements have been
established. We have placed restrictions on our own industry to limit joint venture
arrangements to other trilateral partners. New Zealand is of the view that
arrangements with parties outside the trilateral framework would be in breach of the
agreement to discourage catches of SBT by those parties.

Implicit in these stances, however, is a failure to appreciate that, on proper legal
analysis, quota carries with it a measure of international responsibility. A catch limit
is an obligation to ensure that catches by persons and vessels subject to the control of
the State accepting the limit – in this case Australia – do not exceed a certain
quantified level. It is submitted that there is no warrant for implying into this a
further restriction that Australia’s 5,265 tonnes must be caught by Australian vessels.

Had Australia permitted or encouraged the use of foreign vessels to catch SBT
against quota covered by statutory fishing rights under the *Fisheries Act 1952*, that
fishing, whether or not it took place within Australia’s EEZ, would be governed by
Australian law and produce catch that would be counted against Australia’s national
allocation just as if it had been caught by Australian-flagged vessels. That is, it is
enough that the fishing by the foreign vessels would have taken place under the same
conditions as that of Australian vessels and been catch for which Australia accepted

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378 Draft 1990 Summary Record, *supra* n 342, at 29. See also Draft 1990 Japanese Opening
Statement, *supra* n 344, at 3:

> If Australia is not able to use its quota itself it should give it up. Allowing Taiwan and ROK
to use Australian quota will severely exacerbate the problem of other countries catching
outside the Trilateral Management arrangements.

379 “New Zealand Statement for Plenary Session of Ninth Southern Bluefin Tuna
Management Talks, Canberra 9 October 1990” (unpublished, copy held by author extracted from
DPIE files, hereinafter New Zealand 1990 trilateral statement), at 1.
international responsibility, including for any failure to prevent the combined total exceeding 5,265 tonnes.\textsuperscript{380}

The lack of imagination on the part of Japan and New Zealand may have stemmed from a continuing belief in flag State primacy, giving no weight to the fact that the vessels were voluntarily subjecting themselves to management regulation under Australian law. Their understanding of the nature of quota may also have been blurred because the catch of Japanese vessels fishing under the joint venture was double-counted against both Australian and Japanese quota; this was the way in which the total catch was kept down.\textsuperscript{381}

The 1990 resolution ultimately appeared to contemplate that outsiders might be able to fish a party’s quota, though in words that were less than encouraging of such a development:

\begin{quote}
The three parties reiterated their common view that there was a place within the trilateral framework for various charter and leasing arrangements, and that it would be desirable for such arrangements to be between the trilateral partners.\textsuperscript{382}
\end{quote}

\section{The beginnings of a more systematic approach}

Other participants in the SBT fishery were also a consideration for the three States when at their 1992 management meeting they decided they needed to specify more clearly their objectives for the fishery, and in consequence adopted the outlines of a mid-term management strategy for the next three years, “directed at annual increases in parental biomass and reduction of the risk of abrupt recruitment decline”. The further refinement of the strategy planned for early 1993 would include in it:

\textsuperscript{380} This is supported by the 1988 reference to the obligation to ensure compliance with management measures, in the context of the desire to control fishing for SBT by non-parties in the EEZ, not prohibit it: \textit{supra}, text at n 401.

\textsuperscript{381} \textit{Supra}, text at n 336.

\textsuperscript{382} “SBT Trilateral Management Discussions – Resolution”, \textit{supra} n 346, at 2. Note too the possibility that the implementation of the decision on reallocation of catch shares under Annex 1 to the 1990 Resolution might not proceed if third-State vessels took more than 10% of Australia’s or New Zealand’s quota; see paragraph 2 of the Annex reproduced \textit{supra}, text at n 347.
(g) actions, consistent with international law, to deter catches of SBT outside the SBT trilateral conservation and management framework including consideration of a mechanism for tracking SBT products such as certificate of origin regime, and coordinated contacts to relevant fishing authorities

(h) scientific cooperation between the trilateral parties and other countries fishing for SBT or having SBT in waters under their jurisdiction. 383

Once more the three States expressed “significant concerns at the current level and apparent increase of SBT catches by parties outside the trilateral framework, particularly Taiwan,” and reaffirmed their 1990 views on catches by others. They agreed to “explore, as a matter of urgency, possible measures for addressing the problem of non-trilateral catch.” Concurring that every effort should be made to discourage SBT fishing by vessels reflagged for convenience, they requested Japan to take effective measures to deter such reflagging of exported Japanese longliners. The three States also undertook to cooperate in investigating the potential of a certificate of origin scheme for SBT and scheme as a means for more clearly identifying the origin of SBT catches. Meanwhile, they recommended that the scientists extend invitations to counterparts from other countries to participate as observers at the next trilateral scientific meeting. They also saw merit in seeking Indonesia’s involvement in co-operative stock enhancement projects. 384

The refrain continued at the 1993 meeting, where concern was expressed by all three States over the significant increase of non-trilateral catch, especially that of Taiwan and Indonesia. Australia in its opening statement listed a much broader range of information that was required on catch taken outside the trilateral framework:

Catches of SBT taken outside the trilateral quota system threaten to undermine our collective efforts to manage the fishery. Other countries involved in the SBT fishery


384 Ibid., at 4. Annex 3, “Resolution on Catches by Other Parties” was, apart from some minor additions, placing the mention of cautious management in the context of the outline midterm management strategy, and contemplating early, coordinated contacts with the fisheries authorities of other participants, essentially the same as the equivalent document of 1990 (see supra n 375).
must be encouraged to participate in the work of the new Commission. It is also
evital that we obtain, as soon as possible, much better information about the nature
and origin of these catches. We need to know what vessels are fishing, where and
when they are doing so, and by what means their catches are being brought to
market. We need to work together on obtaining detailed information on non-quota
catches, and to cooperate in devising effective means of influencing the activities of
the vessels concerned.  

Australia focused on catch and effort data to underpin management of the fishery:
Any calls for catch constraint outside the trilateral quota regime will be both
pointless and unjustified if we are unable to show that we have effective
management measures in place for our own fisheries. These must necessarily
include programs to ensure the collection and exchange of timely and verified catch
and effort data from within fishing zones and on the high seas.  

New Zealand saw a certification scheme as the answer:
The grave stock situation continues to be aggravated by uncontrolled and increasing
catch outside the trilateral arrangement. In the medium term we need to seriously
consider how to bring new parties into the Convention. In the shorter term the most
immediate step is to implement a certification scheme as soon as possible. The New
Zealand Government and industry are ready to cooperate in a system which will
have documentation for all SBT caught by New Zealand vessels.  

Briefed by Japan on the ICCAT statistical document program’s origins, Australia and
New Zealand were interested in collaborating in the introduction of such a scheme as
an important component of a strategy for obtaining information on non-party catch,
but in Japan’s view the merits of doing so for SBT had yet to be assessed. All three

385 “SBT Trilateral Management Discussions 21-23 October 1993 Australian Opening
Statement”, in Attachment C to 1993 Conclusion, supra n 348, at 2.
386 “SBT Trilateral Management Discussions 22 November 1993 – Second Session:
Australian Opening Statement” (Attachment E to November 1993 Draft Summary Record, supra
Ch I n 289).
387 “Opening Statement – New Zealand” (Attachment C to November 1993 Draft Summary
Record, supra Ch I n 289), at 2.
States recognised the need to seek cooperation from flag States of vessels that catch SBT before implementation of such a scheme which might affect them.  

Australia reported joint research with Indonesia that “reliably estimated” the latter’s annual catch at 650 tonnes, of which 67 per cent was exported to Japan. Japan in turn provided statistics on significant SBT imports from countries (Taiwan, Korea, Indonesia, Singapore, Panama) other than Australia and New Zealand, noting that the separation of statistics for southern and northern bluefin tunas would allow the closer monitoring of such imports in future. Information was shared on SBT catches by Indonesia’s tuna longline fisheries collected through CSIRO’s co-operative research program with Indonesian scientists, which Australia was encouraged to continue. Australia and New Zealand urged Japan to discourage transactions in SBT caught outside the trilateral conservation framework. Japan undertook to obtain detailed information on the landings of Taiwanese-caught SBT on a vessel-by-vessel basis.

The three States undertook to set up a system for the collection, timely sharing and reviewing of all trade, scientific and other relevant data available from non-parties in relation to SBT with a view to determining the magnitude of non-party catches and to prepare an assessment of those data at the time of the trilateral management meeting in May 1994. Australia and New Zealand encouraged Japan to monitor imports of non-party catch closely and to alert them to developments in this regard. All were to consider the merits of introducing a statistical document program similar to that of ICCAT for the May 1994 meeting. In the meantime, Each Party will make every effort to discourage its nationals from being involved in non-Party fishing, transactions involving SBT caught by a non-Party or engaging in other activities involving non-Parties in relation to SBT, where such fishing,

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388 1993 Conclusion, supra n 348, at 3.  
389 Ibid., at 2-3; October 1993 Draft Summary Record, supra n 360, at 2.  
transactions or activities are likely to undermine the effectiveness of the SBT conservation effort.391

When the meeting resumed a month later, the three States agreed on a draft Action Plan on Non-Party Catch based on a draft prepared by Japan, which contemplated that they would organise and send a joint mission to Indonesia and Taiwan in mid- or late 1994 to urge them to join the SBT conservation and management effort, as well as collect information on their fishing activities. It was agreed that each of them would take any opportunity available to discuss the conservation and management of SBT with Taiwan, Indonesia, Korea and Panama, the plan’s main targets, and they prepared a draft joint demarche which would form the basis of such approaches.392

The draft demarche refers to UNCLOS and the 1993 Convention, and the obligation in Article 117 of UNCLOS to take, or cooperate with other States in taking, measures for nationals necessary for the conservation of the living resources of the sea, though not identified as such, is described as being among the “generally accepted principles of international law”. The draft rehearses the history of the trilateral catch limits in the context of the “voluntary cooperation among the three nations to manage sustainably the SBT fishery resource”. Drawing attention to the 1,148 tonnes of non-trilateral SBT exports to Japan in 1992, and to the addressee’s share of it (165 tonnes from Indonesia in the example used), the text continues:

Given the severe restraints already exercised by the parties to the Convention, this information causes concern to the three nations over not only the lack of catch data for proper scientific analysis but also the possible adverse impact of such catches on the effectiveness of the conservation effort under the Convention. Australia, Japan and New Zealand, as contracting parties to the Convention, wish to work closely and cooperatively with Indonesia. The Parties therefore encourage Indonesian

391 Ibid., at 32.
392 November 1993 Draft Summary Record, supra Ch I n 289, at 4. For the draft plan and text of the demarche see Annex II to Attachment D to 1993 Conclusion, supra n 390, at 31-33. At 31-32 catch by non-parties was also mentioned, in line with the focus on control of catch under the mid-term management strategy (Attachment D to 1993 Conclusion, in 1993 Conclusion, supra n 348, 27 at 28).
participation under the Convention framework either though joining the Convention or as observers to scientific, plenary and other meetings relevant to the conservation of stock, including the trilateral management meeting in May 1994.

The demarche ends with a call for the addressee to provide as soon as possible all relevant catch and effort data, including location and method of capture, necessary for effective scientific assessment of SBT, in time for it to be included in scientific evaluations of the status of SBT to take place in April 1994.393

F The 1993 Convention and its negotiation

The 1993 Convention was negotiated by Australia, Japan and New Zealand from 1988 to 1992 at six meetings of the working group established by the trilateral meeting of 1987 for this purpose. As seen above,394 the three original Parties decided to formalise their cooperation in this way for two main reasons. One was the early signs of significant catch of SBT by other States and entities, which they thought would be easier to control through a formal mechanism, while the second was the FAO’s decision to set up what became the Indian Ocean Tuna Commission (IOTC), with a twofold attendant risk: not only might decisions on SBT adverse to the Parties’ interests be made by a body with a considerable number of members that had no stake in the fishery, but sooner or later those other members would take the IOTC’s nominal competence to regulate the SBT fishery as an inducement or encouragement to enter the fishery themselves. Either way this amounts to a desire on the part of the three original parties to retain control of the fishery – including their overwhelming collective share of the SBT catch – as far as possible.

The Working Group had before it a consolidated working text prepared by Australia but concentrated on its substance, not specific wording.395 It identified two basic

393 “Draft Text for Joint Diplomatic Demarche to Indonesia”, attached to Annex II to Attachment D to 1993 Conclusion, supra n 390, at 33.
394 Supra, nn 358-359 and accompanying text.
395 Report of the Trilateral Working Group on Possible Institutional Arrangements for International Management of Southern Bluefin Tuna Second Meeting, Canberra 8 – 10
approaches for a treaty: creation of a commission, or regular meetings of parties but without establishing a formal body. There was substantial agreement that the treaty should cover the entire range of SBT, and include a clause encouraging participation by other countries whose nationals fished for SBT or in whose EEZ or exclusive fishery zone SBT occurred.\footnote{September 1988 (Attachment F to 7th Trilateral Management Meeting Report, supra n 359), Summary Record, at 1-2.} Among outstanding issues were whether to have a secretariat (Japan favoured this, but Australia and New Zealand were reluctant);\footnote{Ibid., at 4. Participants concurred that the agreement should not be seen as exclusive. Japan was of the view that the establishment of a commission would be welcomed internationally as it would be seen as being open for other countries to join. All agreed on the need for there to be incentives for countries with an interest in SBT to become party to the treaty: at 8.} criteria for the allocation of catch shares;\footnote{Ibid., at 4. While Australia and New Zealand were wary of the costs of a commission, Japan said it was not necessarily expensive and pointed to precedents of commissions without a secretariat.} how to specify the sovereign rights of coastal States and rights of distant-water fishing States;\footnote{New Zealand supported allocation criteria so as to safeguard the interests of coastal States, i.e. the priority right of a coastal State to develop the resources in its EEZ; Japan considered that this would reopen debate on the relative rights of distant-water fishing States and coastal States over highly migratory species, and preferred to let the commission decide its own criteria: ibid., at 6.} and decision-making procedures, including whether to have an objection clause.\footnote{Agreement was at this stage confined to the abstract need for balance: ibid., at 3. Australia and New Zealand favoured inclusion of a reference to the sovereign rights of coastal States, the principal requirement being a clause restating the right of a coastal State to determine fishing access to its EEZ or exclusive fishery zone. Bearing in mind that SBT was a highly migratory species, Japan preferred a more general disclaimer concerning the parties’ rights, claims and views in regard to international law. New Zealand had said in plenary (7th Trilateral Management Meeting Report, supra n 359, at 3) that it “maintains the right to control SBT fishing in its zone by any party in addition to trilateral management control measures.” For some years after UNCLOS was adopted in 1982 the issue of whether highly migratory species were by virtue of Article 64 uniquely not subject to the coastal State’s sole control in its EEZ remained controversial, but was eventually resolved in the negative. A US proposal that would have led to a strong international management element for tuna in the EEZ (UN doc A/CONF.62/C.2/L.47 (8
Australia and New Zealand were particularly concerned that adequate provision be made to control fishing for SBT in EEZs by non-parties. While New Zealand thought such activity should be discouraged, participants concurred on the value of including a general provision stating the obligations of parties to ensure compliance with all relevant management measures adopted under the treaty. 401

There was general agreement that parties should not encourage SBT fishing by non-parties outside the terms of the treaty. Though all concurred that there should be provisions to discourage activities by non-parties adversely affecting the conservation and management measures adopted under the treaty, these should be consistent with other international laws and agreements including the GATT. 402

The meeting concurred that invitations for new parties to accede to the treaty should be unanimous, as Australia’s draft text provided. 403

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400 Attachment F to 7th Trilateral Management Meeting Report, supra n 395, Executive Summary, at 1-3.

401 Ibid., Summary Record, at 7. There is no necessary contradiction here with New Zealand’s statement in plenary (7th Trilateral Management Meeting Report, supra n 359, at 3) that a figure approaching 2,000 tonnes of SBT annually was caught by foreign vessels in its EEZ, as Japanese vessels continued to enjoy access to its EEZ to fish SBT under the 1978 treaty (supra Ch I n 264).

402 Ibid., at 8.

403 Ibid., at 10. See Attachment B, “Consolidated Working Text on the International Management of Southern Bluefin Tuna, 26 August 1988”, whose Article XV(2) stated:
Although the working group went into abeyance for a number of years, at its fifth meeting in early 1992 the instrument that became the 1993 Convention acquired a form fairly close to the final one, when the meeting established a working party to review draft texts and proposals. This smaller group then prepared a consolidated working text which reflected the deliberations of the meeting.

Fishing by others remained throughout the drafting of the 1993 Convention a main incentive to finalise it, the delegations at the sixth and final working group meeting recording their “shared concern at the expansion in fishing activity for southern

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404 “Southern Bluefin Tuna Working Group on Institutional Arrangements, Wellington, 10-13 February 1992 Executive Summary Record” (unpublished, copy held by author extracted from DPIE files), at 1.

405 The text is headed “Consolidated Working Text February 1992” and forms Annex C to the report of the Working Group’s meeting cited in the previous footnote. The differences from the 1993 Convention are mostly editorial, except that: (a) the definitions (Article I) were still blank; (b) decision-making was subject to an objection procedure (Article IX) by which a Party unable to accept a measure adopted could, by notifying the Commission, avoid becoming bound by it; this would lead to a Special Meeting at which any other party could follow suit, followed by consultations with other parties “to facilitate the expeditions adoption of the measure, amended as necessary”; (c) there was no equivalent of the 1993 Convention’s Article 14, on third party-observers at meetings; (d) the annex for the arbitral tribunal had yet to be written, though there was already a reference to it in the dispute settlement clause (Article XV); (e) nor was the anti-reservation clause (Article 19 of the 1993 Convention) yet present. By the next draft (Annex B to “Southern Bluefin Tuna Sixth Working Group on Institutional Arrangements, Canberra, 12-14 August 1992, Executive Summary Record” (unpublished, copy held by author extracted from DPIE files)), the text is virtually in its final form, except that the articles have headings which are omitted from the final, and there was still no provision on reservations.
bluefin tuna by vessels operating without proper flag State control outside the current trilateral framework.”

One curious passage of the report shows that delegations clearly had the European Community in mind as a potential participant, but deliberately chose not to provide for its participation \textit{ab initio}:

The delegations also noted their readiness to work on revision of the terms of the Convention should a regional economic integration organisation express an interest in becoming a member of the Commission and be qualified to do so.

It may be surmised that this reluctance was prompted by fear that specific provision would have been interpreted by the European Community as an encouragement to enter the SBT fishery, to the three States’ detriment.

After making the final changes, the three States signed the 1993 Convention on 10 May 1993 at a ceremony in Canberra. In 1994 for Japan, New Zealand and Australia deposited instruments of ratification on 8 April, 9 May and 20 May respectively; by Article 17, paragraph 2 it entered into force on the last of these dates.

1 Assessment of the 1993 Convention: continuity and change

The original Parties chose an initial structure\textsuperscript{408} for the CCSBT that is typical of the three-element norm (plenary, subsidiary bodies and staff) identified by Koers in 1973.\textsuperscript{409} The Scientific Committee is entrenched in the 1993 Convention (Article 9), while Article 10 merely permits, but does not oblige, the Commission to establish a

\textsuperscript{406} “Southern Bluefin Tuna Sixth Working Group on Institutional Arrangements, Canberra, 12-14 August 1992, Executive Summary Record”, \textit{supra} n 405, at 2 (paragraph 7).

\textsuperscript{407} \textit{Ibid}. (paragraph 9).

\textsuperscript{408} By a 2001 resolution the Commission created an Extended Commission and Extended Scientific Committee in order to accommodate Taiwan: Resolution to Establish an Extended Commission and an Extended Scientific Committee (Attachment I to CCSBT7 Report), in CCSBT Blue Book 2002, \textit{supra} Ch I n 30, 54, reproduced \textit{infra} at Appendix D. This is analysed more fully in Chapter IV.

\textsuperscript{409} Koers, \textit{supra} Ch I n 285, at 130. Other more elaborate structures are possible: examples are ICCAT’s four panels, and NAFO’s dual structure under which a Commission sets
For the first two years of its life the CCSBT had no independent Secretariat, the secretariat functions rotating among the parties along with the Chair of the Commission – essentially a continuation of the pre-1994 practice.

A Finance and Administration Committee was established at the CCSBT’s Third Meeting to begin operations from 1997, with Japan to chair it for the first two years. There exist also a Compliance Committee and a Working Group on Ecologically Related Species.

This it did in 1996, once Australia had made regulations for the Commission under the International Organisations (Privileges and Immunities) Act 1963 (Cth) – the Commission for the Conservation of Southern Bluefin Tuna (Privileges and Immunities) Regulations, Statutory Rules 1996 No 40. Australia made office space available within the DPIE’s building for an interim Executive Secretary supplied by that Department, Mr McGregor, to begin the task of setting up the permanent Secretariat in separate premises, which were subsequently opened in September 1996 by the Australian Minister for Resources and Energy, Senator Parer. The 1993 management meeting had recognised as factors in favour of the establishment of a permanent secretariat the need to increase international awareness of the trilateral conservation effort for SBT and to establish relations with other relevant international bodies: 1993 Conclusion, supra n 348, at 5. For the text of Articles 9 and 10, see Appendix C, Part I infra.

Nevertheless, the Parties’ intent appears to have been to establish a secretariat reasonably promptly; at the First Meeting of the CCSBT Japan and New Zealand accepted Australia’s offer to host the secretariat once established: CCSBT1 Report, supra Ch I n 273, at 5. CCSBT3(1) Report, supra Ch I n 102, at 8.

At the CCSBT’s First Meeting, Japan proposed the establishment of an infractions “sub-committee”: CCSBT1 Report, supra Ch I n 273, at 3. The term “sub-committee” appears to be a misnomer, as the Scientific Committee provided for in Article 9 of the 1993 Convention had not yet been formed, and the CCSBT did not at this meeting establish any other committee to which it would have reported. Reference is subsequently made to a future “Enforcement and Infractions Committee” in the record of the informal meeting of April 1995: Japan-Australia-New Zealand Southern Bluefin Tuna Informal Consultations, Canberra 26-28 April 1995, Draft Summary Record (unpublished; hereinafter April 1995 Draft Summary Record), at 9. The records of this informal consultation and of those of October 1994 (infra Ch IV n 685) and September 1995 were subsequently incorporated in that of the closing session of the CCSBT’s first meeting:
In other respects, however, the 1993 Convention was innovative.

2 Decision-making in the CCSBT

Though it was not always so, the prime purpose of modern fisheries commissions is to set catch and/or effort limits, or, in the case of stocks for which they have

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Koers, supra Ch I n 285, at 171 identifies seven functions of international fisheries commissions: full utilisation of the living resources of the sea, conservation of those resources, economic efficiency of marine fisheries, allocation of catch, research, enforcement of fisheries regulations and conflicts between fisheries and either other fisheries or other uses of the ocean. Few of the older commissions he surveys, however (ibid. at 171-228), particularly those created by the FAO with the first of his functions primarily in mind, reflecting the post-war preoccupation with protein shortages in the developing world, have any power to institute measures binding on their member States – they are consultative rather than normative fora.

Accord Burke, supra Ch I n 80, at 19 and 23-24.
competence but no such limits are required, to monitor the state of those stocks and introduce limits when they become necessary. The 1993 Convention by Article 8, paragraph 3 directs the CCSBT, “[f]or the conservation, management and optimum utilisation” of SBT, to “decide upon a total allowable catch and its allocation among the Parties” unless it decides upon “other appropriate measures” on the basis of the report and recommendations of the Scientific Committee established under Article 9; it may also “if necessary, decide upon other additional measures”. The original Parties thus took a common position, and wrote it into the Convention, on two debates about management rules in the international community: the relative merits of catch limits as opposed to effort limits, and of “Olympic” fisheries as opposed to national allocations.

(a) **Catch limits vs effort limits**

Limitations of catch (i.e. of the output of a fishery) have the disadvantage that they tend to magnify the natural fluctuations of the biomass (in that a given tonnage caught represents a greater proportion of a stock when it is scarce than when it is abundant), but they are easy to define and administer. Restrictions of effort (i.e. of the inputs to a fishery) are not only more difficult to police, but require prior agreement among participants on the way in which effort is to be measured – number of vessels, number of fishing days, number of hooks deployed are some of the common ones – and are vulnerable to circumvention by channelling of investment
into still unrestricted inputs.\textsuperscript{416} Their offsetting advantage is that a given amount of effort, however defined, will \textit{ceteris paribus} yield a higher catch when the stock is abundant and a lower one when it is not.\textsuperscript{417}

(b) \textit{Allocated vs unallocated shares}

At first, international fisheries management relied on “Olympic” or unallocated catch limits, open to all comers, not subdivided into national shares. Allocated limits, though increasingly the norm, are of relatively recent origin, first introduced by the International Commission for the Northwest Atlantic Fisheries in 1972.\textsuperscript{418}

Unallocated catch limits have two main problems. The first is that they do nothing about the incentive to overinvest, as all compete to maximise their share of available

\textsuperscript{416} P. Gooday, \textit{Economic Aspects of Fisheries Policy} (ABARE eReport 04.18 (2004), <www.abareconomics.com/publications_html/fisheries/fisheries_04/er04_fish_policy.pdf>, accessed on 30 October 2008), at 6-7. Australia’s experience with SBT in the 1970s, where a simple limit on vessel numbers was ineffective to prevent older smaller vessels from being replaced by larger new ones with greater fishing capacity – see supra Ch I, text at n 148 – is a prime example of this drawback of effort limits. See also J.L. Kask, \textit{Tuna: A World Resource} (Occasional Paper No 2; Kingston: Law of the Sea Institute, University of Rhode Island, 1969), at 18: where the tonnage of vessels was restricted, owners substituted new vessels that were capable of greater speed (allowing more fishing trips to be made) or had greater hold capacity (allowing more fish to be taken with vessels of the same tonnage).

\textsuperscript{417} Of course, other things are not always equal: the scientific literature is replete with examples of “depensatory” as well as compensatory biological mechanisms. Clark, \textit{supra} Ch I n 83, at 17, defines as compensatory any model in which the growth rate is a decreasing function of the population size, at any size, whereas depensation occurs when at certain population sizes the growth rate is an increasing function of that size. The point here is that, while catch limits are in themselves depensatory in effect, effort limits (leaving aside their ease of circumvention) are neutral in this regard.

secondly, on the international plane they require a cumbersome institutional mechanism to support them which is at significant risk of breakdown through error or bureaucratic inefficiency. Vessels must first report their catch to their individual flag States, who in turn report them to a central body, which then closes the fishery when the catch limit is approached or reached, involving further delays before member State authorities convey news of the closure to their own fleets.  

National allocations avoid the second of these evils (States’ fisheries close at different times as their limits are reached, with a single-level communication process, for subsequent reporting to the Commission), but can only attenuate the first unless each participant in the fishery has an individual share of the TAC. Australia’s ITQ system has achieved this within the confines of its national allocation, and New Zealand and more recently Japan have followed suit, but these are actions undertaken and enforced only at the domestic level; they are neither prohibited nor encouraged by the 1993 Convention or other international fisheries instruments. No international fisheries commission distributes quota directly to individual participants.

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419 See supra Ch I n 88 and accompanying text; also Johnston, supra Introduction n 1, at 382-383 for a specific instance of this in the otherwise successful regulation from the 1930s onwards of the Pacific halibut fishery.

420 For example, Japan told the 1988 trilateral management meeting that for the 1988 fishing year, the Japan Fisheries Agency would make an annual catch projection on a monthly basis from November 1988 to January 1989; from the date when catch is expected to exceed the catch limit, some vessels would be ordered to leave the fishing ground, and the submission of monthly reports would be ordered; administrative guidance would be given after the catch limit was reached to release incidental catch of SBT by vessels which target other tunas outside restricted areas: 7th Trilateral Management Meeting Report, supra n 359, at 3. The main force of these measures, however, came only once the limit was reached, and Japan in effect conceded the possibility of the quota being exceeded by providing additionally for closed areas to be set if this occurred: ibid. This in fact happened in 1989 when catch rates higher than those on which the Japanese authorities had based their expected date of reaching the national allocation left them unprepared to close the fishery in time to avoid overcatch: see infra Ch V, text at n 1096.

421 See the discussion supra Ch I, text at nn 89 (Australia), 202 (Japan) and 212 (New Zealand).
sponsored by its member States, but trade in quota between States, which in principle would go part-way to achieving the same capacity-limiting end, may in future come to be an accepted part of the international fisheries landscape, with the CCSBT in the forefront: see Chapter VI.

3  **Consensus decisions: beyond the objection procedure, or a half-measure?**

Until the 1980s fisheries commissions’ decision-making procedures reflected the general reluctance of States to hand over to an international body what they regard as sovereign decisions on the amount of fish that they may take from the high seas. In this ICCAT, under Article VIII of its 1966 Convention, is typical. Its decisions are styled “recommendations” and do not come into force immediately on their making. Rather, after adoption by a two-thirds majority, recommendations are transmitted by the ICCAT Secretariat to the Contracting Parties and become binding six months from the date of notification, unless within that period any Contracting Party presents an objection. In that event a number of other rules come into play, entailing at minimum a delay in the recommendation’s entry into force. The salient point of these rules is that even a lone objector can escape being bound, and on receipt of its objection every other Contracting Party has a choice between becoming bound by the recommendation as against all parties but the objector, or itself escaping the obligation through a consequential objection of its own.

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422 This was proposed by R. Shotton and M. Haward, “Requirements for Managing Deep-Seas Fisheries”, in FAO Fisheries Proceedings 3/1, supra n 314, 686 at 707. On the analysis above, however, States are the “middlemen” in the quota allocation transaction and there is no reason to expect that they would be keen to relinquish this role. This is to be contrasted with the position for deep seabed mining established by Part XI of UNCLOS.

423 Article VIII of the 1966 Convention is reproduced in Appendix C, infra, in Part II.

424 This a State might well wish to do in order to safeguard its share of the catch if the objector is a major participant in the fishery concerned, given that the history of ICCAT’s allocation decisions is that there is little or no discount for catches taken above an allocation which did not enter into force because of one or more objections.
The reason for the three original Parties to the 1993 Convention not adopting this procedure is that the Convention’s negotiation was itself prompted by the growth of catches by vessels flagged to the Republic of Korea, Indonesia and Taiwan.\textsuperscript{425}

Though objections were rarely presented in ICCAT, the recent history of that body is that they have tended to be presented not by Members of long standing, but rather by newly acceding coastal States. These would otherwise have found themselves without quota for species they had hitherto fished in their own EEZs, and – at least until the 2002 adoption of criteria of allocation\textsuperscript{426} – little prospect of obtaining any because ICCAT’s entrenched practice, reflecting the dominance of its developed country members, was to rely predominantly on historic catch to allocate quota.\textsuperscript{427}

\textsuperscript{425} Supra, text at nn 359 ff.

\textsuperscript{426} “ICCAT Criteria for the Allocation of Fishing Possibilities” (Annex 8 to Proceedings of the 17\textsuperscript{th} Regular Meeting of the International Commission for the Conservation of Atlantic Tunas (Murcia, Spain - November 12 to 19, 2001) (hereinafter ICCAT17 Report)), in ICCAT Green Book 2002/1, supra Ch I n 228, 211.

\textsuperscript{427} Japan impliedly criticised South Africa’s objections for not being motivated, as Japan considered they ought to be, only by the most serious of reasons: see “Opening Statement by Japan” in “1\textsuperscript{st} Meeting of the ICCAT Working Group on Allocation Criteria, Madrid, Spain, May 31 to June 2, 1999 – Opening Statements” (Appendix 3 to Report of the 1\textsuperscript{st} Meeting of the ICCAT Working Group on Allocation Criteria, Madrid, Spain, May 31 to June 2, 1999 (Annex 6 to 16\textsuperscript{th} Regular Meeting of the Commission, Rio de Janeiro, Brazil – November 15 to 22, 1999 (hereinafter ICCAT16 Report)), in ICCAT Green Book 2000/1, supra Ch I n 242, 104 at 105. Japan urged that objections be made only if a recommendation was contrary to the 1966 Convention or totally lacked scientific justification, not simply because it was not in the national interest of the State contemplating objecting; its Government’s view was that it should not act as “puppet of our industry”. See also the joint proposal by Canada, the EC, Japan and the United States, “Draft Resolution by ICCAT Regarding the Presentation of Objections in the Context of Promoting Effective Conservation and Management Measures Adopted by ICCAT” (Annex 9.4 to Proceedings of the 13\textsuperscript{th} Special Meeting of the International Commission for the Conservation of Atlantic Tunas (Bilbao, Spain – October 28 to November 4, 2002) (hereinafter ICCATSM13 Report)), in ICCAT, Report for Biennial period 2002-03 Part I (2002) - Vol.1 (hereinafter ICCAT Green Book 2003/1), 207. While Brazil opposed this proposal on the basis that what it purported to do could only be done by amending the 1966 Convention, South Africa withdrew at
Against this background, it can be seen that in the 1993 Convention the objection procedure was eschewed less because Australia or New Zealand feared objection by Japan, than because all three original Parties feared objections by new entrants. Instead of an objection procedure, Article 7 of the 1993 Convention simply provides that “Each Party shall have one vote in the Commission. Decisions…shall be taken by a unanimous vote of the Parties present at the Commission meeting.” In other words, each Member has a veto on catch decisions, conditional only on its attendance at the meeting where it is decided – a qualification that has the useful benefit of discouraging boycotts of CCSBT proceedings by dissatisfied Members.

Article 8, paragraph 3 of the 1993 Convention directs the CCSBT to “decide upon a total allowable catch and its allocation among the Parties” and/or “other appropriate measures”; in doing so it must “take full account” of the Scientific Committee’s report and recommendations: Article 8, paragraph 6. Crucially, paragraph 7 then provides that “All measures decided upon under paragraph 3 shall be binding on the Parties.” In addition, by Article 5, paragraph 1, each Party must “take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under paragraph 7 of Article 8.” That is, each Party is obliged to enact into its domestic law catch limits for its SBT fleet that are no higher than its national allocation from the CCSBT, and then to enforce these limits, or at least make every reasonable effort to do so.

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this meeting its objection to the recommendation on South Atlantic Swordfish: ICCATSM13 Report, ibid., 34 at 42-43. On allocation to new entrants see generally infra Chapter III.

428 Supra, text following n 415.

429 The establishment by the CCSBT of its Compliance Committee as a subsidiary body under Article 8(10) of the 1993 Convention (supra n 413) indicates that full compliance was not peremptorily assumed, nor even thought to be realistic. Breach of a national catch limit by a vessel could place its flag State in breach of the Convention, as occurred in December 1996 when an Australian aerial surveillance operation, conducted to investigate Japan’s claims that non-member vessels were moving into high seas SBT fishing grounds as soon as fishing by Japanese vessels had ceased, instead revealed at least 40 Japanese vessels operating after closure of the Japanese season in contravention of Japanese law. Japan subsequently reported that the incident
While it is assumed that the TAC and national allocations are decided in advance of each season, there is no requirement that this be so. Thus it is at least theoretically possible – by contrast with the 1966 Convention’s contingent “recommendations” – that the binding effect of such decisions will operate immediately.\[^{430}\] That the CCSBT then “promptly” notifies all Parties of such measures (Article 8, paragraph 8) is thus a requirement included essentially for form’s sake. The only conceivable way a CCSBT Member could for any length of time be unaware of the CCSBT’s adoption had led to overcatch of its national allocation by 308 tonnes: CCSBT3(2) Report, \textit{supra} n 413; at 2–4 passim. The purpose of the Compliance Committee was thus to provide a vehicle for Parties to exert peer pressure on each other to return to compliance as soon as possible.

\[^{430}\] Or even retrospectively: in the CCSBT’s early years disagreements over these matters frequently led to these limits being decided after one or more of the Parties had begun fishing under a self-imposed provisional quota. Thus no TAC was set at what was to have been the only session of the CCSBT’s Third Meeting: CCSBT3(1) Report, \textit{supra} Ch I n 102, at 20. The matter was adjourned to a resumed session of the meeting and in the interim Australia and New Zealand undertook that, if no decision on a TAC and national allocations were made by the start of their next fishing seasons, they would abide by their previous national allocations as though they were still in force: \textit{ibid.}, at 21. Japan gave no comparable commitment and when the meeting resumed in February 1997 it described the fact that Australia and New Zealand had started fishing without a TAC as an “abnormal situation”: CCSBT3(2) Report, \textit{supra} n 413, at 2. Note that Japan was not alleging breach of any obligation, as the proposition that absent a TAC no fishing at all was permissible would have allowed Australia to impose by default the moratorium it unsuccessfully proposed in 1989: \textit{supra} Ch I, text at n 271. Since no party in fact opposed continued fishing at the previous year’s level, the better view is that there can be no real objection to the course of action adopted by Australia and New Zealand. Retrospectivity is not a practical problem early in a season, if catches are spread roughly evenly throughout the year, as illustrated by the following hypothetical example: the effect of deciding on a national allocation of 1,000 tonnes for State X three months into a fishing season in which it has already caught 250 tonnes is that in effect it has a limit of 750 tonnes for the remainder of the season. In reality, however, SBT’s migratory cycle means that most of the Australian catch occurs in just a few weeks when the fish are within range of the fleet based at Port Lincoln. Thus Australia’s self-imposed quota was 100\% of its previous year’s national allocation, and was soon almost exhausted. This effectively meant that Australia would hardly subsequently accept a national allocation less than that previous quota, and certainly not a quota less than its catch to date, of which it would immediately be in breach.
of a decision on TAC and national allocations is if its delegation has acted contrary to its home government’s instructions in agreeing to the adoption of such a decision.

4 The veto under consensus: another form of the same problem

Although consensus does away with the objection procedure in form, the veto rule merely reproduces its deleterious effects in another guise. For the weakness of the objection procedure is that it undermines the bargain on which decision-making in respect of high seas stocks relies, in which each party’s restraint is purchased by the others’ promise of like restraint. The system may survive an occasional objection by new entrants whose fishing capacity, and thus ability to damage a given stock, remains limited in the short term, but an objection by a large player, or even the prospect of one, will inevitably lead to the non-adoption of management measures acceptable to a required supermajority but not to that player. This has two systemic consequences: first, whatever the decision-making article may prescribe, the larger the fishing capacity of any member, the closer it comes in practice to having an outright veto on any decision the commission might contemplate making; secondly, such a rule tilts the balance of advantage against States concerned about the viability of a fish stock, and in favour of any State (rightly or wrongly) not so concerned. This runs counter to the underlying precautionary slant implicit in the UNCLOS fisheries management principles, and to the precautionary approach to fisheries explicitly affirmed in Article 6 and Annex II to the UN Fish Stocks Agreement.

The 1993 Convention’s veto rule thus simply makes direct and generalises to all Members the indirect consequence of the objection procedure. With no provision for resolving deadlocks, the locus of disagreement and obstruction is merely shifted to

431 See infra Ch V, text at n 952.

432 It should be noted that this bias is not replicated in favour of a lone objector who regards the majority decision as insufficiently precautionary. An objector in this position has nothing to gain by opting out of being bound; rather it can become bound and still have the choice of taking its full national allocation or – if it does not find the game theoretical considerations canvassed in this and the previous chapters compelling – unilaterally exercising restraint.
the making of the decision itself. Had the CCSBT been established with ICCAT’s decision-making mechanism, say, Australia and New Zealand would have been able to secure adoption of an unchanged or reduced TAC and national allocations, by which Japan, through presenting an objection, could have ensured it was not bound. Instead, thanks to each party’s veto, Japan was able to prevent the adoption of any TAC that did not meet its demand for an increase, and Australia and New Zealand were able to prevent the adoption of an increased TAC. In 1996 and 1997, for the sake of continued access to the AFZ, Japan relented, but from 1998 no TAC was set until 2003. Whether this was a superior fisheries or legal policy outcome to having a TAC in force from which one party had opted out must be doubted. Indeed, in some ways, at least from the perspective of Australia and New Zealand, it may well have been inferior, in that the exercise by Japan of its veto was obscured from view, substantially alleviating the degree of political discomfort that Japan would have felt as a consequence of its open use.

433 Australia’s longstanding policy of allowing Japanese fishing vessels access to its ports only while their catch of southern bluefin tuna was subject to a negotiated limit – see supra text at n 332 – was credited by Japan before the UNCLOS Annex VII arbitral tribunal both in its memorial for the preliminary objections phase of the dispute (Memorial on Jurisdiction of Japan, at paragraph 53) and in the oral submissions of its counsel, Professor Ando (First Round Presentation of Japan, May 7, 2000 (hereinafter Transcript of 7 May 2000), at 34-35), with securing Japan’s reluctant agreement in the years leading up to the dispute to leave the total allowable catch and national allocations unchanged. All written and oral pleadings in the case cited above are archived under the item of 7 May 2000 at <www.icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (visited on 23 June 2008).

434 See the remark by the Agent of Japan, Mr Togo, in the provisional measures phase of the dispute (Transcript for morning of 19 August, supra Ch I n 285, at 9), that use of the “veto”, impliedly by Australia and New Zealand, was damaging the CCSBT, and the response by the Agent for Australia, Mr Campbell (ITLOS doc ITLOS/PV.99/24/Rev.1 (hereinafter “Transcript for 20 August”), available online at <www.itlos.org/case_documents/2001/document_en_143.pdf>, at 7-8).
A preferable decision-making procedure, it is suggested, is that of the Honolulu Convention, which encourages the search for consensus but, except on budgetary and, it must be admitted, catch limit questions, allows decisions to be taken by a three-quarters majority in each of two chambers. Instead of an objection procedure, an aggrieved party in the minority has recourse to review of the decision on limited grounds. These seem to have been inspired by principles of administrative law: in order to be overturned, the decision must be found to be either contrary to UNCLOS, the UN Fish Stocks Agreement or the Honolulu Convention itself, or unjustifiably discriminatory in form or in fact against the complainant. This removes the systemic bias against policy stances based on concern for the status of the stock.

It would probably, however, have been impossible to incorporate a precisely equivalent rule into the 1993 Convention at the time of its negotiation, particularly in relation to the first limb. Reference to the UN Fish Stocks Agreement, which had not yet been concluded, would have been anachronistic. Nor would Japan be likely to have admitted a reference to UNCLOS, which was not yet in force.

435 Supra Introduction n 8.
436 Article 20 of the Honolulu Convention is reproduced in Appendix C, infra, in Part III.
437 In Attachment F to 7th Trilateral Management Meeting Report, supra n 395, Summary Record, at 3, Japan opposed use of the term “EEZ” on the ground that UNCLOS was not yet in force. New Zealand countered that the meaning of EEZ was well understood and did not require definition. This ultra-conservative approach to new treaty texts is regrettable, as it cannot but retard the progressive development of international law if a treaty cannot even be mentioned in a new instrument until is it in force for all prospective parties to the latter. It was repeated, though, in Japan’s subsequent attitude in the CCSBT to the UN Fish Stocks Agreement, offering a prime example of what Edeson has described as a “currently popular game in negotiating instruments: What is cited and what is not cited”, with Australia and New Zealand keen to adopt some of the principles enunciated in the Agreement for managing the SBT fishery and Japan reluctant to allow this: W. Edeson, “Soft and Hard Law Aspects of Fisheries Issues: Some Recent Global and Regional Approaches”, in M.H. Nordquist, J.N. Moore and S. Mahmoudi (eds), The Stockholm Declaration and Law of the Marine Environment (The Hague/London/New York: Martinus Nijhoff, 2003), 165 at 168. Even if the treaty’s entry into force is felt to be a long way off, it can nonetheless acquire the status of custom relatively quickly, as did the high seas fisheries
This would have left as the first limb the single ground of the decision being *ultra vires* the 1993 Convention alone. Under such an hypothetical rule, Japan would have been compelled to argue that the TAC, by being set at too conservative (low) a level, was incapable of achieving the 1993 Convention’s objective of “ensur[ing], through appropriate management, the conservation and optimum utilisation” of SBT. This in turn would have depended on the meaning, and relationship with each other, of the terms “conservation” and “optimum utilisation”, considered in Appendix A on the 1998-2001 dispute. For present purposes it suffices to observe that this would in effect have reversed the onus of proof that would have been borne by the applicants in that dispute had it in fact reached the merits – and, even without foreknowledge of that dispute, Japan would probably have perceived, and resisted, such a consequence.

As for the second limb, Japan would have had to show that the national allocation hypothetically imposed on it by the majority States discriminated unjustifiably against it. On the assumption that the national allocations making up the TAC would

provisions (Part VII, Section 2) of UNCLOS, indeed the Informal Composite Negotiating Text is referred to by its UN document number in Article 7(6) of the Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area known as the Torres Strait, and Related Matters (1429 UNTS 207, ATS 1985 No 4), which provides, in part, that:

[A] regime of passage over routes used for international navigation in the area between [Australia and Papua New Guinea], including the area known as Torres Strait, shall apply in respect of vessels that is no more restrictive of passage than the regime of transit passage through straits used for international navigation described in Articles 34 to 44 inclusive of Document A/Conf.62/WP.10 of the Third United Nations Conference on the Law of the Sea...If the provisions of those Articles are revised, are not included in any Law of the Sea Convention or fail to become generally accepted principles of international law, the Parties shall consult with a view to agreeing upon another regime of passage that is in accordance with international practice to replace the regime of passage applying under this paragraph.

On the other hand, to judge from the practical consequence of Article 7 of the 1993 Convention that only a Member in attendance at a meeting can veto its decisions, a CCSBT version of the Honolulu Convention rule would probably omit absence from the meeting as a qualifying condition for invoking the review procedure; the latter is probably a recognition of the financial difficulties that small Pacific Island States are likely to have from time to time in attending meetings of the new Commission.
have been reduced pari passu, the arguments Japan would have employed can only be guessed at, but they could hardly have avoided being centred on the CCSBT failing to have sufficient regard to Japan’s historical interests in fishing for SBT and its contribution to scientific research of the stock.\footnote438 Such arguments, however, would have had to overcome Japan’s acceptance in 1990 that in the long run its share of the catch as among the three original Parties should fall to 47 per cent.\footnote439

The net effect would thus have been that the fisheries management policy disagreement which gradually soured the atmosphere in the CCSBT from the mid-

\footnote438 Article 8(4) of the 1993 Convention lists among the factors to be considered by the CCSBT in deciding Parties’ national allocations:

(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.[\]

\footnote439 At its First Meeting in 1994, the CCSBT readopted as its own the 1990 trilateral formula for future increases in national allocations: CCSBT1 Report, supra Ch I n 273, at 2 and Annex 2. This would preclude any argument by Japan that it had borne a disproportionate share of the burden of conservation. If it wanted to rely on its contribution to the “enhancement” of the stock in Article 8(4)(e) – presumably a reference to the initial fishdown along the lines of the old rationale for the abstention doctrine (see infra Ch III, text following n 536) the answer would have lain in the observation that, while this does provides benefit for others, the overwhelming economic benefits are reaped by the pioneer fishing State itself through high catch rates: accord C.W. Armstrong, “Co-operative Solutions in a Transboundary Fishery: The Russian-Norwegian Co-Management of the Arcto-Norwegian Cod Stock” (1994) 9 \textit{Marine Resource Economics} 329 at 337. Note that the factors do not include capacity as such (except possibly under (f) “any other factors which the Commission deems appropriate”), which would have been a profoundly anti-precautionary step. In 1997 Japan argued (CCSBT4(1) Report, supra Ch I n 126, at 11) that the current allocation was inappropriate because it gave no weight to Members’ historical catch records and fishing capacities and the social and economic dependence of their fishing industry on the SBT fisheries. It is submitted, however, that if the factors mentioned by Japan were given priority or even equal weighting with the others, it would act as a disincentive to reduce overcapacity. This would run counter to the inescapable imperative in a fishery for a depleted stock that capacity must be adjusted to the safe level of catch, not \textit{vice versa}.}
1990s before erupting in an open dispute in 1998 may well have been brought to the surface, and solved, much earlier. While there is a risk that a finding against Japan under a review procedure would have put unbearable strain on its commitment to the CCSBT framework, Japan does not have a history of leaving bodies whose policy stance it finds uncongenial to its interests.

G Conclusion

It can be seen from the foregoing that, as the CCSBT began its institutional life, its members had for some years been thinking about non-member catch and how they might approach the States concerned with a view to minimising it. The leisurely pace at which they were proceeding suggests, however, that for all their repetitive rhetoric they still saw it as a second-order issue. The only concrete action called for in the 1993 text of the joint demarche was the provision of catch and effort data, and the text gave not even a hint of any intention or threat to take steps to exclude others from the fishery, something that there seemed to be no legal power for them to do.

To succeed in enticing new entrants into the CCSBT would be a mixed blessing. The consensus rule gives any new Member veto power, but in the context of the 1993 Convention is not in itself unreasonable, given that the CCSBT began life with only three Members. Without it, there is a strong risk that one Member would find itself continually outvoted by the other two. In principle, this might be either New Zealand or Japan. New Zealand has interests as a latecomer to the fishery not responsible for its initial depletion; with only a small share of the catch, Australia and Japan might frequently resort to informal bilateral deals without its knowledge. On the other hand, Australia and New Zealand have common interests as coastal States on the SBT migratory path, and their respective tolerances of risk of collapse of the stock in terms of preferred fisheries management policies are much closer to each other than either is to Japan’s, and much lower than Japan’s.
Though there are instances of the former, in practice, the latter has been the dominant dynamic within the CCSBT. In replacing the objection procedure with a veto, however, the 1993 Convention’s decision-making procedure does not solve the basic problem that a policy of limiting catch of, or fishing effort for, a highly migratory stock to which there is practically unrestricted access on the high seas can be effective only if all significant participants in the fishery, and preferably all of them, are bound. It treats the symptom rather than the cause. A procedure akin to that in the Honolulu Convention, ensuring that TAC and national allocations are fixed and that minority objectors can avoid being bound by them only by persuading a review panel that the decision is somehow legally defective would seem better suited, at the price of some loss of sovereignty, to prevent deadlocks that prevent a

440 An example is the less than transparent settlement of the 1998-2001 dispute, in which New Zealand yielded in advance of Australia on port access, but resisted Japan’s claim to additional catch to compensate it for the 711 tonnes forgone in part-implementation of the ITLOS provisional measures orders, whereas Australia and Japan together set the opposite agenda – see infra Appendix A, text at nn 1472 and 1473. The only attempt by Japan to make common cause with New Zealand against Australia – with a proposal for reallocation of catch shares – was rebuffed by New Zealand. At the CCSBT’s Third Meeting Japan tabled a proposal for a future quota allocation mechanism that assigned certain weights to the criteria in Article 8(4) of the 1993 Convention for consideration in deciding allocations: “Proposal[:] A Future Quota Allocation Mechanism for the Parties in Accordance with the Provisions of the Convention” (Attachment P to CCSBT3(1) Report, supra Ch I n 102). The net effect would have been to transfer quota from Australia to both Japan and New Zealand. New Zealand declined the inducement and the CCSBT agreed to revert to the matter in future, but to set it aside in the meantime in order to focus on other significant priorities: CCSBT4(1) Report, supra Ch I n 126, at 11. Japan did not thereafter pursue the proposal with any vigour and no discussion of it is recorded in any subsequent meeting reports.

441 J.-J. Maguire, “Southern Bluefin Tuna Dispute”, in Nordquist and Norton Moore (eds), supra Ch I n 87, 201 at 211-212 points to the smallness of the CCSBT, leading to polarisation, worsened by the shared mindset of Australia and New Zealand leaving Japan feeling isolated in a permanent minority. Presciently, New Zealand officials in cable No 3027 of 22 October 1982, supra n 320, had worried about New Zealand co-ordinating its position too closely with Australia despite the two States’ similarity of outlook on this issue, lest Japan see this as collusion.
fisheries commission from fulfilling its basic task. Not even this, however, would ensure that a non-member of the CCSBT that catches significant quantities of SBT does not undermine the CCSBT’s conservation measures if it is under no obligation to join the Commission or comply with its measures. The next chapter will examine the problem of new entrants into the fishery and the adjustment of their interests and those of CCSBT members through a number of instruments, some external to the CCSBT and others being measures taken by the Commission itself.
CHAPTER III
New entrants, old problem – allocation principles in the UN Fish Stocks Agreement and earlier treaties

A Introduction

The problem of how to accommodate new entrants to existing fisheries has been recognised for over 50 years. That even such an eminent jurist as Judge Oda could confess himself unable to resolve it is not surprising because, in terms of the classical principles of international law, notably the high seas freedom of fishing, it does indeed appear to be insuperable. Restated in economic terms, the problem stems from the open-access nature of high seas fisheries, which the residual character that the legal freedom has since acquired does nothing to alter. The expansion of EEZs in the 1970s and 1980s and the continued depletion of stocks within them means that the share of the world fish catch taken on the high seas is likely to grow beyond the 8-10 per cent estimated by the FAO in 1994 for the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, a figure that itself had risen from less than 1 per cent on 1972 catch data.

This affects the SBT fishery more than most. Assuming that the catches of Australia, New Zealand and Indonesia in Table 2 in Chapter I were all taken within their respective EEZs and the catches of all others on the high seas, only in one year

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(1982) was less than half of the catch taken by distant-waters fishing States, and in 1989, 1991 and 1998 the high seas share was over 60 per cent.

Another way of looking at the problem is to say that limiting entry to fisheries at the domestic level will not be wholly successful in the case of transboundary stocks if a significant proportion of the catch occurs on the high seas, if only because the same considerations that prompted the introduction of limited entry also operate on the international plane, whether the solution cannot be so easily transposed. Contracts between participants to limit their catches will not prevent entry to the fishery of outsiders – for that legislation is necessary, and the Australian and now New Zealand and Japanese Parliaments have supplied it.\textsuperscript{445} Similarly, in international law the privity of contract is replicated in the \textit{pacta tertiis} rule, as codified in Article 34 ("A treaty does not create either obligations or rights for a third State without its consent.") of the Vienna Convention on the Law of Treaties.\textsuperscript{446}

Some international equivalent of legislation to limit entry to fisheries would therefore now be needed, but the search for anything answering this description is not easy. Either one is forced to look beyond treaties to custom (with all the attendant difficulties of its formation) or, if a multilateral convention is instead relied on, then it must be one that either codifies custom or attracts so many parties that it exerts what Mendelson has called a "gravitational pull" on the formation of custom.\textsuperscript{447}

While the high seas fisheries provisions of UNCLOS may well fall into this category, the same may not yet be true of the UN Fish Stocks Agreement. Although Articles 8 and 17 of the latter come close to a limited-entry rule, the Agreement as a whole, or

\textsuperscript{445} Supra Ch I nn 160, 202 and 212.

\textsuperscript{446} Supra Introduction n 18. See also Article 35 of the Convention:

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

at least these provisions of it, would need to become customary international law in order to bind non-parties.\footnote{448}

Viewed as a whole, one of the main aims of the Agreement is to encourage States whose nationals fish in certain parts of the high seas or for certain species to join the relevant fishery commission or at least abide by the measures it adopts. Some of the substantive provisions directed to this end (for example, Article 8’s conditioning of freedom of fishing on the high seas for a given species by reference to membership of, or cooperation with, the relevant regional or subregional fisheries management organisation such as the CCSBT)\footnote{449} are more susceptible of transformation into custom than others (such as the boarding and inspection provisions of Articles 21 and

\footnote{448} It is entirely possible that some provisions of the UN Fish Stocks Agreement will in due course be received into customary international law, so binding all States engaged in the SBT fishery, whether or not they are parties to it. The Chile/EC swordfish dispute, which may yet proceed to a hearing before a Special Chamber of the International Tribunal for the Law of the Sea – see \textit{infra} Ch IV n 901 – would be likely to elicit arguments from all sides (including third parties) that particular provisions of the Agreement have in fact achieved the status of custom: see generally A. Serdy, “See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile’s Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas”, (2002) \textit{3 Melbourne Journal of International Law} 79 at 105-107 and 115.

\footnote{449} As to whether the CCSBT is actually a “regional or subregional fisheries management organization” within the meaning of that Agreement (\textit{passim}, e.g. in Article 8; by contrast UNCLOS Article 64 refers only to “appropriate international organizations”), given that it applies to SBT wherever in the world they are found, note that Japan’s citation of the Agreement precludes any argument by it to the contrary: CCSBT7 Report, in CCSBT Blue Book 2002, \textit{supra} Ch I n 30, 1 at 9 (paragraph 60). An earlier Japanese statement (“Japan’s Opening Statement” (Attachment A to CCSBT4(2) Report), in CCSBT Blue Book 1999, \textit{supra} Ch I n 126, 68)) also assumes the CCSBT is included within this phrase. A curiosity here is that Australia’s delegated legislation implementing domestically its national allocation from the CCSBT applies to not to the whole world but only to the part of the southern hemisphere north of 60ºS and between 50ºW in the west and 140ºW in the east: \textit{Southern Bluefin Tuna Fishery Management Plan 1995}, \textit{supra} Ch I n 31, cl 3.1, definitions of “high seas fishing zone” and “SBT Fishery Zone”.

22, which allow the authorities of one State that is party to the Agreement to enforce on the high seas the measures of such an organisation of which it is a member against vessels of another State party, whether or not the second State is also a member). In the light of the sparseness of State practice to date, however, the better view is that this has not yet occurred.\footnote{R. Rayfuse, “The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?” (1999) 20 \textit{Australian Yearbook of International Law} 253 at 278. Nonetheless, with some qualification, it is possible to agree with Birnie (P. Birnie, “Impact on the Development of International Law on Cooperation: the United Nations Law of the Sea, Straddling Stocks and Biodiversity Conventions”, in Nordquist, Norton Moore and Mahmoudi (eds), \textit{supra} Ch II n 437, 85 at 94) that “it seems likely that once the [UN Fish Stocks Agreement] is widely in force, its provisions could become established as part of customary law governing access and persistent objectors could lose the right to fish on the high seas.” This would be so if the persistent objections were not to the provisions of the Agreement itself, but to given management measures adopted by a fisheries commission, and the loss of the right to fish on the high seas was not general, but limited to the stock(s) concerned.}

This chapter considers the efforts of Australia, Japan and New Zealand to limit the entry of third parties to the SBT fishery. Although in a strict sense New Zealand was the first new entrant in the 1980s under the emergent EEZ regime, it is convenient to assimilate it to a historic participant in the fishery, not merely because it was an original party to the 1993 Convention, but also because its right to participate in the SBT fishery was never seriously questioned – a circumstance assisted by the modest capacity of the New Zealand fishing industry to catch SBT. The chapter considers the third-party provisions of the conventions negotiated at three UN conferences – the 1958 (First) UN Conference on the Law of the Sea, the 1973-82 Third UN Conference on the Law of the Sea and the 1993-95 UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. It assesses the likely impact over time of the entry into force of the UN Fish Stocks Agreement, including, by way of the hypothetical example of South Africa, the possibility of catch limits being set by recourse to the dispute settlement mechanism, but also the inherent limitations of its rules. It then examines a cul-de-sac in the history of international fisheries law, the
doctrine of abstention, which in modern times has enjoyed something of an unspoken revival in fishery commissions struggling to cope with or forestall the quota demands of growing memberships. The conclusion drawn is that, while the UN Fish Stocks Agreement does not itself incorporate abstention in another guise, the practice of its parties in applying it comes very close to doing so. This may be necessary to solve the new entrants problem, but it is not sufficient.

B The UN Law of the Sea Conferences Treaties

1 The 1958 Conventions

Of the four treaties produced by the first (1958) UN Conference on the Law of the Sea, only one is directly germane to the entry of new participants into an existing international fishery (that is, one in which at least two States already take part) – and it is not the Convention on Fishing and Conservation of the Living Resources of the High Seas (hereinafter the Fishing Convention), the last of the four to come into force and which never achieved wide adherence. Even so, according to Koers the Convention did become “a moral code which fishing nations prefer not to violate.”

The Fishing Convention mentions neither any particular species of fish nor any category of fish by reference to the extent of its migratory path. It is more concerned

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451 Supra Introduction n 21.
452 All four Conventions were expressed to enter into force on the thirtieth day after deposit of the twenty-second instrument of ratification or accession: Fishing Convention Article 18(1) (entered into force 20 March 1966); Convention on the High Seas, supra Introduction n 20, Article 34(1) (entered into force 30 September 1962); Convention on the Continental Shelf (done at Geneva, 29 April 1958; 499 UNTS 311, ATS 1963 No 12), Article 11(1) (entered into force 10 June 1964); Convention on the Territorial Sea and the Contiguous Zone (done at Geneva, 29 April 1958; 516 UNTS 205, ATS 1963 No 12), Article 29(1) (entered into force 10 September 1964). The combined catch in 1965 of the 23 States that had become party to the Fishing Convention by mid-1967 amounted to only 14% of the world’s fish catch: W.C. Herrington, “The Future of the Convention on Fishing and Conservation of the Living Resources of the Sea”, in Alexander (ed), supra n 442, 62 at 62.
453 Koers, supra Ch I n 285, at 118.
with how a fishery becomes international – that is, the entry of a second State to a fishery on the high seas hitherto pursued in isolation by a single State.

The 1958 Conference was notable instead for the qualification in Article 2 of the Convention on the High Seas\textsuperscript{454} of the hitherto unalloyed principle of freedom of fishing on the high seas. This reads, so far as material:

\[\ldots\]Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, for both coastal and non-coastal States:

\ldots

(2) Freedom of fishing;

\ldots

These freedoms…shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

The second paragraph of the preamble to the High Seas Convention referred to the adoption of the provisions of that Convention “as generally declaratory of established principles of international law.” That this applies to the qualification at the end of Article 2 can be seen from the Commentary of the ILC on Article 27 of its Draft Articles on the Law of the Sea prepared in 1956:\textsuperscript{455}

Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community. These rules concern particularly

\ldots

(iii) The rights of States relative to the conservation of the living resources of the high seas[.]\textsuperscript{456}

\textsuperscript{454} Supra n 452.

\textsuperscript{455} The ILC Draft Articles and Commentary are in Report of the International Law Commission covering the work of its eighth session, 23 April–4 July 1956 (UN doc A/3159), reprinted in UN, Yearbook of the International Law Commission 1956, Vol II (New York: UN, 1957) 253 at 256-301.

\textsuperscript{456} Ibid., at 278.
Article 2 of the High Seas Convention was also in effect the source of the *locus classicus* of the International Court of Justice (ICJ) in the *Fisheries Jurisdiction* cases\(^\text{457}\) that:

[i]t is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.\(^\text{458}\)

As Iceland, the respondent in those cases, though a signatory to both the High Seas Convention and the Fishing Convention, had never ratified either of them,\(^\text{459}\) the dictum of the Court indicated conclusively that the underlying principle had indeed been received into customary international law. While the precise time this occurred cannot be ascertained with certainty, it serves nonetheless as a strong indication that the same principle would have been applicable for some time previously as between Australia and Japan concerning the latter’s mid-Indian Ocean fishing for SBT. The Fishing Convention is nonetheless indirectly relevant in two ways, even though, of the States principally involved in the SBT fishery, only Australia in fact ratified it.\(^\text{460}\)

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\(^{457}\) ICJ Reports 1974, p.3 (United Kingdom v. Iceland) and p.175 (Federal Republic of Germany v. Iceland).

\(^{458}\) *Ibid.*, at 31 (paragraph 72) and 202 (paragraph 64) respectively.


\(^{460}\) It did so on 14 May 1963; Indonesia and New Zealand signed the Convention on 8 May and 29 October 1958 respectively but never ratified it; Japan and the Republic of Korea did not sign it. South Africa acceded to the Convention on 9 April 1963. Taiwan, whose authorities at the time held the Chinese seat at the UN as the Republic of China, also signed the Convention on 29 April 1958: see the Status List for the Fishing Convention, *supra* n 459. Japan abstained in the vote on its adoption at the 1958 Conference: see UN, *United Nations Conference on the Law of the Sea, Official Records, Volume II: Plenary Meetings* (New York: UN, 1958) at 59. The
First, although the concept of highly migratory species was a novel element of international fisheries law introduced in the Third UN Conference on the Law of the Sea, with the benefit of hindsight, a harbinger of the future regime governing such species may be faintly discerned in Article 8. Paragraph 1 reads:

Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources of the high seas in that area, may request the State or States whose nationals are engaged in fishing there to take the necessary measures of conservation under articles 3 and 4 respectively, at the same time mentioning the scientific reasons which in its opinion make such measures necessary, and indicating its special interest.

This Article was based on Article 56 of the Draft Articles prepared by the ILC, itself influenced by the outcome of the International Technical Conference on the Living Resources of the Sea that had taken place in Rome the previous year. At the 1958 Conference there was very little discussion of this provision. In its commentary on the 1956 draft, the ILC had stated:

This case may arise, for example, if the exhaustion of the resources of the sea in the area would affect the results of fishing in another area where the nationals of the State concerned do engage in fishing.

Convention was adopted by a vote of 45 in favour, 1 against with 18 abstentions. As no delegation demanded a roll-call ballot, the Official Records do not reveal how the States present voted, but it is clear from the text that the sole vote against the Convention was cast by the Federal Republic of Germany. In an earlier vote on the substantive provisions of the Convention (Articles 1 to 14) the result was 44 in favour (including Australia and New Zealand), 16 against (including Japan) and 8 abstentions: ibid. at 46.

Burke, supra Ch I n 80, states at 199: “Prior to this negotiation, this categorization of species was unknown.”

Supra n 455.

Supra Ch I n 56 and accompanying text (Article 56 of the Draft Articles, supra n 455, appears here as Article 28); Oda, supra Ch I n 56, at 86.

Oda, supra Ch I n 56, at 118.

Report of the International Law Commission covering the work of its eighth session, 23 April–4 July 1956, supra n 455, at 291 (paragraph (1) of Commentary to Article 56).
While Oda interprets this as being aimed at ecologically related stocks, it is also susceptible of application to a single highly migratory stock such as SBT which migrates between an area on the high seas (the Indian Ocean) where it is fished by one State (Japan) and the territorial sea of a second State (Australia) whose nationals may exploit that stock off the coast, including perhaps in the adjacent part of the high seas (in the 1950s, off New South Wales and South Australia, as outlined in Chapter I), but not in that part of the high seas remote from its coast where the first State is exploiting the stock.\footnote{J.H.W. Verzijl, “The United Nations Conference on the Law of the Sea, Geneva, 1958”, Part II (1959) 6 Nederlands Tijdschrift voor Internationaal Recht 115 at 126.}

Secondly, several of the Fishing Convention’s provisions are the basis for related articles in UNCLOS, albeit often in a changed context. Most prominently, Article 1, paragraph 1:

\begin{quote}
All States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of coastal States as provided for in this Convention, and (c) to the provisions contained in the following Articles concerning conservation of the living resources of the high seas.
\end{quote}

constitutes a second qualification of the formerly unfettered freedom of high seas fishing and is clearly the template on which Article 116 of UNCLOS\footnote{See text \textit{infra} following n 495.} was drafted.

Unlike Article 6, paragraph 1, which recognises the coastal State’s “special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea”,\footnote{\textit{Supra} n 463.} Article 8 does not mention coastal States as such. Hence the rights of the coastal State in a highly migratory species of fish in the situation mentioned by Verzijl were arguably not contemplated by the drafters as falling within the “interests and rights of coastal States as provided for in this Convention”, to which the rights of the fishing State are made subject. Nonetheless, this phrase appears redundant as the whole of the substantive provisions of the
Constitution, including Article 8, are embraced by “the provisions contained in the following Articles concerning conservation of the living resources of the high seas” to which they are anyway subject. In fact, however, in the 1960s there was not yet any concern on Australia’s part at the scale of Japanese catches of SBT; rather it was Japan – or more precisely Japanese scientists – that expressed concern in that decade about Australian fishing for SBT, not vice versa.

2 UNCLOS

The modern law of international fisheries, and the place within it of SBT as a highly migratory species, is a result largely of the Third United Conference on the Law of the Sea, which met in sixteen sessions from 1973 to 1982 and of whose labours UNCLOS was the fruit. The Conference was established by General Assembly Resolution 3029 A (XXVII) of 18 December 1972 and by Resolution 3067 (XXVIII) of 16 November 1973 its mandate was extended to encompass the whole of the law of the sea. Prior to its convening, general law of the sea issues including fisheries had also been taken up by Sub-Committee II of the Committee on the Peaceful Uses

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470 Supra Ch I, text at nn 255-257.

471 Formally there were eleven sessions, but the last five of them were all adjourned and later resumed after an interval of several months: see the Chronology of Significant Law of the Sea Events in M.H. Nordquist (Editor-in-Chief), United Nations Convention on the Law of the Sea, 1982: A Commentary, (Dordrecht, Boston and Lancaster: Martinus Nijhoff, 1985) (hereinafter Virginia Commentary), Vol I, at xxx-xxxiii.

of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction\(^{473}\) (hereinafter the Sea-Bed Committee), the Sub-Committee having been formed in 1971 once the in-principle decision to convene the Conference had been taken.\(^{474}\) As will be seen below, it was to this earlier body that the first precursors of Article 64 and Annex I of UNCLOS were submitted.

\((a)\) \textit{Article 64}

The text of Article 64 of UNCLOS:

\begin{verbatim}
Article 64

Highly migratory species

1. The coastal States and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal States and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.
\end{verbatim}

was finalised relatively early in the Third UN Conference on the Law of the Sea, appearing in a form very similar to that above as Article 53 of the Revised Single Negotiating Text at the Fourth Session in 1976.\(^{475}\) It is the result of a compromise between fishing States keen to establish a special regime for species of fish moving

\(^{473}\) The Committee was established by UN General Assembly Resolution 2467 A (XXIII) of 21 December 1968, and its mandate was amended so as to extend to a wide range of law of the sea issues by Resolution 2750 C (XXV) of 17 December 1970.


through extensive areas of ocean space, and coastal States taking the view that such species ought to be treated no differently from others found in their EEZs.

Article 64, along with the remainder of Part V of UNCLOS, was found “consonant with general international law” by a chamber of the ICJ in the *Gulf of Maine Case.*

(b) *Annex I to UNCLOS*

The idea of enumerating in an annex the species to which what became Article 64 applies stems from a proposal put to the Sea-Bed Committee in 1971 by the United States that “In the case of a highly migratory oceanic stock identified in Appendix A*, such stocks shall be regulated pursuant to agreement or consultation among the States concerned with the conservation and harvesting of the stock.” The footnote to

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476 According to Burke, *supra* Ch I n 80, at 199, a principal motivating factor was the interest of Japan and the United States in tuna fisheries in particular.

477 *Virginia Commentary*, Vol II, *supra* n 474, at 649-650. Because the requirement to cooperate extends to the EEZ, it does impinge to a degree on the largely unfettered discretion that the coastal State enjoys in the EEZ concerning the fixing of the allowable catch of other species that occur in the EEZ, though it falls short of mandating access by other States to any surplus that the coastal State is unable to harvest itself in its EEZ – see Articles 61 and 62 and the discussion in Burke, *supra* Ch I n 80, at 213-217 and F. Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge; New York: Cambridge University Press, 1999); at 26-28. Thus under UNCLOS fishing States would have seen their position as stronger in respect of highly migratory species than of straddling stocks, given that the requirement in Article 63(2) that affected States must “seek…to agree upon the measures necessary for the conservation of these stocks” applies only “in the adjacent area” (i.e. the high seas area adjacent to the EEZ), and not within the EEZ itself. In practice, however, coastal States have tended consistently to take more conservative stances than fishing States on permissible levels of exploitation intensity, with the result that disputes are far more likely to be about the high seas exploitation of a highly migratory species than the coastal State’s exploitation of it in the EEZ – as indeed occurred in the SBT dispute considered in Appendix A *infra.*

478 *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment*, ICJ Reports 1984, p.246 at 294 (paragraph 94). Churchill and Lowe, *supra* n 472, take the view that coastal State EEZ rights have become custom but not the Article 61 and 62 obligations: at 161-162.
which the asterisk referred indicated that no appendix was actually attached.\textsuperscript{479}

When these draft articles were revised in 1972 the phrase re-emerged as “the highly migratory species listed in Annex A” and “[t]he highly migratory oceanic resources listed in Annex A”,\textsuperscript{480} but again no annex was provided – and as the predicate of the sentence in which it appeared shows (“shall be regulated by appropriate international fishery organizations”), the drafters’ focus was on the principles for management of such species, not on their enumeration. When the Conference proper began, the same phrase, still without any annex, was used in tentative draft articles produced at the Second Session in 1974 by an Informal Group of Juridical Experts.\textsuperscript{481} At the same session a draft article on such species proposed by Australia and New Zealand continued the pattern of referring to but not including an annex listing them, though it added a novel element in the suggestion that, because of the technical nature of such an annex, a flexible procedure for amending it would be desirable.\textsuperscript{482}

The first proposal to which an annex was attached was made by the United States at the Second Session of the Conference in 1974.\textsuperscript{483} The Annex ran to twelve items, of which the first five are identical with the English text of their respective counterparts in the final Annex I. Tunas as a genus were mentioned by name for the first time at


\textsuperscript{480} UN doc A/AC.138/SC.II/L.9 (undated), sections II(A) and III respectively, reprinted in \textit{Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond National Jurisdiction: General Assembly Official Records, Twenty-Seventh Session, Supplement No 21 (A/8721)} (New York: UN, 1972), 175 at 175 (section II(A)) and 176 (section III).


the same session, when eight Western European States (Belgium, Denmark, France, Federal Republic of Germany, Ireland, Italy, Luxembourg and the Netherlands) proposed unsuccessfully that regional or sectoral organisations be created to manage conservation and utilisation of “certain species such as tuna and whales.”\textsuperscript{484} After the scientific names were added in the Revised Single Negotiating Text at the Fourth Session in 1976,\textsuperscript{485} a further unsuccessful proposal made informally by Japan in 1977 at the Sixth Session would have partially defined highly migratory species to include tuna, cetaceans and such other species as may be designated by the relevant regional or global organization on the basis of their ocean-wide range of migration and the need for their regional or global management by reason of multinational participation in the fishery of such species.\textsuperscript{486}

The addition of SBT was in fact the last substantive change made to the Annex, and took place at the Ninth Session in 1980 on the informal proposal of Japan and the Republic of Korea,\textsuperscript{487} with the Chairman of the Second Committee reporting that it had received widespread support.\textsuperscript{488} Originally included as item 17 in the Informal Composite Negotiating Text,\textsuperscript{489} in the next revision but one at the Resumed Tenth Session in 1981 it was moved up the order to join the other tunas, becoming item

\textsuperscript{484} UN doc A/CONF.62/C.2/L.40 and Add.1 (5 and 28 August 1974), Art 13, reprinted \textit{ibid.}, 217 at 218.
\textsuperscript{485} UN doc A/CONF.62/WP.8/Rev.1/Part II, \textit{supra} n 475, at 173.
\textsuperscript{486} Reprinted in Platzöder, \textit{supra} n 481, Vol IV (1983), at 440.
\textsuperscript{487} Reprinted \textit{ibid.}, Vol V (1984), at 63.
The intention appears to have been to include all known tunas in Annex I, but was imperfectly executed.

(c) Articles 116-119

Section 2 of Part VII of UNCLOS bears the heading “Conservation and Management of the Living Resources of the High Seas”. Although SBT is not mentioned by name, fishing for this and all other highly migratory species of fish on the high seas is governed by Articles 116 to 119, which constitute the bulk of section 2. These articles must also be read with Article 87, which reads, so far as material:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by the Convention and by other rules of international law. It comprises, *inter alia*, for both coastal and land-locked States:

   …

   (e) freedom of fishing, subject to the conditions laid down in section 2.

2. These freedoms shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedoms of the high seas, ...

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491 A monograph by the deputy head of the Spanish delegation to the Conference states that the highly migratory species include “all the varieties of tuna”: de Yturriaga, *supra* n 472, at 128. Though eventually included, one reason for the long persistence of SBT’s initial omission may have been that it was wrongly assumed to be encompassed under Item 2, “Bluefin tuna”: see A. Serdy, “One Fin, Two Fins, Red Fins, Bluefins: Some Problems of Taxonomy and Nomenclature Affecting Legal Instruments Governing Tunas and Other Highly Migratory Species” (2004) 28 *Marine Policy* 235, at 236n (an assumption that appears in some quarters to have persisted well into the 1990s: at 242).

492 The remaining article in this section, Article 120, deals only with marine mammals and is thus not germane to SBT.
While the extracted part of paragraph 2 reproduces almost *verbatim* the last sentence of Article 2 of the High Seas Convention quoted above, in the Sea-Bed Committee there had been moves to end the freedom of fishing. Malta had put forward a proposal in which fishing was omitted from the list of high seas freedoms, while Colombia, Mexico and Venezuela were the joint authors of another proposal by which fishing on the high seas “shall be neither unrestricted nor indiscriminate”.

Article 116, headed “Right to fish on the high seas”, provides that:

All States have the right for their nationals to engage in fishing on the high seas subject to:

- (a) their treaty obligations;
- (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2 and articles 64 to 67; and
- (c) the provisions of this section.

That is, the interests of distant-water fishing States exploiting SBT are now subordinated to some extent to those of coastal States, which can be expected to

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493 *Supra*, text following n 454. B. Kwiatkowska, “The High Seas Fisheries Regime: at a Point of No Return?”, (1993) 8 *IJMCL* 327 notes at 329 that freedom of fishing was second in the 1958 Convention’s list of high seas freedoms but was demoted to fifth (out of six) in UNCLOS Article 87.

494 UN doc A/AC.138/53 (undated), reprinted in *Sea-bed Committee Report 1971, supran* 479, 105 at 117 (article 5).


496 *Contra* D. Nelson, “The Development of the Legal Regime of High Seas Fisheries”, in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford and New York: OUP, 1999), 113 who says at 123 that “subject to” should be taken to mean “with due regard to”, but his reasons for reading the provision down in this way essentially rely on the drafting history of Article 116 as opposed to its ordinary contextual meaning as required by Article 31 of the Vienna Convention on the Law of Treaties, *supra* Introduction n 18, so are not particularly convincing. The preferable interpretation is that of Burke, *supra* Ch I n 80, at 214 (“Article 116 appears to introduce a drastic
include in particular the maintenance of the long-term sustainability of the stock. As the coastal States harvest the stock in their EEZs, they have a duty as well as an interest in ensuring that it does not fall below the level which produces the maximum sustainable yield as qualified by Article 61. In addition, coastal States have an interest in decisions on determination of the allowable catch of the species – and although Article 119, paragraph 1 does not specifically require that such decisions be made jointly by all interested States, it has that effect when read in conjunction with Article 118:

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations change in high seas fishing rights by providing for a priority in coastal state rights and interests affecting high seas fishing states.”), elaborated at 220-224.

Though this in fact has happened for SBT – see supra Ch I, text between nn 296 and 303. From the coastal State’s point of view Article 61 is expressed in mandatory terms, the auxiliary verb “shall” denoting an imperative duty or obligation (see “Note on the use of the word ’shall’”, Virginia Commentary Vol II, supra n 474, at xlvi-xlvi):

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation….

3. Such measures shall also be designed to maintain or restore populations of harvest species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

As urged by S.N. Nandan and S. Rosenne (volume editors), Virginia Commentary, supra n 471, Vol III (Dordrecht/Boston/London: Martinus Nijhoff, 1995), at 309-310. The degree of that subordination is canvassed in Burke, supra Ch I n 80, at 214 and 219-224, Orrego Vicuña, supra n 477, passim but esp at 62-72 and in the SBT dispute would no doubt have been the subject of detailed argument before the Annex VII Tribunal had it permitted the arbitration to proceed to the merits. S.B. Kaye, International Fisheries Management (The Hague and London: Kluwer Law International, 2001) at 160-161 prefers a construction denying that Article 63(2) gives coastal States preferential rights in relation to straddling stocks, in terms that appear to apply equally to Article 64 and highly migratory species.
with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Article 117:
All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

also reinforces the obligation of cooperation set out in Article 64, as does Article 119, paragraph 2:
Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

In particular, there is no suggestion here that, by way of compensation for coastal States’ ability to exclude them from fishing for straddling or highly migratory stocks in their EEZs, distant-water fishing States have some sort of preferential claim to the same species on the high seas. By Article 87, paragraph 2, the high seas freedoms are exercised “on the basis of equality of States.”

Australia and New Zealand alleged breach of all four of these Articles by Japan in embarking on its unilateral program of experimental fishing in 1998 and 1999.

499 Virginia Commentary, Vol III, supra n 498, at 86.
500 Statements of Claim under Article 1 of Annex VII to UNCLOS by which Australia and New Zealand commenced their litigation against Japan, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=%3ca%20href=javascript:goHome(/)%3ePublications%3c/a%3e%3e%20%3ca%20href=/ICSID/ICSID/ViewNewsReleases.jsp%3eNews%20Releases%3c/a%3e&pageName=Archive_%20Announcement7> (visited on 23 June 2008; hereinafter Statement of Claim), paragraphs 45 and 69(1), with fuller reasoning at paragraphs 59-62 (Article 116), 55 (Article 117), 56 (Article 118), 57 and 58 (Article 119). See also Appendix A infra on third-party aspects of the dispute generally, and in particular section 8 of that Appendix on specific issues within Articles 64 and 116-119 that a hearing on the merits might have resolved.
3 The United Nations Fish Stocks Agreement

Despite the undoubted advance over the previous international law of fisheries represented by Articles 64 and 116 to 119 of UNCLOS, relatively little attention was paid at the Third UN Conference on the Law of the Sea to questions related to the straddling and highly migratory fish stocks, and the above provisions of UNCLOS did not elaborate any mechanism by which relevant States’ duty to cooperate should be implemented.\(^{501}\)

The inadequacies of these rules soon became apparent. In the context of the feared depletion of the pollock stock in the high seas “doughnut hole” in the middle of the Bering Sea, the United States Assistant Secretary of State for Oceans and Fisheries, Mr Wolfe, observed that States had no right to expand high seas fishing activities at the expense of rights and interests of coastal States; moreover failure to cooperate with coastal States in establishing and implementing conservation measures for high seas fisheries would constitute an abuse of high seas rights.\(^{502}\) The arguments made by the United States during the negotiation of the subsequent treaty included not just the “profound and unpredictable consequences for the ecosystem at large” that stock

\(^{501}\) J-P. Lévy and G.G. Schram (eds), United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents (The Hague, Boston and London: Martinus Nijhoff, 1996), at 9. Addressing the General Assembly the day after the opening for signature of the UN Fish Stocks Agreement, the Canadian Minister for Fisheries, Mr Tobin, went so far as to say that the high seas fisheries provisions of UNCLOS were “stated in such general terms that they are not a practical guide for States in the conduct of their international relations”: UN doc A/50/PV.80 (5 December 1995), at 6.

\(^{502}\) United States Senate, Hearing before the National Ocean Policy Study of the Committee on Commerce, Science and Transportation, “Fishery Management and Enforcement in the Bering Sea,” 100th Congress, second session (16 March 1988) at 22 and 46. The argument based on abuse of rights advanced by the United States in relation to the pollock stock in the high seas area of the central Bering Sea may yet find an echo in the CCSBT as regards fishing for SBT on the high seas by newcomers. It is of no assistance, however, to any State fishing for SBT _erga_ Indonesia and South Africa, whose entire catch is in their EEZ. As will be seen below in section E, for many years ICCAT’s approach to tackling this difficulty was to ignore the rights of coastal States in their EEZs, and to some extent in effect this remains so.
collapse would bring – an argument more attuned to all States’ UNCLOS Article 192 obligation to protect and preserve the marine environment, but also (echoed by the Russian Federation) Article 116(b), given that the fishing communities of Alaska and the Russian Far East were more vulnerable to economic harm from overfishing than distant-water fleets, which could move elsewhere. In response, the distant-water States maintained that the coastal States were in part responsible for any collapse of the stock, and thus should bear some of the conservation burden for its recovery. They declined to restrict or terminate their own high seas pollock fisheries simply so that the coastal States could continue theirs in their EEZs. Against the background of the large-scale transfer of fishery resources to coastal States through the institution of the EEZ, their argument ran, no theory of justice could support any further coastal State control over the few remaining desirable fishing grounds still open.

By the time a treaty was concluded in 1994, however, the stock it was intended to protect had been depleted. Kaye has argued that the fact that the predicted depletion occurred highlights the ultimate inadequacy of the UNCLOS provisions, for there was no clear failure of cooperation on the part of any of the distant-water fishing States in bringing matters to this juncture, and hence no possibility of sheeting home to any of them a breach of these provisions. The most that can be said, based on the reliance on them and behaviour of the protagonists, is that there was a general acceptance by all that these provisions, even though UNCLOS was not yet in force, had by then solidified into customary obligations binding them anyway.

503 Balton, supra Ch I n 124, at 153.
504 Ibid., at 153-154. In support of the last proposition they even cited Article 2(1) of the Charter of the United Nations (done at San Francisco, 26 June 1945; 1 UNTS xvi, ATS 1945 No 1 (electronic)), on sovereign equality of States.
505 Supra Ch II n 316.
506 Kaye, supra n 498, at 325-326.
507 Ibid., at 322-323.
Even before this, States had begun to consider how the UNCLOS provisions might be strengthened. At the Third Session of the Preparatory Committee for the UN Conference on Environment and Development (UNCED), a group of 15 coastal States including New Zealand submitted a proposal on the conservation and management of the living resources of the high seas. Of the four principles and nine measures it advocated, the material ones are reproduced below:

(principle) (c) On the high seas, States fishing a stock which straddles the 200-mile limit of a coastal State, or highly migratory species which are found within that limit, must take all measures necessary to give effect to the special interest and responsibility of the coastal States concerning the portion of the stock outside the 200-mile limit and in the highly migratory species while outside that limit.

(principle) (d) High seas fishing must not have an adverse impact on the resources under the jurisdiction of coastal States.

(measure) 8. With respect to a stock occurring both within the exclusive economic zone of a coastal State and in an area of the high seas adjacent to it, the management regime applied to the stock must provide for consistency of the measures applied on the high seas with those applied by the coastal State within its exclusive economic zone.

(measure) 9. With respect to a highly migratory species, the management regime on the high seas must fully recognize the sovereign rights of the coastal State in its exclusive economic zone and, taking into account the special interest of the coastal State in the species while outside its zone, avoid an adverse impact on the resources within that zone.

When revised in March 1992, with only inconsequential changes to the above text, the proposal was co-sponsored by 40 States, including Australia and New Zealand.


But when UNCED took place the following June the proposal was not adopted, no
doubt in part because inclusion of the reference to the special interest of the coastal
State in fisheries outside its EEZ was needlessly controversial, given that UNCLOS
does not reproduce *mutatis mutandis* for the EEZ Article 6, paragraph 1 of the 1958
Fishing Convention: “A coastal State has a special interest in the maintenance of the
productivity of the living resources in any area of the high seas adjacent to its
territorial sea.”\(^{510}\) This apart, however, the principles and measures reflect soundly
each the consequences of the rights, duties and interests of coastal States to which
fishing on the high seas for the stock concerned is subjected by Article 116(b) of
UNCLOS,\(^ {511}\) even if the coastal State has no superior or preferential right to fish
such stocks on the high seas merely because they also occur in its EEZ. The
argument of Treves in this regard, although confined to straddling stocks, is equally
applicable to highly migratory species:

> Il est difficile, d’une part, de nier que l’Etat côtier a un intérêt digne de protection à
cel que l’exploitation du *straddling stock* en haute mer ne se répercute pas
négativement sur la conservation du même stock dans sa zone économique
exclusive. Il est, d’autre part, également difficile de trouver un appui sérieux dans la
Convention ou dans la pratique à la thèse que l’Etat côtier a une position
«supérieure» ou «dominante» pour ce qui est des *straddling stocks* en haute mer.”\(^ {512}\)

Instead, UNCED called in paragraph of 17.49(e) of Agenda 21\(^ {513}\) for a further
conference to be convened to pursue the effective implementation of the provisions

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\(^{510}\) The next paragraph of Article 6 of the Fishing Convention, *supra* Introduction n 21,
reinforces the coastal State’s position:

2. A coastal State is entitled to take part on an equal footing in any system of research and
regulation for purposes of conservation of the living resources of the high seas in that area,
even though its nationals do not carry on fishing there.

\(^{511}\) See *supra* text following n 495.

Droit de la Mer”, (1992) XXXVIII *Annaire Français de Droit International* 885 at 895.

\(^{513}\) Agenda 21 is the title of Annex II to UN doc A/CONF.151/26/Rev.1 (Vol. I), *Report of
the United Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (New
York: UN, 1993).
of UNCLOS concerning straddling and highly migratory fish stocks. A few months later, the UN General Assembly by Resolution 47/192\textsuperscript{514} formally convened the Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks with such a mandate. The Conference did not at any stage in its work distinguish systematically between straddling stocks on the one hand and highly migratory stocks on the other,\textsuperscript{515} let alone focus on individual species, as is reflected in the treaty which it adopted, the UN Fish Stocks Agreement.\textsuperscript{516}

The substantive provisions of the UN Fish Stocks Agreement have generated a considerable body of literature.\textsuperscript{517} For present purposes, it suffices to remark that

\begin{itemize}
\item UN doc A/RES/47/192 (22 December 1992), paragraphs 1 and 2.
\item According to Applebaum, supra Ch I n 124, at 283, straddling stocks are those “for which there would be no special category or legal status if fishing zones followed continental shelf contours instead of being limited to 200 miles.”
\item Supra Introduction n 4.
Articles 8 to 13 make a considerable advance in the problem of new entrants by putting regional fisheries commissions firmly at the core of management of straddling and highly migratory stocks. Article 13 directs States to “cooperate to strengthen existing subregional and regional fisheries management organizations and arrangements in order to improve their effectiveness in establishing and implementing conservation and management measures” for the stocks concerned.

More notably, Article 8, paragraph 3 provides that States with a real interest in a fishery must join the relevant commission or cooperate with its management measures, and the commission must be open to their participation:

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.

The corollary of this is in the next paragraph of the same Article:

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.

By Article 17, paragraphs 1 and 2, moreover, a State which neither joins nor agrees to apply the conservation and management measures established by a relevant fisheries commission is not discharged from the obligation to cooperate in the conservation and management of the relevant fish stocks. Such a State may not authorise vessels flying its flag to engage in fishing for the stocks subject to the conservation and management measures established by that commission.

This is the basic bargain – for States Parties to the UN Fish Stocks Agreement, open access to high seas fisheries as a consequence of freedom of fishing on the high seas is replaced by a duty to join or cooperate with the competent fisheries commission, if any, as a condition of access to the fishery. (Where there is no such body extant for a stock or region, Article 8, paragraph 5 requires relevant coastal States and States fishing on the high seas to cooperate to establish one or enter into other appropriate arrangements to ensure conservation and management of such stock and participate in the work of the commission or arrangement. By Article 9, paragraph 2, States cooperating in the formation of a commission or arrangement must “inform other
States which they are aware have a real interest in the work” of the proposed commission or arrangement.)

What, though, if the fisheries commission imposes restrictive conditions on entry of new participants or is closed altogether to their participation? At minimum, it is submitted, the freedom of high seas fishing of a State with a real interest in a particular high seas stock is abdicated only to a commission that is in fact prepared to admit it as a member. If its constitutive instrument does not allow that, the freedom is not lost. If it allows it conditionally, the commission in essence has a choice between admitting the new entrant and rejecting it but not depriving it of its high seas freedom of fishing. The difficulty lies in that Article 8, paragraph 3 contains no definition of “real interest”; if the ground of refusal to admit the applicant is that it

518 Accord Molenaar, supra n 517, at 498-499, where he warns that yielding in this way to their members’ “resentment” at “having to accept diminishing shares as a consequence of new entrants” may be self-defeating. This is because the obligations under Article 17(1) and (2) of the Agreement to refrain from fishing the stock concerned would not be opposable to any State barred from participation for lack of an overly narrowly defined real interest, and any dissuasive measures taken by those members pursuant to Article 17(4), or boarding and inspection of new entrants’ fishing vessels under Articles 21 and 22, would be unjustified.

519 A subsequent attempt to define “real interest” in what became the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, done at Windhoek, 20 April 2001 (hereinafter SEAFO Convention), 2221 UNTS 189, (2002) 41 ILM 257, was unsuccessful and ultimately abandoned: A. Jackson, “Developments in the Southeast Atlantic, 1997-1999: Meetings of Coastal States and Other Interested Parties on a Fisheries Management Organization for the South East Atlantic (the SEAFO Process)”, in Nordquist and Norton Moore (eds), supra Ch I n 87, 55 at 58; Molenaar, supra n 517, at 508 (part of a discussion of the “real interest” concept more generally at 493-501 and of State practice in this regard in various fisheries commissions and negotiations at 507-523). Nor could any common understanding be found in “Working Group on Allocation of Fishing Rights to Contracting Parties of NAFO and Chartering of Vessels Between Contracting Parties, 13-15 April 1999, Halifax, N.S., Canada”, in Northwest Atlantic Fisheries Organization, Annual Report 1999 (hereinafter NAFO Annual Report 1999), available online at <archive.nafo.int/open/ar/ar99.pdf> (visited on 12 June 2008), 31 at 31 – though it was noted that the context in which the phrase occurred was solely that of membership in a fisheries commission, not necessarily extending to the allocation of quota.
has no such interest, the rejected applicant cannot take action against the commission because the latter is not party to the UN Fish Stocks Agreement, but must pursue its remedies against all its members.

Questions of entry aside, it is no longer enough for States simply to become members of the relevant fisheries commission. Their conduct within the commission is now governed by Article 10 of the UN Fish Stocks Agreement, which provides that, in order to fulfil the obligation to cooperate through subregional or regional fisheries management organisations or arrangements, it is necessary, *inter alia*, to:

(a) agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;

(b) agree, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort;

(c) adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations;

... 

(i) agree on means by which the fishing interests of new members of the organization or new participants in the arrangement will be accommodated;

(j) agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner;

(k) promote the peaceful settlement of disputes in accordance with Part VIII;

(l) ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of the organization or arrangement; and

(m) give due publicity to the conservation and management measures established by the organization or arrangement.

Expanding on paragraph (i), Article 11, headed “New members or participants”, states that:

In determining the nature and extent of participatory rights for new members of a subregional or regional fisheries management organization, or for new participants in a subregional or regional fisheries management arrangement, States shall take into account, *inter alia*:
(a) the status of the straddling fish stocks and highly migratory fish stocks and the existing level of fishing effort in the fishery;

(b) the respective interests, fishing patterns and fishing practices of new and existing members or participants;

(c) the respective contributions of new and existing members or participants to conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks;

(d) the needs of coastal fishing communities which are dependent mainly on fishing for the stocks;

(e) the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources; and

(f) the interests of developing States from the subregion or region in whose areas of national jurisdiction the stocks also occur.

There has been only one major attempt to elaborate on this, in ICCAT. As Judge Oda might have predicted, this produced no concrete results in terms of allocation, as the question was pushed further down the organisational hierarchy to the individual panels which set catch limits for each stock. First, however, there is another secondary set of provisions that can be applied to the question of allocation at the instance of an interested State: those on dispute settlement.

C Allocation by litigation: the hypothetical example of South Africa

Another element of the 1958 Fishing Convention revived by the UN Fish Stocks Agreement is the possibility of invocation of the dispute settlement provisions for the fixing of short- as well as long-term conservation measures such as catch limits. Normally the processes of litigation are too slow by comparison with the typically yearly migratory cycle of a fishery, and thus of quota-setting, to offer a meaningful remedy to an aggrieved State. Going further than the tentative recommendation of the 1955 Rome Conference, the 1958 Convention provided for binding decisions on such measures by a special commission to be created by the parties to the dispute,

\[520\] Infra, text at n 541.
but only after a year had elapsed in which such measures could not be adopted by negotiation, and its provisions were never used.

By Article 5, paragraph 1, new entrants had to apply to their nationals the measures binding existing participants (provided they were non-discriminatory in form or fact) within seven months of their notification to the Director-General of the FAO.

Paragraph 2 then continued:

2. If these other [new entrant] States do not accept the measures so adopted and if no agreement can be reached within twelve months, any of the interested parties may initiate the procedure contemplated by Article 9. Subject to paragraph 2 of Article 10, the measures adopted shall remain obligatory pending the decision of the special commission.

Article 7 of the UN Fish Stocks Agreement provides a similar procedure based on, but adding to, the dispute settlement mechanism in Part XV of UNCLOS. Although South Africa appears to have accepted in 2006 a quota of 45 tonnes as a cooperating non-member, at one stage it was seeking, and Members were resisting, an allocation of 250 tonnes. As a party to that Agreement, South Africa could have invoked Article 7, paragraph 5 to have a provisional catch limit prescribed for it via the

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521 See Articles 9-11 of the Fishing Convention, supra Introduction n 21.
522 Also pertinent to new entrants are Article 6, dealing with negotiations between a coastal State and other States (not necessarily new entrants) fishing the high seas adjacent to its territorial sea, which by paragraph 5 become subject to unilateral invocation of the dispute settlement provision if no agreement on conservation measures is reached within twelve months, and the possibility in Article 7(2) of unilateral measures imposed by the coastal State after six months of fruitless negotiations being valid erga other States on condition:

- That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;
- That the measures adopted are based on appropriate scientific findings;
- That such measures do not discriminate in form or in fact against foreign fishermen.

Article 7(3) and (4) then provides that these measures are to remain in force “pending the settlement, in accordance with the relevant provisions of this Convention, of any disagreement as to their validity.”

523 See infra Ch IV, text at nn 771-784; including the curious fact that despite this in 2006 it was allocated only 40 tonnes.
dispute settlement process; to the extent that it wished to take the 250 tonnes in its EEZ, the test under paragraphs 2 to 6 of that Article would have been whether this was “compatible” with the measures applying on the high seas through the CCSBT’s TAC.\footnote{524} Since 250 tonnes represented an addition of only around 1.6 per cent to the

\footnote{524} The South African vessels would have been free, however, to catch SBT on the high seas too: see “Opening Statement by the Republic of South Africa” (Attachment 6 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, supra Ch I n 34, 52 at 53. Article 7(2)-(6), so far as relevant, is in the following terms:

2. Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks. In determining compatible conservation and management measures, States shall:

(a) …;

(b) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas;

(c) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;

(d) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;

(e) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and

(f) ensure that such measures do not result in harmful impact on the living marine resources as a whole.

3. In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.

4. If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII.

5. Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that they are unable to agree on such arrangements, any of the States concerned may, for the purpose of obtaining provisional measures, submit the dispute to a court or tribunal in accordance with the procedures for the settlement of disputes provided for in Part VIII.
global SBT catch in 2003 (including the 14 tonnes caught by South Africa), even as an ambit claim, it may be thought, it was not certain to fail.

Invocation of the Agreement, however, illustrates the difficulty pointed out by Rayfuse\(^\text{525}\) that fishery commissions face caused by the differences in their members’ obligations. Whether or not it acceded to the 1993 Convention, South Africa could under those provisions proceed for the CCSBT’s failure to offer it a reasonable quota not against the CCSBT or its membership as a whole, but only against those Members that at the time were also parties to the UN Fish Stocks Agreement, namely Australia and New Zealand. Had it done so, the absence from such litigation of Japan and the Republic of Korea as necessary third parties could have been fatal to the admissibility of its claim. The absent third party rule\(^\text{526}\) states that a claim is inadmissible when a legal finding on the acts or omissions of a third party not before the court or tribunal is a necessary condition of determining the claim. The rule is hence not directly applicable, since a finding in favour of South Africa would merely carry a concurrent implication that all CCSBT Members, not only Australia and New

6. Provisional arrangements or measures entered into or prescribed pursuant to paragraph 5 shall take into account the provisions of this Part, shall have due regard to the rights and obligations of all States concerned, shall not jeopardize or hamper the reaching of final agreement on compatible conservation and management measures and shall be without prejudice to the final outcome of any dispute settlement procedure.

\(^{525}\) R. Rayfuse, “The Interrelationship Between The Global Instruments of International Fisheries Law”, in Hey (ed), supra n 517, 107 at 113-114. The problem has also been noticed by Hey, supra n 517, at 482 and 489, who treats the UN Fish Stocks Agreement as \textit{lex specialis} to the \textit{lex generalis} of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted by the Conference of the Food and Agriculture Organization of the United Nations at its Twenty-seventh Session, Rome, 24 November 1993; 2221 UNTS 93; [2004] ATS 26; (1994) 33 \textit{ILM} 968 (hereinafter FAO Compliance Agreement).

Zealand, were in breach of their duties to South Africa. The implicit finding against
Japan and Korea would thus be a consequence of, not a necessary prerequisite for,
that against Australia and New Zealand. Yet if the latter two States were to be
unsuccessful in raising as a substantive defence the impossibility of carrying out their
duties because of the CCSBT’s decision-making procedure, the consequence would
be that, by joining a fisheries commission, States render themselves jointly and
severally liable for the acts and omissions of the commission as whole, or in practice
the acts and omissions of the delinquent majority of members. This would hardly be
conducive to encouraging wider membership of those commissions. Australia and
New Zealand could also point to the futility of ordering relief against them which
they could not carry out within the CCSBT.

The only feasible relief for South Africa in such circumstances might be to award it a
share of the catch out of those of the respondent States. That too, however, would
not only be a disincentive to remaining party to the UN Fish Stocks Agreement, but
also run counter to UNCLOS Article 116, paragraph (b), whose effect at minimum
must be that existing coastal State members should not bear a disproportionate share
of the burden of quota reallocation to other States, and arguably would sustain a
conclusion that it shields coastal States from that burden altogether. Alternatively, South Africa could have sued all CCSBT Members under UNCLOS, but the applicable law under Article 293, paragraph 1 would have differed as among the respondents, the UN Fish Stocks Agreement being opposable only to Australia and New Zealand, unless South Africa (or Australia and New Zealand, as it would be in their interests to do so) persuaded the arbitral tribunal that its relevant provisions had become custom.

Strong opposition to South Africa’s claimed allocation was shown by Japan. Possibly its attitude was driven by fears that, while a net addition to catch remained scientifically inadvisable, South Africa’s allocation as a coastal State with a greater legal interest in the fishery than Japan, Korea and Taiwan would come at the expense of the distant-water fleets. At any rate, while the CCSBT and its Members can require South Africa’s cooperation under both UNCLOS and especially the UN Fish Stocks Agreement once it is in force for all of them, they cannot insist that the only way for South Africa to fulfil that obligation is by taking zero catch. Though South

\[527\] The problem would disappear if the CCSBT could itself become party to the UN Fish Stocks Agreement, which is expressed by Article 1(3) to apply *mutatis mutandis* to “other fishing entities”. Article 6(9) of the 1993 Convention provides that the CCSBT “shall have legal personality and shall enjoy in its relations with other international organisations and in the territories of the parties such legal capacity as may be necessary to perform its functions and achieve its ends.” This includes international legal personality, as evidenced by its headquarters agreement with Australia, which is of treaty status: Headquarters Agreement between the Government of Australia and the Commission for the Conservation of Southern Bluefin Tuna (Canberra, 20 January 1998); 2076 UNTS 527; ATS 1999 No 6. Although the commonly accepted view is that Article 1(3) was inserted as a *sub rosa* reference to Taiwan: see *infra* Ch IV n 828, it is conceivable, if unlikely, that in future a fisheries commission wishing to underline its collective commitment to the Agreement could by resolution declare itself bound by it under this provision. To be truly effective, however, the declaration would need to include acceptance of the application to the commission *mutatis mutandis* of the dispute settlement provisions.

\[528\] Article 293(1) states that “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”
Africa’s cooperating status is a useful step forward, the long-term interests of the existing Members might have been better served by making South Africa a quota offer closer to 250 tonnes so as to entice it to accede to the 1993 Convention. Recourse could have been had to the precedents in both CCSBT and ICCAT for “development quota”. This was how the 1,000-tonne limit for New Zealand under the trilateral mechanism of the 1980s, which it did not come close to catching, was described, and in ICCAT’s 2002 Recommendation on the South Atlantic swordfish stock, the TAC was set higher than advised by the Standing Committee on Research and Statistics, on the basis that it would not all be caught, as it included development quota for new entrants. While the danger appears to have passed of the CCSBT, having learnt nothing from the mistake it made with its insufficient quota offers to Korea and Taiwan, impelling South Africa to build up its catch outside the CCSBT to a point where only a significantly higher allocation would induce it to accede to the 1993 Convention, the like issue with respect to Indonesia remains, now that it is party to that Convention. The other Members would be in a vulnerable position were Indonesia to ratify the UN Fish Stocks Agreement.

D The abstention doctrine – a false start for conservation

If the debates on fisheries at and preceding the Third UN Conference on the Law of the Sea resembled a “class war” between coastal and distant-water fishing States, the history as outlined above of allocation negotiations within fishery commissions since the adoption of UNCLOS is notable chiefly for the extent to which the dominant

529 See Table 2, supra Ch II at n 351.
530 “Recommendation by ICCAT on South Atlantic Swordfish Catch Limits” (Annex 8.3 to ICCATSM13 Report), in ICCAT Green Book 2003/1, supra Ch II n 427, 159.
531 Reports of the Meetings of Panels 1 - 4 (Annex 13 to ICCATSM13 Report), ibid., 303 at 319. Note however that a frequent drawback of the unreality of development quota is that it generally stores up trouble for later by failing to make explicit the assumption that existing participants would reduce their catch as the new entrants’ fisheries develop. Thus it would be realistic to expect resistance to this notion on the part of the former when the time comes.
532 Infra Ch IV, text accompanying n 761.
thread has ceased to be a continuation of that struggle on the basis of Article 116, paragraph (b) of UNCLOS. Instead there is now an uneasy accommodation between the two camps, which may vary in composition among commissions, sustained by a joint vigilance to discourage or even prevent altogether new entrants to the fishery from either camp. When the stock is being exploited at an intensity of effort at or above the level of maximum sustainable yield, so that to make room for admission of new entrants would require some restriction of their own fishing effort, the predominant attitude is best summed up as “first come first served”. The justifications advanced in modern fishery commissions for urging restraint on non-members tend to be that the stock is “fully subscribed” or “fully allocated”.

1 Abstention and the UN Fish Stocks Agreement

This line of argument is not new. In its essential elements it is little different from the doctrine of “abstention” propounded by the United States in the early 1950s with the aim of forestalling Japan from dominating the salmon fisheries in the North-East Pacific, after the political reaction in the late 1930s to the appearance of large Japanese vessels targeting salmon in Bristol Bay off Alaska. The abstention principle was accepted by Canada because its interests were parallel in this instance to those of the United States, but only reluctantly by a Japan emerging from occupation, in the 1952 International Convention for the High Seas Fisheries of the

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533 Article 116(b), it will be recalled, subjects the right of all States for their nationals to fish on the high seas to “the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63 paragraph 2, and articles 64 to 67.” For the full text of Article 116 see supra, text following n 495.


535 Scheiber, supra Ch I n 177, at 29-31; Burke, supra Ch I n 80, at 156-157.
The conditions for a Party abstaining from fishing are set out in Article IV(1)(b) of the 1952 Convention:

(i) Evidence based upon scientific research indicates that more intensive exploitation of the stock will not provide a substantial increase in yield which can be sustained year after year.

(ii) The exploitation of the stock is limited or otherwise regulated through legal measures by each Party which is substantially engaged in its exploitation, for the purpose of maintaining or increasing its maximum sustained productivity; such limitations and regulations being in accordance with conservation programs based on scientific research, and

(iii) The stock is the subject of extensive scientific study designed to discover whether the stock is being fully utilized and the conditions necessary for maintaining its maximum sustained productivity.

By Article III(1)(b), if the Commission decides that a particular stock fulfils the above conditions, it shall recommend, (1) that such stock be added to the Annex, (2) that the appropriate Party or Parties abstain from fishing such stock and (3) that the Party or Parties participating in the fishing of such stock continue to carry out necessary conservation measures.

One significant exception, which underlines the vulnerability to new entrants of any regime based on an agreement only among existing participants in a fishery, covers stocks harvested in greater part by a non-party to the Convention: Article IV(1)(b). Originally the principle was conceived as an *ad hoc* solution to the problem of reconciling the various United States fisheries’ conflicting interests. On one hand the salmon industry was pressing for a strong coastal State stance against Japanese interest in the Bristol Bay salmon fishery; on the other the Californian tuna and New England groundfish fleets wished to preserve their access to the fishing grounds of the west coast of Central and South America and the Grand Banks of Newfoundland respectively. Later, from 1955 to 1958 the United States attempted to incorporate the principle into international fisheries law, first at the Rome Conference, then through the ILC\(^\text{a}\) and finally in the Fishing Convention at the first UN Conference on the Law of the Sea.\(^\text{b}\) It met little success. The Rome Conference clearly saw the nature of the problem posed by new entrants,\(^\text{c}\) but the closest its report came to endorsing abstention was a passage stating that “where…development or restoration by the harvesting State or States is necessary to maintain the productivity of the resources, conditions should be made favourable for such action.”\(^\text{d}\) The general conclusions on new entrants state simply that, where they posed a serious problem, the States involved should submit the question to “suitably qualified and impartial

\(^{537}\) See the US comment on the ILC’s 1955 provisional articles on the high seas, *supra* Ch I n 60, in ILC Yearbook 1956/II, *supra* n 455, 91 at 93.


\(^{540}\) *Ibid.*, at 7 (paragraph 61).
experts chosen for the special case by the parties concerned, with the subsequent transmittal of the findings, if necessary, for the approval of the parties concerned”. 541

There might have been a narrow majority for abstention in 1956 in the ILC, but for a too frank remark in its favour by the Mexican member Padilla Nervo, who called it the “principle of justified exclusion of third parties”. 542 In the end the ILC saw the question more as a technical one:

[T]his proposal, the purpose of which was to encourage the building up or restoration of the productivity of the resources…reflect[s] problems and interests which deserve recognition in international law. However, lacking the necessary competence in the scientific and economic domains to study these exceptional situations adequately, the Commission, while drawing attention to the problem, refrained from making concrete proposals. 543

A resolution to “commend the abstention procedure to States for utilization where appropriate as an incentive to the development and restoration of the productivity of the living resources of the sea” found majority support in the Third Committee of the 1958 conference, but lacked the two-thirds support needed for the plenary to adopt it. 544 Japan in particular opposed it despite being party to the 1952 Convention, as did France, the United Kingdom and the Union of Soviet Socialist Republics and others, who criticised it as a distribution scheme rather than a conservation measure, discriminating in favour of developed countries, in conflict with the principle of

541  Ibid., at 9 (paragraph 79).
542  See the summary record of the ILC’s 356th meeting, 30 May 1956, in UN, Yearbook of the International Law Commission 1956, Vol I (hereinafter ILC Yearbook 1956/I; New York: UN, 1956), 119 at 123 (paragraph 47); Chapman, supra n 538, at 48; Herrington, supra n 536, at 116.
543  See the ILC’s commentary on Article 53 of its Draft Articles in UN doc A/3159, supra n 455, at 290.
freedom of the high seas and open to abuse through false claims as to the existence of the conditions sufficient to qualify a stock for abstention.\footnote{545}

The United States decided not to reintroduce the abstention text at the Second UN Conference on the Law of the Sea in 1960.\footnote{546} At two meetings in 1963 of the parties to the 1952 Convention Japan stated that “the abstention formula has in it intrinsic irrationality since it is...actually designed for the protection of fishery industries of certain countries rather than for conservation of resources” and called for the replacement of the 1952 Convention with a new one. The head of the Japanese delegation said that the principle

mixes the problems of resource conversation and that of resource distribution, establishes exclusive fishery rights in the disguise of resource conservation, and eventually leads to the monopolization of fishery resources. I do not think that any nation today can ever be persuaded of the argument that fishery resources will be depleted but for their monopolization.\footnote{547}

Thereafter attempts to propagate it ceased, and the abstention provisions were removed from the Convention by a 1978 Protocol.\footnote{548} It is not without irony that in 1987 the United States itself undertook to abstain from fishing for SBT in most of the western half of the Pacific Ocean: by paragraph 5 of Annex I to the Treaty on

\footnotetext[545] {R. Johnson, “The Japan-United States Salmon Conflict”, (1967) 43 Washington Law Review 1 at 29. For a persuasive criticism of the principle see Oda, \textit{supra} Ch I n 56, at 89-90 (“very similar to acquisitive prescription...completely contrary to the concept of freedom of the high seas”), which succeeded in discrediting it. Knight, \textit{supra} Ch I n 52 at 43 confirms that abstention has never been a rule of international law. It was suggested as a means of handling the problem of new entrants, but, in fact, this is a non-solution because there is no benefit to the new entrant simply from abstention. If \textit{a quid pro quo} were found for such a situation, the result would be properly described as a bilateral (or multilateral) agreement in which one state gives up the right of access in return for another payoff... .}

\footnotetext[546] {Chapman, \textit{supra} n 538, at 55.}

\footnotetext[547] {S. Oda and H. Owada (eds), \textit{The Practice of Japan in International Law 1961-1970} (Tokyo: University of Tokyo Press, 1982), at 131.}

\footnotetext[548] {Protocol amending the International Convention for the High Seas Fisheries of the North Pacific Ocean, done at Tokyo on 25 April 1978; 1207 UNTS 325.}
Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America, its vessels “shall not be used for directed fishing for Southern Bluefin Tuna, or for fishing for any kinds of fish other than tunas, except that other kinds of fish may be caught as an incidental by-catch.”

2 Abstentio rediviva?

Yet, while it is one thing to object to locking-up of a high seas fishery by its first exploiters, it is another to find an alternative mechanism by which the tragedy of the commons can be averted. If new entrants cannot be excluded from a fisheries commission, the situation is uncomfortably close to that of a fishery wholly confined to coastal state waters in which the coastal state authorities establish and enforce a TAC, but exert no control over fleet size.

Although “abstention” is a word for which one searches in vain in modern fisheries commission meeting reports and papers from the Straddling and Highly Migratory Fish Stocks Conference, objectively it differs little from the requirement in Article 8, paragraph 3 of the UN Fish Stocks Agreement for new entrants to have a “real interest” as their entrée card to the relevant commission. The true character of the “fully subscribed” argument becomes apparent when such non-members join the fisheries commissions or avail themselves of the increasingly formalised procedures for cooperation with them that Article 8 has inspired. For, as Butterworth and

549 Supra Introduction n 9.

550 Kaitala and Munro (1993), supra Ch I n 120, at 320.

551 Supra, text following n 517. Nevertheless, it is submitted that to equate the cumulative effect of the pertinent provisions of the UN Fish Stocks Agreement itself with abstention, as Tsuru does (supra n 536 at 542 and 548), is an oversimplification. They do not close the door to new entrants, but subject their entry to the requirement of cooperation with existing participants through the relevant commission. As will be argued below, abstaining from entering a fishery altogether is not the only way to cooperate with the existing participants. As to the definition of “real interest”, see supra n 519 and accompanying text.

552 In the case of the CCSBT, this is the resolution cited at Ch IV n 803 infra and discussed in the text following.
Penney write,\textsuperscript{553} this simply transforms what was hitherto a “non-member problem” into a “new member problem”, namely how “old” members can retain their existing shares of the catch if its absolute level cannot rise to accommodate newcomers because there is no surplus. Coastal States are grudgingly admitted by virtue of their geographical location to have a real interest, and in ICCAT at least the visible result of this to date is the 2001 Criteria for Allocation of Fishing Opportunities and the allocation Recommendations based on it,\textsuperscript{554} but other new members without a catch history from the relevant stock are told that they lack a real interest and therefore have no business fishing it in future. In this way limited entry to the fishery is achieved on the international plane, but only by depriving some potential new entrants of the possibility of even acquiring a “real interest”. This problem will now be explored in greater detail.

\textbf{E Allocation precedents in other international fisheries}

The new entrants problem is one aspect of the wider unresolved question of the legal principles governing allocation of shares in international fisheries. As a legal issue, for stocks within 200 miles of coastal States’ territorial sea baselines it may be regarded as solved by UNCLOS through the new institution of the EEZ.

After the adoption of UNCLOS in 1982, legal interest centred on the debates on allocation of surplus within EEZs under Article 62, but that too had largely petered out by the late 1980s.\textsuperscript{555} For stocks beyond 200 miles, however, the problem


\textsuperscript{554} \textit{Infra} n 608.

\textsuperscript{555} The debate may be seen as one between lawyers of classical bent on one hand who saw the EEZ regime provisions on foreign access as intended to signal a move away from Western concepts of ownership (e.g. A.V. Lowe, “Reflections on the Waters, Changing Conceptions of Property Rights in the Law of the Sea”, (1986) 1 \textit{International Journal of Estuarine and Coastal Law} 1, and on the other hand economists and policy-oriented lawyers who saw more clearly their transitory applicability and its consequences. Thus W.T. Burke, “Extended fisheries jurisdiction
remained acute, and at bottom is the reason why the subject of fisheries has not lost
the attention of writers on international law.

The tension first came to the fore in the Northwest Atlantic Fisheries Organization
(NAFO) when the 1986 entry of Spain and Portugal into the European Community
prompted the latter to advocate a less conservative management policy for cod than it
and the new Law of the Sea”, in B.J. Rothschild (ed), Global Fisheries: Perspectives for the
1980s (New York: Springer-Verlag, 1983), 7 at 46 concludes with some regret that “the coastal
state is given substantially complete discretion to manage the fisheries for its own exclusive
interests, however narrowly and selfishly conceived they might be”; agreeing, G.R. Munro,
“Coastal states, distant-water fleets and EFJ [extended fisheries jurisdiction]: Some long-run
considerations” (1985) 9 Marine Policy 2 at 3-4, argued that the coastal State’s obligation to
enter into cooperative fisheries arrangements under UNCLOS Article 62(2) was “more apparent
than real, at least over the long term.” Under the preceding Article 61, (at 3)

The coastal State is given a virtual free hand in establishing the total allowable catches
(TACs) for fisheries within its zone. In theory, the coastal state could set the TACs at such
levels as to ensure zero surpluses throughout its EEZ.

The sole constraint is that, if the coastal State were to set “unconscionably low” TACs, that
would invite poaching by distant-water fleets, counterable only through “prohibitively expensive
surveillance and enforcement procedures.” According to Munro (at 4), Burke’s concession that
Article 300 prevents coastal States from imposing terms and conditions clearly designed to bar
distant-water fleets from the surpluses (W.T. Burke, “1982 Convention on the Law of the Sea
Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction” (Annex 1 to
FAO, Report of the Expert Consultation on the Conditions of Access to the Fish Resources of the
Exclusive Economic Zones, Rome, 11-15 April 1983 (FAO Fisheries Report No 293; Rome:
FAO, 1983)), 23 at 31) means only that “the coastal state should not be unduly blatant in its
attempt to discourage distant-water nation interest in its zone…the coastal state’s obligation…is
basically that [it] should be prepared to endure a phase-out period”, leaving it with “virtually full
property rights to the fishery resources within its zone” thereafter. Kaitala and Munro (1993),
supra Ch I n 120, say that the coastal State’s sovereign rights in the EEZ under Article 56 are
“essentially full property rights to the fishery resources”: at 314. Knight, supra Ch I n 52, at 42
agrees that there is no international legal doctrine of historic fishing rights – rather, UNCLOS
Article 62 in his view reflects the “fact of political and economic life that it would be generative
of conflict to eliminate suddenly and unilaterally…the distant-water state….from an area in which
it had traditionally derived resources and revenues.”

556 Created by the Convention on Future Multilateral Cooperation in the Northwest Atlantic
Fisheries, done at Ottawa, 24 October 1978, 1135 UNTS 369, Canada Treaty Series 1979, No 11.
had hitherto accepted. The coastal State, Canada, saw no reason to depart from the old policy. Some years later a Canadian fisheries official argued that the preferential position of coastal States in management of straddling stocks meant that the high seas right was subordinate.\(^{557}\) Further, the UNCLOS Article 61 duty of the coastal State to conserve and manage the stocks in its EEZ by reference to MSY as qualified by economic and environmental factors creates a duty of other States to make it possible for it to fulfil the former.\(^{558}\) As for new entrants, he maintained that, since NAFO quotas were based on “customary proportionate shares”, it would not be discriminatory and thus in breach of UNCLOS Article 119 to insist that new entrants have a zero share – a novel, but equally unconvincing way of justifying the abstention doctrine.\(^{559}\)

At the Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Canada was joined by four other coastal States in putting forward, as part of a draft convention, a provision on new entrants in the following terms:

\textit{Article 18}

\textit{New participants}

Parties which participate in a regional fisheries conservation organization or arrangement shall, where appropriate, encourage States with an interest in a high seas fishery which it regulates to participate in such organization or arrangement. Such Parties may:

(a) As part of a new participant’s contribution to the conservation measures of such organization or arrangement:

(i) Make allocations of any stock they regulate to new participants subject to a waiting period;

(ii) In cases where stocks are depressed, make allocations of any stock they regulate to new participants only when the total allowable catch exceeds a

\(^{557}\) Applebaum, \textit{supra} Ch I n 124, at 290.

\(^{558}\) Ibid., at 288.

\(^{559}\) Ibid., at 291-292.
threshold level determined for that purpose by the organization or under the arrangement;

(iii) In cases where stocks are at appropriate levels and fully allocated, make allocations of any stock they regulate to new participants subject to quotas being relinquished by existing participants;

(b) In cases where quotas are relinquished by existing participants, decide to reallocate those quotas to new participants, provided that special consideration shall be given to a coastal State with regard to straddling fish stocks or highly migratory fish stocks occurring within both its exclusive economic zone and the regulatory area and, secondarily, to developing States.\[560\]

The same idea of allocations to new entrants being entirely within existing participants’ gift occurs also in abbreviated form in Article 14, paragraph (i) of an alternative draft convention submitted by Ecuador.\[561\]

Kaitala and Munro conclude that neither of these texts is incompatible with the Agreement as adopted.\[562\] They dismiss the waiting period as a solution, viewing it as simply a postponed surrender to economic irrationality,\[563\] but are much more enthusiastic about transferable membership,\[564\] pointing out that if existing members

\[560\] UN doc A/CONF.164/L.11 (14 July 1993), Draft Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (submitted by the delegations of Argentina, Canada, Chile, Iceland and New Zealand), reprinted in Lévy and Schram, supra n 443, 147-161; Article 18 is at 155.

\[561\] UN doc A/CONF.164/L.44 (23 June 1994), Presentation of the Working Paper for a Draft Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (submitted by the delegation of Ecuador), reprinted ibid., 503-549; Article 14(i) is at 523.

\[562\] Kaitala and Munro (1997), supra Ch I n 120, at 99.

\[563\] Ibid., at 99-100. The ultimate omission of this concept from the UN Fish Stocks Agreement is, however, less likely to have been for this reason than for the opposite one: the very idea of waiting is incompatible with States’ political need for instant gratification, exemplified by their high implied discount rates (on which see supra Ch I, text at nn 106-115).

\[564\] Ibid., at 100-106. Note that the transfer is of membership rather than of quota and appears to contemplate that membership of a commission is itself a property asset (possibly owing its value to the assumption that a fixed quota share is attached to it). For transfer of quota separate from (though still related to) membership, see Ch V infra.
cannot veto a transfer, then will lose from replacement of a less efficient distant-water fishing State by a more efficient one if the maximum economic yield is being extracted from the fishery, though they can minimise the loss if they are permitted to make counteroffers. The strongest argument against a declared policy of closing a fishery to new entrants is, however, perhaps a practical one: the economic benefits will be achieved only if the closure comes as a surprise; if it seen for some time beforehand to be impending, as must inevitably be the case given the slow pace of international diplomacy, then it has the same perverse effect as before the introduction of ITQs, namely a rush to stake claims, attracting the entry of newcomers anxious to be inside the fishery when the door closes.

The remainder of this section discusses three issues of allocation that have troubled ICCAT in the last dozen years.

1. **New entrants bound by old decisions – is there an acquis commissioneer?**

This issue poses two questions, one general and one specific. The general question is whether, if a treaty such as the 1993 Convention gives a commission it creates power to bind by its decisions the parties to the treaty, a new party to the treaty is bound by past decisions as well as subsequent ones. Without a general rule of international law on this matter, guidance must be sought in the terms of the treaty itself. Though it is not clear whether the question was specifically adverted to by any of the three original Parties during the negotiation of the text, Article 8, paragraph 7 of the 1993 Convention states that “All measures decided upon under paragraph 3 above shall be binding on the Parties.” Neither this provision nor any other in the Convention states

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566 R. Falloon (with the assistance of T.M. Berthold), “Individual Transferable Quotas: the New Zealand Case”, in OECD, *supra* Ch I n 88, 43 at 57. The prospect of avoiding this self-defeating anticipatory reaction is an important reason why quota trading (see *infra* Ch V), in effect a way of achieving closure by stealth, may succeed in aligning fishing capacity with the size of the stock where a more transparent approach would fail.
who the Parties are. By Article 17, paragraph 1, it is expressed to be open for
signature by Australia, Japan and New Zealand, but it is clear from the context of the
treaty as a whole that what is meant must be not only the three original parties but
also any States that accede to the 1993 Convention under Article 18. In other words,
a new entrant to the fishery contemplating accession to the 1993 Convention must
look further than the text of the treaty itself to see what its rights and obligations will
be; it must obtain from the Secretariat the text of decisions taken by the CCSBT
under Article 8, paragraph 3. 567

The specific question is whether, if a commission has adopted a TAC and national
allocations in which a new entrant is not mentioned, this is equivalent to a national
allocation of zero to the new entrant should it accede to the relevant treaty. 568 If so, it
can hardly be doubted that this would be a serious disincentive to accession to the

567 Contrast in this regard the CCSBT’s resolution to establish its Extended Commission,

supra Ch II n 408, paragraph 6 of which merely requires the applicant for membership of the

Extended Commission to “give the Commission its firm commitment to…comply with such
decisions of the Extended Commission as become decisions of the Commission pursuant to
paragraph 4” with the position in ICCAT, where Taiwan was given a list of decisions with which
it was expected to comply: “ICCAT Chairman’s Letter to Taiwan Regarding its Fishing
Activities in the Atlantic Ocean & Mediterranean Sea” (Appendix 3 to ICCAT-PWG4 Report), in
ICCAT Green Book 1996/1, supra n 534, 205.

568 A related question is whether a new member acquires a right to object to any measures
constituting the acquis even when the time to do so may for existing members long since have
expired. In 2007 the Chair of ICCAT’s Compliance Committee appears to have taken the view
that time begins running for a new member from the date it joins: Report of the Meeting of the
Conservation and Management Measures Compliance Committee (Annex 10 to Proceedings of
the 20th Regular Meeting of the International Commission for the Conservation of Atlantic Tunas
(Antalya, Turkey – November 9 to 18, 2007) (hereinafter ICCAT20 Report)), in ICCAT, Report
at 214, rejecting as out of time Belize’s objection in 2007 to a recommendation adopted in 1997.
Belize had become party to the 1966 Convention in 2005: see the status list maintained by the
FAO as depositary at <www.fao.org/Legal/treaties/014s-e.htm> (visited on 1 August 2008).
treaty even if, as in Article 18 of the 1993 Convention, fishing the stock was in itself sufficient qualification to accede. This problem has not yet affected the CCSBT, but ICCAT has had to face it squarely, and the way it did so may serve as a precedent for when the CCSBT comes to grapple with it.

The new entrants problem in fact can arise even before binding catch limits are imposed, as for example occurred in ICCAT in 1974 in the context of a proposal to freeze ABT catch for a year at recent levels. Although supporting the need for restraint, Brazil voiced opposition in principle to a freeze on the ground that it would prevent it establishing a fishery for the species at all, but was prepared to abstain from vote on the proposal on the basis that it interpreted the freeze as applying only

Note that this cannot explain Korea’s reticence. While there might have been a problem in theory of zero allocation in the remainder of the year of joining that a veto for Korea over future TACs (under the consensus decision-making rule in Article 8(2) of the 1993 Convention) would not have remedied, from 1998, thanks to the dispute, there had been no existing TAC in fact. The real explanation may be Korea’s bruising experience as a new entrant at the hands of NAFO, which offered it an allocation of 69 tonnes of redfish from area 3M, despite Korea having fished 9,000 tonnes before of redfish its accession to NAFO’s constitutive treaty, supra n 556. The allocation was never used because it was too small to be commercially profitable: see Korea’s expressions of dissatisfaction in NAFO doc NAFO/GC Doc. 98/2, Report of the Working Group on Allocation of Fishing Rights to Contracting Parties of NAFO and Chartering of Vessels Between Contracting Parties, 4-6 March 1998, Brussels, Belgium (unpublished, copy supplied by NAFO Secretariat on file with author), at 13 (Annex 5, “Opening Statement by the Representative of Korea”) and NAFO doc NAFO/GC Doc. 99/9, Report of the General Council 21st Annual Meeting, 13-17 September 1999, Dartmouth, N.S., Canada (unpublished, copy supplied by NAFO Secretariat on file with author), at 14 (see too at 43 (Annex 12, “Statement by the Representative of the Republic of Korea on Quota Allocating Practices (Mr. G. Lee)’’)); also Molenaar, supra n 517 at 515n). The inutility of very small quotas has also affected St Pierre and Miquelon, which has asked ICCAT for enough quota to keep occupied a single “polyvalent” boat targeting multiple species, or at least for full flexibility to transfer unused quota to future years: “Statement by France (St. Pierre and Miquelon) to Panel 2” (Appendix 3 to Annex 9 to ICCAT20 Report), in ICCAT Green Book 2008/1, supra n 568, 205 at 205-206 and “Statement by France (St. Pierre and Miquelon) to Panel 4” (Appendix 8 to Annex 9 to ICCAT20 Report), ibid., 209.
to those members already fishing, with all others remaining free to begin doing so. Similarly, in relation to swordfish 25 years later, South Africa observed that, if ICCAT were to follow the recommendation of the Standing Committee on Research and Statistics that catch and effort be capped at their 1998 levels, any development in southern Atlantic coastal States fisheries would necessarily have to be accompanied by a reduction in the TAC allocation to distant water fleets. South Africa proposes that this transfer...be achieved by applying an annual attrition rate to the allocation of the high-seas fleets, to release part of the TAC for distribution among the developing coastal states.571

The case of Iceland and ABT is equally instructive. In the mid-1990s Iceland suspected the presence of this species in its EEZ, and was considering developing the fishery and joining ICCAT, but apprehended that if it did so, the relevant ICCAT Recommendations in force might prohibit new Contracting Parties from targeting relevant species, even in their own EEZ and irrespective of the distribution of the stock. This was perceived by Iceland as a serious disincentive to its accession to the 1966 Convention unless a reservation or other solution were possible.572 At the 1996 Meeting Iceland reminded ICCAT that:


571 “Statement by South Africa to Panel 4 on South Atlantic Swordfish Allocations” (Appendix 10 to Reports of the Meetings of Panels 1 to 4 (Annex 9 to ICCAT16 Report)), in ICCAT Green Book 2000/1, supra Ch I n 242, 185. The next year South Africa proposed that “Countries with existing quota should not expect to hold these quotas in perpetuity, and...the principle of quota attrition [should] be incorporated in future sharing arrangements to provide potential for re-allocation.” See Report of the 2nd ICCAT Working Group on Allocation Criteria (Madrid, Spain - April 6 to 8, 2000) (Annex 6 to Proceedings of the 12th Special Meeting of the International Commission for the Conservation of Atlantic Tunas (Marrakech, Morocco – November 13 to 20, 2000) (hereinafter ICCATSM12 Report)), in ICCAT, Report for biennial period, 2000-01 Part I (2000) - Vol.1 (hereinafter ICCAT Green Book 2001/1), 80 at 89 (paragraph 5.78). The US, however, found this unacceptable: ibid.

572 ICCAT14 Report, in ICCAT Green Book 1996/1, supra n 534, 45 at 56 (paragraph 12.4); “Statement by the Observer from Iceland” (Annex 5-3 to ICCAT14 Report), ibid., 101.
…Iceland as a coastal state in respect of the east Atlantic bluefin stock and a state whose economy is overwhelmingly dependant [sic] on the exploitation of the living marine resources has certain interests in this stock, as well as rights, in accordance with international law.

Therefore the Commission should, in its work, fully take into account that the rights of those who have been fishing for the stock on the high seas and elsewhere are subject to these rights and interests of Iceland, as well as of the rights and interests of other coastal states, of course. This should be done in respect of [both short- and] long term management.

...

Regarding the long term management, the Commission should take into account that those states now fishing for the stock have no rights to continue the over harvesting of the stock and thus to deprive the Coastal States of the future economic benefit of harvesting this resource.573

The following year Iceland took a similar stance:

The management of the Atlantic bluefin stock must take fully into account rights and interests of coastal States. As a coastal State Iceland has full rights to require those currently exploiting the Atlantic bluefin tuna to limit their catches in order to allow

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the stock to recover and to allow for reasonable harvesting of the coastal States that have not yet been able to develop their fisheries.\textsuperscript{574}

Invited instead to apply for admission as a Cooperating Party under the 1997 Resolution establishing that status,\textsuperscript{575} Iceland replied that:

It seems pointless for Iceland to apply for the status of Cooperating Party if that would mean that Iceland would have to fish in conformity with the conservation decisions of ICCAT. In the case of bluefin tuna that is to fish nothing at all. Such a position would not in any way recognize the rights of Iceland to utilize this important resource that occurs within our EEZ in significant quantities.\textsuperscript{576}

By 2000 the situation had not changed. The Icelandic observer told that year’s ICCAT meeting:

The current allocation system, where the sovereign rights of coastal States such as Iceland are disregarded, is unacceptable and we can not [sic] allow measures based on this approach to become binding for us. Until the allocation system is changed, Iceland’s involvement in ICCAT meetings will have to be limited to participating as observers.\textsuperscript{577}

The position of ICCAT is set out in letters of warning it sent to coastal States, among them Iceland, calling for compliance with the measures if it was not to impose restrictions on imports from them of the species concerned:

The Commission recognizes that coastal States have sovereign rights and jurisdiction with respect to living marine resources within their EEZs. When those resources are


\textsuperscript{575} “Resolution by ICCAT on Becoming a Cooperating Party, Entity or Fishing Entity” (Annex 5-17 to ICCAT15 Report), \textit{ibid.}, 79.


\textsuperscript{577} “Statement by the Observer of Iceland to the Opening Plenary Session” in “Statements to the Plenary Sessions” (Annex 4 to ICCATSM12 Report), in ICCAT Green Book 2001/1, \textit{supra} n 571, 61 at 75.
highly migratory species, however, and when a regional fishery management organization such as ICCAT has been created to regulate those species, it is incumbent upon the coastal States to join the organization or, at a minimum, to apply the fishing rules adopted by the organization. If each coastal State of the Atlantic Ocean determined for itself how much bluefin tuna should be harvested within its respective EEZ, there could be no effective management of bluefin tuna.

... For both the eastern and western Atlantic, ICCAT Contracting Parties have had to reduce harvests for conservation reasons. Moreover, for the western Atlantic stock, the Commission has recently adopted a strict 20-year rebuilding program. The Commission finds it unacceptable that, in the face of such measures, Icelandic vessels are increasing their harvests and that Iceland is unwilling to cooperate fully with ICCAT by ensuring that such vessels abide by ICCAT conservation and management measures for bluefin tuna. 578

There can be no quarrel with the sentiment that leaving each coastal State to determine for itself how much it catches would frustrate proper management of the stock. Yet this reasoning does not adequately answer the coastal States’ objection that joining ICCAT would not automatically entitle them to any quota, let alone one equitably reflecting the preferential status of coastal States under UNCLOS Article 116, paragraph (b). 579 Nor can it be supposed that this is the effect of Article 7, paragraph 2 of the UN Fish Stocks Agreement, which requires mutual compatibility

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578 “Commission Chairman’s Letters to Non-contracting Parties, Entities or Fishing Entities Pursuant to the ICCAT Swordfish and Bluefin Tuna Action Plan and the 1998 Resolution on IUU Catches” (Appendix 5 to Report of the 9th Meeting of the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures (PWG) (Annex 10 to ICCATSM12 Report)), in ICCAT Green Book 2001/1, supra n 571, 255 at 257. A letter identical to this, mutatis mutandis, was sent to Denmark, in respect of the Faroe Islands: ibid., at 256. See also the letters to Argentina (at 260), Belize (at 264-265), Barbados (at 260-261), Cambodia (at 265-266), Grenada (at 261), Honduras (at 266-267), Liberia (at 261-262), Malta (at 258), Mozambique (at 262-263), the Netherlands Antilles (at 263), Norway (at 263-264), St Vincent and the Grenadines (at 267), Turkey (at 258-259) and Vanuatu (at 259-260); most of these are Atlantic coastal States.

579 See also on UNCLOS Article 116(b) T. Skarphedinsson, “Management of the Utilization of Living Marine Resources”, in Nordquist et al (eds), supra Ch II n 437, 399 at 401-402.
of coastal State and high seas conservation measures.\textsuperscript{580} Were it otherwise, the balance between coastal States and distant-water fishing States would be sharply shifted in the latter’s favour, which would vindicate the decision of Chile, Ecuador and Peru to stand aloof from the Agreement because of their perception that the compatibility provision undermines coastal States’ rights in their EEZs.\textsuperscript{581}

2 The ICCAT Working Group on Allocation

ICCAT set up a Working Group on Allocation Criteria in 1998 when nine members and four observers, all developing countries, called for it in the wake of difficulties encountered the previous year in allocating catch shares in the South Atlantic swordfish stock.\textsuperscript{582} A prime illustration of an unsuccessful allocation process was an informal meeting held earlier that year on the southern albacore fishery, which brought to the fore some of the problems evident with ICCAT’s propensity to allocate catch shares based on historic participation in the fishery. This led to the parties announcing voluntary catch limits whose sum exceeded the TAC they were trying to allocate.\textsuperscript{583} Namibia had then complained that:

\begin{quote}
...we are concerned about the impacts of allocation mechanisms on economic development opportunities, especially for coastal developing states. In our view, the allocation processes which we understand are currently the basis for allocations of
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item For a detailed exposition of the effect of Article 7(2), see Oude Elferink, \textit{supra} n 517.
\item Much of the argumentation of Orrego Vicuña, \textit{supra} n 477, is an attempt to show that these States are under a misapprehension in this regard. If so, it persists: see the paper submitted by these and several other States to the 2006 Review Conference for this Agreement: UN doc A/CONF.210/2006/12 (23 May 2006), Annex to the note verbale dated 22 May 2006 from the Permanent Missions of Argentina, Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Mexico and Peru to the United Nations addressed to the Secretariat.
\end{enumerate}
\end{footnotesize}
fishing opportunities within ICCAT, are not consistent with the rights of coastal states under UNCLOS, and especially with the provisions of the UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks ("The Agreement"). In particular, Namibia cannot accept allocations of fishing opportunities based on historical fishing patterns because Namibia as a nation did not have the opportunity to participate in fishing in the past.

Namibia considers that a new approach to the allocation of fishing opportunities within ICCAT is required; that this approach should be based on the appropriate provisions of the Agreement; and that historical fishing levels should be a minor factor in the application of these provisions.584

Overreliance on historic catch may also punish a previous cessation of fishing, whether voluntary or involuntary. Involuntary cessation, by which is meant withdrawal from a fishery because of falling catches attributable to overfishing mainly by others, may then be an obstacle to the coastal State’s desire to re-enter it.

In 1998, for example, Norway stated that

Norwegian tuna fisheries had developed in the 1950s and 1960s but had ceased in 1986 when the seasonal migration patterns of the stock failed. As the stock was now present in the waters of neighboring States, the possibility of the old migration routes being re-established was being studied.585

Nor, however, would it be wise to discourage voluntary cessation of fishing, reinforcing the tragedy of the commons, by permitting those States that continue fishing to use their subsequent catch history to their own advantage. In 1997 Brazil presented a paper elaborating on what it saw as a proper basis for allocation; the next year it made a statement equating historic catch shares with “quantitative responsibility” for endangering the stock.586

584 “Statement by the Republic of Namibia on Coastal Developing States” (Annex 6-4 to ICCAT15 Report), in ICCAT Green Book 1998/1, supra n 574, 85 at 85.
585 ICCATSM11 Report, supra n 582, at 29.
586 “Technical Considerations by Brazil at the Inter-sectional Meeting relevant to the Allocation of Catch Quota for the South Atlantic Swordfish Stock” (Addendum 4 to Report of the Informal Inter-sectional Meeting of Panel 4 (Joao Pessoa, Brazil - July 15 & 16, 1997) (Appendix 9 to Reports of the Meetings of Panels 1 to 4 (Annex 10 to ICCAT 15 Report))), in ICCAT Green Book 1998/1, supra n 574, 194 at 195; “Statement by Brazil on the Concerns of
ICCAT’s 1999 and 2000 meetings saw several strong statements devoted to this issue which was clearly exercising many delegations, and the meetings of the Working Group were reported at great length. The series of meetings began, as is common, with reiteration of entrenched positions, the European Community arguing that “international law does not recognize preferential rights for coastal states”, and Japan that “coastal state preferential rights for highly migratory species is [sic] not seen in any existing international legal instruments and should not constitute a factor of an allocation scheme.” Japan did, however, recognise that the historic catch criterion was disadvantageous to newcomers, although it denied that a simple reallocation would be equitable, given its own lowered quota and scientific expenditures. Japan went on to point out that Article 11 of the UN Fish Stocks Agreement, listing a number of allocation criteria favouring coastal States, was expressed as applying only to new members, not existing ones.

See the statements of Denmark (in respect of the Faroe Islands) in 1999, in “Statements by Observers” (Annex 4.2 to ICCAT16 Report), in ICCAT Green Book 2000/1, supra Ch I n 242, at 61-62 and several States in 2000: Annex 4 to ICCATSM12 Report, supra n 577, at 73-74 (Denmark), 76 (Mexico) and 77-78 (Norway); see also South Africa at Annex 6 to ICCAT16 Report, supra Ch II n 427, 84 at 85.

Annex 6 to ICCAT16 Report, supra n 587, at 86.

“Opening Statement by Japan” in Appendix 3 to Annex 6 to ICCAT16 Report, supra Ch II n 427, at 104-105.

“Closing Statement by Japan” in “Closing Statements” (Appendix 7 to Annex 6 to ICCAT16 Report), ibid., 111 at 112. This is an example of the myopic argumentation to which delegations sometimes resort. If ICCAT as a whole had adopted this view, it would not only have been an incentive to coastal States to refrain from joining ICCAT pending the report of the Working Group, for fear of losing the benefit of Article 11, but might even have persuaded existing members of long standing not participating in certain fisheries that, in order to gain the benefit of Article 11, they should denounce the 1966 Convention and reaccede later at a more opportune moment. The same is true of the view expressed by Japan on collective responsibility for past overcatch, infra text at n 595, which would deny the “clean hands” argument for a higher share of an allocation to new entrants who are members of ICCAT, but not to those outside.
At the Second Meeting of the Working Group the following year, the European Community maintained that the real interest qualifying a State for membership of a commission should be its effective fishing capacity,\(^{591}\) provoking contrary statements from Morocco, Namibia and Cape Verde;\(^{592}\) as a corollary, it disapproved of chartering as a way of increasing that capacity, a sentiment shared by Japan but not Brazil.\(^{593}\) In its view, for stocks already allocated, historic catch should be the only criterion for future allocation, a stance opposed by Namibia, Brazil and South Africa.\(^{594}\) A similar divide was observed on the question of responsibility for past overexploitation of the stock: South Africa, Morocco and Mexico favoured a broad interpretation, but the United States did not want to penalise States that had abided by historical conservation measures, even if those were in retrospect seen to have been insufficiently stringent, while Japan said ICCAT as a whole should be responsible for the history, not individual Contracting Parties.\(^{595}\)

The idea that the spatio-temporal distribution of the biomass of a stock should govern the allocation was supported by Brazil and Namibia but rejected by Canada, the European Community and Japan on the ground that the Standing Committee on Research and Statistics had indicated that reliable data were not available, but even if

\(^{591}\) Annex 6 to ICCATSM12 Report, \textit{supra} n 571, at 82 (paragraph 5.7). By way of added justification, the EC sought to imply that the share of supply should be influenced by that of demand for the species, noting that the parties with major historic catch records were also those that developed the existing markets for those species, into which States wishing to develop their own industries intended to sell their catch: “Opening Statements to Allocation Criteria Meeting – 2000” (Appendix 3 to Annex 6 to ICCATSM12 Report), in ICCAT Green Book 2001/1, \textit{supra} n 571, 105 at 107. This would give development by a State of a fishery for export lesser legitimacy than development to supply its own market and would not have been well received by developing States, as a denial of their right to development.

\(^{592}\) Annex 6 to ICCATSM12 Report, \textit{supra} n 571, at 82 (paragraphs 5.8 (Morocco), 5.9 (Namibia) and 5.14 (Morocco and Cape Verde)).

\(^{593}\) \textit{Ibid.} (paragraphs 5.10 (Japan), 5.12 (Brazil) and 5.13 (EC and Brazil)).

\(^{594}\) \textit{Ibid.}, at 85 (paragraphs 5.39 (EC), 5.40 (Namibia) and 5.41 (Brazil and South Africa)).

\(^{595}\) \textit{Ibid.}, at 87 (paragraph 5.66).
they were, this would result in the Committee in effect making the allocation.\footnote{Ibid., at 88 (paragraphs 5.74 (supporters) and 5.75 (opponents)).} The last consideration is unpersuasive. If the idea of spatio-temporal distribution is sound either in its own right, or because it acts as a proxy for the degree to which each participant could affect the fishery in the absence of agreement, it does not follow that ICCAT’s management organ would be abdicating its allocative function to the scientific organ merely because it bases its decision on the latter’s input. Even were it to remain fixed for an extended period, it would still be the management organ that determined the formula for deriving the output (allocations) from the inputs. The only danger is politicisation of the science, in which individual scientists manipulate the inputs to their own State’s advantage. Though this is not completely fanciful, the inherent transparency of the scientific process means that there is a high probability of any such manipulation being detected and discounted by other delegations.\footnote{The CCSBT is a possible exception, its smallness being one reason advanced by Maguire, \textit{supra} Ch II n 441, at 211-212, why the “mutual distrust” among scientists referred to in “Japan’s Proposal on Enhancement of CCSBT Function” (Attachment E to \textit{Report of the Peer Review Workshop, First Part, 23, 24 and 26 November 1999, Canberra, Australia} (hereinafter Peer Review Workshop Report), in CCSBT Blue Book 2001, \textit{supra} Ch I n 242, 158 at 158) persisted there, with one camp reacting to the other’s real or imagined manipulation by counter-manipulation of its own.}

Much greater convergence of views was evident at the Working Group’s Third Meeting, where the debate about “real interest” resumed. South Africa would have allowed each State to determine for itself whether it had one, while the position that coastal States with a resource in their EEZs must have a right to it was put forward by Mexico, Norway and Iceland.\footnote{\textit{Report of the 3rd ICCAT Ad Hoc Working Group on Allocation Criteria} (\textit{Brussels, Belgium – May 21 to 23, 2001}) (Annex 6 to ICCAT17 Report), in ICCAT Green Book 2002/1, \textit{supra} Ch I n 228, 121 at 125 (paragraphs 7.18 (South Africa) and 7.23 (Mexico, Norway, Iceland)).} The European Community said that quota under this head should go only to States able to fish themselves or developing a plan to do so. Brazil, however, opposed any link to a domestic fishing fleet as discriminating
against developing countries; how were they expected to plan without a quota? But the United States, supported by France (on behalf of St Pierre et Miquelon) and Japan, said ICCAT should not have responsibility to distribute resources to non-members merely because they were coastal States. If such States wanted quota for species managed by ICCAT, the onus was on them to join the commission; there would be no point in having ICCAT at all if coastal States could simply fish the stock. South Africa in response made the obvious point that ICCAT should avoid depriving coastal States of all incentive to work within the system. There was debate as to whether the fact of occurrence of a species in a coastal State’s EEZ, as opposed to the relative extent of its presence there, would be used as a criterion. In a sign that polarisation was lessening, Japan admitted that current holders of quota would have to make sacrifices to allow opportunities for newcomers. Its readiness to see gradual application of the criteria to stocks already allocated was not, however, matched by Canada, which called for no immediate adjustment to be made where the stock was at a low level of abundance and a rebuilding program was in place. Brazil and Mexico opposed their exclusion from stocks under rebuilding plans. Agreement was also reached on the weight to be accorded to historic catch. With all ready to include it as a criterion, the European Community was isolated in insisting to the last on its paramountcy, and at its next meeting the Working Group was able to present a consensus text to the Commission with allocation criteria.

599 Ibid., at 124 (paragraphs 7.16 (EC) and 7.17 (Brazil)).
600 Ibid., at 125 (paragraph 7.24).
601 Ibid., at 126 (paragraph 7.31).
602 Ibid., at 129 (paragraphs 7.65 to 7.71).
603 Ibid., at 126 (Japan at paragraph 7.36, Canada at paragraph 7.35), 128 (Brazil and Mexico at paragraph 7.60).
604 Ibid., at 127 (paragraphs 7.46 and 7.50).
The Working Group referred to the Commission four unresolved issues that may affect allocation decisions: Contracting Parties’ arrears of financial contributions to ICCAT, vessel chartering, temporary quota transfers and, as Japan’s condition for accepting the omission from the criteria of its proposal that catches made under objection be excluded from historic catch calculations, use of the objection procedure.

3 The 2001 allocation criteria – unfinished business

The allocation criteria can be seen as a job only half done. Although for Iceland, the Working Group’s 2001 report “changed the situation, making it possible…to join ICCAT in the expectation of getting our fair share of the fisheries”, they contain no actual arithmetical formula for allocation, but leave these to be worked on out on a stock-by-stock basis by the panels responsible for each stock, to whom they give only general guidance. While this is understandable given the varying considerations attending stocks already subject to allocated catch limits and those which might need to be so limited in future, there seems to have been no recognition that the legal and political issues would not be finally resolved until the various factors were given some numerical expression – a concrete weighting of the factors admitted as legitimate, even if only as maxima or minima.

(paragraph 6.85). In view of the consensus reached in the Working Group, the plenary does not appear to have seen a need to endorse the criteria formally: see ICCAT17 Report, ibid., 49 at 51 (paragraphs 6.1 to 6.4).

606 ICCAT17 Report, supra n 605, at 51 (paragraph 6.3); Annex 7 to ICCAT17 Report, supra n 605, at 191 (paragraph 6.85).


608 “Statements to the Plenary Sessions” (Annex 4 to ICCATSM13 Report), in ICCAT Green Book 2003/1, supra Ch II n 427, 70 at 74-75. See also the statements of Denmark (“seriously considering” membership) and Norway (accession to the 1966 Convention imminent): at 85 and 86-87 respectively.
As if to confirm that this issue was far from settled despite the agreement on the allocation criteria, Panel 2 deferred their application to the western stock of ABT until the next stock assessment, deciding that meanwhile the allocation in the 1998 rebuilding program would continue.\(^609\) Similarly the European Community stated in Panel 4 that for the South Atlantic swordfish stock “the automatic transfer of quotas was not feasible at this time and there was no alternative other than to maintain the 2000 recommendation”.\(^610\) The Recommendation adopted by the Commission for this stock completely failed to come to grips with the allocation problem: a TAC was set but left unallocated, and the parties fishing the stock were asked to set their own quotas so as not to exceed the TAC.\(^611\)

Like problems have continued to plague the question of allocation of the TAC of the eastern stock of ABT. In 2003 Turkey, Mexico and Morocco called in Panel 2 for application of the 2001 criteria to allow new members a share of quota.\(^612\) Turkey charged that the quotas were not in line with the criteria, with non-contracting parties expected by application of a 1994 Recommendation to make the 25 per cent reduction on their 1993-94 catch that many Contracting Parties had themselves failed to make.\(^613\) The United States agreed that “expectation of receiving quota is an

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\(^{609}\) Reports of the Meeting of Panels 1-4 (Annex 13 to ICCAT17 Report), in ICCAT Green Book 2002/1, supra Ch I n 228, 297 at 305 (paragraph 6.9).

\(^{610}\) Ibid., at 315 (paragraph 6.c.5).

\(^{611}\) “Recommendation by ICCAT on South Atlantic Swordfish” (Annex 9-13 to ICCAT17 Report), ibid., 228.


incentive for new members to join ICCAT and take part in its conservation and management programs.\textsuperscript{614} Japan on the other hand, despite professing itself “eager” to work with new members on the allocation question, wanted to “protect” the previous year’s Recommendation.\textsuperscript{615} The European Community argued that quota allocations to new members should come out of the previous allocation to “others”, but Turkey complained that a reduction in that category would be a disproportionate burden on non-members and a disincentive for them to join ICCAT.\textsuperscript{616}

South Africa accepted past performance as being “of crucial importance” for sharing the southern albacore fishery among coastal States, but this needed to be balanced with “genuine needs of developing coastal states to develop their fisheries”.\textsuperscript{617} In Panel 3 it tabled a lengthy policy statement which is the first, and so far only, one of its type on the application of the 2001 Allocation Criteria. Its central theme was that in principle… the majority of the allocation should go to range states bordering the oceanic region/s within which a stock resides and migrates. As a starting point… distant water fleets should not be allocated more than 50\% of the South Atlantic albacore TAC.\textsuperscript{618}

Allocation among distant-water States should be proportional to their catch in the 5-year period preceding any review, and

[ultimately, once all participating states have had adequate opportunity to develop their fisheries, recent past performance should serve as the best measure of any state’s ability, capacity and need to fish a stock… Allocation of TAC shares cannot remain fixed in perpetuity. There are many reasons why fishing capacities and aspirations

\textsuperscript{614} Annex 8 to ICCAT18 Report, \textit{supra} n 612, at 183.
\textsuperscript{615} \textit{Ibid.}, at 184. The Recommendation in question was “Recommendation by ICCAT Concerning [sic] a Multi-Year Conservation and Management Plan for Bluefin Tuna in the East Atlantic and Mediterranean” (Annex 8.8 to ICCATSM13 Report), in ICCAT Green Book 2003/1, \textit{supra} Ch II n 427, 167 (see esp at 168 (paragraph 6)).
\textsuperscript{616} Annex 8 to ICCAT18 Report, \textit{supra} n 612, at 183 (Turkey), 184 (EC).
\textsuperscript{617} \textit{Ibid.}, at 188.
\textsuperscript{618} “South African Policy Statement to the 2003 Meeting of Panel 3 Regarding Development of an ICCAT Sharing Arrangement for South Atlantic Albacore” (Appendix 11 to Annex 8 to ICCAT18 Report), \textit{ibid.}, 207 at 207.
may change over time (inter alia shifts in targeting, economic constraints, changes in resource distribution, decrease and/or development in fisheries). Past performance over some agreed range of recent years should therefore be used to periodically revise allocations, together with other relevant considerations.  

Nor was it either feasible or desirable, South Africa argued, to develop a mathematical sharing formula for South Atlantic albacore, incorporating specific measures and weightings of the 2001 criteria. Instead, it called for preference for coastal States that have demonstrated a clear interest in fishing for the stock using their own fishing fleet under their own flag, States having artisanal fleets of vessels less than 24 metres in length targeting the stock, States having demonstrated a specific interest and developed a degree of socio-economic or food-provision reliance on fishing for species under ICCAT management, especially South Atlantic albacore (but not other non-ICCAT stocks).

Moved to respond to South Africa’s statement, Taiwan also committed its views to paper. It opposed South Africa’s 50 per cent rule as lacking justification, and recent past performance was not the same as the “historical catches” mentioned in the 2001 criteria. It went on:

The very reason for ICCAT to take such pain and effort to develop these Criteria was to instill the merits of transparency into the quota allocation process. The development of a workable sharing formula is yet to be completed. It is precisely the weighting and the objective way of calculation to implement the rather abstract and vague Criteria that awaits further development. Undoubtedly, such development

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619 Ibid., at 208. This formulation suffers from the paradox of the diminished usefulness of information from a State’s catch and effort data when either catch or effort is subject to a legal limitation such as a national allocation under a TAC. In that event, only a substantial shortfall in catch compared to the national allocation would actually affect the catch history. It would be of no use among the original parties to the 1993 Convention, for example (apart from the additional Japanese catch under its disputed experimental fishing program, to whose inclusion in the catch history Australia and New Zealand would for obvious reasons be predicted to object).

620 Ibid.

621 Ibid., at 209.
will never be an easy matter. But such move is necessary, if there is any meaning for having reached the Criteria in the first place.\textsuperscript{622}

It is difficult to disagree with these sentiments. Nor can Taiwan’s analysis of the transition underway be faulted, which it accepted despite being a net loser from it: With the development concerns of the coastal countries in mind, the quota allocation process is in fact a re-distribution and adjustment of the present shares of fishery resources pertaining to each of the participants as reflected in the original quota duly assigned thereto...It should be noted that the significance of minimizing economic dislocation lies in the necessity for smooth predictable, bearable and manageable transformation in all fishing-related industries of the participants whose current catch level is subject to such sacrifice.\textsuperscript{623}

\section{NAFO and NEAFC – closure in all but name?}

The two North Atlantic non-tuna fisheries commissions have gone furthest in the direction of this neo-abstention. NAFO adopted the following resolution at its 21st annual meeting in 1999:

1. NAFO is an open organization. Non-members may join the organization by depositing an instrument of accession in accordance with Article XXII of the Convention. In accordance with Article IV of the Convention, all Contracting Parties are Members of the General Council.

2. Should any new member of NAFO obtain membership in the Fisheries Commission, in accordance with Article XIII(1) of the Convention, such a new member should be aware that presently, and for the foreseeable future, stocks managed by NAFO are fully allocated, and fishing opportunities for new members are likely to be limited, for instance, to new fisheries (stocks not currently allocated by TAC/quota or effort control), and the “Others” category under the NAFO Quota Allocation Table.\textsuperscript{624}

\textsuperscript{622} “Comments by Chinese Taipei on the Draft ICCAT Sharing Formula for South Atlantic Albacore” (Appendix 12 to Annex 8 to ICCAT18 Report), \textit{ibid.}, 210 at 211.

\textsuperscript{623} \textit{Ibid.}

\textsuperscript{624} “Resolution to Guide the Expectations of Future New Members with Regard to Fishing Opportunities in the NAFO Regulatory Area” (Attachment 3 to General Council Annual Meeting 13-17 September 1999, Dartmouth, N.S., Canada), in NAFO Annual Report 1999, \textit{supra} n 519, 62. The Convention referred to is the Convention on Future Multilateral Cooperation in the
More recently the North-East Atlantic Fisheries Commission (NEAFC), at its 22nd Annual Meeting in 2003 adopted a document entitled “Guidelines for the expectation of future new Contracting Parties with regard to fishing opportunities in the NEAFC Regulatory Area” whose operative paragraphs are reproduced below:

Non Contracting Parties of NEAFC should be aware that presently and for the foreseeable future, stocks regulated by NEAFC are fully allocated, and fishing opportunities for new members likely to be limited to new fisheries (stocks not currently allocated),

New Contracting Parties will participate, on the same basis as existing Contracting Parties, in future allocations of stocks which are unregulated at the time when the application is made,

New Contracting Parties who were previously Cooperating Non Contracting Parties may request an allocation of a part of the relevant Co-operative quota. Such allocations will be done on a case by case basis.

These conditions are extremely restrictive, coming very close to Norway’s suggestion that “The message to new entrants should be: future members cannot have a share in stocks that are already regulated.” In essence, new members that were previously cooperating non-contracting parties are restricted to part of the

Northwest Atlantic Fisheries, supra n 556. Article XIII(1) limits membership of the Fishery Commission to those parties who either participate in the fisheries of the Regulatory Area defined in Article I(1) and (2), or satisfy the General Council at an annual meeting that they expect to do so in that or the next year.

Created by the Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries, done at London, 18 November 1980, 1285 UNTS 129.


relevant cooperative quota which is subtracted from that quota for this purpose, leaving even less for future new entrants. In other words, “to be blunt, a just and reasonable share of the TACs for new entrants is interpreted largely as being what is left over.”628 The proposal of several unidentified NAFO Members not to share the benefits of the access to the stocks even if they recover, “in recognition of their [Members’] restraints and contributions to conservation”629 provokes Molenaar’s scorn: “irresponsible management in the past thereby provides a justification for minimising allocations to new participants in the present and future.”630

5 WCPFC

The debate on reservation of access to stocks for members took a somewhat different tack in the WCPFC at its 2007 (fourth) annual meeting. Here the context was the consideration of applications from a number of States for cooperating non-member status under the relevant resolution.631 Adopted at the WCPFC’s first meeting in 2004,632 this measure is more restrictive than its counterparts in other fisheries

628 FAO Fisheries Technical Paper No 465, supra Ch I n 123, at 47.
629 NAFO doc NAFO/GC Doc. 99/4, Report of the Working Group on Allocation of Fishing Rights to Contracting Parties of NAFO and Chartering of Vessels Between Contracting Parties, 13-15 April 1999, Halifax, N.S., Canada (unpublished, copy supplied by NAFO Secretariat on file with author), at 4, opposing the original US proposal ibid. which envisaged broader sharing should the stocks recover; see also Molenaar, supra n 517, at 515-516.
630 Molenaar, supra n 517, at 516. At 520 Molenaar contrasts this with the position in ICCAT, where those States apt to be excluded by such a policy were already in the commission and thus able to mount the obvious arguments to counter it. Munro, however, would argue that only in this way can existing members have sufficient incentive to limit their catches to allow the stocks’ recovery at all.
commissions in two ways. One is that cooperating non-member status is only for a year at a time. The other is that it allows the WCPFC in deciding on applications to have regard to “the state of its fish stocks and the levels of fishing effort in the fishery”, as well as applicants’ record of compliance with the Honolulu Convention and the conservation and management measures of the WCPFC and other fisheries commissions. The WCPFC is also to exercise caution “so as not to introduce into the Convention Area the excessive fishing capacity of other regions”.

One camp at the 2007 meeting consisted of those concerned at the prospect of having to give applicants participatory rights should their applications succeed and fearing the potential overcapacity this would create given current concerns over the health of Western and Central Pacific tuna stocks. The other comprised those seeing “the importance of…acknowledging the rights of States…[outside the WCPFC] to fish on the high seas in a responsible manner” and others stressing the WCPFC’s “duty to encourage cooperation in managing stocks, particularly with States that have a history of fishing in the Convention Area, and to follow open and transparent criteria when considering…applications.” Presumably favouring a declaration along NAFO/NEAFC lines, some members stated that non-members

635 Ibid., paragraph 5(b) and (c).
636 Ibid., paragraph 9.
638 Ibid., at 5 (paragraph 28).
should be aware that presently and for the foreseeable future, stocks of yellowfin, bigeye, South and North Pacific albacore, swordfish and striped marlin that are regulated by the WCPFC are fully fished, and that fishing opportunities are therefore limited to new fisheries. 639

Ultimately Belize was granted cooperating non-member status, 640 but for inability to secure consensus in their favour, the applications of Senegal, Ecuador and El Salvador were rejected. 641 New Zealand did not support Senegal’s application, on the basis of its non-compliance with the previous year’s request to withdraw its vessels “and that the current status of fish stocks cannot support any increase in fishing capacity.” New Zealand also questioned whether Senegal had a real interest in fisheries in the Western and Central Pacific, a precondition to its right to participate in them. More moderately, Australia voiced concern about the WCPFC’s ability to meet the aspirations of new cooperating non-members given the current status of fish stocks and the conservation and management measures already in place. 642 Because of its dissatisfaction with the development and implementation of those measures, Samoa stated that it could not support any applications for new cooperating non-members. 643 New Zealand also opposed the applications of Ecuador 644 and El Salvador, citing in the latter’s case its “failure…to demonstrate compliance” with WCPFC conservation and management measures. 645

The Federated States of Micronesia went so far as to admit that the Honolulu Convention

639 Ibid., at 6 (paragraph 31).
640 Ibid. (paragraph 36).
641 Ibid., at 7 (paragraph 45 (Senegal)) and 8 (paragraphs 50 (Ecuador) and 55 (El Salvador)).
642 Ibid., at 7 (paragraph 43).
643 Ibid. (paragraph 44).
644 Ibid., at 8 (paragraph 48).
645 Ibid. (paragraph 53).
was designed to make it harder for new entrants to become members, because of
problems of overcapacity; also, because unlike other tuna regions, most participants
are small island countries for which tuna resources are important.

It then pointed to Article 35 of the Honolulu Convention, which permits States that
participated in the conference that produced the Convention to accede to it at any
time, whereas all others can do so only by being invited to become a Member by a
consensus decision of the Commission.\(^{646}\)

The trouble was not that the WCPFC was denying applications for reasons
extraneous to the criteria in the 2004 resolution, as supporters of the applications
appeared to imply,\(^{647}\) but that the criteria themselves were already skewed \textit{ab initio}
against all applicants. Yet paragraph 12 of the resolution requires the Executive
Director to encourage States whose vessels fish in the Convention Area to apply for
such status. Working at cross-purposes with paragraph 5, this exposes the poorly
conceived nature of this instrument, resting as it does on the politically unreliable
and legally false assumption that surfaced in the 2007 debate. It may be true that to
admit applicants as cooperating non-members would raise squarely the matter of
their participatory rights in WCPFC-regulated fisheries, but it does not follow that
rejecting them ensures that the question will not arise. By confusing the issues of
cooperation and equitable allocation, the WCPFC did a disservice to both causes.\(^{648}\)

\(^{646}\) \textit{Ibid.}, at 5 (paragraph 26).

\(^{647}\) \textit{Ibid.}, at 4 (paragraph 22), to varying degrees also by Canada, Australia and the US at 6
(paragraph 34).

\(^{648}\) See also WCPFC, \textit{Commission for the Conservation and Management of Highly
Migratory Fish Stocks in the Western and Central Pacific Ocean, Third Regular Session, 11–15
(paragraphs 16-21) where the applications of Belize and Senegal were met with a less than
enthusiastic response and in particular the instruction to the Executive Director (at 3 (paragraph
21)) to write a letter “advising Senegal to remove all its vessels from the Convention Area.”
6 Assessment

The practice of States within ICCAT, NAFO and NEAFC shows that there is not merely the classic divide between coastal States and distant-water fishing States, but a further distinction between those already participating in a fishery, who may be called “ins”, and will often make common cause to restrict or discourage entry to the fishery by others, the “outs”. Despite paragraph (b) of Article 116 of UNCLOS, this is so even when the latter are coastal States. The temptation for “ins” to conspire against “outs” is in one sense no more than a consequence of the tendency towards replication on the international plane of the limited-entry fisheries that States have enacted in their municipal law, which act as a preventative measure against the tragedy of the commons if the limitations on entry are sufficiently strict.

Remarkably, there is no evidence of any State objecting to its exclusion from a share of the catch in the NAFO and NEAFC fisheries on the basis of the documents quoted in the previous subsection. The likeliest explanation is that, by comparison with the 1950s, a much larger number of States now have a stake in at least one international fishery, and see on balance more benefit from shoring up their position by excluding newcomers from those, even at the price of their own exclusion from fisheries they have not themselves yet entered. Applebaum may therefore have been ahead of his time in treating abstention as custom (without using the word) where a fishery is managed by a commission.649

Although it is largely the “ins” that have dominated ICCAT through their original membership and their superior ability to devote resources to it, they have exhibited some awareness that complete exclusion of “outs” is not permissible. Even though coastal States may not yet be ready to develop a fishery for a given species in their EEZ, they understandably wish to preserve their right to do so, which the “ins” are now willing to concede. This is sometimes manifested in ICCAT Recommendations as a divide between large and small participants in a fishery, where catch limits are

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649 Applebaum, supra Ch I n 124, at 303.
accepted by the large, while those whose catch is too small to be individually threatening are each permitted to fish unrestricted as long as their catch does not rise above a certain level. This may result in TACs that are less than the sum of their implied parts, as the national allocations of the large participants, added to the catch ceiling of all other members multiplied by their number, exceeds the stated TAC. While this is arithmetically untidy, it does seem to offer a modus vivendi that works in practice to avoid friction – no small achievement for international fisheries law.

Yet the 2007 debate in the WCPFC on applications for cooperating non-member status appears to be a reversion to the traditional coastal States versus distant-water fishing States contest. New Zealand’s leading role in speaking against applications for cooperating non-member status seems to be at odds with its punctilious regard for other States’ rights in its response to the CCSBT’s externally obtained advice on quota trading. It also risks being counter-productive, since the main obligation of a cooperating non-member is to abide by the Convention and all conservation and management measures under it, whereas it would otherwise be subject only to a general duty of cooperation. Thus, to reject an application for non-compliance with an unsoundly based request to withdraw vessels, when the very purpose of the application is to bring those vessels’ fishing within the system, verges on the perverse, as does denying the “real interest” of States recently engaged in fishing in the Convention Area. New Zealand and those arguing along similar lines appear to have forgotten that the obligation to cooperate is mutual: in rejecting an application for cooperating non-member status, the WCPFC is essentially telling applicants it does not wish to cooperate with them, and thereby relieving the applicants

650 An example of this is the “Recommendation by ICCAT Concerning Bluefin Tuna Catch Limits in the East Atlantic and Mediterranean” (Annex 7-9 to ICCATSM12 Report), in ICCAT Green Book 2001/1, supra n 571, 142.
651 Infra Ch V, text at n 1074.
652 This was a point raised in the 2007 debate: WCPFC4 Report, supra n 637, at 4 (paragraph 22).
themselves of their duty. In the medium-to-long term this can only be to the
detriment of the WCPFC’s effectiveness.\footnote{653}

The reason for the distant-water fishing States speaking up in favour of admitting
applicants rather than acting as “ins” is not obvious, but may be a consequence of
them being latecomers themselves to the WCPFC (involuntarily so in the European
Community’s case, whose application first had to be approved under Article 35 of
the Honolulu Convention – this occurred at the first meeting in 2004\footnote{654}). It is
difficult to believe that the test for applications in the 2004 resolution would not have
been substantially less stringent had they had any part in the negotiation of its text.

F Conclusions

The failure of the abstention principle to be accepted into international fisheries law,
although a transitory setback for the cause of conservation, is in retrospect not
surprising. During consultations on abstention with the United Kingdom by visiting
United States officials in 1953, Sir Gerald Fitzmaurice, Member of the International
Law Commission and Michael Graham, a leading fisheries scientist of the day, made
the telling point to the visitors that abstention would not work in the North Sea. This
was because most of the States collectively overexploiting the fisheries of that body
of water were coastal States, and as such would be exempt from its application.\footnote{655}

Though its North American proponents were ahead of their time in promoting the
need for a much stronger role for conservation as a basis for international fisheries
law and identifying the new entrants problem as the chief obstacle to it, abstention
was the wrong solution to the problem. In particular, its allocative consequences

\footnote{653}{Again this was noted in the debate, \textit{ibid.}, at 6 (paragraph 30), where some participants,
“concerned that the Commission’s tools for managing the fishing activities of non-members are
not as robust as its tools for managing the fishing activities of [those within the WCPFC]”,
worried “whether the Commission’s ability to manage fishing activity in the Convention Area
may be jeopardized by denying…applications” for cooperating non-member status.}

\footnote{654}{WCPFC1 Report, \textit{supra} n 632, at 1(paragraph 6).}

\footnote{655}{Herrington, \textit{supra} n 536, at 112.}
were unpalatable to the international community.\textsuperscript{656} It is also difficult to see how a legal principle can be erected on a voluntary waiver of rights without making that waiver compulsory, in other words abolishing the underlying right. The abstention doctrine thus became a historical curiosity of international fisheries law, confined to the 1952 Convention, and the concrete problems it sought to solve in the Northeast Pacific were ultimately settled by the new concept of the 200-mile EEZ and the near-ban on fishing on the high seas for anadromous species in Article 66 of UNCLOS.

Has anything changed since Judge Oda criticised the 1958 Fishing Convention for not tackling allocation, an omission to which he attributed its lack of influence in the management of international fisheries? He feared that the high seas fisheries provisions of UNCLOS might suffer the same fate for the same reason:

\textquote[\textsuperscript{656}]{[T]he obligation [in the 1958 Convention] to negotiate among the states concerned was virtually ignored in practice…and there have been few instances of international agreements or national legislation referring to it. The basic problems facing us in respect of high seas fisheries concern the search for universally agreed principles according to which a limited amount of these resources should be allocated among nations, all of whom will undoubtedly clamor for greater shares. Just as the 1958 Convention did not provide any solution to the problems of allocation of fishery resources among states, thus failing to be implemented in any concrete case, so the 1982 Convention—even allowing that, with its accent on the EEZ, it puts high seas fisheries in a rather different context—has likewise overlooked the importance of these basic problems of allocation by simply suggesting cooperation among nations for the conservation of these resources. The institution for the settlement of disputes, if requested to tender its views on conservation of high seas fisheries, will inevitably be faced with the difficult issues surrounding the philosophy of fishery resource allocation.}

\textsuperscript{656} The fact that early exploiters of a fish stock typically have low fishing costs per tonne because of the high abundance and thus make good profits – at least while the biomass is above that generating their respective maximum economic yields – may explain why what amounts to a claim for preferential treatment for pioneer investors has had so little resonance in fisheries, unlike the case of deep seabed mining; see supra Ch II n 439.
...[I]t will inevitably be the power of diplomatic negotiations of each nation, not any legal principle, that will be determinant in settling the difference of views among nations with regard to the allocation of fishery resources...[W]hile the persistent difference of views among nations will make a mutually satisfactory solution difficult, their dispute will hardly be of so predominantly legal a character as to be suitable for submission to any judicial body. Once conservation has been ensured, the regulation of competition for the high seas catch is surely, under the present regime, a political, not a legal, concern.657

This overlooks the fact that it is precisely because of the underlying allocative tensions that conservation will often not be ensured; the only way the parties can avoid the difficulty is by taking a greater – and unsafe – overall catch in the short term, but one which is unlikely to be sustainable. It is submitted, however, that the answer lies not in intensifying the search for elusive primary rules of allocation, but rather in a secondary, procedural mechanism that encourages States to resolve their differences before they collectively deplete the stock. This is achieved by the expedient of subjecting allocation, despite its admittedly political character, to the institution of compulsory dispute settlement. The knowledge that a third party can impose settlement at the instance of any party provides a powerful incentive to the compromise of differences that has hitherto been lacking. It is significant that McDougal and Burke, while critical of most of the substance of the 1958 Fishing Convention,658 approve of its provision in Article 9 for compulsory dispute settlement – here by a five-member ad hoc “special commission” – as the only way of resolving issues of this nature. This is to be contrasted with the optional dispute settlement protocol applying to the other three 1958 Conventions.659

658 McDougal and Burke, supra Ch I n 271, 959-1007, esp at 998ff.
659 The Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, Geneva, 29 April 1958, 450 UNTS 169, has no provision on its entry into force, but is taken by the UN Secretariat to have entered into force on 30 September 1962 when the first of the 1958 Conventions (the High Seas Convention, supra Introduction n 20) did so, and eventually secured 38 parties: see <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=457&chapter=21
Under UNCLOS Article 116, paragraph (b), by which the high seas freedom of fishing is now subject to coastal States’ rights, duties and interests, Japan’s position in law is more precarious than its prominence in the CCSBT might suggest: it has only the same right as Korea and Taiwan to fish for SBT on the high seas, unless its long history of fishing for the species somehow gives it a superior right. Some of Japan’s utterances suggest that this is its attitude, but this makes for a problematic legal basis given that this very history is largely one of depleting the stock. Given that international fisheries law has little more to say about allocation of catch among States participating in a fishery, why has Article 116(b) gone largely unused, not only in the CCSBT but also elsewhere? Possibly it is because in practice the coastal State’s superior interest is only with difficulty realisable for highly migratory species, since insisting on absolute priority within the allowable catch for as much as it can itself take in its EEZ deprives of it any lever to induce catch restraint by States whose high seas fleets are beyond its enforcement reach. Arguably the United States would have been better off in 1952 conceding to Japan a fixed share of the salmon catch close to its Pacific coast given the risk, which subsequently materialised, that the meridian of longitude 175° West established as the eastern limit of abstention by Japan from fishing for salmon would prove to lie too far east to prevent unrestricted interception on the high seas of salmon spawned in North American rivers.

&lang=en> (visited on 26 September 2008).

660 For example, in its written pleadings in the dispute (see Japanese memorial, supra Ch II n 433, at footnote 117 (page 80)) Japan stated that the effect of UNCLOS Art 297(3) was to shield decisions on conservation measures of States generally, not just of the coastal State in the EEZ, from the compulsory dispute settlement procedures of Part XV – as if its long history in the SBT fishery had elevated it to an equivalent status.

661 In ICCAT this is illustrated by the debate in 2003 on whether to divide the southern albacore TAC into individual shares, in which, of the four States that expressed clear opinions, one coastal State and one distant-water fishing States lined up on each side: Brazil and Taiwan were in favour, Namibia and Japan against: Annex 8 to ICCAT18 Report, supra n 612, at 188 (Brazil, Namibia), 189 (Japan, Taiwan).

662 Herrington, supra n 536, at 109; Scheiber, supra Ch I n 177, at 89.
In the longer term, because the preference given to coastal States by Article 116, paragraph (b) of UNCLOS is an abstract right, particularly for highly migratory species, if coastal States are to benefit from this right they will need to be willing to commute it into a fixed share of the TAC higher than their political and economic clout alone would warrant. They may wish to build in a sliding scale, so that as the TAC rises and falls the coastal State is partly protected against the fluctuations. This will be difficult in ICCAT, which now has 46 Contracting Parties, almost all of them bordering the Atlantic Ocean and its adjacent seas (though few fish all the species subject to quota solely in their own EEZs), but the CCSBT offers more fertile ground for this innovation. The advantage is that each year’s negotiations would be confined to the TAC and not to its division among participants in the fishery. A partial example of this is ICCAT’s 1995 North Atlantic swordfish recommendation, by which 94 per cent of the TAC is divided in fixed shares among Canada, Japan, Portugal, Spain and United States, with the remaining 6 per cent left for “others”.

The duty to have regard to the interests of others in Article 87, paragraph 2 remains – so even though UNCLOS Article 116, paragraph (b) and UN Fish Stocks Agreement Article 11 establish priority of access for coastal States, that is no justification for those at the top of the priority ladder to monopolise the stock. They must consider the interest even of those at the bottom: in the case of SBT, the Philippines as a would-be new entrant to the fishery on the high seas, and other developed States that may in future wish to enter the fishery. Although the coastal State opponents of the UN Fish Stocks Agreement appear to favour a strategy of barricading themselves into their own EEZs, any attempt to capture the whole of the benefits for coastal States and place the entire conservation burden on distant-water fishing States is destined to fail because of the lack of reciprocity and thus of commitment as argued

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663 See the full list infra Ch IV n 900.
664 “Recommendation by ICCAT to Establish Percentage Shares of Total Allowable Catch (TAC) and Overage & Underage Provisions for Nations Fishing for North Atlantic Swordfish” (Annex 4-11 to ICCAT14 Report), in ICCAT Green Book 1996/1, supra n 534, 89.
above. The top-down approach also makes the necessary trade-offs much easier to achieve than the bottom-up alternative.  

As a practical matter, there appears to be little alternative to the call by Australia in the preliminary objections phase of the Annex VII arbitration for cooperation and compromise, admittedly an incomplete legal answer:

The question is what tonnage it is equitable for [the non-Members] to fish, given both the state of the stock and the pre-existing interests in the stock of the three parties currently before the Tribunal. In fact the third parties tell us that it was not they who depleted the stock in the first place. And they do have a point...Equally, however, if the new entrants were to build up their own catch without limit, that would compound the danger and court disaster. The solution must lie in cooperation and compromise.

Even so, the “ins” versus “outs” dynamic remains a motor of debates in CCSBT as well as ICCAT, and is a continuation in another guise of the old doctrine of abstention. The next chapter examines in detail how the CCSBT has treated third-party entry issues and the extent to which it too may have unwittingly embraced abstention.

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Ørebech et al, supra Ch II n 315, at 129. For East Atlantic and Mediterranean ABT, however, Costa Duarte et al, supra Ch I n 107, at 33 show coastal States are in a strong position through their ability to fish in their own EEZs.

CHAPTER IV
New entrants and the CCSBT

A  Introduction

This chapter relates the history of the new entrants issue within the CCSBT. The actions and goals of the CCSBT and its Members are measured against the yardstick of the modern rules of international fisheries law on new entrants. The evidence suggests that, irrespective of whether they are party to the UN Fish Stocks Agreement, the Members’ aim has been to go beyond its rules and exclude new entrants to the extent possible, at times invoking concepts redolent of the doctrine of abstention unsuccessfully promoted by the United States in the 1950s.

At the time of writing, of the States in whose EEZ SBT occurs or which catch significant quantities of it on the high seas – Australia, Indonesia, Japan, Korea (Republic of), New Zealand and South Africa – all six are party to UNCLOS, and all but one are parties to the UN Fish Stocks Agreement, the exception being Indonesia, which has signed it. Taiwan is not eligible to become party to either treaty. The CCSBT has made some attempt to take account of the Agreement’s implications for the way in which it manages the SBT stock, but has made little progress in this regard. Most notably, a management strategy consistent with Annex II was long

667  Supra Introduction n 4.
668  See the electronic Status List for the UN Fish Stocks Agreement maintained by the Treaty Section of the UN Secretariat at <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=460&chapter=21&lang=en> (visited on 26 September 2008).
669  Article 1(3) of the Fish Stocks Agreement suggests, however, that Taiwan as a fishing entity may be able to become party to any fisheries treaty not expressly limited to States: see A. Serdy, “Bringing Taiwan into the International Fisheries Fold: The International Legal Personality of a ‘Fishing Entity’”, (2004) LXXV British Year Book of International Law 183 at 219 and generally.
670  The matter seems to have progressed no further than a report written by the Secretariat discussed by the Members before the 1999 Annual Meeting – see “Report from the Secretariat”
resisted by Japan; though work to develop such a strategy is now under way, in 2006 it suffered a major setback and is now not due to be completed until 2011 or 2012.\footnote{CCSBT-EC6 Report, supra Ch I n 141, at 22 (paragraphs 115 and 118). See infra Ch VI, text between nn 1330 and 1334 on the crisis caused by the admissions of past overcatch which invalidated the data on which the strategy adopted in 2005 was based, just when it was about to be implemented.}

For the time being, therefore, the UN Fish Stocks Agreement applies only to the purely bilateral interactions that the five States concerned have with each other in relation to SBT, but these are extremely limited, for example the potential for boarding and inspection of each other’s vessels on the high seas under Articles 20 to 22 of the Agreement in case of a suspected violation of CCSBT measures.

As regards the CCSBT’s openness to new entrants, the 1993 Convention\footnote{Supra Introduction n 5.} on its face poses no obstacle to them. Non-members fishing for SBT have a choice either of remaining outside the Commission, in which case Article 15 will apply to them:

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 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 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.

\footnote{(Attachment 10 to CCSBT5(1) Report), in CCSBT Blue Book 2000, supra Ch II n 413, 23 at 24 (paragraph 9) – but has never found its way onto the formal agenda of any CCSBT meeting.}
or of acceding to the 1993 Convention under Article 18, which reads as follows:

After the entry into force of this Convention, any other State, whose vessels engage in fishing for southern bluefin tuna, or any other coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, may accede to it. This Convention shall become effective for any such other State on the date of deposit of that State’s instrument of accession.

In theory, hence, the only condition for accession to the 1993 Convention by a State fishing for SBT or lying on the migratory path of the species is the deposit of an instrument of accession. In practice, however, as the next section will demonstrate, matters have not been so straightforward. The CCSBT is nonetheless a principal means by which those of its Members that are parties to the UNCLOS and the UN Fish Stocks Agreement and other fisheries treaties can implement their obligations under those treaties. The next section examines the approach taken by the CCSBT and its Members since its formation to fishing for SBT by non-members individually and collectively, and the question of their membership.

B  The CCSBT’s dealings with third parties

The most remarkable feature of the CCSBT’s handling of the new entrants issue has been the extent to which Article 18 of the 1993 Convention has been disregarded. Article 18 quoted above allows any State whose vessels catch SBT to become a member of the CCSBT and instantly acquire a veto over the setting of TAC and national allocations through the consensus rule for decision-making in Article 7.673 No States have however taken advantage of this possibility. This may be because they are reluctant to use deadlock as a political tool as their first act on entry, or because the Article 11 formula for sharing the costs of the CCSBT, which the Commission has conceded imposes a significant burden on Members with smaller

673 Quoted supra Ch II, text following n 427; the whole Convention is reproduced infra in Appendix C, Part I.
catches, particularly if they are developing countries, makes them hesitant to join until the size of their allocation is known with some degree of certainty. At all events, the first two new entrants since the 1993 Convention came into force – the Republic of Korea and Taiwan – chose to negotiate quotas first as a precondition of entry. While Korea’s plaint at one point that its “strenuous efforts to be a member of CCSBT was [sic] not rewarded as expected” might be dismissed as an isolated rhetorical flourish, there were practical reasons peculiar to Taiwan rendering it unable to accede under Article 18.

This does not, however, account for the collective ignorance that descended over the debate in 2002 about South Africa’s possible accession. For this the only plausible explanation is that the practice adopted regarding the first two new entrants appears to have infected the thinking of the CCSBT, its Members and would-be Members in relation to Article 18 generally. Ignoring both Article 18 of the 1993 Convention and Article 8, paragraph 3 of the UN Fish Stocks Agreement, South Africa claimed a right under UNCLOS to accede to the 1993 Convention and purported to apply to do so. For its part, the Extended Commission is recorded as having been unable to

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674 The formula splits the budget into two components for the purposes of calculating assessments: 30% is shared equally among the Parties, and 70% in proportion to their “nominal catches” of SBT: see the text of Article 11(2), reproduced infra n 854. For example, suppose for simplicity’s sake that South Africa, which at one point sought a national allocation of 250 tonnes (infra, text at n 771), by acceding to the 1993 Convention were able to secure an allocation equal to 1.5% of the TAC. As one of six Members, its share of the CCSBT’s budget expressed as a percentage would then be (30 ÷ 6) + (70 x 0.015) = 6.05%, over four times its share of the catch.


676 Infra, section C.

677 Attachment 6 to CCSBT-EC1 Report, supra Ch I n 242, at 55. In the same statement South Africa dismissed the notion of “join[ing] on the basis of a mere prospect of a quota at some time in the future” (at 54).

678 CCSBT-EC1 Report, supra Ch I n 293, at 18 (paragraph 23). See also the assumption by New Zealand of South Africa making an application for “full membership” of CCSBT in
agree on the terms and conditions it would require for this.\textsuperscript{679} Moreover, the information supplied by the Secretariat to the UN Secretariat for the Second Informal Meeting of States Parties to the UN Fish Stocks Agreement\textsuperscript{680} in 2003 states outright that the CCSBT “accepts new members by agreement among existing members.” This is so clearly erroneous – as well as being contrary to Article 8, paragraph 3 of the UN Fish Stocks Agreement, by which relevant fisheries commissions must be open to the participation of States with a real interest in the fishery concerned – that to persist with this line in future must threaten the CCSBT’s credibility.

The CCSBT has however encouraged attendance by pertinent non-members at its meetings and those of its subsidiary bodies, as provided for in Article 14, paragraph 1 of the 1993 Convention:

The Commission may invite any State or entity not party to this Convention, whose nationals, residents or fishing vessels harvest southern bluefin tuna, and any coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, to send observers to meetings of the Commission and of the Scientific Committee.

\textit{Report of the Special Meeting of the Extended Commission, 26-27 April 2004, Busan, Republic of Korea} (Appendix 3 to \textit{Report of the Special Meeting of the Commission, 26-27 April 2004, Busan, Republic of Korea}; hereinafter CCSBTSM4 Report), in CCSBT Blue Book 2005 supra Ch I n 34, 112 at 118 (paragraph 19) and China’s reported advice that it did not “intend to apply for full membership or cooperating non-membership of the CCSBT”, \textit{ibid.} (paragraph 23). Further, in “Opening Statement by the Philippines” (Attachment 5 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, \textit{supra} Ch I n 34, 51, it expected the “upgrade of the Philippines’ status from being a cooperating non-member to member of the Commission”, as though this were not a matter in its own hands.

\textsuperscript{679} CCSBT-EC1 Report, \textit{supra} Ch I n 293, at 18 (paragraph 25).

\textsuperscript{680} UN doc A/58/215 (5 August 2003), \textit{The status and implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention for the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement) and its impact on related or proposed instruments throughout the UN system, with special reference to implementation of Part VII of the Fish Stocks Agreement, dealing with the requirements of developing States: Report of the Secretary-General}, at 17 (paragraph 55(f)).
As Table 3 on the next page shows, Taiwan and Indonesia attended the CCSBT’s First Meeting\(^{681}\) and Korea and Taiwan have not missed any meeting since 1996; both, but especially Taiwan, have also regularly attended Scientific Committee meetings and to a lesser extent ad hoc meetings such as workshops.

1 Early attempts to reduce non-party catch – the 41 per cent formula

No sooner had the CCSBT been formed than it turned its attention to the growing catch of SBT by vessels other than those flagged to its Members, adopting at its First Meeting an Action Plan in relation to non-parties. This called for a series of joint diplomatic demarches to Indonesia, the Republic of Korea and Panama to request their cooperation with and participation in the conservation of SBT, as well as joint unofficial presentations to Taiwan for the same purpose.\(^{682}\) It also envisaged the collation, sharing and review of all trade, scientific and other relevant data on SBT available from non-parties with a view to determining the magnitude of their catches. The parties further agreed to monitor ICCAT’s statistical document program for  

\(^{681}\) Taiwan and Indonesia in fact began to attend meetings after the 1993 Convention had been signed but before its entry into force: 12th Trilateral Scientific Meeting Report, \textit{supra} Ch II n 348, at 1 (paragraph 1): a representative from Taiwan, in attendance for the first time, offered to provide 5° square catch and effort data from Taiwanese longline and drift Gillnet fisheries. The reiteration of this offer is recorded in 13th Trilateral Scientific Meeting Report, \textit{supra} Ch I n 46, at 1 (paragraph 1), where it is also stated that Indonesia was represented for the first time by an official who gave an update on SBT fishery developments within the Indonesian EEZ.

\(^{682}\) CCSBT1 Report, \textit{supra} Ch I n 273, at 4 and Annex 3. But this did not proceed until 1998: see Attachment 10 to CCSBT5(1) Report, \textit{supra} n 670, at 23 (paragraph 3), and the repeated intentions expressed at successive Commission meetings to that point: CCSBT2 Report, \textit{supra} Ch II n 414, at 7; CCSBTSM1(2) Report, \textit{supra} n 683, at 5; CCSBT3(2) Report, \textit{supra} Ch II n 413, at 9; “Programme for Approaches to Non-Parties (Attachment G to CCSBT4(2) Report), in CCSBT Blue Book 1999, \textit{supra} Ch I n 126, 80; and oral submissions to the Annex VII tribunal of counsel for Australia, Mr Serdy, on 8 May 2000 (Transcript for 8 May 2000, \textit{supra} Ch III n 666, at 192-193). See also the draft work program in \textit{Report of the Accession of Non-Parties Meeting, 13 May 1997, Sydney, Australia} (hereinafter May 1997 Meeting on Non-Parties Report), in CCSBT Blue Book 1999, \textit{supra} Ch I n 126, 205 at 210.
Table 3: Attendance at meetings of the CCSBT and its principal subsidiary bodies by non-members exploiting the SBT stock

<p>| CCSBT1 Report, supra Ch I n 273, at 1; CCSBT2 Report, supra Ch II n 414, at 1; Attachment to CCSBTSM1(1) Report, supra Ch I n 38; Attachment 1 to Report of the Reconvened First Special Meeting, Canberra, 17 – 19 January 1996 (hereinafter CCSBTSM1(2) Report, &lt;www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_2/report_of_special_meeting1 Part2. pdf&gt; (visited on 13 June 2008)); Attachment B to CCSBTSM2 Report, supra Ch I n 289; CCSBT3(1) Report, supra Ch I n 102, at 1; CCSBT3(2) Report, supra Ch II n 413, at 1; CCSBT4(1) Report, supra Ch I n 126, at 2; Report of the Fourth Annual Meeting, Second Part, 19-22 January 1998, Canberra, Australia (hereinafter CCSBT4(2) Report), ibid., 57 at 59; Report of the Fourth Annual Meeting, Third Part, 19-21 February 1998, Canberra, Australia (hereinafter CCSBT4(3) Report), ibid., 87 at 89; CCSBT5(1) Report, supra Ch II n 413, at 3; Report of the Fifth Annual Meeting, Second Part, 10-13 May 1999, Tokyo, Japan (hereinafter CCSBT5(2) Report), in CCSBT Blue Book 2000, supra Ch II n 413, 71 at 73; CCSBT6(1) Report, in CCSBT Blue Book 2001, supra Ch I n 242, 1 at 3 (paragraph 1); CCSBT6(2) Report, ibid., 49 at 51 (paragraph 1); Report of the Special Meeting, 16-18 November 2000, Canberra, Australia (hereinafter CCSBTSM3 Report), ibid., 107 at 109 (paragraph 2); CCSBT7 Report, supra Ch III n 449, at 3 (paragraph 1); CCSBT8 Report, supra Ch I n 30, at 63 (paragraph 6); Attachment 3 to CCSBT-EC1 Report, in CCSBT Blue Book 2003, supra Ch I n 46, 33 at 37 and 40-41; CCSBT-EC2 Report, supra Ch II n 353, at 15 (paragraph 5); Attachment 2 to CCSBT-EC3 Report, in CCSBT Blue Book 2005, supra Ch I n 34, 33 at 34-35 and 38-40; Appendix 2 to CCSBTSM4 Report, ibid., 106 at 111; Attachment 1 to CCSBT-EC4 Report, supra Ch I n 248; Attachment 2 to CCSBT-EC5 Report, supra Ch I n 102; Attachment 2 to Report of the Special Meeting of the Extended Commission, 18-19 July 2006, Canberra, Australia (hereinafter CCSBT-ECM Report, Appendix 3 to CCSBT, Report of the [5th] Special Meeting of the Commission, 18-19 July [2006], Canberra, Australia (hereinafter CCSBTSM5 Report), &lt;www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_13/report_of_special_meeting_2006 pdf&gt; (visited on 13 June 2008)); Attachment 2 to CCSBT-EC6 Report, supra Ch I n 141; CCSBT-SC2 Report, supra Ch I n 240, at 1; Report of the Fourth Meeting of the Scientific Committee, 3-6 August 1998, Tokyo, Japan (hereinafter CCSBT-SC4 Report), in CCSBT Blue Book 2000, supra Ch II n 413, 95 at 97; Report of the Fifth Meeting of the Scientific Committee, 19-24 March 2001, Tokyo, Japan (hereinafter CCSBT-SC5 Report) in CCSBT Blue Book 2002, supra Ch I n 30, 151 at 153 (paragraph 1); CCSBT-SC6 Report, supra Ch I n 291, at 229 (paragraph 2); Attachment 1 to CCSBT-ESC1 Report, in CCSBT Blue Book 2003, supra Ch I n 46, 138 at 141-142; Attachment A to CCSBT-ESC2 Report, in CCSBT Blue Book 2004, supra Ch I n 32, 135 at 138; Attachment 1 to CCSBT-ESC3 Report, in CCSBT Blue Book 2005, supra Ch I n 34, 191 at 192 and 194; Attachment 1 to CCSBT-ESC4 Report, supra Ch I n 114; Attachment 1 to Report of the... |</p>
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<th>Meeting</th>
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<th>South Africa</th>
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*Extended Scientific Committee for the Eleventh Meeting of the Scientific Committee, 12-15 September 2006, Tokyo, Japan (hereinafter CCSBT-ESC5 Report; Appendix 2 to Report of the Eleventh Meeting of the Scientific Committee, 12-15 September 2006, Tokyo, Japan, <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_13/report_of_SC11.pdf> (visited on 13 June 2008); Attachment 1 to CCSBT-ESC6 Report, supra Ch I n 141; Attachment 1 to Report of the First Meeting of the Compliance Committee, 8 – 9 October 2006, Miyazaki, Japan, <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_13/report_of_CC1.pdf> (visited on 13 June 2008); Attachment 2 to Report of the Second Meeting of the Compliance Committee, 14 – 15 October 2007, Canberra, Australia, <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_14/report_of_cc2.pdf> (visited on 13 June 2008). For brevity documents titled “List of Participants” with or without the name of the meeting are referred to simply by their attachment or appendix number. Resumed meetings are disregarded where they were held in conjunction with an immediately following meeting. For a full list of the meetings of the CCSBT and its subsidiary bodies since entry into force of the 1993 Convention see <www.ccsbt.org/docs/pdf/meeting_schedule/ccsbt_previous_meetings.pdf> as from time to time updated. Meetings of the various working groups, workshops and similar are omitted from the table for manageabley.
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Scientific Committee Meetings

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Compliance Committee Meetings

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<td>**</td>
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<tr>
<td>Second Meeting</td>
<td>2007</td>
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</table>

* Meeting also attended by the Philippines.
** Korea deposited its instrument of accession to the 1993 Convention during the Eighth Meeting.
*** Taiwan participated from the Ninth Meeting as a full Member of the Extended Commission established in 2001: text accompanying n 857 infra.
**** Meeting also attended by both the Philippines and the European Community.
ABT and consider the merits of a similar scheme for SBT, as well making every effort to discourage their nationals from involvement in fishing, transactions or other non-party activity where these were likely to undermine the effectiveness of their SBT conservation effort.\textsuperscript{684}

At an informal meeting in October 1994, Japan proposed that “surplus” quota from the reductions in catch of new Members be used for “research quota”. Australia responded that their catch restraint would actually have to occur before such an idea could be considered, while New Zealand voiced concern that this might as act as a disincentive to catch restraint by non-members considering joining the CCSBT.\textsuperscript{685} Japan presented a draft paper on quota allocation for new entrants. In calculating the potential quota for new entrants, Japan said, it had ignored catch data from after the signature of the 1993 Convention (10 May 1993), so that prospective newcomers would not have an incentive to increase their fishing effort in order to build a larger catch history as a basis for seeking additional quota, an approach for which Australia and New Zealand expressed general support.\textsuperscript{686} At the April 1995 informal meeting, the parties agreed that new entrants should be required to accept the same reduction in their catch as the parties themselves had accepted since the last year before they had imposed catch limits under the trilateral arrangements, namely to 41 per cent of their former catch. On this basis they expected that the cumulative allocations to new entrants would not exceed 615 tonnes.\textsuperscript{687} At its second meeting the CCSBT

\textsuperscript{684} CCSBT1 Report, \textit{supra} Ch I n 273, at 5; except perhaps as regards transactions, the last is no more than is required by CCSBT Article 15(2), reproduced \textit{supra}, text following n 671.

\textsuperscript{685} Japan – Australia – New Zealand Southern Bluefin Tuna Consultations, Canberra 17-19 October 1994, \textit{Summary Record} (hereinafter October 1994 Summary Record, subsequently incorporated into the report of the CCSBT’s first meeting: \textit{supra} Ch II n 413), at 4.

\textsuperscript{686} \textit{Ibid.}, at 4-5.

\textsuperscript{687} April 1995 Draft Summary Record, \textit{supra} Ch II n 413, at 8; this implies a cumulative annual catch by significant non-Members of 1,500 tonnes, corroborated by the ICCAT Standing Committee on Research and Statistics noting in 1992 that catches by other countries had increased and were now estimated at more than 1,600 tonnes: \textit{Report of the Standing Committee on Research and Statistics (SCRS) (Madrid, November 2-6, 1992)} (Annex 14 to \textit{Proceedings of...}
decided that in principle any new entrant would be offered a quota equal to 41 per cent of its average yearly catch in the years 1991 to 1993, a figure that might be adjusted by negotiations with the new entrant on the basis of the factors set out in Article 8, paragraph 4 of the 1993 Convention.\footnote{688}

The CCSBT did not immediately reveal the rationale behind its position. Although considerations of equity are implicit in it, neither this nor any other legal basis was offered for it. As subsequent events showed, a more generous offer might have induced Korea and Taiwan to cooperate with the CCSBT much sooner than they did. As it was, with no compelling argumentation to support taking a 59 per cent cut in their catch, they simply continued fishing and, at least at first, made no effort to restrict the growth of their SBT catches.

Not until its Second Meeting, held a month after the UN Fish Stocks Agreement was adopted, did the CCSBT give explicit reasons for catch restraint by third parties. Attributing the “urgent need for all non-parties fishing for southern bluefin tuna to

\footnote{688} CCSBT Article 8(4) provides that:

4. In deciding upon [Parties’ national] allocations...the Commission shall consider:

(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.
come within the Convention regime” to the depleted state of the stock, the report argued that
given...the restraint that Commission members had been required to demonstrate as a result, it was of crucial importance to the future of the fishery that the non-parties did not expand their fishing effort or take any other action that could undermine the objectives of the Commission.\footnote{CCSBT2 Report, supra Ch II n 414, at 7-8. See also the text circulated by the Chair outlining principles for determining quota allocation for new entrants, reproduced at Annex 6 to the Report, in which a footnote states the base for the Parties’ own 59% reduction was 1986, when their combined catch was 28,841 tonnes. Although this figure is supported by Caton et al, supra Ch I n 36, at 21, in Table 2 (supra Ch I) the three Parties’ total catch for that year is 28,319 tonnes; the difference may be because the Table presents catch by calendar year.}

2 Further growth in non-member catches

In 1996, at the second session of the First Special Meeting, the Members recognised that their difficulties on management measures could hinder efforts to secure third parties’ participation, but blamed each other for this. Japan charged that the CCSBT’s “negative attitude...towards the optimum utilisation of SBT reduced the incentives for non-parties to join”; Australia and New Zealand replied that failure by the Commission to demonstrate responsible management of the stock would reduce the attraction for non-parties to join it.\footnote{CCSBTSM1(2) Report, supra n 682, at 5.} There can be seen in hindsight to be substance in both accusations, Japan’s in the longer term and Australia’s and New Zealand’s in the shorter term (though Japan’s is largely negated by the peculiar sense in which it employs the term “optimum utilisation”\footnote{See the discussion of this infra in Appendix A, n 1493 and accompanying text.}). The most important reason, however, continued to be the quota allocation formula. Later that year at the CCSBT’s Third Meeting, Korea pledged to cooperate with it in the conservation and management of SBT and said that in principle it would be willing to join the Commission, but could not do so while “the catch allocation for new entrants [was] so small that the Korean fishing industry would not be able to
sustain their fishing business”. It requested the CCSBT to rethink the catch allocation formula for new entrants. Indonesia regarded the CCSBT as “useful” for the conservation and management of SBT, but declined to join. Its representative noted Indonesia’s lack of fisheries data and asked the existing Members to cooperate with it to remedy this. The Commission directed the Secretariat to write to both governments seeking information on their SBT fisheries.

Taiwan announced that it would in future restrict its catch to the 1995 level of 1,447 tonnes whole weight and that it had secured funding to attend Scientific Committee meetings and introduced a vessel monitoring system to collect catch and other fisheries data and provide daily reporting of catch statistics to its authorities.

When the Meeting resumed three months later, all Members noted the need for the CCSBT to take stronger action than in the past to secure the participation of third parties. They again expressed strong concern at the continued expansion of catch by Korea, Indonesia and Taiwan, who had all signed or expressed support for the UN Fish Stocks Agreement, at a time when the Members themselves were exercising restraint. Japan also noted the need to consider other countries that were just starting to fish for SBT. It was agreed that each Member would nominate a representative to work as part of a small team to develop options for encouraging Korea and Indonesia to join the CCSBT and Taiwan to cooperate with its management measures, while

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692 CCSBT3(1) Report, supra Ch I n 102, at 4. Korea repeated the point at the second session of the meeting: CCSBT3(2) Report, supra Ch II n 413, at 9.
693 CCSBT3(1) Report, supra Ch I n 102, at 4.
694 Ibid., at 11.
695 Ibid., at 10. At the second session of the meeting Taiwan rounded this up to 1,450 tonnes: infra text at n 699. The 1,447 tonnes did not include 110 tonnes caught by a vessel in December 1995 that were not landed until January 1996: CCSBT4(1) Report, supra Ch I n 126, at 6. The fortuitous consequence of this was that the level of Taiwan’s voluntary cap was lower than it would have been had these fish been landed in 1995, since Taiwan’s catch for that year, and presumably its voluntary limit, would have been 1,557 tonnes.
696 CCSBT3(1) Report, supra Ch I n 102, at 4.
senior representatives of Members would seek direct discussions with counterparts from Indonesia, Korea and Taiwan to the same end.\textsuperscript{697}

For its part, Korea was prepared to have one of its scientists attend the next Scientific Committee meeting as an observer.\textsuperscript{698} Taiwan too reaffirmed its intent to become a full Member and said that, to cooperate with the CCSBT, it had imposed a maximum catch of 1,450 tonnes in 1996, a limit it would maintain while the current TAC prevailed, but if the TAC were raised in future, Taiwan would increase its own catch limit by the same percentage.\textsuperscript{699}

All Members expressed support for aspects of the Secretariat’s recommendations for work to identify countries eligible to join the CCSBT, and for inviting them to do so, or at least attend as observers.\textsuperscript{700} The Commission summarised its position \textit{vis-à-vis} the non-members in the following Communiqué it adopted:

\begin{quote}
The Commission for the Conservation of Southern Bluefin Tuna (CCSBT), which was…established…to provide an international forum for the conservation, management and optimum utilisation of southern bluefin tuna (SBT), is urging other countries who fish SBT to a significant level to join the Commission, and fishing entities to cooperate by applying SBT conservation and management measures. The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks established that the long term viability of stocks can only be effectively secured if countries become members of, or in the case of fishing entities cooperate in applying, the conservation and management measures established by regional fisheries management organisations, in this instance the CCSBT. The current Commission members, Australia, Japan and New Zealand, have developed and implemented strict controls on the taking of SBT in order to rebuild the stock. Members of the Commission are required to set a Total Allowable Catch, which for the year 1996/97 is 11,750 tonnes. However, the benefits of these conservation measures are being eroded by non-member fishing fleets not only
\end{quote}

\textsuperscript{697} CCSBT3(2) Report, \textit{supra} Ch II n 413, at 9.
\textsuperscript{698} \textit{Ibid.}
\textsuperscript{699} \textit{Ibid.}, at 10.
\textsuperscript{700} \textit{Ibid.}
continuing to fish but in some instances increasing their catches of SBT in recent years. Reported catches of non-members were in excess of 3,000 tonnes in 1996.

The Commission regrets that the restrictions imposed on the fleets of member countries are being undermined by the action of fleets from non-members and again calls upon those countries and entities to acknowledge and participate in the stock rebuilding programme. In the case of non-members currently taking significant SBT catch, the Commission strongly believes they should accede to the Convention or cooperate by applying the Commission’s conservation and management measures and thereby contribute to a more rapid recovery of the stock. The Commission will pursue, (as a matter of high priority), further discussions with non-member SBT fishing nations and entities with a view to securing this participation, as required by Article 15 of the Convention for the Conservation of Southern Bluefin Tuna.

The Commission requests:

1. That as a matter of priority non-members actively limit their catch of SBT;
2. That non-members as soon as possible accede to the Convention for the Conservation of Southern Bluefin Tuna, or cooperate by applying the Commission’s conservation and management measures;
3. That non-members provide accurate SBT fishing data to the Commission.701

3 Negotiations begin with non-members

Following an intersessional meeting at which the Members agreed that a more flexible approach on quota allocation to new entrants was needed than had been pursued to date,702 Korea and Taiwan began to be more forthcoming with information on their SBT fisheries.

At the CCSBT’s Fourth Meeting, the Korean delegation advised that Korean longliners targeting yellowfin and bigeye tuna had moved progressively into the SBT grounds, and in recent years fishing occurred through most of the year. Catch had increased to 1,179 tonnes in 1996, taken by eight longliners. While the domestic consumption of SBT was increasing, 70 to 80 per cent of the catch was exported to

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701 Ibid., at 13 and Attachment J.
702 May 1997 Meeting on Non-Parties Report, supra n 682, at 209.
Japan. In addition, Korea for the first time indicated the size of the quota it saw as appropriate for itself:

My country has also wanted...to join this organisation. However, the...member countries of CCSBT have closed their door and they are not willing to open.

Member countries suggested a quota allocation formula for us to accede to [the 1993 Convention], but we think that the suggestion is unreasonable for a new entrant to join the organisation. ...Korea has considered...accession..., if we can secure an appropriate quota which would amount to at least about 1000 Mt a year.

Taiwan reported that most of its SBT catch was bycatch. Once 1,450 tonnes had been reached, SBT caught subsequently were required to be returned to the ocean – a practice New Zealand found unsatisfactory as a catch-limiting mechanism.

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703 CCSBT4(1) Report, supra Ch I n 126, at 6-7. Note that, despite the opprobrium it attracts from existing participants, new entrants expecting their catch history to play a part in the size of the quota negotiated have an incentive to overstate rather than understate their catch. This gives existing participants a choice between querying the catch figures and condemning the overfishing they represent; they cannot credibly do both. Earlier the same year, for example, the CCSBT had queried the discrepancy between Korea’s stated catch of 1,179 tonnes and Japanese import statistics which indicated a significantly lower catch than could be expected if the claimed percentage of Korea’s catch was exported to Japan. There is also a note of incredulity in the CCSBT’s comment that the extensive fishing areas indicated for the Korean vessels operating in the fishery were largely outside known SBT fishing areas: CCSBT3(2) Report, supra n 413, at 9-10. Japan also disagreed with Taiwan’s assertion that its fleet fished in areas where SBT would only be taken as bycatch, since the areas identified in Taiwan’s report were largely south of other tuna fishing grounds, at latitudes where SBT was a target species: CCSBT4(1) Report, supra Ch I n 126, at 6.


705 “Review of SBT Fisheries – Taiwan” (Attachment O to CCSBT4(1) Report), in CCSBT Blue Book 1999, supra Ch I n 126, 43 at 45.

706 CCSBT4(1) Report, supra Ch I n 126, at 6. In 2002, however, Taiwan admitted that it had managed its catch on a 5-year average of 1,450 tonnes, though it would introduce yearly catch limits to replace this. Thus, despite its catches in 1999 and 2000 of 1,513 and 1,638 tonnes respectively, Taiwan calculated its average catch over 1996-2000 as 1,387 tonnes: CCSBT8 Report, supra Ch I n 30, at 66 (paragraph 38) and 138 (Attachment K-5, “Review of Taiwan SBT Fishery of 2000/01”).
In reaction, the CCSBT now saw as urgent the need for Korea and Indonesia to join it and for securing Taiwan’s cooperation. Their catch had risen over the past few years to the point where it threatened the recovery of the SBT stock, contrary to their international obligations to cooperate in its conservation and management.\textsuperscript{707}

The Second Part of the CCSBT’s Fourth Annual Meeting saw the adoption of an Action Plan to deal with the non-member issue. It had five operative paragraphs:

1. The Commission renews its calls on non-members fishing for SBT to honour their international obligations to cooperate in the conservation and management of SBT, to respect the competence of the Commission, and to
   a) accede to the Convention or decide to apply the conservation and management measures currently adopted by the Commission with regard to southern bluefin tuna; and
   b) collect more comprehensive and accurate data concerning the fisheries for southern bluefin tuna by their nationals, residents and vessels, to verify such data and to provide them to the Commission.

2. Having considered the low level of parental biomass and the need to rebuild the SBT stock, but acknowledging that reasonable but limited allowance should be made for Non-members fishing for SBT, the Commission has determined that no more than 2550 mt of SBT should be taken in total by Non-members which accede to the Convention or decide to apply the Commission’s conservation and management measures. The Commission notes the strong obligation for Non-members to accede immediately, but until such time as they accede to the Convention or decide to apply its conservation and management measures, the Commission considers that the only responsible action for Non-members to take is to substantially reduce their catch of SBT to ensure that their cumulative catches of SBT do not exceed 2550 mt and to implement voluntarily other conservation and management measures decided upon or recommended by the Commission.

3. The Commission will consider a scheme to collect more accurate and comprehensive information on SBT fishing through trade, with a view to evaluating and designing such a scheme. A special working group for this purpose will be established.

\textsuperscript{707} CCSBT\textsuperscript{4(1)} Report, \textit{supra} Ch I\textsuperscript{n} 126, at 7.
4. The Commission will periodically review the effectiveness of conservation and management measures of the Commission, based on catch data compiled by the CCSBT, national statistics, trade information and other relevant information obtained at ports and at the fishing grounds. If the effectiveness of CCSBT conservation and management measures is being undermined by the fishing activities of particular non-members, the Commission will immediately take appropriate further measures in accordance with international law, to ensure the effectiveness of conservation and management measures of the CCSBT.

5. The parties will adopt appropriate measures in accordance with Article 15.2 and Article 15.3 of the Convention within the limits of their authority. These measures will include, but are not limited to, measures to discourage their nationals from engaging in or cooperating with Non-member fishing activities for SBT, i.e. on board fishing vessels registered in Non-members, as fishing master, vessel operation supervisor, or crew.708

A number of points may be noted. First, although it is not apparent how the figure of 2,550 tonnes was arrived at, it is clearly a substantial advance on the 1994 formula which yielded a collective limit for non-member catch of around 615 tonnes.709 Implicitly the CCSBT was inviting the non-members to co-ordinate with each other, either directly or through the Secretariat, since there is no other way in which they could adhere to the collective limit. Yet, as subsequent events were to show,710 it was still insufficient.

708 “Action Plan concerning Promotion of Accession to, and Cooperation with, CCSBT by non-Member States and Entities” (Attachment F to CCSBT4(2) Report), in CCSBT Blue Book 1999, supra Ch I n 126, 78 at 78-79. The lengthy preamble is not reproduced.

709 Supra, text at n 687.

710 Given the quotas negotiated with Korea and Taiwan of 1,140 tonnes each – infra text at nn 738 and 740 – this would leave Indonesia a quota of 270 tonnes at most, and ignores the later advent of South Africa, which as a coastal State on the SBT migratory path could also reasonably expect a quota. Implicitly the total was raised to 3,829 tonnes in 2001, being the difference between the most recent estimated catch of 15,579 tonnes adopted as a “provisional global catch limit” and the 11,750 tonnes of the original three Parties’ cumulative national allocations: see CCSBT8 Report, supra Ch I n 30, at 70 (paragraph 75).
Secondly, the call to apply the conservation and management measures is made in the abstract, since, due to the impasse within the CCSBT on a TAC and national allocations, apart from the recently adopted obligation to use tori poles south of 30°S as a seabird bycatch mitigation measure, at the time no such measure was in force for Australia and New Zealand whose season had ended,\textsuperscript{711} while Japan’s had only a few weeks to run.\textsuperscript{712}

Thirdly, since UNCLOS Articles 64 and 116-119 do not contain a specific obligation to this effect, it is not clear where the Members thought the source of the “strong obligation for Non-members to accede immediately” could lie unless Article 8 of the UN Fish Stocks Agreement had already acquired the force of custom.\textsuperscript{713}

At the CCSBT’s Fifth Meeting in 1999, Korea’s opening statement referred to its serious concern about “recent discord among member states over the function of the organization”, noting that such “instability” of the Commission could dissuade Korea from joining it. The principal hindrance to that step, however, remained the “insufficient offer of quota for Korea which is far from the present reality of Korean SBT industry”. Reporting catches in 1996 and 1997 of 1,179 and 1,325 tonnes respectively and an expected catch for 1998 of 1,562 tonnes, Korea asked for a “more practical” quota of at least twice the 550 tonnes previously offered, indicating

\textsuperscript{711} See infra Ch V n 1168.

\textsuperscript{712} CCSBT\textsuperscript{4}(1) Report, supra Ch I n 126, at 8 accepting the recommendations of the Ecologically Related Species Working Group at 52 (Attachment U, “Recommendations to the Commission relating to Ecologically Relate [sic] Species”, paragraph 3). As the Commission’s power to bind its Members in Article 8(3) of the 1993 Convention is expressed to be “[f]or the conservation, management and optimum utilisation” of SBT, it is uncertain whether measures relating to seabird bycatch come under this provision, since the management of the SBT stock, in the absence of a predator/prey relationship, is unaffected, except to the extent that the efficiency of fishing effort is impaired because a longline hook with a bird impaled on it is thereby disabled from catching a fish.

\textsuperscript{713} See now infra Ch VI n 1218 and accompanying text.
willingness to participate in any experimental fishing program that the Members might adopt by consensus.\textsuperscript{714}

The CCSBT sent a letter to the Korean Ministry of Maritime Affairs and Fisheries referring to its objective of restoring the SBT stock to 1980 levels by 2020 and its serious concern at Korea’s increasing catches and the lack of comprehensive data on these. After giving notice that it was considering a trade certification scheme similar to ICCAT’s, the letter renewed the CCSBT’s call on Korea to “recognise the obligation of States under international law, including [UNCLOS] and the UN Fish Stocks Agreement, to cooperate through regional fishery management organisations and to apply the conservation and management measures imposed by [them].” Repeating the Action Plan’s wording that “a reasonable but limited allowance should be made for non-members fishing for SBT”, the CCSBT was “prepared to negotiate an acceptable level of quota to be made available to non-members which accede to the Convention”. Accordingly, it invited Korea to “undertake formal negotiations to accede to the Convention at the resumed session of the Fifth Meeting.”\textsuperscript{715} Taiwan received a letter similar in substance, though tailored in form to Taiwan’s international status and its existing voluntary catch limit.\textsuperscript{716} Australia undertook to prepare for the next session a proposal to facilitate Indonesia’s accession.\textsuperscript{717}

At the second session of the meeting, Japan reported bilateral discussions it had held with Korea and Taiwan without securing any firm commitment from either. Korea again indicated that “as a responsible fishing nation” it wished to cooperate with the

\textsuperscript{714} “Opening Statement by Korea” and “Annual Review of Korean Southern Bluefin Tuna Fisheries” (Attachments 7 and 16 respectively to CCSBT5(1) Report), in CCSBT Blue Book 2000, \textit{supra} Ch II n 413, 20 and 42 respectively. Although there is no record of a 550-tonne offer to Korea, application of the 41% formula to Korea’s catch using 1997 rather than 1991-93 as the base year yields 543.25 tonnes.

\textsuperscript{715} Attachment 18 to CCSBT5(1) Report, in CCSBT Blue Book 2000, \textit{supra} Ch II n 413, 45 at 45.

\textsuperscript{716} Attachment 19 to CCSBT5(1) Report, \textit{ibid.}, 47.

\textsuperscript{717} CCSBT5(1) Report, \textit{supra} Ch II n 413, at 4.
CCSBT to achieve proper management of the stock, but repeated its industry’s concern that joining it might mean an unacceptable reduction in its catch. As usual, Taiwan indicated that it would continue to cooperate with the CCSBT by limiting its catch to 1,450 tonnes per annum, working with it on the issue of flag of convenience vessels and participating in any trade information scheme. Should its long-term objective of full membership of the Commission not be taken seriously, however, “it would be difficult to maintain full cooperation with CCSBT management arrangements in the long term.”

Outside the plenary there were separate discussions with Indonesia, Korea and Taiwan. With Indonesia there was general discussion of a “package” to assist Indonesia’s accession to the 1993 Convention, but Indonesia expressed a preference for the SBT fishery to be managed by the IOTC. Korea reported 1998 catch in excess of 2,000 tonnes and evinced a general reluctance to avoid any step that might endanger its authorities’ “good relationship with industry”. The meeting with

718 CCSBT5(2) Report, supra n 683, at 75. On flag of convenience vessels see infra, text at nn 798-801.

719 “Record of the Bilateral Meeting between Representatives of the Commission and Indonesia, Mita Kaikan, Tokyo, 12 May 1999” (Attachment E to CCSBT5(2) Report), in CCSBT Blue Book 2000, supra Ch II n 413, 85 and 86 (Annex 1, “Opening Statement by Indonesia”). This may be because Indonesia would bear a much higher proportion of the CCSBT’s running costs under the formula in Article 11 of the 1993 Convention (see supra n 674) than it would of the IOTC’s, given the far greater number of members of the latter – 17 at the time: see the status list maintained by the FAO as depositary at <www.fao.org/Legal/treaties/013s-e.htm> (visited on 1 August 2008) – and the fact that the IOTC’s funding formula apportions 80% of the budget in ways that give an effective discount to Members with low per capita income and low development status: “Scheme for Calculation of Contributions to the Administrative Budget of the Commission” (Annex to Financial Regulations (Appendix F to Report of the First Special Session of the Indian Ocean Tuna Commission, Rome, Italy, 21-24 March 1997 (hereinafter IOTCSS1 Report))), in IOTCSS1 Report (FAO Fisheries Report No 554; Rome: FAO, 1997), 41.

720 “Record of discussion between the representatives of the Republic of Korea and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), Tokyo, 12 May 1999” (Attachment F to CCSBT5(2) Report), in CCSBT Blue Book 2000, supra Ch II n 413, 87 at 87-88.
Taiwan centred on Taiwan’s relationship with the CCSBT and is treated below in section C.

4 The Commission turns to trade measures to enforce non-member cooperation

By late 1999 Japanese impatience with Korea and Taiwan had become intense. All Members agreed that the increasing catch by non-members was cause for concern as it “eroded the Commission’s work for the conservation and optimum utilisation” of the SBT stock. The report of the Sixth Meeting records an exchange on this issue among Japan, Korea and Taiwan, in which Japan referred to Korea’s readiness to accept in 1998 of an allocation of 1,000 tonnes, and described Korea’s insistence on a significant increase above this amount to cover the rise in its catch since then as “completely unreasonable” given the fall of over 70 per cent in Japan’s own allocation in the late 1980s.

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721 See “CCSBT Record of Discussions between the Commission and Representatives of Taiwan, Tokyo, 12 May 1999” (Attachment G to CCSBT5(2) Report), ibid., 89 at 89-90.
722 CCSBT6(1) Report, supra Ch I n 219, at 4 (paragraph 15); see also supra text at n 704.
723 Note that Japan employs here the tactic of claiming credit for its reduction from an unsustainable base. It did so again in the preliminary objections phase of the Southern Bluefin Tuna Case, describing as an “achievement” the fall in the three parties’ quota from 38,650 tonnes in 1985 to 11,750 tonnes in 1989 and highlighting Japan’s “contribution” of reducing by 74% its own catch from 23,150 tonnes to 6,065 tonnes: oral submissions to the Annex VII tribunal of counsel for Japan, Professor Ando, Transcript for 7 May 2000, supra Ch II n 433, at 30; Counsel for Australia, Mr Serdy, pointed out the following day that Japan’s base figure was “not [even] remotely sustainable”: Transcript for 8 May 2000, supra Ch III n 666, at 193. See also the written pleadings of the applicants (Reply on Jurisdiction of Australia and New Zealand (hereinafter Applicants’ Reply), archived under the item of 7 May 2000 at <www.icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (visited on 23 June 2008), at 89n), noting that not until 1989 did Japan have to curtail its fishing effort in order not to exceed its catch limits. The 59% reduction underlying the 1994 quota allocation formula for new entrants, supra nn 687 and 688 and accompanying text, is somewhat more reasonable, but the fate of that formula shows that even then, those who needed to be convinced found it unpersuasive.
Dissatisfied with the responses of Korea and Taiwan, Japan tabled a draft plan for trade-related measures based on the ICCAT model for bluefin tuna and swordfish.\(^\text{724}\) For its part, Korea announced that it would voluntarily limit its catch to 1,600 tonnes and that by withdrawing three vessels from the SBT fishing grounds it had reduced its capacity from 19 vessels to 16. It also undertook to provide catch and effort data under the planned Trade Information Scheme should the CCSBT adopt it, and noted its desire to have its scientists attend meetings of the Scientific Committee.\(^\text{725}\) When the meeting resumed some months later, Korea reduced its demand to 1,500 tonnes, and offered the additional explanation that at the time it had requested 1,000 tonnes, “officials had not been aware of the current catch levels of their fishing fleet. Recent catch data indicated catches were in the order of 2000 tonnes and therefore...a quota of 1500 tonnes was reasonable.” This increase “was not designed to increase Korea’s allocation but was caused by the fall of the won in 1997.”\(^\text{726}\)


\(^\text{726}\) CCSBT6(2) Report, supra n 683, at 51 (paragraph 7). The implied link in the chain of causation is that it thereby became profitable for Korean vessels to export SBT to Japan.
The Action Plan was adopted at the resumed session of the Sixth Meeting in a
resolution\textsuperscript{727} based on the Japanese draft, but mentioning in addition in its preamble
Article 15, paragraph 4 of the 1993 Convention (obliging Parties to cooperate in
taking appropriate action to deter non-Party fishing that could adversely affect the
Convention’s object). The operative paragraphs of the resolution were as follows:

1. The Commission requests non-Members catching SBT to cooperate fully with the Commission in implementing the measures applicable to Members for conservation, management and optimum utilisation of SBT (hereinafter referred to as “conservation and management measures”). The Commission also requests those non-Members to advise it of their actions taken in that regard.

2. The Commission will identify, at or before the Seventh, and then at each subsequent Annual Meeting of the Commission, those non-Members whose vessels have been catching SBT in a manner which diminishes the effectiveness of the conservation and management measures, based on catch data compiled by the Commission, trade information and other relevant information obtained in ports and on fishing grounds.

3. The Chair of the Commission shall request those non-Members identified pursuant to paragraph 2 to rectify their fishing activities so as not to diminish the effectiveness of the conservation and management measures and to advise the Commission of their actions taken in that regard.

4. Members shall jointly and/or individually request non-Members catching SBT to cooperate fully with the Commission in implementing the conservation and management measures.

5. The Commission will review, at subsequent Annual Meetings as appropriate, actions taken by those non-Members to which requests have been made pursuant to paragraphs 3 and 4, and identify those non-Members which have not rectified their fishing activities.

6. The Commission may decide to impose trade-restrictive measures consistent with Members’ international obligations on SBT products, in any form, from the non-Members identified pursuant to paragraph 5.

\textsuperscript{727} “Action Plan” (Attachment I to CCSBT6(2) Report), in CCSBT Blue Book 2001, \textit{supra} Ch I n 242, 76.
Japan suggested identifying non-members who were not taking steps towards cooperating with the CCSBT. Korea argued that, with quota negotiations continuing, and voluntary restraint by Korea of its catch, the action set out in the Plan would be premature. It complained that the CCSBT was attempting to impose requirements on non-members beyond the provisions of UNCLOS, all the more egregiously given that Members had not themselves arrived at an agreed TAC. The Chair pointed out that the Resolution was not aimed at non-members cooperating with the CCSBT, nor was it intended to undermine the Commission’s negotiations with them. Rather, it was aimed at the operations of non-members and vessels whose actions were undermining the CCSBT’s management arrangements, so as to encourage them to join the Commission or cooperate with its arrangements. This, it is submitted, is sufficient to dispose of Korea’s true but irrelevant objection. The pressure exerted on it by the CCSBT is consistent with Article 8 of the UN Fish Stocks Agreement and the legality of trade restrictions would depend on their consistency with the GATT. Even the fact that the CCSBT as a whole had not set a TAC is not fatal to trade restrictions provided the World Trade Organization (WTO) Member imposing them has limited its own catch.

728 CCBT6(2) Report, supra n 683, at 52 (paragraphs 12 and 14).
729 Ibid. (paragraph 14).
730 Australia and New Zealand stressed that any proposed measures would need to be consistent with Members’ obligations under international law, particularly those under GATT, supra Introduction n 22: ibid. Japan stated that its draft was modelled on ICCAT’s 1994 Plan, “which was designed to ensure consistency with” GATT: “Opening Statement by Japan” (Attachment D to CCBT6(2) Report), in CCBT Blue Book 2001, supra Ch I n 242, 70 at 71.
731 Serdy, supra Ch III n 448, at 99. Article XX of GATT, supra Introduction n 22, is headed “General Exceptions” and provides, so far as material (emphasis added), that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
At its Seventh Meeting the CCSBT identified Cambodia, Equatorial Guinea, Honduras and Belize under paragraph 2 of the Resolution as non-members whose vessels had been catching SBT in a manner that diminished the effectiveness of its conservation and management measures. Although no action was taken against those States, the CCSBT decided to continue to monitor their activity. Belying the Chair’s previous denial that the principal third parties were the targets of the Action Plan, there was discussion of both Indonesia and Taiwan under this agenda item, and the question of Indonesia was remitted for review at the Eighth Meeting.732

The report of that meeting records no decision on Indonesia under the relevant agenda item. There was however a draft decision appended to the report, in which the CCSBT identified Indonesia under paragraph 2 of the Action Plan as a non-member whose vessels were catching SBT in a manner diminishing the effectiveness of its conservation and management measures. The draft instructed the Executive Secretary to write to Indonesia bringing this to its attention and requesting it to rectify its fishing activities so as not to diminish the measures’ effectiveness and advise the CCSBT of its actions taken to that end, as well as urging Indonesia to take measures to prevent fishing on the SBT spawning grounds and ensure that SBT Statistical Documents were completed in accordance with the Trade Information Scheme’s requirements.733

Instead, the CCSBT’s attention turned to action targeted at specific vessels as an alternative to banning imports of SBT from all vessels of a particular flag.734 Cambodia, Equatorial Guinea and Honduras were identified pursuant to paragraph 5

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732 CCSBT7 Report, supra Ch III n 449, at 6 (paragraphs 26 and 27).
733 “Draft Decision regarding Indonesia pursuant to the 2000 Action Plan” (Attachment I to CCSBT8 Report), in CCSBT Blue Book 2002, supra Ch I n 30, 100.
734 CCSBT8 Report, supra Ch I n 30, at 65 (paragraph 26).
as non-members having failed to rectify their fishing activities so as not to diminish the effectiveness of the CCSBT’s measures. The Executive Secretary was instructed to write to each of them informing them that, unless a satisfactory response were received by the time of the next meeting, that meeting would consider taking trade-restrictive measures under paragraph 6.\(^{735}\) The decision on Belize noted in its preamble a “limited response from Belize indicating some willingness to cooperate with the Commission, but that it is unable to provide information on fishing vessels until domestic measures are put into place to collect such information”. The Executive Secretary was instructed to write to Belize informing it that in the absence of a satisfactory response by the time of the next meeting, the CCSBT would identify Belize pursuant to paragraph 5 as a non-member having failed to rectify its fishing activities so as not to diminish the effectiveness of the Commission’s measures, and could at the same meeting take trade-restrictive measures under paragraph 6.\(^{736}\) At the Tenth Meeting Members agreed that no further action needed to be taken against Belize, Cambodia, Equatorial Guinea and Honduras because the Trade Information Scheme showed that their catch had dropped to zero; nor against Indonesia and the Philippines because of their undertakings to cooperate with the CCSBT. Action against the Seychelles was suspended in consequence of its undertaking to Japan not to fish for SBT.\(^{737}\)

5 Korea and Taiwan accept quota offers and join the Commission

At the CCSBT’s November 2000 Special Meeting, the Republic of Korea advised that it accepted the quota offer of 1,140 tonnes made to it and now intended to accede to the 1993 Convention.\(^{738}\) Korea ultimately deposited the necessary instrument on 17 October 2001, during the CCSBT’s Eighth Meeting.\(^{739}\)

\(^{735}\) Attachment H to CCSBT8 Report, supra Ch I n 254.

\(^{736}\) Attachment G to CCSBT8 Report, supra Ch I n 254.

\(^{737}\) CCSBT-EC2 Report, supra Ch II n 353, at 18 (paragraphs 27-29).

\(^{738}\) CCSBTSM3 Report, supra n 683, at 109 (paragraph 11) and 127 (Attachment F; “Opening Statement by the Republic of Korea”). The quantum of the offer does not appear in the
At the Eighth Meeting Taiwan too accepted the CCSBT’s offer of 1,140 tonnes as a basis for its application for membership of the Extended Commission. Taiwan said it would not issue trade information scheme certificates to any SBT catch above that quota, nor to any fresh SBT caught on the spawning ground once the latter’s location was advised to it by the CCSBT.\footnote{Statement made by Taiwan in the Plenary (Attachment F to CCSBT8 Report), in CCSBT Blue Book 2002, \textit{supra} Ch I n 30, 97. On the Extended Commission see section C infra.} Suggesting that tension continued until the last moment, however, the Commission said its acceptance of that application would depend on its being made by the end of 2001 and an immediate undertaking by Taiwan to restrict its annual catch to 1,140 tonnes pending the completion of its domestic legal processes required to give effect to its membership of the Extended Commission. The CCSBT also threatened to identify Taiwan under paragraph 2 of its Action Plan,\footnote{Statement made by Taiwan in the Plenary (Attachment F to CCSBT8 Report), in CCSBT Blue Book 2002, \textit{supra} Ch I n 30, 97. On the Extended Commission see section C infra.} if these conditions were not met, as a non-member whose vessels were catching SBT in a manner diminishing the effectiveness of its conservation and management measures, and to consider trade-restrictive measures under paragraphs 5 and 6 of the Action Plan. In reply, Taiwan claimed – not without justification – that “after all those concessions we have made, it would be unreasonable to resort to

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\footnote{CCSBT8 Report, \textit{supra} Ch I n 30, at 63 (paragraph 11); see also the website maintained by the Australian Government as depositary of the 1993 Convention, <www.austlii.edu.au/au/other/dfat/treaty_list/depository/sbtuna.html> (visited on 2 November 2008). Note that the revised 2001 budget includes an amount for Korea that represents half of a full-year assessment: \textit{Report of the Finance and Administration Committee, 16-18 October 2001, Miyako, Japan} (Attachment J to CCSBT8 Report), in CCSBT Blue Book 2002, \textit{supra} Ch I n 30, 101 at 105 (Annex 3). By Regulation 5.5(a) of the Financial Regulations (adopted at the Reconvened First Annual Meeting, \textit{supra} Ch II n 413, <www.ccsbt.org/docs/pdf/about_the_commission/financial_regulations.pdf>, visited on 13 June 2008), if a new Member joins the Commission in the second half of the year, it pays half of what it would have paid for the full year, and other Members’ assessments are reduced accordingly for that year.}
Action Plan against such a cooperative non-member.”

The conditions appear to have been satisfied, as Taiwan took its place in the Extended Commission at the CCSBT’s Ninth Meeting in October 2002.

6 The long road to Indonesian accession

Indonesia’s infrequent attendance at CCSBT meetings before becoming party to the 1993 Convention – see Table 3 above – meant that most of its interaction with the Members took place informally on the scientific level. As a developing country, Indonesia faced a twofold additional obstacle to its participation beyond the Article 11 formula in the 1993 Convention for financial upkeep of the Commission: a lack of institutional fisheries management capacity, firstly to gather information on what is mainly a bycatch fishery for SBT and secondly to impose and enforce limits on catch of SBT. Thus estimates of Indonesia’s catch presented at CCSBT meetings have tended to vary widely. For example, in 2000 the Commission was informed that the Indonesian industry estimated its catch at 150 tonnes, the Indonesian Government at 800-850 tonnes and Australian scientists at 2,500 tonnes. In 2001 Indonesia told the CCSBT that it believed its take of SBT to be largely bycatch, though some SBT was targeted by Taiwanese vessels or vessels with Taiwanese fishing masters.

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742 CCSBT8 Report, supra Ch I n 30, at 64 (paragraph 13).
743 CCSBT-EC1 Report, supra Ch I n 293, at 16 (paragraph 2).
744 See the remarks of Counsel for Australia, Mr Serdy, in Transcript for 8 May 2000, supra Ch III n 666, at 184-185:

A complicating factor in [Indonesia’s] case is that most, if not all, of its SBT catch is taken as bycatch from its yellowfin and bigeye tuna fishery. Indonesia, it need hardly be said, is not a country at the same stage of development as the parties before you. Until now, it has had neither the legal tools nor the administrative machinery that we take for granted in enforcing our catch limits domestically. It does plan to acquire them, we understand, but laws have to be passed and administrative systems established, and...this takes time. Australia has been leading for the Commission in discussion with Indonesia aimed at...familiarizing Indonesian fisheries officials with modern management methods and also at introducing the Indonesian fleet to methods of fishing that would reduce Indonesia’s SBT bycatch to a point where its adherence to a quota on accession to the 1993 Convention becomes feasible.

745 CCSBT6(2) Report, supra n 683, at 51 (paragraph 9).
operating out of Bali; while about 300 tonnes of SBT were landed, there was a need to clarify whether this represented the whole catch or some had been transhipped. Indonesia said it was keen to determine where exactly on the spawning grounds, and in what season, spawning occurs, so that it could advise its fishermen accordingly “and perhaps regulate their fishing practices.”

At the CCSBT’s Eighth Meeting, however, there was further criticism of Indonesia’s data collection and provision, Japan complaining that the Trade Information Scheme data it received from Indonesia had been “quite poor” and with “considerable missing information”. The CCSBT agreed to develop options for a plan to secure Indonesia’s accession to the 1993 Convention and improve data provision, with Australia to act as the main point of contact. Indonesia’s interest in joining the CCSBT was tempered by concern to be compensated for reducing its catch on the spawning grounds, and the level of the membership fee.

746 CCSBT7 Report, supra Ch III n 449, at 5 (paragraphs 17-19).
747 CCSBT8 Report, supra Ch I n 30, at 65 (paragraphs 16 and 18).
748 CCSBT6(2) Report, supra n 683, at 51 (paragraph 9); see also CCSBT7 Report, supra Ch III n 449, at 3: “budgetary and financial considerations had been a major constraint” (paragraph 6). At the 2003 annual meeting the CCSBT conceded that the formula was a hindrance to developing countries’ accession to the 1993 Convention and agreed to review it, but in 2004 said it preferred to look for mechanisms other than an amendment to Article 11, “which would be difficult to achieve in a short timeframe”: CCSBT-EC2 Report, supra Ch II n 353, at 16 (paragraph 13); CCSBT-EC3 Report, supra Ch I n 78, at 24 (paragraphs 55 and 56). Note that the participation of one or more members of the Indonesian delegation was financed out of the CCSBT budget: ibid., at 17 (paragraph 12), 55 (Attachment 7a-1, “Commission for the Conservation of Southern Bluefin Tuna Revised General Budget - 2004) and 58 (Attachment 7b-1, “Commission for the Conservation of Southern Bluefin Tuna General Budget - 2005 (CCSBT11), providing for the same in the following year). This support has continued up to the present: see “Commission for the Conservation of Southern Bluefin Tuna General Budget - 2006 (CCSBT13)” (Attachment 7b-1 to CCSBT-EC4 Report, supra Ch I n 248), “Table 1: General Budget - 2007 (CCSBT14)” in (untitled) Attachment 7 to CCSBT-EC5 Report, supra Ch I n 102; and CCSBT-EC6 Report, supra Ch I n 141, at 4 (paragraph 30) and “General Budget for 2008” (Attachment 7a to CCSBT-EC6 Report).
At the Tenth Meeting Indonesia referred to a forthcoming revision of its fisheries law that would cover regional cooperation, as well as of its improved data collection mechanism which would distinguish between SBT and bigeye tuna. Aware that a resolution on cooperating non-members was likely to be adopted, it asked in its opening statement to be admitted to the CCSBT as a “non-cooperating [sic] non-member”. Although at the 2004 Special Meeting Indonesia announced that it had submitted an application to that end, at the subsequent Eleventh Meeting Indonesia indicated that it was no longer pursuing this objective, prompting the CCSBT to write to Indonesia to warn that it was considering taking stronger action against Indonesia under the 2000 Action Plan, while still wishing Indonesia to become a cooperating non-member as soon as possible.

The crucial nature of Indonesian cooperation to the CCSBT’s ability to manage its stock is shown by the Extended Scientific Committee’s enumeration of the consequences of ending the monitoring of Indonesian catch: the CCSBT would have no reliable information on the size and age composition of the spawning stock with which to gauge the impact of current and future management measures on its composition; limited or no information on removals from the spawning stock by the Indonesian fishery, fluctuations in which, at the current estimated biomass, have the potential to affect appreciably the accuracy of stock assessments. It would be unable to assess changes in operations of the Indonesian fleet and foreign fleets operating under the Indonesian flag. Lack of information on the age structure of the SBT catch as a direct input into the stock assessment would increase uncertainty in relation to recent changes in the spawning stock and predictions about the impact of future

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749 “Opening Statement by Indonesia” (Attachment 5-1 to CCSBT-EC2 Report), in CCSBT Blue Book 2004, supra Ch I n 32, 53.

750 “Opening Statement by Indonesia” (Attachment 4-6 to Appendix 3 to CCSBTSM4 Report), in CCSBT Blue Book 2005, supra Ch I n 34, 139; see also Appendix 3 to CCSBTSM4 Report, supra n 678, at 117 (paragraph 18), indicating that a “formal application would be received in the near future.”

751 CCSBT-EC3 Report, supra Ch I n 78, at 27 (paragraphs 84 and 85).
catches; data for estimating the age at maturity and relative spawning potential and possible changes in these over time would also be lacking.\textsuperscript{752}

At the 2005 meeting Indonesia explained that disagreement within its government was the cause of its decision, but it still intended to cooperate with the CCSBT.\textsuperscript{753} Members were especially concerned at Indonesia’s rising catch and its effect on the spawning stock.\textsuperscript{754} Were Indonesia to reverse its decision, they decided, it would be granted an 800-tonne quota.\textsuperscript{755} Indonesia queried the figures, which may have been inflated by transshipping.\textsuperscript{756} No trade measures were taken, because the earlier decision allowing catch to be landed in ports of a Member or cooperating non-member only from vessels nominated by one of their number had the same effect.\textsuperscript{757} Even so, Indonesia asked at the 2006 meeting for their “removal”, with a renewed commitment to cooperating with the CCSBT and again promised to seek the status of cooperating non-member “in the near future”.\textsuperscript{758} Its quota was reduced to 750 tonnes.\textsuperscript{759} At the 2007 meeting Indonesia said that it now expected to become a full Member, but still cited internal legal processes for its inability to act to date;\textsuperscript{760}

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\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{752}] CCSBT-ESC3 Report, \textit{supra} Ch I n 236, at 186 (paragraph 115).
\item[\textsuperscript{753}] CCSBT-EC4 Report, \textit{supra} Ch I n 248, at paragraph 24. See also “Opening Statement by Indonesia” (Attachment 6).
\item[\textsuperscript{754}] \textit{Ibid.}, at paragraph 23.
\item[\textsuperscript{755}] \textit{Ibid.}, at paragraph 67.
\item[\textsuperscript{756}] \textit{Ibid.}, at paragraph 79.
\item[\textsuperscript{757}] \textit{Ibid.}, at paragraph 118. See Resolution on Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels over 24 meters [sic] Authorized to Fish for Southern Bluefin Tuna (Attachment 10 to CCSBT-EC2 Report), in CCSBT Blue Book 2004, \textit{supra} Ch I n 32, 90.
\item[\textsuperscript{758}] CCSBT-EC5 Report, \textit{supra} Ch I n 102, at 17 (paragraph 97); see also Attachment 6-2 (“Opening Statement by Indonesia”).
\item[\textsuperscript{759}] \textit{Ibid.}, at 13 (paragraph 64).
\item[\textsuperscript{760}] CCSBT-EC6 Report, \textit{supra} Ch I n 141, at 35 (paragraphs 186 and 187); see also “Opening Statement by Indonesia” (Attachment 6-1), indicating that only the requisite Presidential decree remains outstanding.
\end{enumerate}
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ultimately its instrument of accession to the 1993 Convention was deposited on 8 April 2008.\textsuperscript{761}

7 The remaining significant non-members

With Indonesia, Korea and Taiwan now within the CCSBT, South Africa is the most significant non-member State. The Philippines also attended two meetings in 2000 – see Table 3 above – and has expressed interest in joining the CCSBT, as well as its intent to cooperate with it; although its SBT catch was bycatch, it wished to develop a targeted SBT fishery in future.\textsuperscript{762} It subsequently also became a cooperating non-member, as did South Africa and the European Community.\textsuperscript{763} There is also a growing problem of unregulated fishing for SBT by vessels flying flags of convenience but controlled by the Members’ own industries.

At the CCSBT’s Tenth Meeting, Members expressed pleasure that Indonesia and the Philippines were interested in taking up the new status of cooperating non-member pursuant to the resolution passed at that meeting,\textsuperscript{764} and that Seychelles had indicated, through Japan, that it would not fish for SBT.\textsuperscript{765} The Executive Secretary was instructed to write to South Africa, the Philippines and Indonesia inviting them to apply for association with the Extended Commission under that status, though the latter was intended not to be permanent but as an interim step towards accession to the 1993 Convention.\textsuperscript{766}

\textsuperscript{761} See the depositary website \textit{supra} n 739.

\textsuperscript{762} CCSBT-EC2 Report, \textit{supra} Ch II n 353, at 17 (paragraph 20).

\textsuperscript{763} \textit{Infra}, text at nn 790, 782-783 and 796 respectively.

\textsuperscript{764} \textit{Infra} n 803.

\textsuperscript{765} CCSBT-EC2 Report, \textit{supra} Ch II n 353, at 17 (paragraph 18). According to figures provided by Japan, 177 tonnes of SBT were imported into Japan from Seychelles-flagged vessels in 2002: see “Import Statistics of SBT by Japan” (Appendix 2 to Attachment 8-3 to CCSBT-EC2 Report), in CCSBT Blue Book 2004, \textit{supra} Ch I n 32, 77.

\textsuperscript{766} CCSBT-EC2 Report, \textit{supra} Ch II n 353, at 17 (paragraphs 23 and 24).
(a) **South Africa**

Since its first appearance as an observer at the CCSBT’s Fifth Meeting in 1999, South Africa’s attendance at meetings has been more regular than Indonesia’s. South Africa reported that its domestic tuna fishery consisted mainly of pole and line operations directed at albacore rather than SBT. The occasional landings of SBT over the last ten years had never been more than 1 tonne in dressed weight. The catch from a new experimental longline fishery in 1997, targeting billfish and tuna other than SBT, was 756 kg. In addition, Japan and Taiwan reported to South Africa under their respective access agreements catches of SBT from South Africa’s EEZ, the mean reported Japanese catch in the years 1990-1998 having been 34 tonnes. Taiwan reported 14 tonnes in 1997 and three tonnes in the first half of 1998.\(^\text{767}\)

\(^{767}\) “Opening Statement by South Africa” (Attachment 8 to CCSBT5(1) Report), in CCSBT Blue Book 2000, *supra* Ch II n 413, 21. Signed in Pretoria on 6 December 1977, the Agreement on Fisheries between the Government of Japan and the Government of the Republic of South Africa, available online in the Internet Guide to International Fisheries Law <www.intfish.net/treaties/bilaterals/texts/jap-rsa/1977.htm> (visited on 4 November 2008), entered into force on signature by Article 9 and was to have run until 31 December 1979. By an exchange of Notes on 20 December 1979 between the Consul-General of Japan in Pretoria and a Deputy Secretary of the South African Department of Foreign Affairs, the Agreement was extended for a further two years initially and thereafter would remain in force “until the expiration of six months from the date on which either Government shall give notice to the other of its intention to terminate the Agreement.” The text of the Notes is appended to that of the Agreement, *ibid*. A similar treaty with the Republic of China, with which South Africa at that time maintained diplomatic relations, was signed in Cape Town on 26 January 1978 and entered into force the same day by virtue of Notes exchanged simultaneously with signature between the Ambassador of the Republic of China and the South African Minister of Foreign Affairs: Agreement between the Republic of China and the Republic of South Africa on Mutual Fishery Relations and Memorandum of Understanding, available online in the Internet Guide to International Fisheries Law <www.intfish.net/treaties/bilaterals/texts/chi-rsa/1978.htm> (visited on 4 November 2008), Article 8. Since Taiwanese vessels targeted albacore rather than SBT, their catch of SBT in South Africa’s EEZ over the years would have been taken as bycatch. By Article 10 the Agreement could be terminated by either Party on 12 months’ notice at any time after ten years from the date of its entry into force. Taiwan’s access to South African waters appears to have continued even past South Africa’s recognition of the People’s Republic of China, to judge by the announcement on
The appointment of a South African national as Chair of the Scientific Committee will have heightened South Africa’s interest, though its validity depends on a creative reading of the 1993 Convention. At the CCSBT’s Seventh Meeting South Africa expressed interest in attaining full membership, with the matter under consideration by its Government. Although not present at the Eighth Meeting, it indicated that it would be seeking a quota allocation of 250 tonnes. 

Subsequently the question of South Africa’s accession became entangled in the resolution of the allocation question, as it did for Korea. This is analysed below in section E. South Africa’s absence from the Tenth Meeting of the CCSBT was an early indication of this happening. Welcoming coastal States in the abstract, Taiwan said that a catch limit should be decided for them before they joined the Extended Commission as cooperating non-members. While some Members supported South Africa’s entitlement to develop its SBT fishery, others were concerned about the development of a flag of convenience fishery in South Africa. At the 2004 Special Meeting of the CCSBT, South Africa presented its history of catches of SBT in its EEZ. Although this showed catches exceeding the 30 tonnes that the CCSBT offered it, Japan thought South Africa would be unable to develop a substantial SBT fishery.


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768 See CCSBT6(2) Report, supra n 683, at 54 (paragraph 28).
769 Infra n 847 and accompanying text.
770 CCSBT7 Report, supra Ch III n 449, at 3 (paragraph 6).
771 CCSBT8 Report, supra Ch I n 30, at 65 (paragraph 20).
772 “Opening Statement by the Fishing Entity of Taiwan” (Attachment 4-2 to CCSBT-EC2 Report), in CCSBT Blue Book 2004, supra Ch I n 32, 44 at 44-45.
773 CCSBT-EC2 Report, supra Ch II n 353, at 17 (paragraph 19).
unless it were to operate outside its EEZ with large-scale vessels, so that the offer should stand until development of the fishery indicated the need to review it, a position which Australia and Korea were prepared to adopt. Only New Zealand pointed out South Africa’s rights as a coastal State under international law and that the Members had a duty to cooperate with it, such that a national allocation of more than 30 tonnes would be justified. The CCSBT’s response should “not alienate” South Africa and affect its cooperation. 774 A decision was deferred until the Eleventh Meeting, 775 but here too no decision was taken, with South Africa advising that it intended to develop a tuna fishery of 50 large-scale longline vessels which would in all likelihood catch SBT, as it occurred in the South African EEZ. The catch might possibly be as high as 400 tonnes, but South Africa could entertain a voluntary upper limit of 250 tonnes. 776

The report notes that South Africa as a party to the UN Fish Stocks Agreement “should not enter the fishery unless it first accedes to the [1993] Convention or otherwise applies the conservation and management measure of the CCSBT.” 777 Taiwan argued for historical catch to be taken into account, favouring allocation only for new entrants “who have demonstrated their development of a fishery, rather than acquiring catch limits with the hope or aspiration of future possible development of

774 Appendix 3 to CCSBTSM4 Report, supra n 678, at 118 (paragraph 19).
775 Ibid. (paragraph 20).
776 Attachment 6 to CCSBT-EC3 Report, supra Ch III n 524, at 52-53. In this document South Africa quoted in extenso from the conclusions of the 2002 FAO Expert Consultation on the Management of Shared Fish Stocks, in particular the sentence that “Zonal attachment was considered especially important for that segment of the resource to be found within the EEZ” and, on the question of whether the coastal State’s historic catch included only its own catch or those of foreign vessels also, “The consensus is that all catches within the EEZ are to be counted, when establishing the historical catch record of the coastal state.” It concluded that the Commission has placed South Africa in the untenable position of being forced to establish a catch history, which may in all likelihood contribute to the unsustainable depletion of the resources and acting contrary to the stock rebuilding efforts of the CCSBT.
777 CCSBT-EC3 Report, supra Ch I n 78, at 18 (paragraph 17).
the fishery.” Nonetheless there was recognition of South Africa’s right to an allocation by virtue of its catch history and the migration of SBT through its EEZ, and the Extended Commission “did not want to place South Africa in a position where it might fish in a manner inconsistent with the conservation and management measures of the CCSBT.” The offer of 30 tonnes was renewed which it believed sufficient for initial implementation of South Africa’s longline fishery as advised, with progress in development of the fishery to be monitored and future catch limits to be “established in the light of the management and conservation measures of the Extended Commission.” This delphic phrase could be interpreted as indicating either that the CCSBT was resigned to South African catch growing to 250 tonnes but could not yet bring itself to admit it, or that it thought the catch would not grow to that extent and would be prepared to offer a quota of roughly whatever the lower level might be at which it stabilised. The latter was more likely, as in 2005 South Africa made a revised request for 60 tonnes. Despite the “recent poor response… to requests from the Secretariat for catch information” and the low state of the stock, the CCSBT agreed to increase its offer to 45 tonnes on condition of South Africa formally becoming a cooperating non-member. South Africa subsequently did so, but the allocation it received in 2006 was only 40 tonnes for reasons not explained in the meeting report, though there is a hint that it may have been because of annoyance at South Africa’s non-attendance despite its new status, which meant that it was not in a position to resist the 5-tonne cut. In 2007 South Africa supplied its catch data for the years 1998 to 2004 showing modest catches of SBT

778 “Opening Statement by the Fishing Entity of Taiwan” (Attachment 4-2 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, supra Ch I n 34, 45.
779 CCSBT-EC3 Report, supra Ch I n 78, at 18 (paragraphs 18 and 19).
780 Ibid., at 22 (paragraph 40).
781 CCSBT-EC4 Report, supra Ch I n 248, at paragraph 72.
782 Ibid., at paragraphs 67 and 74.
783 CCSBT-EC5 Report, supra Ch I n 102, at 16 (paragraph 87).
784 Ibid., at 13 (paragraph 64) and 16 (paragraph 88).
(that of 2004 at 19 tonnes was the highest) and declared its willingness to provide further information.  

Because of the small allocation and the fact that most of the SBT it caught was predominantly bycatch from other fisheries, South Africa indicated that it could not give a commitment for the moment to accede to the 1993 Convention. Its status as cooperating non-member was renewed.

(b) The Philippines

The Philippines indicated in 2003 its intention to apply for cooperating non-member status as soon as the necessary resolution could be adopted. At the CCSBT’s 2004 Special Meeting, Japan advised that the Philippines was “almost ready to accept catch limits of 50 tonnes”; the Commission noted that the Philippines was fishing by agreement in Indonesia’s EEZ, and that its acquisition of that status would assist the CCSBT’s attempts to control fishing on the spawning ground.

At the Eleventh (2004) Meeting the Philippines joined the Extended Commission as a cooperating non-member and advised that it wished to develop its distant-water fleet further in future and become a full member of the Commission. Though accepting a catch limit of 50 tonnes, it “observed that rejection of its proposal to increase its catch limit to 70 tonnes must send a message to other developing countries about the Extended Commission’s willingness to embrace their legitimate aspirations.” Its status and quota were both renewed in 2005, and a report on the Philippines fishery was submitted. In 2006 its status was again renewed, but in the context of the poor

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785 CCSBT-EC6 Report, supra Ch I n 141, at 10 (paragraphs 56 and 57).
786 Attachment 5-2 to CCSBT-EC6 Report, supra Ch I n 243, at 2. It is unclear whether a cause-and-effect relationship between the two factors is being asserted.
787 CCSBT-EC6 Report, supra Ch I n 141, at 35 (paragraph 185).
788 Attachment 5-2 to CCSBT-EC2 Report, supra Ch I n 248, at 54.
789 Appendix 3 to CCSBTSM4 Report, supra n 678, at 117 (paragraph 17).
790 CCSBT-EC3 Report, supra Ch I n 78, at 18-19 (paragraphs 20 and 21). As for South Africa, there is no obstacle to its immediate accession to the 1993 Convention under Article 18.
791 Ibid., at 22 (paragraphs 39 and 41).
792 CCSBT-EC4 Report, supra Ch I n 248, at paragraphs 67 (quota) and 73 (status).
793 Ibid., Attachment 8-5 (“2005 Philippine Report to CCSBT”).
state of the stock and the voluntary reductions by Korea and Taiwan, though “sorry” to see its quota reduced, the Philippines accepted a cut to 45 tonnes, and in 2007 it requested and was granted renewal of its cooperating member status and 45-tonne quota. The issues raised by the Philippines’ intention to develop a fishery for SBT are similar to those of South Africa, except that it is not a coastal State on the SBT migratory path, and are considered below in Section E.

(c) The European Community

The European Community has had cooperating member status since 2006 with an allocation of 10 tonnes to cover a small amount of SBT taken as bycatch. It neither attended the 2007 meeting nor advised its catch of SBT, attracting criticism from the Secretariat for the “serous shortcomings with the level of cooperation” from it and prompting a decision for the Chair to write a “stern letter” requesting it to comply with its obligations and attend the annual meetings.

8 Resolution on flags of convenience

At its Fifth Meeting the CCSBT adopted a resolution on catches of SBT by fishing vessels flying flags of convenience in which it urged its Members to take measures, in accordance with their domestic laws and international law, to ensure that their nationals and companies do not engage in FOC [i.e. flag of convenience] fishing activities in an attempt to avoid compliance with

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794 CCSBT-EC5 Report, supra Ch I n 102, at 13 (paragraphs 57 and 64) and 16 (paragraph 85).
795 CCSBT-EC6 Report, supra Ch I n 141, at 34 (paragraphs 181 and 182).
796 For the history of this see supra Ch I n 252-253 and accompanying text.
797 CCSBT-EC6 Report, supra Ch I n 141, at 34 (paragraphs 180) and 35 (paragraph 183).
798 The resolution does not define this term, although the preamble cites concern “at the reflagging of fishing vessels by nationals and companies of Parties to [the 1993 Convention] in order to avoid compliance with international fisheries conservation and management measures”. It is usually understood to mean vessels flagged to States which are not members of the relevant fishery commission for the stock concerned and, the “genuine link between the State and the ship” required by UNCLOS Article 91(1) being tenuous or non-existent, take no interest in their fishing activity in general or their catch of species regulated by the commission in particular.
internationally agreed management measures including those under the Convention, including:

(a) monitoring and promoting, though the Commission, other regional fisheries management organisations and the FAO, the exchange of information on FOC fishing activities and on ownership of and investment in FOC vessels;

(b) preventing the transfer of vessels registered under their flags to the registers of countries which are not members of a regional fisheries management organisation and regulating the export of fishing vessels catching the stocks concerned;

(c) urging the flag States of FOC vessels to withdraw the registration of vessels owned by nationals and companies of [parties to the 1993 Convention];

(d) calling upon States and other fishing entities in which owners of FOC vessels reside or are incorporated, to repatriate those vessels (that is, to return them to their own registers);

(e) exploring effective vessel scrapping programs to ensure that fishing vessels surplus to their fishing requirements cannot become FOC vessels;

(f) controlling, regulating or preventing transshipment of catch from FOC vessels, including refusing to such vessels, where possible, entry into their ports;

(g) discouraging and prohibiting their nationals engaging in fishing activities on FOC vessels; and

(h) monitoring and discouraging commercial activities, including trade and transshipment, in respect of SBT caught by FOC vessels.\(^\text{799}\)

There appears to be a particular problem with Taiwanese interests owning a great many fishing vessels under flags of convenience. Taiwan said at the same meeting that it would make every effort to repatriate FOC fishing vessels built in Taiwan.\(^\text{800}\)

\(^{799}\) “Catches of Southern Bluefin Tuna by Flag Of Convenience Fishing Vessels” (Attachment 20 to CCSBT5(1) Report), in CCSBT Blue Book 2000, supra Ch II n 413, 49.

\(^{800}\) CCSBT5(1) Report, supra Ch II n 413, at 4. See also Taiwan’s statement to ICCAT in 1998, “Statement by the Observer from Chinese Taipei Concerning the Unreported and Unregulated Fishing Vessels in the Convention Area” (Appendix 7 to Report of the 7th Meeting of the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures (PWG) (hereinafter ICCAT-PWG7 Report; Annex 8 to ICCATSM11 Report)), in ICCAT Green Book 1999/1, supra n 576, 116 at 116-117:
At the CCSBT’s Seventh Meeting there was discussion of joint action being taken by Japan and Taiwan involving the return of Taiwan-built flag-of-convenience vessels to control under the Taiwan flag and the buyback and scrapping of second-hand flag-of-convenience vessels built in Japan.\textsuperscript{801} At the Fourth Special Meeting there was criticism of Taiwan’s unwillingness to act against vessels that were now registered in Indonesia. Australia, Japan and New Zealand all observed that this was contrary to Article 15, paragraphs 2 and 3 of the 1993 Convention as well as the UN Fish Stocks Agreement (not, however, specifying the provision of the latter they had in mind).\textsuperscript{802}

9 The Resolution on Cooperating Non-Members

At the CCSBT’s Tenth Meeting a resolution formalising the status of “co-operating non-member” was adopted,\textsuperscript{803} pursuant to which South Africa, the Philippines and the European Community have since acquired that status.\textsuperscript{804} Article 8 of the UN Fish Stocks Agreement can be seen as the inspiring force for this, even though it was not mentioned by Japan in calling for the CCSBT to “develop immediately a system

\textsuperscript{801} CCSBT7 Report, \textit{supra} Ch III n 449, at 6 (paragraph 28).
\textsuperscript{802} Appendix 3 to CCSBTS4M Report, \textit{supra} n 678, at 118 (paragraph 21).
\textsuperscript{803} “Resolution to Establish the Status of Co-operating Non-Member of the Extended Commission and the Extended Scientific Committee” (Attachment 7 to CCSBT-EC2 Report), in CCSBT Blue Book 2004, \textit{supra} Ch I n 32, 61.
\textsuperscript{804} \textit{Supra}, text at nn 782-783, 790 and 796 respectively.
where only countries which cooperate in the framework of CCSBT, can be permitted to catch SBT”. 805

As this 2003 resolution shares much wording with the resolution two years earlier that established the Extended Commission and Extended Scientific Committee and is fully analysed below, 806 it need not be discussed in detail. Rather, it suffices to list its salient features.

By paragraph 2, the Executive Secretary 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 CCSBT by acceding to the 1993 Convention, becoming a member of the Extended Commission or applying to that body for the status of a co-operating non-member.

Paragraph 4 requires an applicant State or entity to give a number of written commitments. Of these the most noteworthy are the commitments to “abide by conservation and management measures and all other decisions and resolutions adopted in accordance with the Convention” and, cryptically, to “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.” A possible explanation of the latter lies in paragraph 5, which states that “In deciding upon a total allowable catch and its allocation the Extended Commission may negotiate catch limits for Cooperating Non-Members. Cooperating Non-Members shall abide by any negotiated limit.” It is not clear from this whether the catch limit is to be negotiated solely among the Members of the Extended Commission and presented to the applicant on a take-it-or-leave-it basis, or negotiated with the applicant, or has been deliberately left vague to accommodate either possibility. The 800 tonnes

805 “Opening Statement by Japan” (Attachment 4-3 to CCSBT-EC2 Report), ibid., 46 at 47 (paragraph 5).
806 Infra, text following n 849.
“offered to Indonesia” under the 2003 TAC decision\textsuperscript{807} contains no clue as to the CCSBT’s intention in this regard.

Paragraph 7 then gives the State or entity so admitted the right “to participate actively in meetings of the Extended Commission, the Extended Scientific Committee and their subsidiary bodies, including, but not limited to, the right to make proposals and the right to speak, but not to vote”, and permits the Extended Commission to “restrict the participation of a cooperating non-member in a particular Agenda item.” Paragraph 11 amends the Extended Commission’s Rules of Procedure accordingly.

Paragraphs 6 and 8 provide for reaffirmation of these commitments by the Cooperating Non-Member at the Annual Meeting of the Extended Commission, which will determine whether the latter qualifies for continuation of its status by reference to its performance against the commitments. In this the cooperating non-member’s status is similar to that of a Cooperating Party under ICCAT’s 1997 resolution,\textsuperscript{808} and ranks below that of a member of the Extended Commission, which is not subjected to any such procedure. If the Extended Commission determines that a co-operating non-member has not fulfilled its commitments, paragraph 9 provides for the Extended Commission to “proceed in accordance with the 2000 Action Plan, or take other appropriate steps.”\textsuperscript{809}

Noting that China had begun catching SBT for export to Japan but had made known its intention not to accede to the 1993 Convention or apply to become a cooperating non-member under the 2003 Resolution, and that Spain was reported to have started a program of exploratory fishing on the SBT fishing grounds, in order to avoid an ad hoc approach to dealing with such issues the CCSBT instructed its Secretariat in

\textsuperscript{807} CCSBT-EC2 Report, \textit{supra} Ch II n 353, at 24 (paragraph 51).
\textsuperscript{808} \textit{Infra} n 820.
\textsuperscript{809} The 2000 Action Plan is discussed \textit{supra}, text at n n 727-737.
2004 to prepare draft criteria for admission of new members. Little appears to have come of this work: at the Eleventh Meeting later that year, the CCSBT merely expressed “concern” at China’s expanding fishing capacity and noted the consequent need to observe its future catches. In 2005 China was recorded as not answering correspondence, which resulted in the invocation of the Action Plan against it. The following year it did reply, but only note to that it had no interest in SBT except as a very minor bycatch.

C The entry of Taiwan into the CCSBT

1 Introduction

In addition to the generic problem of controlling non-member catch, in the case of Taiwan the CCSBT and its Members faced the specific issue of how they could have any confidence that Taiwan would adhere to any commitments they might secure from it, unless these were legally binding. Although not explicitly stated in any of the meeting reports, the underlying assumption of all three original Parties to the 1993 Convention appeared to be that their lack of diplomatic relations with the Taipei authorities implied the complete impossibility of formal international legal relations – an assumption whose soundness there only gradually became cause to question from the mid-1990s. Nor was the problem merely one-sided, for why should Taiwan give a binding commitment to States not prepared to regard their own undertakings to Taiwan as binding? This section recounts the history of how the CCSBT grappled with this issue, also dwelling briefly on a second possible alternative solution and offering a possible reason for why it was not followed, before turning to an examination of the provisions of the Resolution. The theme is largely one of separating the legal from the political element of this mix.

810 Appendix 3 to CCSBTSM4 Report, supra n 678, at 118 (paragraphs 23-25).
811 CCSBT-EC3 Report, supra Ch I n 78, at 19 (paragraph 22).
812 CCSBT-EC4 Report, supra Ch I n 248, at paragraphs 21 and 119.
813 CCSBT-EC5 Report, supra Ch I n 102, at 18 (paragraph 101).
The CCSBT’s consideration of the difficult issue of how to include Taiwan in its operations benefited from the previous work done on this by ICCAT, where the matter has a long history. ICCAT’s Standing Committee on Research and Statistics lamented in its report to the 1974 meeting of that Commission that:

the Committee’s scientific work was much hampered by the lack of certain data on the Chinese (Taiwan) fleet. It was, however, noted that some national scientists and the Secretariat staff have kept a good working relationship with Taiwanese fisheries representatives and have obtained important segments of data. The Committee wishes to draw…attention…to the fact that data from the Taiwanese fleet are very essential in carrying out its assignment, and that the problem cannot be solved by the Committee because of its political implications.814

This is no less true of CCSBT in relation to SBT. At its first meeting, [t]he Commission noted the desirability of Taiwan attending meetings of the Commission as an observer and of seeking the [sic] greater participation by Taiwan in the conservation and management activities of the Commission.

…

The observer from Taiwan indicated that Taiwan was prepared to take measures to collect further statistics on southern bluefin tuna and expected general preparedness on the part of Taiwan to cooperate on the southern bluefin tuna conservation and management process.815

Although Taiwan had attended the 1993 and 1994 trilateral scientific meetings as an observer,816 initially, in Japan’s view, the most that could be done was to request

815 CCSBT1 Report, supra Ch I n 273, at 4.
816 Supra n 681. Although reports of the proceedings of the trilateral meetings have not been published, summaries (including the fact of Taiwan’s attendance) were reported by Japan to ICCAT: see Report of the Meeting of the Standing Committee on Research and Statistics (SCRS) (Madrid, November 1-5, 1993) (Annex 23 to Proceedings of the Thirteenth Regular Meeting of the Commission, Madrid, November 8-12, 1993 (hereinafter ICCAT13 Report)), in ICCAT, Report for biennial period, 1992-93 Part II (1993) (hereinafter ICCAT Green Book 1994), 167 at 220; Report of the Meeting of the Standing Committee on Research and Statistics (SCRS)
Taiwan to cooperate with the CCSBT on an informal and voluntary basis. Australia and New Zealand both stressed the need to identify some mechanism which, “whilst still respecting the existing political situation with regard to Taiwan” would ensure that Taiwan committed itself to controlling the SBT operations of its fleet. They considered that Taiwan’s significant catch of SBT meant that it was essential that Taiwan be brought within the CCSBT regime in some effective way.  

For Taiwan, the overriding consideration was equality of treatment. For a number of reasons it did not achieve that within ICCAT. By the time of ICCAT’s 1998 meeting, however, Taiwan had acquired the status of a “cooperating fishing entity” under a Resolution adopted the previous year, having submitted an application for

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817 October 1994 Summary Record, supra n 685, at 4.  
818 See e.g. Taiwan’s objection to a paragraph in draft correspondence from ICCAT urging Taiwan to limit its bigeye tuna catch to 12,000 tonnes as “discriminatory and unfair” given “the absence of a general formulation announced by ICCAT”: “Statement by Taiwan to the Chairman’s Letter on Taiwanese Fishing Activities in the Atlantic Ocean & Mediterranean Sea” (Appendix 4 to ICCAT-PWG4 Report), in ICCAT Green Book 1996/1, supra Ch III n 534, 206. It also objected to a separate letter to a number of non-members including Taiwan which requested them to use the mean of their 1993 and 1994 catches of ABT in the Eastern Atlantic and Mediterranean rather than the 1994 catch as the base for the 25% reduction, as no such request was made to members whose catch had also increased in 1994: “Statement by Taiwan to the Chairman’s Letter to Non-Contracting Parties whose Bluefin Tuna Catches have Recently Increased Substantially in the Mediterranean Sea” (Appendix 6 to ICCAT-PWG4 Report), ibid., 207. But after Taiwan admitted to a much higher catch than it had previously reported, a 1997 resolution limited Taiwan’s catch of bigeye tuna to 16,500 tonnes in 1998: “Resolution by ICCAT on Chinese Taipei Bigeye Tuna Catches” (Annex 5-15 to ICCAT15 Report), in ICCAT Green Book 1998/1, supra Ch III n 574, 77. See also Taiwan’s protest at its non-invitation to an intersessional meeting: “Statement by Chinese Taipei to Panel 4” (Appendix 11 to Reports of the Meetings of Panels 1 to 4 (Annex 10 to ICCAT15 Report)), ibid., 215.

819 For a fuller recounting of the history of this issue in ICCAT, see Serdy, supra n 669, at 200-207.

820 Annex 5-17 to ICCAT15 Report, supra Ch III n 575, paragraph 2. The Resolution is reproduced in Serdy, supra n 669, at 204-205; traces of it may be seen in the CCSBT’s 2001
that status and the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures having approved the sending of a letter by the Secretariat informing it of this. The letter requested confirmation from Taiwan that it would abide by the relevant measures listed within it.\(^{821}\) Contingent on that confirmation, Taiwan received a “special allocation” of ABT in the Eastern Atlantic and Mediterranean for the years 1999 and 2000.\(^{822}\)

### 2 The obstacles

In theory the requirement that Taiwan must be a “State” in order to accede to the 1993 Convention need not be an obstacle to Taiwan’s accession, although in practice it can hardly avoid being so. The CCSBT has international legal personality which the Parties to the Convention are bound to recognise,\(^{823}\) and could itself in turn treat Taiwan as a State if it so wished. Yet in reality the CCSBT will not wish to do so, as it has no will independent of its Members – its decisions are adopted by consensus\(^{824}\) – and all of its Members maintain diplomatic relations with the People’s Republic of

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\(^{821}\) ICCAT-PWG7 Report, in ICCAT Green Book 1999/1, *supra* Ch III n 576, 99 at 101-103 (paragraphs 5.1, 5.4, 5.10 and 5.11); “Letter to Chinese Taipei Regarding Cooperating Status” (Appendix 4 to Annex 8 to ICCATSM11 Report), *ibid.*, 114-115.


\(^{823}\) The first sentence of Article 6(9) of the 1993 Convention provides that:

> The Commission shall have legal personality and shall enjoy in its relations with other international organisations and in the territories of the parties such legal capacity as may be necessary to perform its functions and achieve its ends.

The better view is that this relates to personality on the international rather than the domestic plane, since no purpose is served by the Commission having as many separate domestic law personalities as the Convention has parties; this is supported by the reference to relations with other international organisations, most of which are likely to be endowed with similar international legal personality.

\(^{824}\) 1993 Convention, *supra* Introduction n 5, Article 7.
China. Thus any acceptance of Taiwan as a State by the CCSBT could occur only with the knowledge and approval of all its Members.

For their part, the authorities on Taiwan regard themselves as a continuation of the Republic of China which has existed since 1912 but now controls only the island of Taiwan and some small outlying islands. This is the result of losing the civil war, which saw the establishment on 1 October 1949 of the People’s Republic by the victorious Communist side. Since 1971 it has been the People’s Republic that occupies the Chinese seat in the UN and maintains diplomatic relations with most other States. The number of States recognising the Republic of China fell steadily after 1949 but has recently achieved a measure of stability in the higher twenties. The three original Members of the CCSBT all recognised the People’s Republic and terminated their diplomatic relations with the Taipei authorities in the early 1970s, but continue to maintain economic and trade ties with Taiwan.

In formalising their previous informal cooperation through the 1993 Convention, the original Parties took care to permit the continuation of their nascent cooperation with Taiwan, through Article 14, paragraph 1:

The Commission may invite any State or entity not party to this Convention, whose nationals, residents or fishing vessels harvest southern bluefin tuna, and any coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, to send observers to meetings of the Commission and of the Scientific Committee.

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826 For present purposes it suffices to note that both the People’s Republic of China and the Republic of China claim to be the government of the whole territory of China and that the former regards the establishment by a State of diplomatic relations with the latter as incompatible with the maintenance of such relations with itself.
At the CCSBT’s 1996 Annual Meeting, the Taiwanese observer noted Taiwan’s right under the UN Fish Stocks Agreement to join regional management regimes. Presumably he had in mind Article 1 of the UN Fish Stocks Agreement, whose subparagraph 2(b) lists by cross-reference to Article 305 and Annex IX of UNCLOS a number of entities that are eligible, in addition to all States under Articles 37-39, to become party to that Agreement, after which paragraph 3 goes on to say that: “This Agreement applies mutatis mutandis to other fishing entities whose vessels fish on the high seas.” From here the putative chain of reasoning would move to the conclusion that Article 8, paragraph 3, by which relevant fisheries commissions must be open to the participation of States with a real interest in the fishery concerned, applies by extension to fishing entities. In addition, by Article 17, paragraph 3, such “fishing entities...which have...vessels in the relevant area...shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks.”

Although at this early stage the Members’ main preoccupation was the sensitivity of some them regarding nomenclature for Taiwan, by early 1998 the CCSBT saw the need to formalise cooperation between itself and Taiwan. Australia and New Zealand expressed a preference for a memorandum of understanding, while Japan stated that “due to the sensitive nature of its relationship with Taiwan” it needed further time to decide on the appropriate form of instrument. At the Fifth Meeting the following year, Japan drew the other Members’ attention to ICCAT’s 1997 resolution by which “Any non-contracting party, entity or fishing entity which seeks to be accorded Cooperating Party, Entity or Fishing Entity status shall apply to the

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827 CCSBT3(1) Report, supra Ch I n 102, at 24.
828 The received view is that the term “other fishing entity” in paragraph 3 of Article 1 is intended to refer to Taiwan: T. Treves, “The Settlement of Disputes According to the Straddling Stocks Agreement of 1995” in Boyle and Freestone (eds), supra Ch III n 496, 253 at 261; Juda, supra Ch III n 517, at 156.
830 CCSBT4(2) Report, supra n 683, at 59.
Executive Secretary [, giving a] firm commitment to respect the Commission’s conservation and management measures” and to supply all data to ICCAT that the Contracting Parties themselves had to supply.\(^{831}\)

At the same meeting Taiwan acknowledged that it was obliged to cooperate with the Parties to the 1993 Convention to manage the resource sustainably, but claimed it should have the same rights as those parties; in particular, it wished to accede “to become a full member” of the CCSBT.\(^{832}\) This theme continued in a bilateral meeting between Taiwan and CCSBT representatives at the second session of that Meeting. The CCSBT noted Taiwan’s interest in becoming a “full member”, but stated that the 1993 Convention did not allow for this. In this it was being somewhat disingenuous, for “any other State, whose vessels engage in fishing for southern bluefin tuna” may accede to the Convention under Article 18.\(^{833}\) Thus it is not the 1993 Convention itself but all its parties’ recognition of the People’s Republic of China’s sovereignty over Taiwan that was the real obstacle.\(^{834}\) The CCSBT in fact implicitly conceded this point as it went on to draw Taiwan’s attention to the “political reality” of the situation, with the parties “not in a position to have Taiwan accede...with member status”. Nonetheless it wished to conclude an arrangement that provided for Taiwan’s “cooperation with and participation in the work of the Commission,” to which end it was developing mechanisms that it wished to discuss further with Taiwan in due course. The Taiwanese representatives acknowledged the difficulties associated with accession to the 1993 Convention and said that, if this prevented Taiwan’s membership of the CCSBT, they were prepared to respond in a flexible manner, provided Taiwan would be treated “in an equitable manner with other members within the framework of the Commission”. Acknowledging this

\(^{831}\) Annex 5-17 to ICCAT15 Report, supra Ch III n 575, paragraph 2.

\(^{832}\) “Opening Statement from Taiwan” (Attachment 9 to CCSBT5(1) Report), in CCSBT Blue Book 2000, supra Ch II n 413, 22.

\(^{833}\) The text of Article 18 is reproduced supra, text between nn 672 and 673.

\(^{834}\) Supra, text at nn 824 and 826.
desire, the CCSBT averred that it aimed to “provide the fullest possible involvement, with similar privileges and responsibilities to those of members.”

Despite this apparent meeting of minds, at the start of the CCSBT’s 1999 Annual Meeting Taiwan handed the Chair a letter applying for “contracting Party status to the [1993] Convention”, while conceding that an “arrangement…to make our Party status possible” that was “fair, workable and duly respecting Taiwan’s status” might be acceptable. It should be noted that in doing so Taiwan was not purporting to accede to the 1993 Convention; this would have required lodging an instrument of accession with Australia as depositary. It can, however, be taken as a request to its parties to amend Article 18 of the Convention so as to allow entities other than States to accede. It would be consonant with Article 1, paragraph 3 of the UN Fish Stocks Agreement, it is submitted, for, say, “a fishing entity to which Article 1 [of the Agreement] applies” to be eligible to accede to the 1993 Convention. Nor would it be out of step with wider developments relating to Taiwan’s fragmentary international legal personality, which provides an alternative route. Now that Taiwan is a Member of the WTO, States having accepted the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu as having sufficient international legal personality to accede to the Agreement Establishing the World Trade Organization

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835 Attachment G to CCSBT5(2) Report, supra n 721, at 89-90.
836 “Opening Statement by Taiwan” (Attachment H to CCSBT6(1) Report), in CCSBT Blue Book 2001, supra Ch I n 242, 27. See also CCSBTSM3 Report, supra n 683, at 109 (paragraph 8), where Taiwan said it was “looking forward to working on an equal footing with the Members of the Commission.” For similar statements uttered by Taiwan in other fisheries commissions see Serdy, supra n 669, at 202 (ICCAT) and 210 (Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean). By this time Taiwan had acquired cooperating fishing entity status in ICCAT: supra nn 820-822 and accompanying text.
837 See Article 20 of the 1993 Convention for the amendment procedure. Note that the European Community, though generally recognised as having international legal personality, is not a State and hence could not accede to the Convention under Article 18 in its present form.
under Article XII(1), Taiwan could become party to any fisheries treaty expressed to be open for signature or accession by “Members of the WTO”. 838

The drawback to this is that amending treaties takes time. With varying degrees of parliamentary scrutiny applying to multilateral treaties in all three original parties, it would also have provided ample opportunity for the People’s Republic of China to raise public objection if it wished. It is also possible that the Republic of Korea, which expressed its intention at the CCSBT’s November 2000 meeting to accede to the 1993 Convention, 839 might have done so before the amendment entered into force, in which case it too would need to accept the amendment. This might not be automatic given that the Korean authorities would only recently have taken the original Convention through their internal approval procedures and might be reluctant to do so again after only a short interval.

3 A possible solution not pursued

An alternative way of bringing Taiwan into the CCSBT as a Member is afforded by a curiosity in the drafting of the 1993 Convention, which, unlike most treaties creating fisheries commissions, does not provide for either the parties themselves or any of their individual delegates to be members of the CCSBT. 840 This is left to the Rules of Procedure. 841

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838 Taiwan has been a WTO member since 1 January 2002: see the WTO’s press release WTO doc Press/244 (18 September 2001), “WTO successfully concludes negotiations on entry of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” <www.wto.org/english/news_e/pres01_e/pr244_e.htm> and <www.wto.org/english/trade_memb_e/countries_e/chinese_taipei_e.htm> (visited on 13 June 2008). By necessary implication from paragraphs 1 and 2 of the Action Plan reproduced supra, text at n 708, the CCSBT itself saw Taiwan as early as 1997 as having sufficient personality to have “obligations” attributed to it.

839 Supra n 738 and accompanying text.

Given this, it might have been possible to amend the definition of “Member” in either of the ways described above in the context of Article 18 of the Convention.\textsuperscript{842} This would not be attended by any of the delays inherent in the equivalent treaty amendment. The Rules of Procedure prescribe no particular formal or procedural requirement for their own amendment. Yet this would be only a partial solution at best, for the Rules of Procedure must be subject to the 1993 Convention itself, and though Taiwan would be a Member of the CCSBT, it would still not be a party to the Convention. Hence any right or obligation the Convention assigns to a “Party” could not apply to Taiwan, even if the Rules of Procedure assign the right to a “Member”. That is, Taiwan would not be on a footing of equality with the other Members. An irreducible minimum of four such legal disabilities may be identified:

(a) Voting – Rule 7 of the Rules of Procedure gives each Member one vote, but by Article 7 of the 1993 Convention only Parties have the right to vote. The Rules are thus consistent with the Convention only if all Members are also Parties.

(b) Financial contribution – by Article 11, paragraph 2 of the 1993 Convention, 30 per cent of the costs of the CCSBT is split equally among the Parties and the remaining 70 per cent is assessed in proportion to the “nominal catch” of SBT

\textsuperscript{34}(4) of the Honolulu Convention, \textit{supra} Introduction n 8; Article 6(1) of the SEAFO Convention, \textit{supra} Ch III n 519. Earlier tuna commission treaties such as the Convention for the Establishment of an Inter-American Tropical Tuna Commission, \textit{supra} Ch I n 28, and the 1966 Convention, \textit{supra} Introduction n 6, do not rely on a concept of membership, although the home page of the commission created by the former lists 16 “member countries”: <\texttt{www.iattc.org/HomeENG.htm}> (visited on 13 June 2008) and Article X(2)(a) of the 1966 Convention provides that the basic fee for a Contracting Party’s “membership” of ICCAT is US$1,000 \textit{per annum}.\textsuperscript{841} Rule 1(1) provides in its first sentence that “Each Party to the [1993 Convention] shall be a member (Member) of the [CCSBT] and shall be represented in the Commission by not more than three delegates who may be accompanied by experts and advisers.” The Rules of Procedure as since amended may be seen at <\texttt{www.ccsbt.org/docs/pdf/about_the_commission/rules_of_the_commission.pdf}>.

\textsuperscript{842} \textit{Supra}, text at n 838.
by each of them. Were Taiwan to become a Member without being Party to the Convention, no annual contribution towards the Secretariat’s costs would be assessable against it. This could amount to a sizable subsidy by the other Members. If the CCSBT’s annual budget ran to $1 million and Taiwan became the fourth Member taking 11 per cent of the four-Member catch, it would avoid paying $152,000. While Taiwan could contribute by way of gift, as Article 11 does not limit the CCSBT’s sources of income to the Parties’ annual contributions, there would be no corresponding debt to the Commission. There are also other difficulties in applying the formula to a non-Party.

(c) Quorum – by Article 6, paragraph 7 of the 1993 Convention, two thirds of the parties constitute a quorum. The corresponding provision in the Rules of Procedure, Rule 2(4), substitutes “Members” for “Parties”. Once again it is not inconsistent with the Convention as long as all Members are Parties. If Taiwan were unable to be counted towards a quorum, the CCSBT could potentially be

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843 The meaning of this phrase is not defined. In practice the parties have taken it to mean the national allocation of each party forming part of the TAC decided each year up to 1997 by the CCSBT under Article 8(3)(b) of the 1993 Convention, with no subsequent adjustment among the parties on the basis of the actual catch of each discernible from the CCSBT’s reports. Curiously, while from 1998 to 2002 no TAC and national allocations were set by the CCSBT, the Secretariat continued to assess the Parties in proportion to the 1997 national allocations, even though in 1998 and 1999 Japan’s catch was significantly higher than its 1997 allocation, the difference being the catch from its experimental fishing programs which were the subject of the 1998-2001 dispute.

844 At the time the Resolution was being drafted, the Republic of Korea and Indonesia had not yet acceded to the 1993 Convention. In 2000 Taiwan’s catch of 1,448 tonnes was roughly 11% of the total of its own catch and that of the three original parties. Of the TAC of 14,030 tonnes adopted by the CCSBT in October 2003 – see supra Ch I n 276 and accompanying text – Taiwan’s share was 1,140 tonnes, or a little over 8%. The equivalent calculation in the current six-member Extended Commission, assuming a national allocation to Indonesia identical to the 750-tonne allowance it had before its accession – supra n 759 and accompanying text – reduces Taiwan’s share to approximately 7.7% and yields a subsidy to Taiwan of around $104,000.

845 This is not unusual, as such a limitation would also preclude the earning of bank interest.

846 See infra n 855.
quorate with only two out of its four Members present (or three out of five once the Republic of Korea had acceded to the 1993 Convention).

(d) Chairs of the CCSBT and of its Scientific Committee – Article 6, paragraph 4 provides that the Chair and Vice-Chair of the Commission shall be from different parties, while Article 9, paragraph 5 lays down the same rule for the Chair and Vice-Chair of the Scientific Committee. By necessary implication, it is submitted, a non-party to the Convention cannot supply the holder of any of these four offices. 847

While the CCSBT could have amended its Rules of Procedure so as to substitute “Party” for “Member” wherever the admission of Taiwan as a Member would have the effect of making the Rules inconsistent with the 1993 Convention, for the reason just outlined this would have created a second class of membership for Taiwan. This, going by its previous statements, 848 would have been unacceptable to it.

Instead, another more innovative vehicle was found. At its Seventh Meeting in April 2001 the CCSBT adopted a Resolution establishing an “Extended Commission” and “Extended Scientific Committee”. The text of the Resolution, and of the annexed Rules of Procedure for the Extended Commission, is set out in Appendix D. The next section analyses it in some detail.

4 Exegesis of the 2001 Resolution

It is evident that much care has gone into the drafting of this Resolution, which is far more comprehensive than the 1997 ICCAT resolution on which it is partly based. 849

847 Note that the position would be different if instead the rule were expressed as “Chair and Vice-Chair may not be from the same Party”. Article 8(2)(a) gives the CCSBT power to interpret the 1993 Convention, and the appointment of a South African national as Chair of the Scientific Committee – supra n 768 – depends on treating the rule in this way; no harm appears to be done to either Parties or non-parties by doing so in this instance.

848 Supra, text at nn 832-836.

849 Supra n 831.
The preamble states that, if the SBT stock is to be sustainably exploited, all those fishing it must cooperate through the CCSBT, then expresses the Commission’s wish that all States that fish for SBT should accede to the 1993 Convention if eligible, while “entities or fishing entities with vessels fishing for SBT” are encouraged to implement the CCSBT’s conservation and management measures.\footnote{Note that in the Preamble, and again in some of the operative paragraphs, the CCSBT has followed the 1997 ICCAT resolution’s false distinction between “entities” and “fishing entities” and perpetuated the error into which the latter Commission fell. Moreover, the 1993 Convention itself refers to “entities” \textit{simpliciter} by Article 15(1),\textbf{[t]he 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. [emphasis added]}}

Paragraph 1 establishes an Extended Commission for the Conservation of Southern Bluefin Tuna and an Extended Scientific Committee and provides that, as well as the Parties to the 1993 Convention, the Members of the Extended Commission include “any entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years”, once admitted by the Extended Commission under later paragraphs. Three years, though arbitrary, is more than enough to capture Taiwan. The opening words of the paragraph indicate that the CCSBT is acting under Article 8, paragraph 3(b) and Article 15, paragraph 4 of the 1993 Convention. While the former authorises the CCSBT to decide on binding measures “other” than a TAC and national allocations, in order to further the conservation, management and optimum utilisation of SBT, the focus of the latter, on deterring fishing by non-party States and entities, seems somewhat antagonistic towards Taiwan.

\textbf{[t]he 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. [emphasis added]}

In addition, paragraph 4 of the same article provides for cooperation among the Parties “to deter fishing activities for southern bluefin tuna by nationals, residents or vessels of any State or entity not party to this Convention” [emphasis added] where such activity could adversely affect the attainment of that objective. See also Article 14(1), text following n 680 \textit{supra}. Thus if \textit{arguendo} “fishing entities” are indeed creatures distinct from “entities”, then the CCSBT has exceeded its powers in so far as it purports to make provision for cooperation with the former.
Paragraph 2 directs the Extended Commission and Scientific Committee to perform the same tasks as their original counterparts, in particular deciding on TAC and its allocation among the Members, who, crucially for Taiwan, all have equal voting rights. All provisions of the 1993 Convention relating to the Commission and Scientific Committee proper – that is, Articles 6 to 9 – apply *mutatis mutandis* to their Extended versions, with two exceptions (paragraphs 9 and 10 of Article 6) that do not affect the equality principle.\(^{851}\) There is a non-binding mechanism for settling disputes concerning the interpretation or implementation of the Resolution in terms drawn from Article 33 of the Charter of the United Nations. In somewhat unclear terms, a dispute about the interpretation and implementation of the Resolution is defined to include disputes about the interpretation and implementation both of the articles of the 1993 Convention specified in the Resolution and of an Exchange of Letters for which paragraph 6 provides.\(^{852}\)

Paragraph 3 is a straightforward provision directing the CCSBT Secretariat to function as the Secretariat of the Extended Commission, so avoiding unnecessary duplication of administrative machinery.

With paragraph 4 the purpose behind the establishment of the Extended Commission and Extended Scientific Committee becomes clear. In order to include Taiwan in decision-making, that function of the CCSBT, from which Taiwan remains excluded, is essentially hived off to the Extended Commission, in which Taiwan has (from paragraph 2) an equal voice. Since it would be contrary to Article 8, paragraph 3 of the 1993 Convention for the CCSBT to abdicate completely its decision-making powers to the new body, it is necessary for its controlling role to be preserved, yet in such a way as to give Taiwan comfort that a decision of the Extended Commission, by which it is bound under paragraph 6, will as near to automatically as possible be

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\(^{851}\) These paragraphs respectively give the CCSBT legal personality and privileges and immunities and allow it to choose its headquarters.

\(^{852}\) Although this is not quite what the fourth sentence says, it does, with some sacrifice of clarity for brevity, appear to be its intent.
adopted subsequently by the Commission proper, so binding the Convention’s parties to the same decision. This is done by the device of having the Extended Commission report its decisions to the Commission. Decisions once reported are deemed adopted by the Commission proper unless reversed by it\textsuperscript{853} by the end of the meeting session. Of course, it would also be \textit{ultra vires} for the CCSBT to put it out of its own power to rescind the Resolution. Thus an additional non-binding clause (“should not be taken”) encourages “prior due deliberation” by the Extended Commission of any CCSBT decision “that affects the operation of the Extended Commission or the rights, obligations or status of any individual Member within [it]”.

Paragraph 5 establishes the initial Rules of Procedure for the Extended Commission in an Annex to the Resolution and leaves their future amendment in the hands of the Extended Commission itself. The Annex itself is wholly unremarkable.

By paragraph 6,

[a]ny entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, may express its willingness to the Executive Secretary of the Commission to become a member of the Extended Commission...In so doing, the applicant shall give...its firm commitment to respect the terms of the Convention and comply with such decisions of the Extended Commission as become decisions of the Commission [by] paragraph 4.

This last sentence ensures that the Parties proper cannot use the Extended Commission to impose a binding decision on national catch limits on the other Members and then sanctify by a CCSBT decision higher limits for themselves only.

Paragraph 7 states that if the Extended Commission decides to admit the applicant, it negotiate a catch level of SBT by the applicant pending the next decision of the CCSBT setting a total allowable catch and its allocation among the Members. This is formalised in an exchange of letters with the Executive Secretary by which the applicant assumes the status of Member of the Extended Commission.

\textsuperscript{853} It will be recalled that the CCSBT operates by consensus: 1993 Convention, Article 7.
Paragraph 8 allows the Extended Commission Members to be represented and speak as observers at meetings of the CCSBT and its subsidiary bodies, an added safeguard for Taiwan in ensuring that its procedural rights under paragraph 6 are respected.

By paragraph 9 the contributions to the Extended Commission’s annual budget of a Member not party to the 1993 Convention are determined by application mutatis mutandis of Article 11 of that Convention. In practice the contributions to the Commission proper of those Members that are parties are taken as satisfying at the same time their obligation in respect of the Extended Commission.

Superfluously, and perhaps serving only to betray the nervousness of its drafters, or their slavish deference to precedent, paragraph 10 provides that “The provisions of this Resolution relating to participation by entities or fishing entities in the operations of the Extended Commission are solely for the purposes of the Convention.”

Paragraph 11 makes consequential amendments to the CCSBT’s Rules of Procedure by including in the provisional agenda for each annual meeting approval of decisions taken by the Extended Commission.

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854 Article 11(2) provides that:

2. The contributions to the annual budget from each Party shall be calculated on the following basis:

(a) 30% of the budget shall be divided equally among all the Parties; and

(b) 70% of the budget shall be divided in proportion to the nominal catches of southern bluefin tuna among all the Parties.

855 Serdy, supra n 669, at 198n shows that, except in one particular circumstance unlikely to appeal to any Member but Taiwan, it is mathematically impossible for the respective proportions among Members specified in Article 11 to be followed at once in relation to both the full set of Extended Commission Members and the subset of those who are parties to the 1993 Convention.

856 Annex I to the Honolulu Convention, supra Introduction n 8, provides in paragraph 4 that “The provisions of this Annex relating to participation by fishing entities are solely for the purposes of this Convention.” Surely, however, one must regard with extreme scepticism the efficacy of any statement in a document to the effect that “this is not to be used a precedent”. Presumably whatever special circumstances led to the adoption of the provision in question in the first place would make the same solution equally acceptable to all concerned if they arose again.
5  Events subsequent to the passing of the Resolution

At the CCSBT’s Eighth Meeting in October 2001 Taiwan announced that it would apply to become a Member of the Extended Commission as soon as possible. The application of the “Fishing Entity of Taiwan” met with success and with a negotiated quota of 1,140 tonnes Taiwan took its place within the Extended Commission at the CCSBT’s Ninth Meeting in 2002. Reports of meetings of the Commission proper since 2002 are very short, but each with a very long attachment that is the report of the associated meeting of the Extended Commission. Similarly, reports of the Scientific Committee are near-hollow shells, with all its business beyond formalities now found in the appended reports of the Extended Scientific Committee.

The passage by the Extended Commission in 2003 of the resolution establishing the status of “Co-operating Non-Member”, and the fact that this new status is confined to the Extended Commission, demonstrate the degree to which the Extended Commission is now for practical purposes the central body within the framework of the 1993 Convention. Sometimes, however, this is obscured by failure to observe the legal niceties in the drafting of resolutions, attributable to use of precedents from other commissions without making the necessary changes to adapt them to the CCSBT framework.

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857 Attachment F to CCSBT8 Report, supra n 740.
858 CCSBT9 Report, in CCSBT Blue Book 2003, supra Ch I n 46, 1; CCSBT10 Report, in CCSBT Blue Book 2004, supra Ch I n 32, 1; CCSBTSM4 Report, in CCSBT Blue Book 2005; supra Ch I n 34, 101; CCSBT11 Report, supra n 683; CCSBT12 Report, supra Ch I n 248; CCSBT13 Report, supra Ch I n 102; CCSBT14 Report, supra Ch I n 141.
859 CCSBT-ESC1 Report, supra Ch I n 293; CCSBT-ESC2 Report, supra Ch I n 32; CCSBT-ESC3 Report, supra Ch I n 236; CCSBT-ESC4 Report, supra Ch I n 114; CCSBT-ESC5 Report, supra n 683; CCSBT-ESC6 Report, supra Ch I n 141.
860 Supra n 803.
861 For example in the resolution establishing the CCSBT Record of Vessels (Attachment 10 to CCSBT-EC2 Report, supra n 757, at 91), the Extended Commission describes itself in the preamble as acting “in accordance with paragraph 3(b) of Article 8 of the [1993] Convention”, even though for all Members of the Extended Commission but Taiwan, the obligations resulting
Formally Taiwan’s position remains one of dissatisfaction with its status and wanting the CCSBT to allow it to become a member of the Commission proper, but it is not pursuing the matter with any vigour.

There is also a question about Taiwan’s ability to host and chair meetings of the Extended Commission and subsidiary bodies of the CCSBT. On the rotation principle it was Taiwan’s turn to chair the Extended Commission in 2005, each of the other four Members having chaired the CCSBT in as many years (Japan 2001, Australia 2002, New Zealand 2003, Republic of Korea 2004). Evidently, however, there is still a degree of sensitivity about this: although Taiwan offered to host the 2004 management procedure workshop, it was held in Korea. Even so, the fact that Taiwan supplied the Vice-Chair of the Extended Commission in 2004 (though not of the Commission proper), which is also the usual precursor to chairing the following year, showed that Members were willing to adhere to this principle.

Accordingly, although the Twelfth Meeting was hosted and chaired by Japan, with Australia as Vice-Chair, Taiwan hosted and chaired the associated Extended Commission and Extended Scientific Commission meetings of 2005, as well as that from this Resolution flow from the omnibus approval decision of the Commission (CCSBT Report, supra n 858, at 3 (paragraph 5)), not that of the Extended Commission. The American spelling of “meters” and the reference to “Contracting Parties” in paragraph 1 suggest that an ICCAT resolution has been used as the template for this resolution: “Recommendation by ICCAT Concerning the Establishment of an ICCAT Record of Vessels over 24 Meters Authorized to Operate in the Convention Area” (Annex 8.22 to ICCATSM13 Report), in ICCAT Green Book 2003/1, supra Ch II n 427, 186.

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862 “Statement by the Fishing Entity of Taiwan to the Admission, Canberra October 15-18, 2002” (Attachment 1 to CCSBT-EC1 Report), in CCSBT Blue Book 2003, supra Ch I n 46, 30.

863 CCSBT, Report of the Second Meeting of the Management Procedure Workshop, 7-9 & 12, 14-15 April 2003, Queenstown, New Zealand (hereinafter CCSBT-MPW2 Report), in CCSBT Blue Book 2004, supra Ch I n 32, 239 at 250 (paragraph 48); CCSBT-MPW3 Report, supra Ch I n 306.

864 CCSBT-EC2 Report, supra Ch II n 353, at 28 (paragraph 81). The Vice-Chair of the Commission proper was nominated by Japan: CCSBT10 Report, supra n 858, at 3 (paragraph 7).

865 As decided in 2004: CCSBT11 Report, supra n 683, at 3 (paragraphs 6 and 7).
of the Stock Assessment Group and the 2006 meeting of the Ecologically Related Species Working Group. 866

6 Conclusions

The CCSBT’s 2001 Resolution which established the Extended Commission has proved to be an effective way of enticing Taiwan into the workings of the CCSBT and gaining its cooperation, despite what on the surface appeared to have been an unpromising legal basis on which to operate. Taiwan has been accepted by the CCSBT and its Members as having sufficient legal personality to be bound by obligations relating to its SBT fishing activities. In the light of the more significant treaty law steps taken seven months earlier (September 2000) to accommodate Taiwan in the WCPFC, and even more so in 2003 in the Inter-American Tropical Tuna Commission’s new Antigua Convention, 867 it may be concluded that neither the CCSBT nor Taiwan – nor, for that matter, China – has an interest in upsetting the mutually satisfactory arrangement reached through the 2001 Resolution.


867 Annex I to the Honolulu Convention, supra Introduction n 8, contemplates the delivery by Taiwan of a written instrument to the depositary, by which it “agree[s] to be bound by the regime established by this Convention” (paragraph 1), participates in the decision-making, and “shall comply with the obligations under this Convention” as a Member of the Commission (paragraph 2) and submits to “final and binding arbitration in accordance with the relevant rules of the Permanent Court of Arbitration” of disputes concerning the interpretation or application of the Convention (paragraph 3): Serdy, supra n 669, at 213. Taiwan (sub nomine Chinese Taipei) has “signed” the Antigua Convention in accordance with its terms and there is even provision for a procedure akin to ratification, apparently accepted without rancour by China: ibid. at 215 and sources there cited.
One note of caution should be sounded about the potential for conflict within the CCSBT were China to accede to the 1993 Convention, as on the face of Article 18 it is entitled to do, on the basis of catch of SBT taken by vessels flagged to Taiwan, as occurred in the IOTC. Nonetheless, Taiwan’s status as a Member of the Extended Commission is firmly grounded in the 2001 Resolution, about which there has been no protest by China. Nor is there any prospect of other Members wishing to rescind it in order to encourage to China to join, should such rescission be its price. With Taiwan a much more significant catcher of SBT than China, it seems reasonable to predict that, faced with a choice between including Taiwan at the cost of excluding China and vice versa, the other Members will opt for the former – at least as long as political factors extraneous to international fisheries policy can be kept at bay.

D  Legal aspects of documentation of trade in SBT

One of the difficulties posed by non-members of a fisheries commission catching any species is that they are under no obligation to provide catch and effort data to that commission. The duty in UNCLOS Article 119 to exchange data is a weak substitute and seldom observed. As a consequence, the scientists carrying out the periodic stock assessments need to make estimates of incomplete third-party catch data, which makes the resultant assessments all the more unreliable. Although the UN Fish Stocks Agreement places a duty on its parties to provide such data to the relevant commission, its utility as against non-parties is open to question, though

868  Ibid., at 208.

869  Supra Introduction n 4. Article 14, paragraph 1 is in the following terms:

States shall ensure that fishing vessels flying their flag provide such information as may be necessary in order to fulfil their obligations under this Agreement. To this end, States shall in accordance with Annex I:

(a) collect and exchange scientific, technical and statistical data with respect to fisheries for straddling fish stocks and highly migratory fish stocks;

(b) ensure that data are collected in sufficient detail to facilitate effective stock assessment and are provided in a timely manner to fulfil the requirements of subregional or regional fisheries management organizations or arrangements; and

(c) take appropriate measures to verify the accuracy of such data.
this is one of the provisions that may be susceptible of becoming customary international law in due course.

In the meantime, the commissions have little alternative to resorting to self-help. In the 1990s ICCAT, troubled by catch of ABT by non-members of that Commission, developed a Statistical Document Program whose centrepiece was a standard statistical document prescribed for use by exporters, “validated” by the flag State or entity of the vessel that caught the ABT.870

Article 3 of Annex I, headed “Basic fishery data”, provides that:

1. States shall collect and make available to the relevant subregional or regional fisheries management organization or arrangement the following types of data in sufficient detail to facilitate effective stock assessment in accordance with agreed procedures:

   (a) time series of catch and effort statistics by fishery and fleet;

   (b) total catch in number, nominal weight, or both, by species (both target and non-target) as is appropriate to each fishery. [Nominal weight is defined by the Food and Agriculture Organization of the United Nations as the live-weight equivalent of the landings];

   (c) discard statistics, including estimates where necessary, reported as number or nominal weight by species, as is appropriate to each fishery;

   (d) effort statistics appropriate to each fishing method; and

   (e) fishing location, date and time fished and other statistics on fishing operations as appropriate.

2. States shall also collect where appropriate and provide to the relevant subregional or regional fisheries management organization or arrangement information to support stock assessment, including:

   (a) composition of the catch according to length, weight and sex;

   (b) other biological information supporting stock assessments such as information on age, growth, recruitment, distribution and stock identity; and

   (c) other relevant research, including surveys of abundance, biomass surveys, hydro-acoustic surveys, research on environmental factors affecting stock abundance, and oceanographic and ecological studies.

870 On possible application of the document to trade in SBT, given that the 1966 Convention, supra Introduction n 6, covers all tunas in the Atlantic Ocean by virtue of the reference in Article IV(2)(b) to the “maintenance of the populations of tuna and tuna-like fishes in the Convention area” and that the early confusion over whether the reference to “all bluefin tuna” in “Recommendation by ICCAT Concerning the ICCAT Bluefin Tuna Statistical Document Program” (Annex 6 to ICCATSM8 Report), in ICCAT Green Book 1993, supra n
The 1992 SBT trilateral meeting was the first at which a certificate of origin scheme for SBT was discussed. The 1993 meeting considered the appropriateness of introducing a Statistical Document Program similar to that used by ICCAT. Japan advised that the ICCAT program was directed to identifying from which sub-stock (i.e. the Atlantic or Pacific Ocean) tuna was taken. As there is only one stock of SBT, Japan did not support the adoption of such a scheme at this stage. Nonetheless, all three States undertook to assess the merits of introducing a certificate of origin scheme for SBT before the next trilateral management meeting.

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687, 67 covers SBT as well as ABT has never been permanently settled, see Serdy, supra Ch III n 491, at 242. ICCAT has never adopted any SBT management measure, though occasionally its panel on temperate tunas, Panel 3, has called for copies of scientific reports produced by the principal States engaged in the SBT fishery. In 1976 the Panel agreed with the recommendation of the Standing Committee on Research and Statistics that past and future results of cooperative studies between Australian and Japanese scientists be made available to the Committee by its next meeting: Reports of the Meetings of Panels 1 Through 4 (Annex 5 to ICCATC4 Report), in ICCAT Green Book 1977, supra Ch I n 259, 54 at 60. In 1982 the Secretariat was requested to obtain from participants at the approaching first trilateral meeting copies of all scientific papers presented and conclusions reached: Reports of the Meetings of Panels 1–4 (Annex 8 to ICCATSM3 Report), in ICCAT Green Book 1983, supra Ch I n 204, 73 at 81-82. The only member of this panel not engaged in the SBT fishery that has occasionally expressed concrete views on it is the United States. In 1977 the US supported all SBT-related recommendations of the Standing Committee on Research and Statistics including the “halt in the further expansion of effort”, while in 1988 it voiced satisfaction with the reduction of the three-country catch to 17500 tonnes, but drew the Chairman’s attention to ICCAT’s continuing ability to take measures for SBT under the 1966 Convention: Reports of the Meetings of Panels 1–4 and Joint Meeting of Panels 1 and 4 (Annex 4 to ICCAT5 Report), in ICCAT Green Book 1978, supra Ch I n 191, 59 at 67; Reports of the Meetings of Panels 1–4 (Annex 6 to Proceedings of the Sixth Special Meeting of the Commission, Madrid, Spain, November 14–16, 1988), in ICCAT, Report for biennial period, 1988-89 Part I (1988), 59 at 66. In 1992 Japan notified ICCAT of improved statistical systems it had introduced to collect data on bluefin imports, the main improvement being the separation of ABT and SBT in the statistics: ICCATSM8 Report, in ICCAT Green Book 1993, supra n 687, 29 at 34.

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871 1992 Conclusion, supra Ch II n 350, at 4.
872 November 1993 Draft Summary Record, supra Ch I n 289, at 4.
1 The CCSBT Trade Information Scheme

At the CCSBT’s Fourth Meeting, Australia called for the immediate introduction of a program along the same lines to provide accurate information on origin and volume of SBT entering international trade. Further, a certification scheme should be developed by 30 November 1997 and implemented by 1 March 1999 as a necessary part of a coordinated approach to documenting and controlling rapidly expanding non-member catch. The Members made a “strong commitment to intersessional work, with the objective of evaluating such a scheme as soon as practicable”\textsuperscript{873} but when the meeting resumed some months later, Japan doubted the necessity for it, because, SBT being a single stock, there was no need to collect trade data by area, and some non-member catch was not traded internationally. The scheme would thus not be a panacea for non-member issues.\textsuperscript{874} New Zealand believed development of such a scheme was necessary to encourage accession or cooperation by non-members, consistent with the requirement in Article 15 of the 1993 Convention that parties discourage SBT fishing activities of non-members.\textsuperscript{875} Nevertheless Japan endorsed the establishment of a Working Group on this issue.

This Working Group met twice. At its first meeting it had before it a Secretariat document which indicated that, Japanese trade statistics apart, little SBT-specific statistical information was available.\textsuperscript{876} Japan explained the history, background and

\textsuperscript{873} CCSBT4(1) Report, \textit{supra} Ch I n 126, at 8.

\textsuperscript{874} CCSBT4(2) Report, \textit{supra} n 683, at 61.

\textsuperscript{875} \textit{Ibid.}, at 61-62. The “Action Plan Concerning Promotion of Accession to, and Cooperation with, CCSBT by Non-Member States and Entities” adopted at this meeting – \textit{supra} n 708 – stated \textit{inter alia} that “the Commission will consider a scheme to collect more accurate and comprehensive information on SBT fishing through trade, with a view to evaluating and designing such a scheme, and that a special working group for this purpose will be established.”

\textsuperscript{876} “Database Format Maintained in the Secretariat (Proposal by Australia)” (Attachment C to \textit{Report of the Peer Review Workshop, Second Part, 20 March 2000, Canberra, Australia} (hereinafter Peer Review Workshop Report \textit{bis})), in CCSBT Blue Book 2001, \textit{supra} Ch I n 242, 203. Those statistics themselves had only a short history, as until 1993 Japan’s import statistics included SBT in “other tuna species”: “Japan’s Proposal for Database Format Maintained in
practical implementation of the ICCAT Bluefin Tuna Statistical Document Program (including its own experiences in implementing its requirements) and described its import application form for ABT. The participants began work to evaluate and design such a scheme for the CCSBT that would be “transparent, non-discriminatory, administratively efficient and consistent with the Parties’ international obligations including under the GATT”, in essence adapting the ICCAT program to CCSBT requirements.877 At its Fifth Meeting the CCSBT drafted letters to non-members, with the July 1998 workshop report attached, advising that it was considering the establishment of a scheme to collect more accurate and comprehensive data on SBT fishing by monitoring trade in the species and seeking their understanding for the application of such a scheme and cooperation in its implementation once adopted.878

Based on text drafted by the second meeting of the Working Group in July 1999, a Trade Information Scheme was finally adopted by the CCSBT at its Sixth Meeting late that year, to come into operation on 1 June 2000.879

Early reports of the operation of the scheme were promising despite some teething troubles. It highlighted a link between Indonesian and Taiwanese fishing through the

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877 Report of the Trade Information Scheme Workshop, 8-10 July 1998, Tokyo, Japan, in CCSBT Blue Book 2000, supra Ch II n 413, 191 at 193 (paragraph 10).
878 “Elements for Letter to Non Members, Trade Certification Scheme” (Attachment 22 to CCSBT5(1) Report), ibid., 52.
879 CCSBT6(1) Report, supra Ch I n 219, at 4 (paragraph 18). The full details of the scheme are set out at 32 (Attachment M), but some of the text is square-bracketed, indicating that the points concerned were left by the parties to subsequent negotiation. When the meeting resumed some months later, the Executive Secretary advised that in the interim the details of the scheme had been sent to those non-members identified by Japan as having exported SBT to it within the last five years, and to other international fishery commissions. A finalised version of the scheme was then adopted: CCSBT6(2) Report, supra n 683, at 53 (paragraph 21); the full specification of the scheme is in “CCSBT Southern Bluefin Tuna Statistical Document Program” (Attachment J to CCSBT6(2) Report), in CCSBT Blue Book 2001, supra Ch I n 242, 77.
recording of over 1,800 tonnes of SBT imports into Japan from Taiwan, despite Taiwan’s voluntary restraint to 1,450 tonnes. Taiwan agreed to investigate this catch further, and appears to have initially accepted responsibility for the catch of Taiwan-owned vessels fishing in Indonesian waters in declaring catches for 1999 and 2000 of 1,787 tonnes and 1,689 tonnes respectively. At the following (Eighth) Meeting of the CCSBT, however, Taiwan reclassified the SBT caught by these vessels as unregulated Indonesian catch, as they were in fact flagged to Indonesia.

The meeting repeated the previous year’s concern that Taiwanese vessels were catching SBT under flags of convenience and at Taiwan’s “apparent inability to exert any control over these vessels, or to provide information concerning the number of vessels, or the flags that they flew.” Japan urged Taiwan to follow its example by making it illegal for its citizens to target SBT using a flag-of-convenience vessel.

2 Japan’s domestic catch data: a flaw in the Scheme?

A weakness of the Scheme is that does not apply to SBT caught on the high seas by Japanese vessels and landed by them in Japan, because this is not trade, a point

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880 CCSBT7 Report, supra Ch III n 449, at 6-7 (paragraphs 33-36).
881 Attachment F-5 to CCSBT7 Report, supra Ch I n 234, at 47.
882 CCSBT8 Report, supra Ch I n 30, at 66 (paragraph 39). The SBT catches by the Philippines and the Seychelles detected by the Scheme were also thought to be by Taiwanese-owned vessels operating under flags of convenience: ibid. at 71 (paragraph 90). The 1999 and 2000 catches have been reduced to 1513 and 1638 tonnes respectively in Attachment K-5 to CCSBT8 Report, supra Ch I n 231, at 138. The Scheme may in addition have been instrumental in exposing Taiwan’s use of a 5-year average: supra n 706. See also “Statement by Chinese Taipei Concerning Re-flagging of Flag of Convenience (FoC) Vessels” (Appendix 12 to Annex 7 to ICCAT16 Report), in ICCAT Green Book 2000/1, supra Ch I n 242, 133.
883 CCSBT8 Report, supra Ch I n 30, at 71 (paragraph 91).
confirmed by Japan in response to a query from Australia. While Australia reluctantly accepted this answer as correct, New Zealand advanced the position that, to be consistent with Article III of the GATT, under the Scheme Parties’ domestic catch must be subject to substantially equivalent reporting requirements. Yet this, it is submitted, is insupportable. This Article is directed, in the words of its heading, at ensuring “National Treatment on Internal Taxation and Regulation”, that is, non-discrimination against imported goods, once they have passed through the customs barrier, so that when a tariff is “bound” at a given level by a Contracting Party under Article II, paragraph 1, the resultant obligation not to raise it above that level is not circumvented by the imported product being subject to a higher rate of taxation or more exacting regulation than the like domestic product. In other words, Article III does not prohibit, as a condition of the importation through the customs barrier, more stringent documentary requirements for imported products than apply to domestic products. Since the Scheme’s requirements are imposed on SBT at the customs

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884 CCSBT6(1) Report, supra Ch I n 219, at 4 (paragraph 20). Serdy, supra Ch III n 448, points out at 91 that, although GATT (supra Introduction n 22) does not define the concept of importation, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, supra Introduction n 13, distinguishes it from “introduction from the sea”, which is defined by Article I(e) as “transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State”. In 2007 the ICCAT scheme for ABT on which this was modelled became a catch documentation program embracing non-traded catch also: Recommendation by ICCAT on an ICCAT Bluefin Tuna Catch Documentation Program, in “Recommendations Adopted by ICCAT in 2007” (Annex 5 to ICCAT20 Report), in ICCAT Green Book 2008/1, supra Ch III n 568, 149 at 160-169.

885 Supra Introduction n 22. The text of the relevant paragraph of GATT Article III reads:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

886 CCSBT6(1) Report, supra Ch I n 219, at 4-5 (paragraph 20).
barrier as a condition of their importation, they are not captured by the text of Article III. Were it otherwise, Article III would require that imported goods be completely freed from the burden of paperwork connected with the importation, since domestic products by definition need no such paperwork in order to enter internal trade.

It is also open to question how fatal this weakness this really is. All SBT on the Japanese market must either have been imported, in which they case are subject to the Scheme, or be the product of Japanese vessels’ catch. As confirmed by the 2006 revelations of overcatch, detected through discrepancies between market and import statistics for SBT in Japan, if the Scheme succeeds in eliminating these discrepancies for imported product, the cause of any remaining discrepancy is identified by process of elimination as Japan’s domestic catch of SBT. This is shown by Japan’s treatment of a shipment of SBT imported, according to its trade statistics, from China. The fish were captured by a Japanese vessel and processed in China by a Japanese company in a special export zone from which trade does not enter China’s own trade statistics as either imports or re-exports.  

Nonetheless, Japan agreed to apply voluntarily the provisions of the Scheme to fish landed by Japanese vessels using New Zealand quota under joint venture. 

Australia at the November 2000 Special Meeting tabled a paper arguing that the narrow definition of trade prevented the CCSBT from collecting (in the words of the Report of the July 1999 workshop) “information not currently available that can be

887 Appendix 2 to Attachment 8-3 to CCSBT-EC2 Report, supra n 765. It is doubtful, however, whether the admission of these fish into Japan without documentation on the basis of their non-traded status under Chinese law was really justified, as one would have expected Japan’s classification of them as imports to be decisive of the matter.

888 CCSBT6(1) Report, supra Ch I n 219, at 4 (paragraph 19) and “Arrangement for collecting information on Joint Venture operations” (Attachment N to CCSBT6(1) Report), in CCSBT Blue Book 2001, supra Ch I n 242, 42 at 42-43.

889 CCSBT doc CCSBT/0011/16, “Full implementation of the Commission for the Conservation of Southern Bluefin Tuna Trade Information Scheme/Statistical Document Program” (Attachment H to CCSBTSM3 Report), ibid., 130.
used to improve stock assessments.” It stated that “growing non-member catches and the possibility of an expansion in non-member markets for SBT make trade an inappropriate basis for collecting comprehensive information on catches of SBT”. Moreover, by deciding to provide voluntarily the like data for domestic commercial catch, the CCSBT would gain non-members’ confidence, raising the likelihood of their joining it. Less persuasively, the Australian paper said that without this step “it would be difficult to justify taking any action in respect of non-members that do not cooperate with the Commission’s conservation and management measures”, citing States’ obligation under UNCLOS Article 119 for their conservation measures not to discriminate in form or in fact against the fishermen of any State.\(^{890}\) It advocated the Patagonian toothfish scheme of the Commission for the Conservation of Antarctic Marine Living Resources\(^ {891}\) (CCAMLR) as the best model on which to base an expansion of the program, pointing out that, while trade-related, it was triggered at the point of landing or transhipment, all vessels of Parties fishing for toothfish being issued with forms on which to provide catch details at the point of landing.\(^ {892}\)

A working group formed at the CCSBT’s 2003 meeting noted in its report that the scheme had a “deficiency” in monitoring domestic consumption and trade of SBT,\(^ {890}\) There being no such measure relating specifically to non-traded catch, this may have been a hint that Australia would oppose trade measures under the Action Plan unless Japan agreed to supply domestic catch data.


\(^{892}\) Attachment H to CCSBTSM3 Report, supra n 889, at 131. First embodied in Conservation Measure 147/XIX: Provisions to Ensure Compliance with CCAMLR Conservation Measures by Vessels, Including Cooperation between Contracting Parties, the CCAMLR scheme is now renumbered and retitled as Convention Measure 10-05 (2006), Catch Documentation Scheme for *Dissostichus spp.* (see <www.ccamlr.org/pu/e/e_pubs/cm/07-08/10-05.pdf>, visited on 13 June 2008), which obliges Contracting Parties *inter alia* to inspect vessels that intend to land or transship toothfish in their ports, deny vessels access to port unless they make a written declaration that they have not engaged in or supported illegal, unregulated or unreported fishing in CCAMLR’s Convention Area, and deny landing or transshipment of fish if there is evidence that the vessel has fished in contravention of CCAMLR conservation measures.
and recommended that the Commission investigate strategies “to best characterise” such catch and trade.\(^{893}\) The report observed that SBT markets were developing in a number of countries including the United States, Hong Kong, Korea and the Philippines, while Taiwan advised that it had begun actively promoting domestic consumption of SBT in view of the glutted Japanese market, and the Indonesian catch monitoring workshop had indicated that some of Indonesia’s catch went to Europe. It therefore recommended that the forms should be amended to require disclosure of the export destination.\(^{894}\)

### 3 GATT Implications of the Scheme

In their 1992 joint paper to ICCAT on a Certificate of Origin Program for Bluefin Tuna, Canada, Japan and the United States stated that the program can be implemented consistent with obligations under the General Agreement on Trade and Tariffs [sic], by reason that the purpose of this program is to collect catch information necessary for the proper conservation and management of Atlantic bluefin tuna, and that requirement of submission of certificate of origin is “strictly” indispensable for this purpose.\(^{895}\)

That doubts about this were entertained by many States is shown by the fate of a Japanese draft resolution in ICCAT which had a provision concerning prohibition of entry into port. At the meeting of the subsidiary body where it was introduced, Spain, Portugal and France all said it was contrary to GATT, and Portugal also


\(^{894}\) The Extended Commission accepted the recommendation: CCSBT-EC2 Report, *supra* Ch II n 353, at 26 (paragraph 61).

considered that it was contrary to UNCLOS. In response to Canada’s denial of this and the United States’ querying of it, Spain explained that the unilateral nature of the measure was the basis of its reasoning. The provision in question was amended so as to authorise refusal of fishing access in the Contracting Parties’ EEZs, but even this was omitted from the resolution ultimately adopted.

Despite its confidence in 1992, part of the reason for Japan’s reticence in approving in principle the idea of a trade information scheme in the CCSBT was its worry that it would be vulnerable to challenge in the WTO, given that neither the United States nor the European Community was a Member of the CCSBT, whereas both belonged to ICCAT. This objection is however without substance.

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896 Report of the Second Meeting of the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures (Tokyo, Japan - April 19-21, 1994) (Annex 15 to ICCATSM9 Report), in ICCAT Green Book 1995/1, supra Ch III n 613, 105 at 111 (paragraphs 8b.6 (Spain), 8b.7 (France) and 8b.8 (Portugal)).

897 Ibid., at 112 (paragraphs 8b.9 (Canada), 8b.11 (United States) and 8b.12 (Spain)). In later years, however, there was no questioning of Iceland’s reference to its refusal of port access to non-member vessels for landing ABT to highlight its willingness to cooperate with ICCAT despite not being willing to join without recognition of its right to a reasonable quota as a coastal State: see e.g. “Opening Statement by the Observer from Iceland”, in Appendix 3 to Annex 6 to ICCAT16 Report, supra Ch II n 427, at 107.

898 “Draft Resolution by ICCAT to Ensure Compliance with ICCAT Conservation and Management Measures” (Appendix 7 to Annex 15 to ICCATSM9 Report), in ICCAT Green Book 1995/1, supra Ch III n 613, 124 at 125 (paragraph k).

899 Resolution by ICCAT on Compliance with the ICCAT Conservation and Management Measures (Annex 13 to ICCATSM9 Report), in ICCAT Green Book 1995/1, supra Ch III n 613, 100.

900 Since 1986 Australia at times, and New Zealand once, have attended meetings as observers, after the Chairman’s suggestion the previous year that they be invited to attend in that capacity given their exploitation of SBT: Proceedings of the Ninth Regular Meeting of the Commission, Palma de Mallorca, Spain, November 13-19, 1985, in ICCAT, Report for biennial period, 1984-85 (Part II 1985), 33 at 37; “List of Participants” (Annex 2 to Proceedings of the Fifth Special Meeting of the Commission, Madrid, Spain, November 12-18, 1986) in ICCAT, Report for biennial period, 1986-87 Part I (1986), 58 at 64; “ICCAT Working Group on Vessel Monitoring List of Participants” (Appendix 2 to Annex 6-2 to ICCAT14 Report), in ICCAT.
Though no WTO Member has ever litigated before a panel an exclusion of its vessels from ports for failure to comply with conservation measures of a fishery commission, in a dispute over swordfish in the south-east Pacific, the European Community has challenged Chile’s closure of its ports to Spanish vessels engaging in that fishery. Under a temporary settlement the dispute has not been heard, but is still on foot in the WTO. While a thorough analysis of the applicable GATT provisions is beyond the scope of this work, it may be noted that the usual approach to interaction between fisheries measures and the GATT is to assume that the measure breaches the latter and then turn to its Article XX(g), a defence for measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. By the chapeau of Article XX, this defence is “[s]ubject to the requirement that such


The Members comprise Albania, Algeria, Angola, Barbados, Belize, Brazil, Canada, Cape Verde, China, Côte d’Ivoire, Croatia, Egypt, Equatorial Guinea, the European Community, France (St. Pierre et Miquelon), Gabon, Ghana, Guatemala, Guinea, Honduras, Iceland, Japan, Korea (Republic of), Libya, Mexico, Morocco, Namibia, Nicaragua, Nigeria, Norway, Panama, the Philippines, Russia, Saint Vincent and the Grenadines, São Tomé e Príncipe, Senegal, South Africa, Syria, Trinidad & Tobago, Tunisia, Turkey, United Kingdom (Anguilla, Bermuda, St. Helena, Turks and Caicos), United States, Uruguay, Vanuatu and Venezuela. Other members of ICCAT in the past have been Cuba (1975 to 1991) and Benin (1978 to 1994). France, Spain, Portugal, the United Kingdom and Italy withdrew from ICCAT following the 1997 accession of the European Community, as did Cyprus and Malta in 2004, though France and the United Kingdom shortly afterwards rejoined it on behalf of their overseas territories outside the Community, listed above: see <www.iccat.int/en/contracting.htm>, visited on 2 November 2008.

See M.A. Orellana, “The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO”, (2002) 71 Nordic Journal of International Law 55 at 65-69 and Serdy, supra Ch III n 448, at 87-88. For the latest ITLOS Order continuing the suspension of the parallel proceedings before a Special Chamber of ITLOS and noting that the parties intend to try to settle the dispute during 2008 see Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 30 November 2007, ITLOS Reports 2005-2007, p.128.

Supra Introduction n 22.
measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”.

The defensibility under GATT of a measure pursuant to what the WTO calls a multilateral environmental agreement\textsuperscript{903} depends neither on the number of States that are party to the latter nor on their share of overall world trade, but in the case of the 1993 Convention may be affected by the parties’ collective share of the SBT market and fishery. Even with only three CCSBT Members at the time, they accounted for almost all the market and most of the fishery, much of the remainder attributable to Korea, Taiwan and Indonesia, which were in dialogue of varying degrees of intensity with the CCSBT and did not dispute its authority to regulate the stock. The United States and (until recently) the European Community have stayed outside the CCSBT because their vessels do not target SBT and their bycatch of it is either negligible or nil. As long as they and other potential participants are not denied a \textit{a priori} either membership or the necessary statistical documents, it is hard to see how conditioning of access to Members’ markets for imported SBT on presentation of a valid such document amounts to “arbitrary or unjustifiable discrimination” in the sense of Article XX of GATT.\textsuperscript{904} Nonetheless, although the clear conservation motive and information-gathering character of the Scheme would probably protect it against a charge of being a “disguised restriction on trade”, it is not altogether certain that this would extend to an actual import ban under the Action Plan. With the parties openly on record as wanting to protect their share of the catch of SBT, conceivably a WTO dispute settlement panel could view this as a surrogate for market share, given that the latter must ultimately depend on the former,\textsuperscript{905} and the wording of the phrase is on its face wide enough to encompass that. No obvious line can be drawn between the actions of a government aimed at conserving for future generations a straddling

\textsuperscript{903}This terminology is criticised in Serdy, \textit{supra} Ch III n 448, at 114n.

\textsuperscript{904}Note, however, that the CCSBT’s misrepresentation of the condition for accession to the 1993 Convention may undermine its own case in this regard: \textit{supra}, text at nn 677-680.

\textsuperscript{905}See on this point Serdy, \textit{supra} Ch III n 448, at 103-104.
or highly migratory fish stock exploited by its fleet, and actions aimed at bolstering
the profitability of its own fleet at the expense of a possibly more efficient foreign
fleet. Either purpose might equally well be served by a given measure.  
Ultimately
it may hinge on the onus of proof, which lies on the party invoking an article XX
defence. The question of trade restrictions imposed by members of a fishery
commission against non-members is considered more fully in the next sub-section.

4 Trade restrictions on non-members

At the CCSBT’s Tenth Meeting Australia and New Zealand renewed their call for a
catch and information documentation scheme that was not restricted to traded catch.
Australia urged members to report their catch to the Secretariat on a monthly basis.
The Commission asked the Secretariat to prepare intersessionally a report on catch
monitoring options.

The nub of the issue is the permissibility under GATT of fisheries commissions
omitting to subject their own members as well as non-members to trade sanctions for
objectively identical behaviour. In 1997, possibly fearing such sanctions by ICCAT
for its catch of ABT in its own EEZ, Mexico, present as an observer, had this to say:

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906 As related by L. de La Fayette, “Access to Ports in International Law” (1996) 11 IJMCL 1 at 20, in 1989 the EC requested consultations with Canada under Article XXII of GATT, supra Introduction n 22, objecting to two provisions of Canada’s port access policy providing for denial of access to foreign vessels competing for the same species as Canadian vessels, and for grant of access where economic benefit for Canada would ensue or the vessels were from countries with which Canada had “favourable fishery relations”, a determination apparently left to officials’ virtually unfettered discretion. The EC did not, however, object to a third aspect of the policy which provided for closure of ports for conservation reasons to vessels engaged in overfishing of depleted stocks, and did not pursue the case once the two aspects of the Canadian policy to which it objected were removed.

907 The WTO Appellate Body confirmed in European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WTO doc WT/DS246/AB/R (7 April 2004) at 38 (paragraph 95) that “[i]t is well-established that Article XX(g) is an exception in relation to which the responding party bears the burden of proof” (italics in original).

908 CCSBT-EC2 Report, supra Ch II n 353, at 25-26 (paragraphs 59 and 62).
...it is worrying...that the fleets under the jurisdiction of ICCAT Contracting Parties do not fully comply with the management and conservation measures recommended and agreed by the Commission...It also seems inappropriate that, faced with this situation, it is recommended that sanctions be applied to non-Contracting Parties for not cooperating with the Commission by not complying with its recommendations. Does this mean that compliance with responsible management of living marine resources can be evaluated in different ways depending on whether or nor States are members of international organizations? In keeping with international law...compliance with such measures by non-Contracting Parties should be demanded once the Parties of the organization itself comply with the conservation and management measures they have adopted, otherwise, this will be interpreted as a double standard.909

It is submitted that the Article XX chapeau requirement to avoid arbitrary and unjustifiable discrimination between countries where the same conditions prevail would be impossible to meet if the commission concerned were not willing to subject its own members to the same restraints it wished to impose on others. Seemingly in recognition of this, ICCAT imposed trade restrictions in certain species on Equatorial Guinea, one of its own members.910

909 “Statement by Mexico on Cooperation with ICCAT” (Annex 6-5 to ICCAT15 Report), in ICCAT Green Book 1998/1, supra Ch III n 574, at 87. See also Brazil’s criticism of the extension to the South Atlantic swordfish stock of compliance procedures applied to certain North Atlantic stocks as discriminatory, allowing coastal developing States that export swordfish to be punished, but not developed importers: ICCAT15 Report, ibid., 38 (paragraph 10.8).

910 Recommendation by ICCAT regarding Equatorial Guinea pursuant to the 1996 “Recommendation regarding compliance in the bluefin tuna and North Atlantic swordfish fisheries” [99-10] (Annex 5-10 to ICCAT16 Report), in ICCAT Green Book 2000/1, supra Ch I n 242, 79; extended to bigeye tuna by Recommendation by ICCAT Regarding Equatorial Guinea pursuant to the 1998 Resolution Concerning the Unreported and Unregulated Catches of Tuna by Large-Scale Logline Vessels in The Convention Area [00-16] (Annex 7-16 to ICCATSM12 Report), in ICCAT Green Book 2001/1, Ch III n 571, 151 at 152 (paragraph 1). The sanctions were lifted in 2004 by Recommendation by ICCAT concerning the lifting of trade sanctions against Equatorial Guinea [04-13], in “Recommendations Adopted by ICCAT in 2004” (Annex 5 to Proceedings of the 14th Special Meeting of the International Commission for the Conservation of Atlantic Tunas (New Orleans, USA - November 15 to 21, 2004) (hereinafter ICCATSM14
In the CCSBT the problem has been less one of indifference to or wilful disregard by Members of their catch limits (as opposed to marginal overcatch, which has been compensated for by reduced catch in subsequent years\(^911\)), than the absence of a TAC altogether from 1998 to 2003. Such limits as the Members then imposed on themselves were voluntary.

Basing unilateral trade restrictions on such limits, is not, however, fatal to them. In *United States — Importation of Certain Shrimp and Shrimp Products*, the WTO’s Appellate Body ultimately upheld on the basis of Article XX(g) a redesigned unilateral United States measure aimed at reducing bycatch of turtles in shrimp fisheries\(^912\) after it found the application of the original one discriminated arbitrarily and unjustifiably between countries where the same conditions prevailed.\(^913\) If the importing State’s vessels are subject to a voluntary limit, that is, one that the State has imposed on itself, and it admits the importation of the species only from other members of the fishery commission that have given like self-limiting undertakings, then the fact that there is no overarching limitation binding in international law should not be an obstacle to the exclusion of imports from States that have accepted no limitation at all. It cannot be assumed, of course, that this condition invariably will be satisfied, nor will it be effective against a State that does have a voluntary limit of its own, but one that is higher than the relevant fishery commission accepts.

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\(^911\) See *infra* Ch V, text at nn 1108-1115.


E  The CCSBT “closed shop” and the new abstention

Commissions refusing to admit new entrants with a “real interest” in an international fishery in defiance of Article 8, paragraph 3 of the UN Fish Stocks Agreement have been described by Rayfuse as “closed shops”. The CCSBT by Article 18 of the 1993 Convention is no closed shop, yet by its statements appears determined to act as far as possible as though it were. The modern version of the abstention principle, as described in the previous chapter, rests on just such attempts to deprive potential new entrants of the opportunity to establish a real interest in a fishery.

Though limitation of entry may be a necessary condition for a given stock to recover, it should be recalled that the context for the abstention doctrine to apply in the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean was a fishery being exploited at an intensity approximating that generating catch of the order of the MSY. To apply it to a depleted stock such as SBT, however, is in a distributive justice sense much less defensible, even though limited entry is no less necessary. As the new entrants from New Zealand onwards were not responsible for the depletion of the SBT stock, on what basis can those among them who can fish for it only on the high seas be expected to refrain from exercising their residual UNCLOS Article 116 right to do so? In particular, if as a result of its depleted state the current replacement yield of the stock is well below the theoretical maximum sustainable yield, do the “ins” collectively have the right to prevent the stock from recovering to the biomass corresponding to that theoretical maximum by taking the entire replacement yield, as has been the practice in CCSBT?

It is now over a quarter of a century since the Third UN Conference on the Law of the Sea adopted Article 61, paragraph 3 and Article 119, paragraph 1(a) calling for stocks to be maintained at the MSY-producing biomass as qualified by economic and

915 See text accompanying n 680 supra.
916 Supra Ch III n 536.
environmental factors, and for depleted stocks to be restored to that level. A necessary consequence of this is that States, whether fishing in their own EEZs or on the high seas, may not collude directly *inter se* or through a commission either to deplete the stock or to delay its rebuilding at the expense of other interested States.

It is submitted that the exclusion of “outs” innocent of responsibility for depleting the stock ought to be permitted only while the excluding States are themselves exercising catch restraint sufficient to allow the stock to return to the mandated biomass within a reasonable time. In the extreme case, if overfishing of a given stock has induced an equilibrium shift in the ecosystem such that a return to that level is no longer possible, as may be the case for cod in the North-West Atlantic, it cannot be reconciled with any notion of equity for an aspiring new entrant to be permanently excluded from the smaller fishery the stock now supports simply because a once much larger one had been depleted by others. Although no timeframe is specified for doing so, the task cannot be postponed indefinitely for the convenience of the States currently exploiting the depleted stock, and in 2002 the World Summit on Sustainable Development set a target date of 2015:

31. To achieve sustainable fisheries, the following actions are required at all levels:

(a) Maintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015;\(^\text{917}\)

This seems to have had no effect on the CCSBT, however, which the previous year had been advised by the Chair of its Scientific Committee that the 2000 catch level of 15579 tonnes appeared to be roughly close to the replacement yield, with equal probabilities of the stock increasing or decreasing at this harvest level. Further, while no effort had yet been made to estimate the harvest level required to achieve

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recovery of the parental stock to its 1980 level by 2020, most of the assessment results indicated low probability of attaining this target at that catch level. \(^{918}\) New Zealand stated that “[t]he logical and responsible conclusion we draw from this is that catch levels must be reduced in order to achieve our stated management objectives”, \(^{919}\) reasoning that cannot be faulted, but the debate centred instead on Japan’s insistence on redistributing to existing Members part of the “spare quota” it identified from overestimates of Indonesia’s catch. \(^{920}\)

The TAC and national allocations ultimately adopted in 2003 also made no attempt at reducing the overall catch of the existing Members, the CCSBT preferring to postpone any concerted effort to rebuild the stock until the adoption of the management strategy, then scheduled for 2004. The fact that attainment of the Johannesburg target date of 2015 might not be possible for SBT even with zero catch \(^{921}\) calls for the substitution of a later date, not for abandoning the effort entirely. As a result, the CCSBT continues to have a difficult task ahead of it in accommodating the interests of new entrants, and its handling of the question to date is open to criticism. But the criticisms made are not always well targeted.

At the CCSBT’s 2003 Meeting the Philippines asked for “the usual consideration and concessions granted developing countries that have been accepted and recognized” in other fishery commissions and in UNCLOS, but without specifying what these were. With little regard for the history of Australia and New Zealand in the fishery, it argued that the original Members “ranged the high seas in exercise of the freedom to fish”. Given the rhetoric of other Members, however, it appears to have been on

\(^{918}\) CCSBT8 Report, *supra* Ch I n 30, at 67 (paragraph 43).

\(^{919}\) “New Zealand Statement” (Attachment N-4 to CCSBT8 Report), in CCSBT Blue Book 2002, *supra* Ch I n 30, 147.

\(^{920}\) For the summary of the debate see *infra* Appendix A, text at nn 1475-1477.

\(^{921}\) This follows doubly *a fortiori* from the statement in CCSBT-MPW2 Report, *supra* n 863, at 244 (paragraph 22) that even under zero catch recovery of the parental biomass to its 1980 level by 2020 is not guaranteed.
stronger ground, if somewhat exaggerating, in indicating that, with the admission of Korea and Taiwan the CCSBT “became a closed club”, treating “[o]utsiders wishing to join in, invariably developing economies…almost…as “gate crashers”, not exercising the freedom to fish in the high seas, but rather as villains out to deprive the participating States of their catch entitlement.”

The responses of the CCSBT to its newest coastal State member and the other coastal State still outside the Commission give varying degrees of encouragement. The special position of Indonesia as a developing coastal State has long been recognised, and when in 2003 the CCSBT for the first time since 1997 set a TAC, it reserved 800 tonnes of quota for Indonesia. On the other hand, Indonesia as the State in whose EEZ the stock spawns would have reason to be dissatisfied with an allocation of less than 6 per cent of the TAC, which this represents. In 1980 Gulland suggested that some of the reasons for favouring the State of origin’s complete control over anadromous stocks, for which UNCLOS Article 66 now provides, may be at least partly replicated in other stocks:

One major reason why it is accepted that the coastal state concerned should have authority over salmon and other anadromous species is that without such acceptance the states concerned would have little or no interest in maintaining suitable conditions, and in due course there would be few if any salmon for anyone to catch. Similar considerations can apply to purely marine species. A country is likely to expect a large allocation of a stock when the productivity of the stock is critically dependent on conditions in the EEZ of that country, especially when activities by the country can affect those conditions. For example, many offshore stocks have their nursery grounds in inshore areas – lagoons and estuaries, etc. – which can be seriously affected by land-reclamation, cutting of mangroves, etc. If a country controls these activities for the benefit of the fisheries it would expect a substantial [sic] allocation, regardless of the location of the fishing grounds, especially if these controls cause losses to other sectors of the national economy.

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922 Attachment 5-2 to CCSBT-EC2 Report, supra Ch I n 248, at 54-55.
923 CCSBT-EC2 Report, supra Ch II n 353, at 24 (paragraph 51).
The factors that might be taken into consideration in setting allocations will include the position of the spawning areas, the nursery grounds, and the main feeding grounds of the adult fish, as well as the areas where the actual catches are taken.  

It thus may well be that 800 tonnes will not be the CCSBT’s last word if Indonesia, now a full member, can provide evidence that it has developed its fishing technology and management tools to a point where it is realistic to expect that it will not habitually exceed whatever national allocation it may be assigned.

South Africa is a different matter. Japan’s preference has been to treat the size of its allocation as a completely separate matter from its accession, even going so far as to note that States could accede with no initial quota allocation.  

Although this has been overtaken by events now that South Africa already has a quota as a cooperating non-member, it would have been a risky and short-sighted course of action for the CCSBT. Failure to make an allocation to South Africa is not the same as giving it a zero allocation, and once a Member of the CCSBT, South Africa could simply block consensus on TAC while voluntarily limiting its catch to its own preferred tonnage – or, as was shown in the previous chapter, invoking the UN Fish Stocks Agreement dispute settlement mechanism with reasonable prospects of obtaining a quota of the order of the 250 tonnes it at once stage sought.

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925 CCSBT8 Report, supra Ch I n 30, at 65 (paragraph 20).

926 The original parties to the 1993 Convention are fortunate that Korea did not simply terminate its quota negotiations and accede to it as Article 18 indubitably permits, thereby gaining equal veto power with them over the TAC and its own national allocation: see supra text at n 674.
F Concluding remarks

The legal aspects of documentation of trade in SBT as a means of obtaining data on, and attempting to restrain, SBT catches of third parties have been well handled by the CCSBT, which has so far navigated safely around the obvious hazards posed by the GATT implications of its Trade Information Scheme and Action Plan, which may lead to flag States being singled out for restrictions on imports of SBT from their vessels. By contrast, the integration into the CCSBT of Korea and Taiwan, though ultimately successful, was impeded by an exclusionary attitude that sought to attain the objectives of abstention under another guise; the same self-inflicted problem, this time with Korea and Taiwan defending their new interests as “ins”,\(^\text{927}\) retarded Indonesia’s accession and still threatens to magnify its cost in quota, although the same risk in respect of South Africa has not materialised. In this regard it will be instructive to see whether the Philippines will maintain its interest in becoming the next non-coastal State seeking access to the targeted fishery. In 2004 the CCSBT was still using the old argument that “in the context of the circumstances of the fishery including that it is depleted and that existing members have made sacrifices there were significant impediments to new entrants in the fishery.”\(^\text{928}\)

The ability of CCSBT to assert its competence over actual and potential new entrants to the SBT fishery will depend on the degree to which its status as the worldwide administrative authority for the species gains widespread international recognition. This will be all the more crucial if its first faltering steps on quota trading, considered in the next chapter, are not to be deliberately or inadvertently undermined by them.

\(^{927}\) Only three years after joining the CCSBT, Korea was saying (“Opening Statement by the Republic of Korea” (Attachment 4-5 to CCSBT-EC3 Report), in CCSBT Blue Book 2005, \textit{supra} Ch I n 34, 50), without any trace of irony, that “non-members represent a growing threat to undermine the conservation and management measures taken by the Commission. We need to introduce stronger...measures...so that the non-members may abide by the Commission’s conservation and management measures.”

\(^{928}\) CCSBT-EC3 Report, \textit{supra} Ch I n 78, at 25 (paragraph 65).
CHAPTER V
Quota trading – CCSBT as a pioneer malgré soi?

A  Introduction

There is now a large literature on individual transferable quotas (ITQs) and their advantages at the national level which shows that, even if they are not a panacea for the problems of overfishing, property rights of some kind are likely to be a necessary part of any solution. Limitation of entry generally preceded the institution of ITQs, and remains an essential feature of them: any system will rely at bottom on a general prohibition of fishing other than in conformity with the management measures in force, \(^{929}\) which in the case of ITQs means operators having (or acquiring) sufficient quota to cover their catch. \(^{930}\) While many of the same ills bedevil international fisheries, the basic principle of freedom of fishing on the high seas would appear, at least at first sight, to preclude any limitation of entry, so here the developments are happening in reverse order. Pressure was until recently growing in the CCSBT to allow trading in quota, a notion that has been debated – and in some cases resisted – in a number of other fisheries commissions.

This chapter considers whether such trading could make adjustment of allocations easier in the CCSBT and other commissions and less likely to become mired in the allocative conflicts that hamper their overall conservation efforts. Under a first-principles analysis from an international legal perspective, it is shown that the standard concept of national allocations within a total allowable catch creates no tradable rights. Nor is trading in allocated catch or effort quotas contemplated in the

\(^{929}\) See e.g. in Australia cll 9.1 and 10.1 of the Southern Bluefin Tuna Fishery Management Plan 1995, supra Ch I n 31, which employ the formula that a person is entitled to fish for SBT “if and only if” certain conditions, including that the person holds sufficient statutory fishing rights, are met.

\(^{930}\) While it is assumed here that what is being traded is allocations expressed as limitations of catch, much the same considerations apply if the limitation is on effort, however measured, rather than on removals from the stock: see OECD, supra Ch I n 53, 93-94.
constitutive treaties of most fisheries commissions. Yet trading in quota in such commissions does have a substantial history: there are ad hoc examples of transfers of quota actually taking place in at least three such bodies: ICCAT, NAFO\textsuperscript{931} and the International Baltic Sea Fisheries Commission (IBSFC).\textsuperscript{932} These are examined and it is demonstrated that, for the CCSBT to follow suit, it would be a relatively simple matter to set up a system for this – and there would be no need to amend the 1993 Convention. Rather, the main novelty in what would be required is a moderately elaborate administrative machinery to support the trading, including a rigorous system of accounting for catch. The chapter concludes with an assessment of the prospects of the quota shares represented by national allocations becoming permanent, in effect creating a new species of quasi-property in international law, and some obstacles to this step.

B National allocations under freedom of fishing: what are they?

1 Origin of national allocations

The mere fact that transfers are already taking place answers in the affirmative what might otherwise have been the threshold question: is trading of quotas possible under international law? To understand what is happening in legal terms, however, it is instructive to look for instances where trading might not be possible. Before quota can be traded between States, it is necessary for there to be something for them to trade – that is, the TAC must be divided into national allocations. This is a relatively recent phenomenon in fisheries, although similar arrangements were known earlier in the regulation of high seas capture of marine mammals. The 1911 Bering Sea Fur

\textsuperscript{931} Created by the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, \textit{supra} Ch III n 556.

\textsuperscript{932} Created by the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts, done at Gdańsk, 13 September 1973, 1090 UNTS 54.
Seals agreement\textsuperscript{933} divided not the harvesting itself but its product. In return for refraining from pelagic sealing, which by Article I was prohibited for all parties in the Pacific Ocean north of 30ºN, Canada and Japan were each granted a 15 per cent share, by number and value, of the much larger number of skins of the Pribilof and Commander Islands rookeries which the United States\textsuperscript{934} and Russia\textsuperscript{935} respectively were able as a result of their sole stewardship to harvest sustainably on their island territories. Each of the other three parties would obtain a 10 per cent share of the skins from Japan’s Robben Island rookery,\textsuperscript{936} with an equivalent obligation on Great Britain if any seal herd were to establish itself on Canadian islands in the Convention area.\textsuperscript{937} Although no national allocations were formally possible in the International Whaling Commission (IWC),\textsuperscript{938} the States concerned came to agreements outside the IWC on the division among themselves of the catch limits.\textsuperscript{939}

\textsuperscript{933} Convention between the United States of America, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals, done at Washington DC, 7 July 1911, [United States] Treaty Series No 564.

\textsuperscript{934} Ibid., Article X. Article XI qualified this by obliging the United States to deliver a minimum of 1,000 skins annually to Canada and Japan unless it closed its commercial operations, in which case they were each to be compensated by US$10,000 annually unless there were fewer than 100,000 seals frequenting the islands.

\textsuperscript{935} Ibid., Article XII, including the qualification that harvesting and the associated sharing obligation could be suspended for as long as there were fewer than 18,000 seals on the islands.

\textsuperscript{936} Ibid., Article XIII, including the qualification that harvesting and the associated sharing obligation could be suspended for as long as there were fewer than 6,500 seals on the islands.

\textsuperscript{937} Ibid., Article XIV.

\textsuperscript{938} Created by the International Convention for the Regulation of Whaling, done in Washington, 2 December 1946, 161 UNTS 72, ATS 1948 No 18.

\textsuperscript{939} See S.J. Holt, “Sharing the Catches of Whales in the Southern Hemisphere” in R. Shotton (ed), \textit{Case Studies on the Allocation of Transferable Quota Rights in Fisheries} (FAO Technical Paper No 411; Rome: FAO, 2001), 322 at 343ff. The international legal status of the quotas so reached is not clear, but potentially, had the subset of IWC members involved in the quota negotiations wanted them to become binding obligations \textit{inter se}, there would not have been any legal obstacle to this, and indeed at least one of the agreements in question was of treaty status: Arrangements for the Regulation of Antarctic Pelagic Whaling, done at London, 6 June 1962, 486 UNTS 263. The pre-war agreements on quotas negotiated directly among the whaling
National allocations in their modern international form have been with us for less than 40 years. Perhaps with the memory of private trading in whale quota in mind, when in 1968 Crutchfield initially proposed TACs and national allocations for cod and haddock in the North-West Atlantic, he simply assumed they would be tradable: “[I]f, as seems essential, quotas are made transferrable [sic], the problem [of the impossibility of limiting entry of all on the high seas] may be eased somewhat.”

Soon after, Kask called for licences to be auctioned internationally, which he saw as a way to allow free (but not costless) access to the world’s tuna resources.

Notwithstanding its residual character, the freedom of fishing in UNCLOS Article 116 still exerts a powerful influence on matters of allocation. This is not because that freedom is completely unfettered, but because neither the qualifications in paragraphs (a) to (c) of Article 116 nor customary international law impose any *ex ante* quantifiable limit on the tonnage of fish that a State’s vessels may harvest on the high seas. (Note, though, that in many, perhaps most circumstances now, the duty of cooperation on which modern international fisheries law is founded may impose an obligation to negotiate in good faith with other interested States to establish such a limit.) Quotas imply numbers, and fisheries commissions are the usual vehicle or forum in which States interested in a fishery engage in bargaining, generally on a yearly basis, to establish those numbers. When the numbers are transformed into binding limits by or under the treaty establishing the commission, the exception to freedom of fishing envisaged in paragraph (a) of Article 116 is at work – though,

companies of various States (Holt, *supra* this n, at 327), in order to reduce the number of expeditions through limiting by freely transferable quotas the catch and effort of each expedition, would have been binding not as treaties, but as contracts each subject to a domestic proper law ascertained by the rules of private international law.


*941* Kask, *supra* Ch II n 416, at 31n.

*942* See text *supra* following Ch III n 495.
under the *pacta tertii* principle, it applies only to the parties to the relevant treaty, not to new entrants.

That said, the freedom of fishing is not in itself an obstacle to trading in national allocations. Even if new entrants cannot be peremptorily excluded from a fishery, so that the exclusivity associated with property rights is absent, the risks of their appearance can be diminished by trade and other economic measures, as is shown by the history of whaling. It is perhaps not coincidental that Norway and the United

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943 Supra Introduction n 18 and accompanying text.

944 From an economic point of view, according to A. Scott, “Introducing Property in Fishery Management” in R. Shotton (ed), *Use of Property Rights in Fisheries Management*, Vol 1 (FAO Fisheries Technical Paper No 404/1; Rome: FAO, 2000), 1 at 5-6, the four main characteristics of property are duration, security, exclusivity and transferability. In legal terms too, property is not, contrary to the loose sense in which it is often used, either a thing or its ownership, but a simple term for a rather complex relationship between a person and a thing: *Yanner v. Eaton* (1999) 201 CLR 351 at 366 per Gleeson CJ, Gaudron, Kirby and Hayne JJ, quoting with approval this passage from K. Gray, “Property in Thin Air” (1991) 50 *Cambridge Law Journal* 252 at 299:

> [P]roperty' consists primarily in control over access. Much of our false thinking about property stems from the residual perception that 'property' is itself a thing or resource rather than a legally endorsed concentration of power over things and resources.

W.N. Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26 *Yale Law Journal* 710 at 746ff analysed property rights as the multiplicity of duties imposed on an indeterminate number of persons not being duties of positive performance but of exclusion; i.e. the right consists of a general protection from interference. In *R v. Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, Mason J (as he then was) adopted at 342 the following passage in Lord Wilberforce’s speech in *National Provincial Bank Ltd v. Ainsworth* [1965] AC 1175 at 1247-1248:

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

Kingdom maintained a number of deterrent measures which largely succeeded in keeping the number of new entrants relatively small.\footnote{316} Given that under Article 8, paragraph 4 of the UN Fish Stocks Agreement\footnote{946} only those States that are members of the relevant fisheries commission or participate in an equivalent arrangement, or agree to apply its conservation and management measures, retain access to the fishery resources to which those measures apply, it may be asked whether creation of a commission of itself does away with the freedom of fishing for the areas and/or stocks concerned, at least among its members. It is possible to isolate the legal effect of a commission’s establishment by looking at what happens when, for whatever reason, the commission is unable to set a TAC or renew or amend it as it expires. If the freedom of fishing is displaced, this would mean that members may not fish at all without an affirmative decision to allow this by the commission; that would in part be the function of the TAC and in its absence the members would be obliged to refrain from fishing until such time as a TAC was set.\footnote{947} Yet, when such situations occurred in both the CCSBT and ICCAT, there was no cessation of fishing\footnote{948} – members in some cases announced voluntary catch limits, but all carried on harvesting.

\footnote{945}{Holt, \textit{supra} n 939, at 324 and 327-329.}

\footnote{946}{Text reproduced \textit{supra} Ch III, text between nn 517 and 519.}

\footnote{947}{Often many years pass between the coming into existence of a commission and its establishment of catch or effort limits, the IOTC and WCPFC being cases in point. In no such situation has fishing been suspended in the interim. This reasoning does not, however, apply to the many fishery commissions such as the Asia-Pacific Fishery Commission (\textit{supra} Introduction, text between nn 10 and 11), that have only advisory rather than management functions; as they are constitutionally incapable of establishing TACs and national allocations, the issue of the trading of such allocations can never arise.}

\footnote{948}{As to the tardy setting of TACs in the CCSBT’s early years see \textit{supra} Ch II n 430. In 1998 Japan implemented unilaterally an experimental fishing program in addition to its commercial catch; since Australia and New Zealand opposed the additional catch, no TAC could be adopted at all for several years, but the members continued to harvest SBT in roughly the same amounts as before, as seen in the Global Catch table, Attachment 4 to CCSBT-ESC4 Report, \textit{supra} Ch I n 141. ICCAT’s failure to make any recommendation on a catch limit for...}
It is conceivable for the members of a fisheries commission to agree to pool their respective rights in a fishery, vesting them in the commission as the representative of their collective interests, so that for the right to fish they must henceforth come to terms with it, but again non-members will not be bound by that. The obligation of States to refrain from fishing for a stock or in an area governed by a fisheries commission of which they are not a member may be in the process of entering the corpus of custom, but would need substantial qualification if it is not to degenerate into an endorsement of closed shop commissions in which the “ins” discriminate against the “outs” by insisting that the only way to cooperate with them is to take zero catch. One could say that non-members have a duty to cooperate with the commission, in the sense that non-members already owe members that duty under the relevant provisions of UNCLOS, and it would seem to be in the members’ power to authorise the commission to receive non-members’ cooperation on their behalf, i.e. to insist that the duty be discharged by cooperating with the commission as their collective delegate rather than with the member States individually.

States, however, have long preferred to keep the fisheries commissions they create institutionally weak with respect to their members, for reasons identified by Koers.  

ABT at its 2001 meeting is seen in ICCAT17 Report, supra Ch III n 605, at 55-56 (paragraphs 14.4-14.10). For 2002 reported catches totalled around 30,000 tonnes, and if unreported catches are factored in, the true total was likely to be around 35,000 tonnes, little different from 2001, when a TAC applied: Annex 8 to ICCAT18 Report, supra Ch III n 612, at 182.

See supra Ch IV, text accompanying n 713 and infra Ch VI, text accompanying n 1218.

Koers, supra Ch I n 285, at 36 writes: “It is a political reality that States are extremely reluctant to give up any of their prerogatives in favour of international law.” At 194-195 States’ reluctance to give international fishery commissions binding powers on members is attributed to the fact that, under freedom of fishing, membership of them is voluntary, and binding authority “would expose them to the risk of being forced to accept a certain conservation measure, whereas non-member States would be under no obligation with regard to such a measure.” He adds, at 275-276: “States have demonstrated over and over again that they are willing to yield authority to international institutions only if this becomes unavoidable.” But by the time States are convinced of its necessity, “irreparable harm may have been inflicted upon the resources…The history of international fisheries commissions is an unfortunate illustration of this point.” Burke, supra Ch
The otherwise innovative WCPFC review procedure,\textsuperscript{951} for example, for all its benefits, lacks one important element in that it fails to cast any organ of that commission in the role of defender of its decision against an individual aggrieved member seeking to overturn it.

2 National allocations analysed from first principles

What precisely, then, do States do when they set a TAC in a fishery commission, and divide it into national allocations? They depart \textit{inter se} from the residual freedom of fishing on the high seas, but what do they put in its place? In theory the answer lies in the commission’s constitutive treaty, but such treaties rarely say anything about it. Thus Article 8, paragraph 3 of the 1993 Convention in subparagraph (a) directs the CCSBT not merely to adopt a TAC, but also to divide it into national allocations, while preserving the possibility of some other measure being adopted instead; subparagraph (b) permits the introduction of further measures in addition to these:

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.

It is thus necessary to go back to first principles. On this basis, it is submitted, all that States which are members of a fishery commission are doing through national allocations is each limiting their own catch in return for similar (though not necessarily equal) limits being accepted by each other member.\textsuperscript{952}

\textsuperscript{951}Supra Ch II, text accompanying n 436.

\textsuperscript{952}Except where the context otherwise requires, “member” in this chapter is taken to include not only each State that is party to the treaty establishing the fishery commission, but any other State or fishing entity formally cooperating with the commission under a mechanism such
In the simplest case, suppose there are three members A, B and C which share a 1,000-tonne TAC as follows: A 500, B 400, C 100. The fleets of all three States fish in the same area for the species at the same stage of its life cycle using the same gear, so that, as long as the aggregate of A, B and C’s catch remains below 1,000 tonnes, there is no effect on the stock from one State’s share of the TAC rising and another’s falling commensurately. If so, then under this classical type of national allocation, A owes a duty to B and C to limit its catch to 500 tonnes, B owes a duty to A and C to limit its catch to 400 tonnes, and C owes a duty to A and B to limit its catch to 100 tonnes. Now imagine that C wishes to increase its catch to 200 tonnes and B is prepared to see its catch fall to 300 tonnes. How can they bring this about? Three situations are possible: before, during and after the relevant fishing season.

If the following year’s allocation has not been made, B and C could simply let it be known that their wish for quota for the following year was 300 tonnes and 200 tonnes respectively, and if A wishes to continue to catch 500 tonnes and the condition of the stock has not deteriorated, there should be no problem. It will be noticed, however, that on one hand there are many conditions attached to this simple case, and on the other it does not necessarily involve trading as such of quota.

as the CCSBT’s resolution establishing the status of cooperating non-member, supra Ch IV n 803 and text following, and accepting a quantified catch limit in token of that cooperation.

In addition, it might be possible to speak of A, B and C each owing the same duty to the fisheries commission in addition to, or perhaps even to the exclusion of, duties owed to each other: this is the approach taken by the New Zealand opinion on trading of quota in the CCSBT, infra, text following n 1059. In Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949, p. 174, the ICJ in an advisory opinion held (at 181-182) that not only did the UN have international legal personality vis-à-vis its own members – which was not stated in the UN Charter, but held to be a necessary implication – but was owed certain duties by them. This will remain without practical significance, however, unless the commission is given some sort of enforcement power over its members – again conceivable in theory, but not, at any rate hitherto, actually encountered in practice.

A frequent complication would be the case of non-equivalence of catch by B and C in terms of its effect on the stock. If 100 tonnes of catch by C has less impact on the stock than 100 tonnes caught by B, then there is no reason to oppose the transaction. But if its effect is greater –
After all, in practice TACs and national allocations are rarely fixed for more than one year at a time. It is therefore open to a commission in theory to vary the allocation completely from one year to the next – say allocating the entire TAC to member X in one year and to member Y in the following year. In practice this does not happen because members value stability and predictability, hence the best way to predict a given member’s share of the TAC in any year is to look at what it was the previous year – changes often occur, but are seldom dramatic.

If the national allocations have already been made, but either fishing has not yet started, or it is early enough in the season for both B and C to be below the lesser of their pre- and post-transaction catch limits, the position is different. Suppose that C makes B an offer for 100 tonnes of B’s quota, which B accepts. B and C proceed to catch 300 and 200 tonnes of fish respectively. In terms of the original analysis, B is in no difficulty: its duty to A and C was to catch 400 tonnes or less, and it has done so. For C, however, the position is more complicated. Its duty to A and B was to catch no more than 100 tonnes. B may be taken to have waived its correlative right as a necessary consequence of the transaction, at least to the extent that it cannot complain of any breach of duty by C if the latter’s catch remains below the sum of the original 100 tonnes and the further 100 tonnes it gained through the transaction, i.e. 200 tonnes. But A has granted no such waiver to C. Thus C’s duty to A remains one of limiting its catch to 100 tonnes, which it will breach if it makes use of the extra quota acquired from B.

The same is true if B purports to transfer all or part of its allocation to D, a non-member of the commission. In the specific case of the CCSBT, this could be

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and in the mid-1980s 1 tonne of Australia’s surface fishery catch was having roughly the same impact on the parental biomass of SBT as 2.25 tonnes of Japan’s longline catch: supra Ch I, text accompanying n 261 – then it would be reasonable for A to insist on an adjustment to restore the equivalence. Conversely, a member whose catch has less impact tonne-for-tonne might be able to persuade the commission to allow it to apply a coefficient greater than 1 to any quota sold to it by B.
contrary to Article 15, paragraph 4 of the 1993 Convention, which calls for cooperative action “to deter fishing activities...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”. Even if no comparable provision exists in the putative commission’s treaty, however, D is in no position to exercise B’s rights under the treaty against A and C, and the transaction is no defence to any case A and C might mount against D independently of the treaty – though perhaps B would be able to absolve itself of responsibility for any subsequent overcatch by D of its quota. A and C might in this situation prevail upon B to exercise whatever remedies it has against D, but none of the existing fisheries commission treaties considered below contains the sophisticated provision that would be needed for them to be able to compel B to do this.

In the simple case, then, trading cannot take place as of right except in the trivial instance of a two-member commission. A waiver must be gained from all non-participants in the transaction. The easiest way of doing this, and the only one that occurs in practice, is for the waiver to be granted by the fisheries commission itself on behalf of all its members. If decisions of this kind, which are substantive rather than procedural, require consensus under the constitutive treaty, then A can prevent the transaction by voting against the granting of approval for it.

What about after fishing has ceased? Let us return to the initial scenario, and suppose the catches in the year were A 495, B 375, C 120. With a total of 990 tonnes caught, the TAC as a whole is not being exceeded, but C has overcaught its

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955 Many fisheries commissions formally take decisions by simple or qualified majority, in which case a State in A’s position will succeed in preventing the commission from giving its blessing to the transaction only if it can persuade a sufficiently large number of fellow members to join it in voting against the granting of approval. In practice, however, commissions often go to great lengths to secure consensus even when the treaty does not require this (for example, in the WCPFC, by Article 20(2) of the Honolulu Convention, infra Appendix C, Part III, voting can occur only once “all efforts to reach a decision by consensus have been exhausted”), and votes are rarely called.
quota by 20 tonnes, while A and B between them have undercaught theirs by 30 tonnes. Should C be able to purchase quota from B to cover its excess catch?

ICCAT approved such a transfer in 2005, but not before the United States and Canada had expressed disapproval of retroactive transfers as a solution to overcatch, preferring “[r]eal guarantees…not to exceed catch limits.”\textsuperscript{956} This is understandable as a desire to maintain internal discipline, but clearing overcatch through trade is not greatly different in substance from the year-to-year accounting mechanism already under discussion in ICCAT for carrying forward balances of overcatch and undercatch, adjusting the next year’s nominal national allocations commensurately to compensate.\textsuperscript{957} If there were such a mechanism in place, C might be able to carry its overcatch into the following year; the 20-tonne overcatch from year 1 would be counted against its year 2 national allocation, and if that too were 100 tonnes, then its actual catch limit in that year would be 80 tonnes.\textsuperscript{958} It would then be for C to decide whether it preferred to clear its overcatch by debit against its future catch, or buy additional quota if any is available, or some combination of the two. The relative attraction of the two courses of action would be affected by any penalty applicable to the overcatch. ICCAT has a flat 25 per cent penalty,\textsuperscript{959} which would increase the


\textsuperscript{957} \textit{Infra} n 1124 and accompanying text.

\textsuperscript{958} If the national allocation were raised or lowered, the carry-over from the previous year would represent a commensurately lesser or greater proportion of the year 2 national allocation, e.g. 20 tonnes would represent 18.2% of 110 tonnes but 22.2% of 90 tonnes. This is a self-correcting mechanism: in a fishery for a stock whose parental biomass is growing, overcatch is less serious than in one where it is falling.

\textsuperscript{959} The 25% penalty applies if quota is exceeded during two consecutive management periods: “Recommendation Regarding Compliance in the Bluefin Tuna and North Atlantic
attraction of purchasing-in quota to cover overcatch; the Australia-New Zealand South Tasman Rise orange roughy arrangement has no penalty for the season’s first 100 tonnes of overcatch, but a 100 per cent penalty above that. Conversely, if undercatch can be carried forward, then B may prefer to do that rather than sell its unused quota to C; where carry-forward is permitted, it is generally on a 1:1 basis up to some specified limit, so if B’s undercatch is greater than that limit, it will have an incentive to come to terms with C. In the example above, B could sell C enough

Swordfish Fisheries” (Annex 5-14 to ICCATSM10 Report), in ICCAT Green Book 1997/1, supra Ch III n 573). 95, extended to the southern swordfish stock in “Recommendation by ICCAT Regarding Compliance in the South Atlantic Swordfish Fishery” (Annex 5-8 to ICCAT15 Report), in ICCAT Green Book 1998/1, supra Ch III n 574, 70.

2000 Arrangement between the Government of Australia and the Government of New Zealand on the Conservation and Management of Orange Roughy on the South Tasman Rise, supra Ch II n 314. Under paragraph 7 a party’s “annual catch limit” takes account of any overcatch in previous season(s) by

(b) debiting against its quota for that season catch, rounded to the nearest tonne, taken by it in excess of its annual catch limit for the previous season (its excess catch), as follows:

(i) one tonne to be debited for each of the first 100 tonnes of excess catch; and
(ii) two tonnes to be debited for each tonne of excess catch thereafter.

Paragraph 8 goes on to provide that:

If a Party’s quota for any season is insufficient to absorb the amount to be debited under paragraph 7(b), the Party concerned will debit any remaining amount against its quota for the following season, and any subsequent season as may be required.

See further on this Serdy, supra Ch II n 314, at 497-498n.

961 For example, ICCAT had a 50% carryover limit for the northern albacore stock, now reduced to 25%, so that there is no build-up of banked quota lest it damage the stock if all drawn down at once: see Recommendation by ICCAT on North Atlantic Albacore Catch Limits for the Period 2004-2006, in “Recommendations Adopted by ICCAT in 2003” (Annex 5 to ICCAT18 Report), in ICCAT Green Book 2004/1, supra Ch III n 612, 141 at 144 (Recommendation [03-06], paragraph 6); Recommendation by ICCAT on North Atlantic Albacore Catch Limits for the Period 2008-2009, in Annex 5 to ICCAT20 Report, supra Ch IV n 884, at 150 (Recommendation [07-02], paragraph 6). For the bigeye stock, a maximum of 30% of underage may be carried over to either of the next two years: Recommendation by ICCAT on a Multi-Year Conservation and Management Program for Bigeye Tuna, in Annex 5 to ICCATSM14 Report, supra Ch IV n 910, at 126 (Recommendation [04-01], subparagraph 4(a)).
quota to eliminate the latter’s overcatch and still have 5 tonnes left to carry forward into year 2.\textsuperscript{962}

These being the basic underlying rules and concepts, the next step is to see to what extent they have been applied or modified in the treaties by which fisheries commissions have been established.

### 3 Relevant provisions of treaties constituting fisheries commissions

Most fishery commission treaties are either silent or describe the measures the commission may adopt with sufficient generality to allow for the institution of trading. Tuna treaties are considered first in reverse chronological order, followed by several others that also shed light on the matter, and two treaties that regulate an international fishery without establishing a commission.

**(a) IATTC**

Paragraph 1 of Article VII (headed “Functions of the Commission”) of the new Antigua Convention\textsuperscript{963} will on entry into force give the IATTC the following functions *inter alia*:

- (c) adopt measures that are based on the best scientific evidence available to ensure the long-term conservation and sustainable use of the fish stocks covered by this Convention and to maintain or restore the populations of harvested species at levels

\textsuperscript{962} A system designed with conservation in mind would presumably permit quota to be purchased only from undercatch, especially if there is a penalty for overcatch. Say there is a 50% penalty for overcatch above 20 tonnes, and B’s catch was 440 tonnes. In year 2 B’s actual catch limit, assuming no change in its national allocation, would be 350 (= 400 – 20 – 20 x 1.5) tonnes. Though A has only 5 tonnes spare undercatch, if B were to purchase 20 tonnes of quota from it, it could have an actual catch limit in year 2 of 380 tonnes, the 30-tonne difference reflecting the 50% penalty it would thereby have avoided. A would not be liable to any penalty because its sale of quota would leave it with overcatch of only 15 tonnes. In order not to undermine the penalty’s deterrent effect it would be prudent to permit A to sell B no more than 5 tonnes, or provide that quota purchased should first be applied against ordinary overcatch and only then against penalty overcatch, or both at once.

\textsuperscript{963} *Supra* Ch IV n 840.
of abundance which can produce the maximum sustainable yield, inter alia, through the setting of the total allowable catch of such fish stocks as the Commission may decide and/or the total allowable level of fishing capacity and/or level of fishing effort for the Convention Area as a whole;

(e) …, determine, on the basis of criteria that the Commission may adopt or apply, the extent to which the fishing interests of new members of the Commission might be accommodated, taking into account relevant international standards and practices;

(h) adopt appropriate measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of the fish stocks covered by this Convention;

(l) where necessary, develop criteria for, and make decisions relating to, the allocation of total allowable catch, or total allowable fishing capacity, including carrying capacity, or the level of fishing effort, taking into account all relevant factors[.]

(b) **WCPFC**

The Honolulu Convention\textsuperscript{964} sets in out in great detail in Article 10 the functions of the WCPFC:

1. Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks within areas under national jurisdiction, the functions of the Commission shall be to:

   (a) determine the total allowable catch or total level of fishing effort within the Convention Area for such highly migratory fish stocks as the Commission may decide and adopt such other conservation and management measures and recommendations as may be necessary to ensure the long-term sustainability of such stocks;

   (b) promote cooperation and coordination between members of the Commission to ensure that conservation and management measures for highly migratory fish stocks in areas under national jurisdiction and measures for the same stocks on the high seas are compatible;

   (c) adopt, where necessary, conservation and management measures and recommendations for non-target species and species dependent on or associated with

\textsuperscript{964} *Supra* Introduction n 8.
the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

…

(g) develop, where necessary, criteria for the allocation of the total allowable catch or the total level of fishing effort for highly migratory fish stocks in the Convention Area;

…

(k) agree on means by which the fishing interests of any new member of the Commission may be accommodated;

…; and

(o) discuss any question or matter within the competence of the Commission and adopt any measures or recommendations necessary for achieving the objective of this Convention.

2. In giving effect to paragraph 1, the Commission may adopt measures relating to, inter alia:

(a) the quantity of any species or stocks which may be caught;

(b) the level of fishing effort;

(c) limitations of fishing capacity, including measures relating to fishing vessel numbers, types and sizes;

…

4. The Commission may adopt decisions relating to the allocation of the total allowable catch or the total level of fishing effort. Such decisions, including decisions relating to the exclusion of vessel types, shall be taken by consensus.

(c) IOTC

At the other end of the scale is the IOTC Agreement, in which a single provision, Article V, subparagraph 2(c), gives the Commission the authority to enact catch limits, national allocations and, semble (though the reference to UNCLOS may cast some doubt on this), permit these to be traded:

965 Supra Introduction n 7.
2. …the Commission shall have the following functions and responsibilities, in accordance with the principles expressed in the relevant provisions of the United Nations Convention on the Law of the Sea:

(c) to adopt, in accordance with Article IX and on the basis of scientific evidence, conservation and management measures, to ensure the conservation of the stocks covered by this Agreement and to promote the objective of their optimum utilization throughout the Area.[]

(d) ICCAT

Subparagraph 1(a) of Article VIII of ICCAT’s constitutive treaty is similarly in very general terms:

The Commission may, on the basis of scientific evidence, make recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch. These recommendations shall be applicable to the Contracting Parties under the conditions laid down in paragraphs 2 and 3 of this Article.

(e) South-East Atlantic Fisheries Organisation

Venturing beyond the tuna world, like the IATTC’s new treaty but more briefly, Article 6, paragraph 3 of the Windhoek Convention that established the South-East Atlantic Fisheries Organisation lists the relevant functions of the Commission, in this case an organ of the Organisation, as being to:

(b) formulate and adopt conservation and management measures;

(c) determine total allowable catches and/or levels of fishing effort, taking into account total fishing mortality, including of non-target species;

(d) determine the nature and extent of participation in fishing.[]

(f) NEAFC

Examples of the measures NEAFC may take are set out in its Convention at Article 7. The list is not exhaustive and would thus not preclude a trading system:

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966 Supra Introduction n 6.
967 Supra Ch III n 519.
968 Supra Ch III n 625.
In the exercise of its functions…, the Commission may consider *inter alia* measures for:

(e) the establishment of total allowable catches and their allocation to Contracting Parties,

(f) the regulation of the amount of fishing effort and its allocation to Contracting Parties.

(g) **CCAMLR**

Article IX, subparagraph 1(f) of CCAMLR’s constitutive treaty\(^{969}\) directs that the Commission to “formulate, adopt and revise conservation measures on the basis of the best scientific evidence available”. Paragraph 2 of the same Article then goes on:

2. The conservation measures referred to in paragraph 1 (f) above include the following:

(a) the designation of the quantity of any species which may be harvested in the area to which this Convention applies;

(b) the designation of regions and sub-regions based on the distribution of populations of Antarctic marine living resources;

(c) the designation of the quantity which may be harvested from the populations of regions and sub-regions;

(d) the designation of protected species;

(e) the designation of the size, age and, as appropriate, sex of species which may be harvested;

(f) the designation of open and closed seasons for harvesting;

(g) the designation of the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study;

(h) regulation of the effort employed and methods of harvesting, including fishing gear, with a view, *inter alia*, to avoiding undue concentration of harvesting in any region or sub-region;

(i) the taking of such other conservation measures as the Commission considers necessary for the fulfilment of the objective of this Convention, including measures

\(^{969}\) *Supra* Ch IV n 891.
concerning the effects of harvesting and associated activities on components of the marine ecosystem other than the harvested populations.

There are two issues here. First, the use of “include” in the chapeau suggests that the list is not exhaustive – although if it were, it would not permit the division of TACs into national allocations, consequentially making CCAMLR the only fisheries commission actually prevented by its constitutive treaty from establishing a system of tradable allocations among its members. Secondly, assuming national allocations are possible, the reference to “designation of the quantity” in subparagraphs (a) and (c) may be interpreted as having a connotation of rigidity that would require fixed quotas incapable of being traded. Even so, the catch-all subparagraph (i) would still, it is submitted, be sufficient authority to introduce both national allocations and trading. Alternatively, if trading were interpreted to be precluded, this could be relatively easily circumvented if the members were so minded, e.g. by vesting the nominal right to fish in CCAMLR itself and either confining themselves to trading some lesser right, or adopting a policy that, if member X wished to trade all or part of its allocation to member Y, X could surrender it to the Commission and an equivalent amount of quota would be automatically issued to Y.

(h) NAFO

NAFO has recently completed the overhaul of its 1978 treaty. In the finalised text of the amendments adopted at its 2007 meeting, Article 8 permits the Commission to adopt conservation and management measures that expressly include “total allowable catches and/or levels of fishing effort and [to] determine the nature and extent of participation in fishing”. In addition Article 9(d) specifically provides for adoption by it of supplementary measures aimed at “preventing, deterring and eliminating IUU fishing.” For the moment, Article XI of the existing treaty assumes that the Members will wish to have national allocations, speaking in paragraph 4 of

970 Supra n 931.
971 NAFO doc GC Doc. 07/4, Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (Annex 17 to NAFO doc GC Doc. 07/5, Report
“[p]roposals…for the allocation of catches in the Regulatory Area”, but does not specifically require them to be adopted.

(i) **IBSFC**

Though defunct since 2006, after all its remaining members apart from the European Community and the Russian Federation joined the former, the IBSFC too fits the above pattern. Article X of its constitutive treaty states that:

Measures relating to the purposes of this Convention which the Commission may consider and in regard of which it may make recommendations to the Contracting States are:

... 

(f) any measures for establishing total allowable catch or fishing effort according to species, stocks, areas and fishing periods including total allowable catches for areas under the fisheries jurisdiction of Contracting States;

(g) any other measures related to the conservation and rational exploitation of the living marine resources.

This does not directly authorise national allocations, except by recourse to the all-purpose paragraph (g), but paragraph (f) too indirectly permits them through the possibility of dividing the TAC spatially among the parties’ EEZs, where fishing by foreign vessels may be prohibited.

(j) **IWC**

The only express prohibition on national allocations, and thus on trading, is found in Article V of the International Convention for the Regulation of Whaling. Paragraph 1 lists a number of types of conservation measures that the IWC may adopt by way of amendments to the Schedule to the Convention in which the

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973 Supra n 932.
974 Supra n 938.
regulations on conservation and utilisation of whale resources are set out. Among these are “(e) …intensity of whaling (including the maximum catch of whales to be taken in any one season)”. Paragraph 2 then continues:

2. These amendments of the Schedule

…

(c) shall not involve restrictions on the number or nationality of factory ships or land stations, nor allocate specific quotas to any factory ship or land station or to any group of factory ships or land stations[.]

(k) Southern Indian Ocean Fisheries Agreement

The 2006 Southern Indian Ocean Fisheries Agreement\(^975\) does not create a commission, but the powers of the Meeting of the Parties in Article 6 are similar:

1. The Meeting of the Parties shall:

…

(d) formulate and adopt conservation and management measures necessary for ensuring the long-term sustainability of the fishery resources, taking into account the need to protect marine biodiversity, based on the best scientific evidence available;

…

(h) develop rules and procedures for the monitoring, control and surveillance of fishing activities in order to ensure compliance with conservation and management measures adopted by the Meeting of the Parties including, where appropriate, a system of verification incorporating vessel monitoring and observation, and rules concerning the boarding and inspection of vessels operating in the Area;

(i) develop and monitor measures to prevent, deter and eliminate illegal, unreported and unregulated fishing;

…

(k) establish the criteria for and rules governing participation in fishing; and

(l) carry out any other tasks and functions necessary to achieve the objectives of this Agreement.

2. In determining criteria for participation in fishing, including allocation of total allowable catch or total level of fishing effort, the Contracting Parties shall take into account, inter alia, international principles such as those contained in the 1995 Agreement.

3. In applying the provisions of paragraph 2, the Contracting Parties may, inter alia:
   (a) designate annual quota allocations or fishing effort limitations for Contracting Parties;
   (b) allocate catch quantities for exploration and scientific research; and
   (c) set aside fishing opportunities for non-Contracting Parties to this Agreement, if necessary.

(I) The Central Bering Sea pollock treaty

More rigid is the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, which likewise creates no commission, but works through an annual conference whose functions are listed in Article IV, paragraph 1:
   (a) to establish the allowable harvest level for pollock in the Convention Area…for the succeeding year;
   (b) to establish an individual national quota of pollock in the Convention Area…for the succeeding year for each Party;
   (c) to adopt other appropriate conservation and management measures for the pollock resources in the Convention Area[.]

Paragraph (b) might be thought to mandate classical national allocations (with no possibility of trading under the analysis above), but paragraph (c) is probably sufficient to permit trading; a scheme would be could be classed as a management measure even though it is not directly linked to conservation.

It is thus apparent that most fisheries commissions are left considerable flexibility by their constitutive treaties to allow transfer of quota. The next two sections consider the extent to which they have made use of that flexibility, the extensive treatment by CCSBT being preceded by a survey of its antecedents in other commissions.

976 Supra Ch II n 316.
C Precedents for trading by fisheries commissions

Four international fisheries commissions other than the CCSBT have considered trading of quota. They appear to have done so independently of each other, that is, there has been no systematic consideration of quota trading either by commissions in concert with each other or as a result of a campaign by an individual State that is a member of more than one of them. The four will now be examined in turn.

1 ICCAT

The most detailed consideration of trading of quota – albeit in a context incidental to the question of allocation – has been in ICCAT, whose history has been one of ambivalence towards the idea: a concerted opposition to allowing it to occur freely, balanced by a general tolerance of it when ad hoc transactions are placed on the agenda for approval. Thus at the first meeting in 1999 of the Working Group on Allocation, both the European Community and Brazil expressed negative opinions on this subject. At the second meeting in 2000, the Community’s position had subtly evolved: it now argued that commercial quota transactions should not be allowed. It was prepared to accept, however, that countries that already had quotas could legitimately swap them, as long as it did not have a negative impact on conservation – a stance with which Japan agreed, but that Brazil opposed.

It is not obvious why the European Community should adopt this attitude. From one point of view, its interests might have been suited, as a member seeking fishing opportunities for its overcapitalised Iberian fleets, by being able to induce Atlantic Ocean coastal States to forgo for value their right to fish ICCAT stocks. One conjectural explanation is that the Community’s insistence on no change in allocation

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977 Annex 6 to ICCAT16 Report, supra Ch III n 587, at 88 (EC, paragraph 6.18), 91 (Brazil, paragraph 6.63). Contrast the view of Iceland at 92 (paragraph 6.75) that quota-sharing may under some circumstances be effort-efficient.

978 Annex 6 to ICCATSM12 Report, supra Ch III n 571, at 82 (paragraph 5.13), the US agreeing, at 83 (paragraph 5.18).

979 Ibid., at 89 (paragraphs 5.80 (EC and Japan) and 5.81 (Brazil)).
for an already allocated stock, for which it wanted historic catch to be the only criterion,\textsuperscript{980} suggests a preference to treat this situation as one of vested rights, even if the quotas were theoretically due for renegotiation every two or three years.\textsuperscript{981}

By the time of its fourth meeting, the Working Group “was of the opinion that transfer of quota was not an allocation issue but rather a management issue.” On this basis it decided to move to a general prohibition on trading in quota and formed the view that “temporary transfers must be authorized by the Commission as part of management decisions.”\textsuperscript{982}

ICCAT accepted this recommendation of its Working Group. Paragraph 27 of the Allocation Criteria it ultimately adopted forbids transfer: “No qualifying participant shall trade or sell its quota allocation or part thereof.”\textsuperscript{983} The same year, however, it showed itself willing to approve ad hoc transfers, adopting a recommendation whose operative part was a single line requiring Commission approval: “Any temporary quota adjustments shall be done only under authorization by the Commission.”\textsuperscript{984}

Panel 1 approved with the support of the United States and the EC a transfer of 1,000

\textsuperscript{980} Ibid., at 85 (paragraph 5.39).

\textsuperscript{981} This accords with the implication of the EC’s question (in Annex 8 to ICCAT18 Report, supra Ch III n 612, at 180) – whether “catch limits” could be transferred in the same way as “quota” – that the two were different, presumably on the basis that the latter created vested rights.

The EC’s implicit assumption may have been that the right was to an absolute tonnage, not a relative share, given its assertion that the status of the stock was relevant to allocations since “ICCAT cannot allocate what it does not have”: Annex 6 to ICCAT16 Report, supra Ch III n 587, at 90 (paragraph 6.57).

\textsuperscript{982} Annex 7 to ICCAT17 Report, supra Ch III n 605, at 182 (paragraph 6.22).

\textsuperscript{983} Annex 8 to ICCAT17 Report, supra Ch III n 605, at 212.

\textsuperscript{984} “Recommendation by ICCAT Concerning the Temporary Adjustment of Quotas” (Annex 9-2 to ICCAT17 Report), in ICCAT Green Book 2002/1, supra Ch I n 228, 216. Note the implication of some degree of vesting of rights to quota shares in the term “temporary”, presupposing a later reversion to the status quo ante. If so, this opens the question of permanent transfers – there is no necessary contradiction between shares of the TAC that last indefinitely and, rather than allowing those shares to be traded freely, subjecting each transaction to approval.
tonnes of unused bigeye quota for 2003 from Japan to China in consideration and on completion of joint work against illegal, unregulated and unreported fishing. The majority of delegations supported temporary transfers as a way of facilitating cooperation among Contracting Parties, to be authorised by the Commission for transparency on a case-by-case basis, but some noted that if the quota allocations were adjusted to meet the Parties’ needs, quota transfers would be unnecessary.

In fact there is now a very long list of quota transactions that have proceeded with ICCAT’s approval. A quota swap between North and South Atlantic swordfish took place between the EC and Japan in 2000. Japan’s excess North Atlantic swordfish bycatch for 2001 was allowed to be counted against unused US quota from its 400-tonne reserve for higher than anticipated discards, and against its own South Atlantic quota in 2002. Under the 2002 decision for this stock, Canada benefited from “transfer” of 25 tonnes of US quota in 2003, 2004 and 2005. There was an effective swap between the US and Brazil: 200 tonnes of US quota were permitted to be harvested in the northernmost 10 degrees of the southern area (and vice versa for Brazil’s quota of southern swordfish in the southernmost 10 degrees of the northern

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985 Annex 13 to ICCAT17 Report, supra Ch III n 609, at 300 (paragraphs 6.b.8 and 6.b.10); “Statement by Japan on Agenda Item 6 of Panel 1 (Appendix 5 to Annex 13 to ICCAT17 Report), in ICCAT Green Book 2002/1, supra Ch I n 228, 326. See also the transfer of 1,100 tonnes for 2002; while there was no opposition to this, the Chairman of Panel 1 said that the transfer should be provided in writing to the Secretariat for approval by the Commission: Annex 13 to ICCATSM13 Report, supra Ch III n 531, at 305 (paragraphs 6.1.5 [both] and 6.1.6). In “Statement by Japan to Panel 1” (Appendix 5 to Annex 13 to ICCATSM13 Report), in ICCAT Green Book 2003/1, supra Ch II n 427, at 322, possible like action the following year is foreshadowed.

986 ICCAT17 Report, supra Ch III n 605, at 52 (paragraph 8.3).

987 Annex 9 to ICCAT16 Report, supra Ch III n 571, at 177 (paragraph 6.21).

area), whereas Japan could count up to 400 tonnes taken east of 35°W and south of 15°N against its southern quota. As regards the eastern stock of ABT, underages from Iceland’s successive yearly allocations of 30, 40, 50, 60 tonnes in 2003-06 were transferred to the EC.

The 2003 meeting of ICCAT saw a transfer of 2,000 tonnes of bigeye quota from Japan to Taiwan, to accommodate vessels that Taiwan had reregistered from other flags in an attempt to control their hitherto unregulated catch. Taiwan may have envisaged this as a permanent solution, but Japan said it was for 2003 only. In Panel 4, however, the United States opposed on procedural grounds a Japanese request for temporary quota adjustment by letter; it suggested that ICCAT should consider the appropriate process for authorising them, arguing that only a positive decision from the Commission in the form of a recommendation would suffice; a mere letter from a Contracting Party to the Commission was inadequate. Two resolutions authorised the transfer from Japan to China and Taiwan of 1,250 tonnes each of bigeye for 2003, provided there was no carry-forward of underage, and of 100 tonnes of South Atlantic swordfish quota from Japan to Taiwan. In 2005

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989 Operative paragraphs 3 and 8 of “Recommendation by ICCAT Relating to the Rebuilding Program for North Atlantic Swordfish” (Annex 8.2 to ICCATSM13 Report), in ICCAT Green Book 2003/1, supra Ch II n 427, 155 at 156-157; operative paragraph 1 of “Recommendation by ICCAT on South Atlantic Swordfish Catch Limits” (Annex 8.3 to ICCATSM13 Report), ibid., 159 at 159.

990 Annex 8.8 to ICCATSM13 Report, supra Ch III n 615, at 168.

991 Annex 8 to ICCAT18 Report, supra Ch III n 612, at 180. The EC supported Taiwan’s proposal on condition of further discussion of underage, overage and catch limit transfers: ibid. at 193. As a recommendation is the means by which a decision of ICCAT can become contingently binding on its members – see Article VIII(2) of the 1966 Convention, supra Introduction n 6 – this accords with the analysis above.

992 Resolution by ICCAT to Authorize a Temporary Catch Limit Adjustment in the Bigeye Tuna Fishery [03-02] and Resolution by ICCAT to Authorize a Temporary Catch Limit Adjustment in the South Atlantic Swordfish Fishery) [03-05], in “Resolutions Adopted by ICCAT in 2006” (Annex 6 to ICCAT18 Report), in ICCAT Green Book 2004/1, supra Ch III n 612, 168 at 168 (bigeye), 169 (swordfish)). Note that resolutions are not mentioned in the 1966
China was the transferee from Japan of 2,000 tonnes of bigeye quota for each year from 2005 to 2008.\textsuperscript{994}

In setting catch limits for the northern stock of swordfish in 2006, ICCAT divided 12,815 tonnes among the EC, the US, Japan and Canada in fixed proportions for 2007 and 2008, but provided for the annual transfer from the US to Canada of 25 tonnes without affecting the underlying percentages, and of 20 tonnes from the UK on behalf of its overseas territories in the Atlantic to France on behalf of St Pierre et Miquelon.\textsuperscript{995} The individual limits of Morocco, Mexico, Senegal and Belize are to some extent pooled, in that ICCAT may transfer amounts to any of them whose limit is exhausted, provided the TAC does not rise.\textsuperscript{996} The flexibility for Japan to count catch in certain parts of the area against its unused limit for the southern stock is maintained,\textsuperscript{997} while the US may take up to 200 tonnes of its quota from the southern swordfish area.\textsuperscript{998} An innovation is that any party may transfer up to 15 per cent of its quota to any other party with an allocation (of which there are 21), which may not

\begin{itemize}
  \item \textsuperscript{994} Resolution by ICCAT to Authorize Catch Limit Adjustments in the Bigeye Tuna Fishery, \textit{supra} n 956, paragraph 1.
  \item \textsuperscript{995} Supplemental Recommendation by ICCAT to Amend the Rebuilding Program for North Atlantic Swordfish, in “Recommendations Adopted by ICCAT in 2006” (Annex 5 to \textit{Proceedings of the 15\textsuperscript{th} Special Meeting of the International Commission for the Conservation of Atlantic Tunas, Dubrovnik, Croatia, November 17 to 26, 2006} (hereinafter ICCATSM15 Report)), in ICCAT, \textit{Report for biennial period, 2006-07 Part I} (2006) (hereinafter ICCAT Green Book 2007/1), 122 at 124-125 (Recommendation [06-02], paragraph 3(c), footnotes 2 (US undercatch) and 4 (UK undercatch)).
  \item \textsuperscript{996} \textit{Ibid.}, footnote 3.
  \item \textsuperscript{997} \textit{Ibid.}, paragraph 7.
  \item \textsuperscript{998} \textit{Ibid.}, paragraph 3(c), footnote 1.
\end{itemize}
retransfer it to a third such party, but transfers to cover overcatch are not allowed.999 A like provision is made for the western stock of Atlantic bluefin tuna,1000 and there is also provision for transfer of US undercatch: 75 tonnes and 100 tonnes to Mexico in 2007 and 2008 respectively not further transferable and 50 tonnes to Canada in each of those years.1001 This is to be contrasted with the recommendation governing the eastern stock of Atlantic bluefin tuna, where transfer of quotas and catch limits among members and cooperating non-members requires ICCAT approval.1002

It appears that no proposed quota transfer has ever been refused, although a proposal to transfer 1,000 tonnes of Korean eastern ABT underage to Turkey was withdrawn in 2004 before the intersessional mail vote on it was completed.1003 There are signs, however, of pressured building for more systematic treatment of quota transfers. At ICCAT’s 2004 meeting Mexico called for transparent regulation of transfer, arguing that, as a form of allocation, it should not affect measures of conservation.1004

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999 Ibid., paragraph 14. The rule against retransfer is not much of a discipline, however, since it could be argued that it is not the same share of the quota that is being transferred, or the sale could precede the purchase.

1000 Supplemental Recommendation by ICCAT concerning the Western Atlantic Bluefin Tuna Rebuilding Program, in Annex 5 to ICCATSM15 Report, supra n 995, at 146 (Recommendation [06-06], paragraph 9).

1001 Ibid., paragraphs 6(d) (transfers to Mexico) and 6(e) (transfers to Canada).

1002 Recommendation by ICCAT to Establish a Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean, ibid., at 132 (Recommendation [06-05], paragraph 11).

1003 See “Chairman Miyahara’s position on mail voting”, in “Opening Addresses & Statements to the Plenary Sessions” (Annex 3 to ICCATSM14 Report), in ICCAT Green Book 2005/1, supra Ch IV n 910, 68 at 92. Korea’s reference in the 2005 report to the proposed transfer as one that “had not been approved by the Commission” suggests that it was withdrawn because it would have failed to secure the necessary two-thirds majority support: Report of the Meeting of the Conservation and Management Measures Compliance Committee (Annex 9 to ICCAT19 Report), in ICCAT Green Book 2006/1, supra Ch V n 956, 210 at 214.

1004 See Mexico’s Opening Statement in Annex 3 to ICCATSM14 Report, supra n 1003, at 77.
ICCAT working group has also urged, so far without result, that clarification would be useful of the rules for transfer of fishing possibilities.\footnote{1005}

While ICCAT would, it seems, disapprove of money changing hands in return for temporary quota transfers, consideration of other kinds, as noted in the preceding examples, appears to be already accepted. Yet there is no reason in principle for distinguishing between indirect consideration (side payments, in fisheries economics parlance) and direct. Kaitala and Munro argue that exclusion of side payments may make the difference between possibility and impossibility of a cooperative solution to allocation conflicts.\footnote{1006}

\footnote{1005} “Request to the Commission by the Key Contacts of the Compendium Working Group for Clarification in Relation to Interpretive Issues” (Appendix 3 to Report of the Meeting of the Key Contacts of the Working Group to Consider the Development of a Compendium of Recommendations and Resolutions (Madrid, Spain, September 21-22, 2004)(Annex 4.3 to ICCATSM14 Report)), in ICCAT Green Book 2005/1, supra Ch IV n 910, 122 at 123.

\footnote{1006} Kaitala and Munro (1993), supra Ch I n 120, at 324. The OECD agrees (OECD, supra Ch I n 53, at 163), supporting side-payments as a way of letting Munro’s compensation principle work. This holds that the preferences of the State that values an international fishery most highly should be fully reflected in management policy; it can then compensate others, transforming the problem from one of allocation of harvests into one of allocation of net benefits from the fishery – as was done in the 1911 Bering Sea Fur Seals Convention (supra n 933): Munro (1987), supra Ch I n 120, at 282-283. An intermediate instance of money changing hands, but not directly for quota, is the lopsided contributions to new “endowment funds” to underpin a 1999 accord under the Treaty between the Government of the United States of America and the Government of Canada concerning Pacific Salmon, done at Ottawa, 28 January 1985, 1469 UNTS 357: K.A. Miller, “North American Pacific Salmon: A Case of Fragile Cooperation”, in Papers Presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks - Bergen, Norway, 7-10 October 2002 (Rome: FAO, 2003; FAO Fisheries Report No 695 (Supplement)), 105 at 116 and 119. On the application of the compensation model to the SBT fishery, one economic model (Kennedy & Watkins, La Trobe University, 1984) considered by Australia’s IAC in its 1983-84 inquiry suggested that the greatest combined return to Australia and Japan would be achieved by closing down the Australian fishery; foreign investment laws permitting, Japanese industry interests would buy all Australian quota at market price and not use it (supra Ch I n 44, at 30, 36). The non-use, though economically rational, is perhaps a bolder assumption than the evidence – principally in the form of Japan’s arguments – warrants. Events in the years
NAFO

Transfers of quota are also possible in NAFO, whose Annual Quota Table for 2000\textsuperscript{1007} has the following footnote in the squid column:

Any quota listed for squid may be increased by a transfer from any “coastal state” as defined in Article 1, paragraph 3 of the NAFO Convention, provided that the TAC for squid is not exceeded. Transfers made to Contracting Parties conducting fisheries for squid in the Regulatory Area shall be reported to the Executive Secretary, and the report shall be made as promptly as possible.

On this evidence NAFO is, in relation to squid if nothing else, near the liberal end of the scale, with blanket advance permission for transfers, subject only to a notification requirement, with no prohibition on payment.\textsuperscript{1008} The squid transfer appears related to Japan’s residual access to Canada’s EEZ for this species, but which Japan has largely left uncaught.\textsuperscript{1009} Further, 370 tonnes of redfish quota were transferred from Canada to Japan in December 2000, also without apparent specific authority.\textsuperscript{1010}

There have been suggestions by France and the Republic of Korea that quotas too small to be commercially viable, and hence left unfished, should be transferred to

\textsuperscript{1007} “Quota Table for 2000” (Annex 5 to Fisheries Commission Annual Meeting 13-17 September 1999, Dartmouth, N.S., Canada (hereinafter NAFO Fisheries Commission Meeting Report 1999)), in NAFO Annual Report 1999, supra Ch III n 519, 96.

\textsuperscript{1008} While there is no express provision as to what the consequence would be of failure to notify a transfer, the likeliest result is the default one from the analysis above: that no NAFO member not party to the transaction is prejudiced by it, hence any such member can hold the purchasing party to its original, pre-transfer quota.


other parties that were “in desperate need” of them, but NAFO has not discussed or made any decision on these. More recently, the United States has tabled a paper on allocation adapting the ICCAT Allocation Criteria to NAFO circumstances; significantly, this did not include the ICCAT precedent’s prohibition on trading. Yet actual quota transfers in NAFO, though having a long history, appear to be infrequent, with the transfer of 300 tonnes of 3M redfish quota from Russia to Japan approved by the Fisheries Commission in 2005 being the first transaction reported since 2001. Nothing of consequence occurred in either 2006 or 2007, the footnote in the quota tables referring to the possibility of trading in squid quota simply continuing from year to year.

3 NEAFC

This commission also permits trading. Since 2002 paragraph 2 of the annual recommendations on the pelagic fishery for redfish has left “Contracting Parties… free to transfer quantities of their quota to other Contracting Parties. All transfers

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shall be reported promptly to the Secretariat.”

A debate on quota transfer at NEAFC’s 1998 annual meeting showed a division of opinion: there was uncertainty in relation to the abundance of the redfish stocks concerned, and Norway in particular thought that leaving quota unused would be beneficial to the stock.

There has also been a series of quota transfers of Norwegian spring-spawning herring among coastal States that appears to relate to access to the EEZ and was not reported to NEAFC even though the fishing takes place within its Convention Area, as the matter is handled directly among its coastal State members (which all five remaining members now are since the 2004 accession of Estonia and Poland to the European Community). In 2006, however, Recommendation I referred to the Community, Denmark (in respect of the Faroe Islands and Greenland) and Norway having agreed to transfer 3,766 tonnes of their joint quota to the Russian Federation, the level to be reduced and phased out by 2010. The formula is repeated in the following year’s Recommendation I, except that the figure for 2008, in line with the reduction

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1017 R.R. Churchill, “Managing Straddling Fish Stocks in the North-East Atlantic: A Multiplicity of Instruments and Regime Linkages—but How Effective a Management?”, in Stokke (ed), supra Ch I n 124, 235 at 246 (Table 8.2).


1019 Recommendation by the North East Atlantic Fisheries Commission in accordance with Article 5 of the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries at its Annual Meeting in November 2007 to adopt Conservation and Management
mentioned the previous year, has become 3000 tonnes. In 2007 there was also a
cryptic reference in Recommendation II to quotas transferred from one party to
another,\textsuperscript{1020} reflecting the separate Agreed Record which leaves the question of quota
transfer to bilateral arrangements.\textsuperscript{1021}

4 IBSFC

Possibly the oldest systematic treatment of transfer of quotas was in the IBSFC. The
first two paragraphs of Rule 2.1 of its Fishery Rules stated that:

[W]ith a view to achieve a better utilization of existing fishing possibilities of the
fish stocks subject to regulations agreed by the Baltic Commission, transfers can be
made between Contracting Parties.

Contracting Parties shall not later than 1 February inform the Commission of quota
transfers and exchanges of quotas with other Contracting Parties or third countries.
Contracting Parties shall inform the Commission on any other quota transfers or
quota exchanges during the year not later than one month after the transaction.\textsuperscript{1022}

The Secretary of this commission had noted that:

Measure for Mackerel in the NEAFC Convention Area in 2008 (Annex E to Report of the 26th
Annual Meeting of the North-East Atlantic Fisheries Commission, 12-16 November 2007,
Volume II – Annexes, available at <www.neafc.org/reports/annual-meeting/docs/26neafc_
paragraph 4.

\textsuperscript{1020} Recommendation by the North East Atlantic Fisheries Commission in accordance with
Article 5 of the Convention on Future Multilateral Cooperation in the North-East Atlantic
Fisheries at its Annual Meeting in November 2007 to adopt Conservation and Management
Measures for Blue Whiting in the NEAFC Convention Area in 2008 (Annex C to NEAFC26
Report, supra n 1019), paragraph 6.

\textsuperscript{1021} See “Arrangement for the Regulation of the Fisheries of Blue Whiting in 2008” (Annex
1 to Agreed Record of Conclusions of Fisheries Consultations between Iceland, the European
Community, the Faroe Islands and Norway on the Management of Blue Whiting in 2008,
on 24 April 2008)), paragraph 5.

\textsuperscript{1022} The former IBSFC’s website is no longer operational, but the version of the Rules as
most recently amended in 2003 can be seen at that of the Internet Guide to International Fisheries
[T]ransfers of quota and/or reciprocal access arrangements have become a normal procedure on a bilateral basis…when transfers of quota are made among members…, these transfers are not permanent (for one respective year only) and… are normally exchanged for quota for other species subject to IBSFC management. There have, however, been instances of quota being exchanged in return for development assistance payments. ¹⁰²³

While the national allocations here were thus of the time-limited variety, as in ICCAT, the distinctive, indeed unique feature of the IBSFC scheme was the openness to trading with non-members. This may well have been a paradoxical result of the ease of excluding them: ¹⁰²⁴ because of the Baltic Sea’s narrowness, no part of it lies more than 200 nautical miles from land, and thus everywhere within it fishing has for many years been subject to the sovereign rights of each coastal State in its EEZ (or of the European Community as the delegate of its member States).

In the IBSFC’s final years the allocated shares also seem to have achieved some degree of semi-permanence. As the Secretary observed in 2002, for the previous few years, the members’ allocations had been based on fixed percentages for the individual species (cod, herring, sprat and salmon) by country. ¹⁰²⁵

D  Consideration of quota trading in the CCSBT

The CCSBT has moved at a gentle pace on the question of trading in quota. At its 2003 meeting a paper prepared by the Secretariat was considered, but the conclusions were less than profound: the issue “was very complex and…the legal implications are not clear.” The Secretariat was requested to prepare a comprehensive review of the issue and circulate it to Members for intersessional discussion, and to seek legal

¹⁰²³  W. Ranke, “Cooperative Fisheries Management Issues in the Baltic Sea”, in FAO Fisheries Report No 695 (Supplement), supra n 1006, 123 at 128.
¹⁰²⁴  See the passages from Burke and Munro both cited supra Ch III n 555.
¹⁰²⁵  Ranke, supra n 1023, at 124. This is confirmed by a comparison of the distribution tables for 1999 and 2002 (at 126 and 127 respectively) showing that the absolute amounts of TAC for various stocks have changed, but each member’s percentage of each stock in 2002 was the same as in 1999 (though an individual member has different percentages of different stocks).
advice from all Members as well as independent advice, although the precise question on which it should seek advice was not specified.  

The subsequent terms of reference for the independent advice were in fact very detailed:

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 [1993] 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:
     - Are allocations “owned” by members?
     - Does a national allocation create a form of “right” that can be considered sub-divisible and able to be traded?
     - If allocations are sub-divisible who has lawful authority over allocation and reallocation of access to the stock i.e. does the authority rest with the member state or the Commission?
     - Does any “right” to an allocation remain ongoing or is it dependent upon conditions such as a member’s capacity to harvest it directly?
     - How do these issues apply to the “catch limits” for cooperating non-members? Do these limits constitute a different form or nature of “right”?  
     - 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:

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1026 CCSBT-EC2 Report, supra Ch II n 353, at 25 (paragraphs 55 and 56).
• 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.1027

1 The independent advice

The advice was provided by William Edeson of the Centre for Maritime Policy at the University of Wollongong, described as “formally [sic] senior legal counsel at the FAO”. The Edeson advice begins by noting that international law has little to say directly on the subject of quota trading. It contrasts the rights-based fishing within zones of national jurisdiction under the sovereign rights of the coastal State, which “involve in varying degrees the opportunity for individuals to have a right to quota and to trade that right” (the ITQs discussed in Chapter I being an example of this), with the position on the high seas, where:

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.1028

In other words, Edeson is here highlighting the impossibility of limiting entry to the high seas fishery. He confirms that terms such as “appropriate management” and “conservation and optimum utilisation” mandated for SBT by Article 3 of the 1993 Convention “would not on their face exclude trading of quota”.1029 From Article 8’s wording he deduces that “quota trading was not in the forefront of the objectives and purposes of the Convention. However, it is not excluded either.” The broad range of

1027 “Quota Trading under the Convention for the Conservation of Southern Bluefin Tuna” (Attachment A to CCSBT doc CCSBT-EC/0410/16, on file with author), at 3.
1028 Ibid., at 4.
1029 Ibid., at 5.
matters the CCSBT may consider (he cites in particular subparagraphs 3(b) and 4(f)), “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.”

Turning to the position of cooperating non-members, Edeson analyses the resolution by which that status was created, drawing particular attention to the written commitments that the candidate State or entity gives to the Extended Commission under subparagraph 2(4), including (b) “abide by the conservation and management measures and all other decisions and resolutions adopted in accordance with the Convention”. An applicant has arguably…bound itself in international law by making the formal written statement…even if there is no binding treaty between the Commission and the cooperating non member…Further, the actions of the Commission and the non member would be governed by international law principles of estoppel and acquiescence.

Paragraph 8 of the Resolution, which provides for annual renewal of the status by the Extended Commission if the cooperating non-member qualifies to retain it, 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.

This might require qualification in the case of parties to the UN Fish Stocks Agreement, who “would have no choice but to operate through the Commission by virtue of article 8.4”, but since not all members of the Extended Commission are parties, the reliance that can be placed on this is limited.

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1030 Ibid., at 5. This is on the basis (at 7) that the Extended Commission, under the resolution that established it (Attachment I to CCSBT7 Report, supra Ch II n 408), reproduced infra at Appendix D, “can do, in respect of quota allocations, what the Commission itself can do.”

1031 Attachment 7 to CCSBT-EC2 Report, supra Ch IV n 803.

1032 Attachment A to CCSBT doc CCSBT-EC/0410/16, supra n 1027, at 10.

1033 Ibid., at 11.

1034 Ibid., at 11-12.
On the specific subject of rights to and ownership of quota, the Edeson advice distinguishes between SBT within EEZs and those on the high seas. In the former, rights to fish could be granted to individuals or vessels “that are similar to a tradable property right”, but for the latter the situation is different in view of the fact that the resources are…subject to the freedom of fishing on the high seas, and…all States have a right to fish on the high seas. It should also be noted that the right is given to States, not individuals.

Thus, any right to fish on the high seas can never be absolute. Under a treaty regime dealing in part with high seas fisheries, while 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.1035

On this point, while the 1993 Convention’s application is not spatially restricted (a view supported by Article 1, which states that it applies to SBT *simpliciter*) and it does not distinguish between the EEZ and the high seas for allocative purposes, it 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. In other words, coastal States would retain the right to do what they wish with their quota which has been taken within its [sic] own EEZ, unless there was a decision of the Commission to the contrary under article 8…subject to any constraints imposed by articles 15.3 and [15.]4.

…In this situation, it would fall to be determined by each member how it gave 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 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.1036

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As to whether UNCLOS prevents States from setting up a system for trading of quota in highly migratory species on the high seas, the advice concludes with some hesitation that

there is nothing in the wording of article 64 or articles 116 to 119…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 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 [sic] constraints…would be the need to ensure that such a system did not infringe the right of all States for its [sic] nationals to fish on the high seas in accordance with article 116, and the requirement that conversation measures adopted and their implementation do not discriminate in form or in fact against the fishermen of any State (article 119.3). 1037

The advice identifies the 1993 Convention as another possible source of constraints, but dismisses Article 8, paragraph 3, since any inference from the directive in subparagraph (a) for a TAC and its “allocation among the parties” that trading might be restricted to being among parties is not supportable in light of the concluding words, which allow the CCSBT to decide on “other appropriate measures”.

Returning to paragraphs 3 and 4 of Article 15, these “do not in their terms actually prevent quota being traded”, but “do place an obligation on the parties to ensure that any quota traded does not have the effect of undermining any measures adopted”. 1038

The advice thus identifies three distinct situations of trading: (a) among members of the Extended Commission there would be “no problem”; (b) from a member to a cooperating non-member, the position could depend on where the catch was to be taken: within the EEZ of the member it would be subject to the latter’s sovereign rights, but on the high seas the written commitments of the non-member would make

1037 Ibid., at 15-16. See infra, text at and following n 1084, for an instance of how trading might tend to defeat the conservation, though probably not the optimum utilisation, of a stock.

1038 Ibid., at 16-17.
it “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.”; and (c) from a member or a
cooperating non-member to any other State or entity, a “possibility [that] is probably
just theoretical at the present”, where the conclusion is that, provided the constraints
in Article 15 of the 1993 Convention are respected, “there appears to be no restraint
on such transfer”. For an external transferee party to the UN Fish Stocks Agreement,
its agreement under Article 8, paragraph 4 of that treaty to “apply the conservation
and management measures established” would put it “in a position similar to a
cooperating non-member”, whereas a non-party to the Agreement would merely be
under a general duty to cooperate in terms of UNCLOS Articles 64 and 116-119.1039

The question on how other fishery commissions have addressed the issue of trading
is answered by reference to the practice of ICCAT and NAFO, considered more fully
in the previous section.1040

The last section of the advice deals with the characteristics of a quota trading scheme
and the factors to be borne in mind should the CCSBT wish to establish one: these
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…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 [sic] tuna
wherever located and allocated the quota directly to those seeking to fish.1041

1039  Ibid., at 17-18. There also “does not appear to be a substantial difference in effect”
between national allocations of members and catch limits of cooperating non-members: at 18.
1040  Ibid., at 18-19; supra, text at nn 977-1013.
1041  Ibid., at 19. By necessary implication this bypasses the step of national allocations, and
is thus a sure way of avoiding discrimination contrary to UNCLOS Article 119(3), provided that
non-members can join and thus make their nationals eligible to bid for quota.
After rehearsing the effect of the various provisions of UNCLOS and of the UN Fish Stocks Agreement already cited, the advice concludes that:

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 [sic] 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.  

For a “full fledged quota trading scheme” the CCSBT would then need to consider what criteria would give the right to apply for allocation of quota, and whether trading should be limited to members, extended to cooperating non-members or also to others. If trading to others were to be permitted, the Edeson advice suggests that it may be necessary to attach conditions to such transfers. These might include respect for the conservation and management measures adopted, permitting transfer only where the flag State is in a position to ensure compliance with them (which in turn might suggest that the Extended Commission should separately authorise each transaction of this sort) and monitoring of the utilisation of the quota – essentially putting the transferee in the same position as if it had given the written commitment of a cooperating non-member. It would be desirable, however, 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.

Another question would be the duration of quota allocations – the fact that allocations to cooperating non-members could only be for a year at a time might call for adjustment of the yearly renewal cycle if a move to multi-year quotas were being

\begin{footnotesize}
\begin{enumerate}
\item[1042] Ibid., at 20.
\item[1043] Ibid., at 21.
\item[1044] Ibid., at 22. In the longer term, however, this is precisely the situation the members appear to want to achieve. As is apparent from nn 1199-1201 infra and accompanying text, however, this will come about not by force of the quota trading system itself, but by the operation on it of future trends in international fisheries law.
\end{enumerate}
\end{footnotesize}
contemplated. Further decisions could be needed on the circumstances in which quota might lapse, be reduced or cancelled, and on how chartering and joint ventures would be managed in relation to traded quota. Although a scheme could be instituted by a simple resolution of the Extended Commission, an in-principle decision in favour of quota trading, “accompanied by an indication of the elements it would like to have included in such a scheme” was recommended as a preliminary step to guide the drafting of the resolution.\textsuperscript{1045}

2 Responses to the advice

In response to the Edeson advice, the Secretariat produced a discussion paper\textsuperscript{1046} and New Zealand a legal opinion of its own.\textsuperscript{1047}

(a) The Secretariat paper

The Secretariat summarised the Edeson advice and applied it to the history of the SBT fishery, noting that Australia’s ITQ system was an application of property rights within the EEZ in exercise of its sovereign rights as a coastal State. It characterised as “trade” the bilateral agreements in the late 1980s and early 1990s by which Japan fished Australia’s quota in its EEZ – and apparently also New Zealand’s chartering arrangements whereby some of its quota was fished by vessels flagged to non-members.\textsuperscript{1048} The advice is interpreted as implicitly favouring restricting any quota trading system to members and

\textsuperscript{1045} Ibid.
\textsuperscript{1046} “Commission for the Conservation of Southern Bluefin Tuna Quota Trading – Discussion Paper” (Attachment B to CCSBT doc CCSBT-EC/0410/16, supra n 1027).
\textsuperscript{1047} “Convention for the Conservation of Southern Bluefin Tuna "Quota Trading"” (CCSBT doc CCSBT-EC/0410/Info01, on file with author).
\textsuperscript{1048} Attachment B to CCSBT doc CCSBT-EC/0410/16, supra n 1046, at 1-2. The last element is farfetched, since the quota was admitted to be still New Zealand’s; see also the analysis of EEZ access in the trilateral period, supra Ch II text at nn 376-382 and New Zealand’s own view infra, text at n 1070.
formal cooperating non-members at most. Restriction of participation to this group would give a framework for ensuring the conservation and management objectives of the CCSBT and would allow a compliance process to be instituted. 1049

Restriction to members only could “act as an incentive for cooperating non-members to accede” to the 1993 Convention, but would “limit the utility of the system by limiting trading opportunities.” 1050

The paper divides States outside this circle into “range states” (i.e. those through whose EEZs SBT migrates) and the remainder. It notes that the former “have some rights in relation to the fishery in their EEZs”, singling out South Africa but, oddly – since it was still in this category at the time – not Indonesia. Though South Africa “might be bound to the Extended Commission’s conservation and management measures because it has ratified the UN Fish Stocks Agreement”, it argues that 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. 1051

Inclusion of any others, however, “would seem totally inconsistent with the objectives of the Convention. It would transfer management of the fishery outside the scope of the Convention.” 1052

On the question of ownership, the Secretariat paper unexceptionably interprets the Edeson advice as being that “it would not be inconsistent with international law” for the Extended Commission to institute a “quota trading system that effectively granted a tradable right of some kind to members across the fishery.” This would reduce the question for the Extended Commission to the level of quota available for trading to be held by members and cooperating non-members. 1053 It notes that any such system would be dependent on there always being a TAC and national

1049 Ibid., at 2. 1050 Ibid. 1051 Ibid., at 2-3. 1052 Ibid., at 3. 1053 Ibid.
allocations – if these could not be set, the system would be rendered inoperable. It suggests that the need to ensure that the high seas freedom to fish was not infringed would be met by restricting its operation to members and cooperating non-members, though there would still be a need to cooperate with others in setting conservation and management measures.1054 As to timing, “any trading would need to be finalised prior to the setting of the TAC and national allocations or soon thereafter to be practical.” Since this is done on an annual cycle, the quota trading system would need to match it, lest quota trading extending beyond a year “allocate a right to trade in a quota that did not exist.”1055

In ascending order of complexity, the Secretariat paper envisages options ranging from trading being allowed within EEZs only, members negotiating trades bilaterally and advising the CCSBT subsequently through the Secretariat; bilaterally negotiated trades requiring CCSBT approval at annual meetings; and members declaring in advance to the CCSBT how much quota they wish to make tradable, with the amount subject to approval but not the actual trades, of which the Secretariat would simply be kept informed. Under the last option there could be some requirement, either case by case or by application of a formula, that some of the quota to be traded be set aside for conservation purposes, e.g. the tonnage gained by the transferee would be only half that relinquished by the transferor.1056 The paper advocates letting the market rather than the CCSBT set the price at which quota is traded, since the latter would generate “sub-optimal results from an economic perspective” as well as being “very difficult and almost impossible to manage effectively.” Leaving it to the transacting parties would by contrast ensure that “the appropriate price signals and national interests would be considered.”1057 For transactions that led to a transfer of

1054  Ibid., at 4. This appears to be a non sequitur, however, as it is hard to see why opening the system to all comers would of itself infringe their freedom to fish.
1055  Ibid.
1056  Ibid., at 4-5.
1057  Ibid., at 5.
effort between the surface fishery targeting juveniles and the longline fishery targeting more mature fish, the paper suggested three options: (a) to trade in fish numbers from longlining to the surface fishery, but in weight in the other direction; (b) to express trades in “adult equivalent” terms, based on scientific advice as to their relative impact on the fishery; (c) to impose an absolute catch limit on the juvenile fishery and allow trading only up to the point where the limit is reached.\textsuperscript{1058}

The Secretariat paper also adverts to the need for systems to monitor trade and record catch against traded quota. At minimum it suggests that any trade must be reported to the Secretariat for entering in a register to which Members would have access, the transferee to be responsible for ensuring the additional quota was not exceeded, with all existing requirements as to fishing against national allocations applying to fishing against additional quota. Finally, the system and the trading that took place under it should be reviewed at the CCSBT annual meeting, so that their impact on the fishery could be taken into account in setting the TAC and national allocations.\textsuperscript{1059}

(b) New Zealand’s opinion

The New Zealand legal advice doubles as a policy paper. It proceeds from a stance of scepticism as to the need for a quota trading system, reserving its position on the matter and suggesting that further thought be given to it “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.”\textsuperscript{1060} It treats “quota transfer” as a generic term including sale, lease or transfers within season, concentrating on “the principle of transfer of allocations rather than on secondary issues such as consideration or financial return”, which it suggests are premature.\textsuperscript{1061}

\textsuperscript{1058} Ibid., at 5-6. The last item is an attempt to take account of the complication described supra n 954. At 7 an alternative to (b) is canvassed: quota in trades shifting effort from the longline to the surface fishery should be reduced by a factor of three.

\textsuperscript{1059} Ibid., at 6.

\textsuperscript{1060} CCSBT doc CCSBT-EC/0410/Info01, supra n 1047, at 6 and 8.

\textsuperscript{1061} Ibid., at 1.
It concludes that under the CCSBT’s legal framework a Member may not unilaterally divide and transfer its allocation to another Member or non-member. To establish a system that allowed this, a decision of the CCSBT would be necessary, which would have to be in accordance with the Members’ obligations under the 1993 Convention, UNCLOS and the UN Fish Stocks Agreement. While the latter two do not preclude such a system, both

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). \(^{1062}\)

New Zealand argues that determination of the extent to which a member enjoys rights in its national allocation does not ultimately answer the key question of whether a member of the CCSBT has the legal capacity unilaterally to subdivide and transfer its allocation. After traversing the relevant provisions of the 1993 Convention, the New Zealand paper suggests 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 responsibility of the Commission to allocate the TAC and to abide by decisions of the Commission.

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.

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 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.

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…the Convention permits the Commission to withdraw, limit, amend or reallocate the TAC at any time…members do not enjoy ownership rights

\(^{1062}\) \textit{Ibid.}, at 1-2.
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.

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 is itself a limit on a member’s right to access the fishery as opposed to an entitlement in a resource.\textsuperscript{1063}

Thus New Zealand, though arguing on somewhat different lines from the analysis in Section B above, also concluded that national allocations are not in themselves assets but limitations on the freedom to fish. The restriction to the members’ own nationals, both in principle and in the light of New Zealand’s history of chartering foreign vessels, is implicitly confined to the high seas. This is confirmed when the New Zealand paper goes on to argue that the effect of UNCLOS Article 116 is that 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 [sic] 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.\textsuperscript{1064}

By “compliance relationship” New Zealand appears to mean inter alia a mechanism for accounting for catch of SBT, as discussed in section E below. It thus implicitly disagrees with Edeson’s analysis that Article 15, paragraph 4 of the 1993 Convention (not mentioned in its opinion) is no obstacle to transfer of quota to non-members. It

\textsuperscript{1063} Ibid., at 3-4.
\textsuperscript{1064} Ibid., at 4.
is not clear, however, what the notion of flag State responsibilities adds here. Given that a national allocation is only a catch limit, it does not follow that a transfer agreement between a Member and a non-member engages such responsibility at all. If anything, the Member would be doing the CCSBT and its fellow Members a service by securing for the first time from the non-member a quantitative limit on its catch, which, if adhered to, would mean no net addition of catch.\textsuperscript{1065}

This confusion is only partly resolved by New Zealand seeing in Articles 64 and 118 of UNCLOS a duty to cooperate with the CCSBT itself, an essential element of which 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…a collective decision of the Commission would be required to determine the necessary conditions of transfer.\textsuperscript{1066}

Again, while it is certainly possible to speak of Members owing duties to the CCSBT,\textsuperscript{1067} in the context of internal transfers, this adds nothing to the section B analysis, especially as only a transferor’s fellow Members are in a position to enforce its obligations. It may be conceded, however, that the duty to cooperate could be a basis on which to resist transfer to non-members in commissions whose constitutive treaties lack an equivalent of Article 15, paragraph 4 of the 1993 Convention.

New Zealand concludes that

[t]he 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 argumentation 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

\textsuperscript{1065} Assuming the quota was time-limited, however, if the CCSBT did not approve of the transaction, it could decline to allocate the same figure to the member the following year.

\textsuperscript{1066} CCSBT doc CCSBT-EC/0410/Info01, supra n 1047, at 4-5.

\textsuperscript{1067} See supra n 953.
members...Until such time as the Commission agrees on the conditions under which quota transfer would be permitted, any unilateral subdivision 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.  

It concedes, however, that “there is no legal reason to prevent the Commission establishing a quota transfer system, setting the conditions under which the system would operate.”

As for coastal States’ EEZs, the opinion stresses that the greater rights such a State enjoys in its EEZ are 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 a non-member simply because it is a coastal state. To do so would undermine the Commission’s capacity to define and manage allocations under the Convention’s article 8(3).

If a coastal state gives foreign vessels access to its EEZ under Article 62, paragraph 2 of UNCLOS because it does not itself have the capacity to harvest the entire allowable catch, this does not amount to transfer of allocations 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.”

On trading under domestic law, the New Zealand opinion is that 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

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1068 CCSBT doc CCSBT-EC/0410/Info01, supra n 1047, at 5.
1069 Ibid.
1070 Ibid. The same logic suggests that allowing a non-member access to the surplus in the EEZ would also not be a transfer of quota, since the non-member would be fishing against the coastal State Member’s quota.
TAC or any other conservation and management decision of the Commission at any
time.\textsuperscript{1071}

Supporting Edeson’s view that property-like rights can be created in the EEZ, it
cautions that such rights would “be subject to a member’s continued responsibility to
ensure that its obligations with respect to the conservation and management measures
of the SBT fishery were respected in any such arrangement.”\textsuperscript{1072}

Should the CCSBT decide to permit quota trading, New Zealand notes that “a quota
transfer system would have to be in compliance with the Commission’s obligations
under article 8, members’ competing obligations under the [1993] Convention,
UNCLOS, and where applicable, UNFSA [the UN Fish Stocks Agreement].”\textsuperscript{1073} It
considers that such a decision could be made under either subparagraph of Article 8,
paragraph 3. Its view of the list of factors going to allocation in paragraph 4, though,
is that these are not static but “dynamic” and “necessarily…subject to adjustment”.
Going beyond Edeson’s view of UNCLOS Articles 64 and 116-119, New Zealand’s
opinion suggests it would not be enough for a quota transfer system just to “observe
the objectives” of these provisions, it must leave Members able to implement “their
competing obligations”, in particular to ensure that any conservation measure was
non-discriminatory, did not undermine the CCSBT’s conservation measures, took
into account the interests of coastal States through whose EEZs SBT migrates, and
was reinforced by a compliance relationship with the CCSBT based on flag state
responsibilities and enforcement. In addition, Members party to the UN Fish Stocks
Agreement would need to have a duty to ensure that such a system did not preclude
any State with a real interest in the fishery from participating in the CCSBT.\textsuperscript{1074}

\textsuperscript{1071} Ibid., at 6. This seems more of a theoretical than a practical constraint, since only in
exceptional circumstances will a Member in this position wish to cut the TAC and national
allocations in mid-season after they have already been set – and then presumably only because
the stock is in such poor condition that that quotaholders cannot anyway catch their full shares.
\textsuperscript{1072} Ibid.
\textsuperscript{1073} Ibid.
\textsuperscript{1074} Ibid., at 7-8.
Finally, New Zealand answers the original question by observing that:

[t]he nature of the rights a member would enjoy in its 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.\textsuperscript{1075}

Despite the implicit divergence of views on the effect of Article 15, paragraph 4 on transfers to non-members revealed by the CCSBT’s intersessional activity on quota trading in 2004, there thus appears to be a common understanding that it is the nature of national allocations, rather than anything in the 1993 Convention or other rules of international fisheries law, that prevents them from being traded as assets from one Member to another, or to a non-member. Accordingly, it was open to the CCSBT, were it so minded, to establish a system of trading. The outlines of that system, as the Edeson advice and the analysis in section B show, were by no means preordained, and the design process might have been expected to be taken forward at the CCSBT’s 2004 meeting. The debate there, however, did not proceed very far.

3 Further debate within the CCSBT

At the 2004 meeting Korea described quota as a “legal asset”,\textsuperscript{1076} implying that national allocations could be traded without further ado, but it was alone in this view, which on the analysis above is premature. The Philippines, however, “strongly endorse[d] the quota trading that has recently been floated” as an alternative way to obtain the larger allocation it sought, clearly implying a willingness to pay for it.\textsuperscript{1077}

\textsuperscript{1075} Ibid., at 8.

\textsuperscript{1076} CCSBT-EC3 Report, \textit{supra} Ch I n 78, at 26 (paragraph 72). In this it may have been influenced by the EC’s use of the same word in Annex 6 to ICCAT16 Report, \textit{supra} Ch III n 587, at 88 (paragraph 6.17).

\textsuperscript{1077} Attachment 5 to CCSBT-EC3 Report, \textit{supra} Ch IV n 915, repeated in 2005 in “Opening Statement by the Philippines” (Attachment 5 to CCSBT-EC4 Report, \textit{supra} Ch I n 248).
Three opinions were reflected in the meeting report without attribution: (a) while the stock is in a serious state, unused quota should not be reallocated through trading, since that would result in increased catch; (b) trading is undesirable in principle because a Member should not benefit by trading unused quota and allocations are not conferred on a permanent basis; (c) quota trading should be considered once the management procedure being worked out by the scientists for the Commission’s approval was in place. Discussion was deferred for another year.

In 2005 it appeared that only Korea was still interested in actively pursuing the matter given the renewed deterioration of the stock, with members considering reduction of the TAC. Interest was nonetheless expressed, albeit as a low priority, in the CCSBT developing a more general policy covering joint ventures and charting as well as buying and leasing of quota, drawing on any ICCAT precedent. The Executive Secretary orally summarised the Edeson advice, to the effect that a positive decision by the CCSBT would be needed for a quota trading system to be introduced, but in the meantime chartering and joint ventures could be undertaken without transfer of quota, with the Member concerned remaining responsible for compliance and other related measures. Bilateral access to a Member’s EEZ also did not require the CCSBT’s approval, but should be reported to it. Undeterred, Korea said it would bring a set of principles and guidelines for trading to the 2006 meeting, though this has not yet happened, no doubt because the CCSBT’s attention has since early 2006 been consumed by the consequences of the crisis caused by revelations of persistent overcatch.

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1078 CCSBT-EC3 Report, supra Ch I n 78, at 26 (paragraph 73).
1079 Ibid. (paragraph 74).
1080 CCSBT-EC4 Report, supra Ch I n 248, at paragraphs 107 and 108.
1081 Ibid., at paragraph 109.
1082 Ibid., at paragraph 111.
1083 See infra Ch VI, text accompanying nn 1331-1334.
The first two objections appear rooted in the present state of affairs but do not amount to an argument against tradability of quotas. That based on the state of the stock – i.e. that quota which a party does not need or propose to fill is best left uncaught for the stock’s sake – assumes that the trading being contemplated is transfer within a season, and to that extent is sound: making more efficient use of quota in this way should mean that less of it is needed overall, that is, the TAC should fall if actual catch is not to increase. Yet a pari passu reduction of national allocations to compensate for the change in efficiency of their use would be resisted by the members not party to the transaction, while to require the transacting parties to bear it all themselves would deprive the transfer of any benefit to them. The objection in principle is understandable in view of the recent history of quota negotiations in the CCSBT, in which one new entrant was able to extract a higher national allocation from the original members with its recent catch history than it was subsequently able to continue catching profitably. But it makes no difference whether quotas are limited in time or permanent (or, more precisely, indefinite), and whether there is any reason to resist the step of making the CCSBT’s national allocations indefinite is a separate question. In view of the need for consensus on an initial distribution, however, a member with a persistently large unused portion of its quota could not reasonably expect to keep all of it.

The third view makes trading contingent on a rule for deriving changes to TAC and national allocations from a pre-agreed long-term formula rather than the present

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1084 See in this context Arnason’s proof that under this system all quota will be used: Arnason, supra Ch I n 105, at 652.

1085 That new entrant, ironically, was Korea, whose desire to treat quota as an asset seems selective: at the same meeting it noted that its share of the budget did not incorporate a discount for the conservation value of leaving its national allocation mostly unused and asked that this be considered at the next meeting: CCSBT-EC3 Report, supra Ch I n 78, at 18 (paragraph 14). But nothing appears to have come of this, and since under the formula in Article 11 of the 1993 Convention Korea could automatically have reduced its contribution by relinquishing part of its allocation, a sympathetic hearing was probably more than it could realistically expect.
system of annual negotiation with its attendant risk of failure to reach a decision. This has much in common with New Zealand’s emphasis on the “compliance relationship” as an essential underpinning of any trading system, which could be expected to bring significant, if incidental, improvements to international fisheries management by forcing commissions to improve their performance in accounting for catch of the stocks which they regulate. This is the subject of the next section.

E Accounting for catch

Once set, it has not inevitably been the case that catch limits have been adhered to, despite being ostensibly binding. Perhaps surprisingly, given that TAC and national allocations are the central management tool with which the 1993 Convention equips the CCSBT, it provides no means for the Parties each to assure themselves that the others are adhering to their negotiated catch limits. To this day the CCSBT lacks a uniform catch accounting policy, leaving it to each Member to adopt its own regime, with consequent susceptibility to manipulation to conceal overcatch. In its early years, the Members informed each other of their accounting regimes at meetings only on an ad hoc basis, continuing the practice of the trilateral period.\footnote{1086}

Thus at the CCSBT’s Third Meeting Australia explained its specialised system of accounting for farmed fish,\footnote{1087} but it was Taiwan as an observer that led the way in

\footnote{1086} In September 1989 Summary Record, supra Ch II n 368, Japan announced (at 4) that it had instituted penalties of 2 years’ jail or ¥500,000 for violation of catch limits, while Australia advised (at 3) that stringent measures for monitoring the catch and its size composition were an integral part of the Australian SBT Fishery Management Plan; all SBT landed in Australia were weighed and assessed for length; recreational fishing groups had agreed not to land SBT; and legislation had been introduced to prohibit landings of SBT outside the total Australian quota.

\footnote{1087} See subsection 4 infra.
respect of actual catches. Since 1996, it related, \(^{1088}\) every vessel that caught SBT had been required to report the weight and fishing ground to the Fisheries Department of the Kaohsiung Municipal Government. At the Fourth Meeting New Zealand explained that vessels participating in its SBT fishery compete for catch until the annual limit of 420 tonnes was reached. The Ministry of Fisheries required licensed fish receivers and larger vessels that froze their catch to submit weekly catch reports for verification. \(^{1089}\)

At the CCSBT’s Fifth Meeting Japan explained that the Japan Fisheries Agency set an annual catch limit and closed seasons to protect spawning and juvenile fish for three separate fishing areas (off Tasmania, off Cape Town and the southern Indian Ocean). It required vessels to report their catches and position, dispatches patrol boats, and has observers aboard fishing vessels. Under government supervision, the

\(^{1088}\) Attachment K to CCSBT3(1) Report, \(supra\) Ch I n 102, at 1. This information was subsequently updated: since 2002 each vessel fishing for SBT must be equipped with a vessel monitoring system that provides the vessel’s location to a monitoring centre by satellite, and the length of each fish caught must be measured. In order to obtain the SBT statistical document (see \(supra\) Ch IV n 879 and accompanying text), daily catch, position and discards records must be supplied in weekly reports: “Review of Taiwan’s SBT Fishery of 2003/04” (Attachment 8-2 to CCSBT-EC4 Report, \(supra\) Ch I n 248), at 1-2.

\(^{1089}\) Attachment N to CCSBT4(1) Report, \(supra\) Ch I n 210, at 42; see also “Review of New Zealand SBT Fisheries for CCSBT-8” (Attachment K-4 to CCSBT8 Report), in CCSBT Blue Book 2002, \(supra\) Ch I n 30, 134 at 134-135. In 2003 weekly reporting was required once 25% of the quota has been taken, and daily reporting once 50% was taken, with a view to closure of the season as close as possible to the New Zealand national allocation being reached; all SBT permits holders are then notified that the season is closed and that it would be an offence to take SBT for the remainder of the fishing year: Attachment 8-4 to CCSBT-EC2 Report, \(supra\) Ch I n 211, at 80. From 2004 all operators have been required to furnish monthly catch returns which are matched against individual quota holdings. Financial penalties apply on a monthly basis to those who catch SBT without quota; operators have the opportunity to reconcile their quota and catch until the end of the fishing year (i.e. by purchase of quota, if available), after which the penalties increase. The total catch is assessed annually and adjustment made in future years’ limits to balance the catch from the fishery and the New Zealand national allocation: Attachment 8-4 to CCSBT-EC3 Report, \(supra\) Ch I n 203, at 78.
industry itself decided the allocation of the catch among the areas, as well as the numbers of vessels and starting dates of fishing in each. Vessels had to report entry to and departure from the fishing ground within three days, and report catches at intervals of ten days. They were encouraged, though not obliged, to report catch data including biological data such as size composition and oceanographic data daily via satellite. On the basis of the information so supplied, the Government would calculate the date on which the catch limit for each area would be reached, and by regulation prohibit fishing after that date.\footnote{Review of Southern Bluefin Tuna (SBT) Fisheries in Japan (1998/97 \textit{sic} season)} From 1 April 2006, in response to the revelations of persistent past overcatches, Japan instituted a system of individual vessel quotas, with landing of SBT restricted to eight designated ports, all landings to be monitored by government inspectors. Each fish must be individually tagged with a serial number and the vessel’s call sign; penalties for infringement are severe and could result in suspension of quota for up to five years.\footnote{Appendix 3 to Attachment 12-5 to CCSBT-EC5 Report, \textit{supra} n 102.}

Not until the Sixth Meeting of the CCSBT in 2000 did the Parties agree to share information on their respective monitoring regimes for catch, landings and non-retention practice by their vessels, their use of observer programs, licensing systems and other relevant elements of their compliance regimes.\footnote{CCSBT6(2) Report, \textit{supra} Ch IV n 683, at 53 (paragraph 25).} It took even longer for the CCSBT to hold a meeting of its Compliance Committee. Despite a proposal by Japan at its very first meeting in 1994 and the decision to establish the Committee being made in 1999,\footnote{Supra Ch II n 413 and references there cited. No concrete steps were taken for three years until Australia and New Zealand made the point that the 40-boats incident underlined the} its first meeting did not take place until 2006.\footnote{What}
follows is an enumeration of the issues that could conceivably have come to the Committee’s attention had it existed earlier; as will be apparent, some were in fact considered by the CCSBT in plenary.

1 Commercial overcatch

No Party to the 1993 Convention has had an unblemished record of holding its catches to its national allocation. Though views have varied as to what legal consequences if any flow from it, they all accept that overcatch is a breach of an international obligation made binding by Article 8, paragraph 7 of that Convention, and a practice has developed of compensating for it by catch reductions in future years, albeit without varying the TAC and national allocations, or the “headline” voluntary limit in the years from 1998 to 2003.

One of the first issues tackled, in the trilateral period, was whether the catch limits covered only targeted catch of SBT, or also fish of the same species taken as bycatch. Although it is evident that only the latter is a genuine discipline on the catch, since quite large amounts of a species may be removed from the sea inadvertently, at first Australia’s ITQ system did not include bycatches. In reporting to the 1988 management meeting that its fishery plan had been amended to delete provision for incidental catches, so that all commercial catches must now be covered by quota, Australia disclosed that bycatch had been around 4-5 tonnes per annum. 1095

Serious allegations of overcatch were made at the 1990 management meeting, when Australia, noting that the method used by Japan to estimate when its quota had been caught led to the fishery not being closed until after the 6,065 tonne limit had been exceeded, outlined concerns “at the extent to which Japanese vessels may have need for the Members to act quickly to establish such a committee: supra Ch II n 429; CCSBT3(2) Report, supra Ch II n 413, at 5.

1094 See the list of past meetings on the CCSBT’s website, supra Ch IV n 683.
1095 7th Trilateral Management Meeting Report, supra Ch II n 359, at 2 (quota henceforth to cover all catch) and 8 (bycatch). Note that the small amounts involved would not have caused Australia actually to exceed its catch limits.
under-reported SBT catch in the 1990 season”. Japan’s explanation as understood by the Australian rapporteur was that it estimates the seasons [sic] catch by extrapolating from CPUE of the previous two years to get an estimated CPUE for the current season and uses this to calculate the expected date upon which the quota would be reached. This method gives a conservative date for closure of the fishery when the CPUE is decreasing. 1096

Yet, while the CPUE had remained stable overall in recent years, it had “risen dramatically off Tasmania over the last two years.” In these circumstances, Japan noted, “it was easy to catch over quota, and this was not at all unusual when the factors operating in this fishery were considered.” 1097

New Zealand did not immediately accept this as a sufficient excuse:

New Zealand is of the view that all parties should ensure that national allocations are strictly adhered to, and that to this end monitoring and surveillance activities should be strengthened. New Zealand would expect any party that had over-caught its allocation to take responsible voluntary action to deal with the situation. 1098

Australia was similarly unimpressed:

We do not regard it as acceptable for Japanese industry to expect that it can blatantly flout the agreements made to save the fishery from extinction, and adhered to at great cost by Australia, without making some adjustment to compensate for the overfishing which has taken place. 1099

In response, Japan appeared to deny any obligation to make such a compensatory adjustment. It accepted that more precise methods of catch management were desirable, but argued that “the punitive measures proposed go too far”:

Last year Australia allocated quota to fishermen before agreement on the quota was reached, but Japan never demanded punitive measures. If Australia insists on

1096 Draft 1990 Summary Record, supra Ch II n 342, at 21.
1097 Ibid., at 9 and 21.
1098 New Zealand 1990 trilateral statement, supra Ch II n 379, at 4.
1099 Australian 1990 trilateral statement, supra Ch II n 377, at 2.
punitive measures for Japan, Japan may insist upon punitive measures for Australia.\textsuperscript{1100}

The following year, Japan reported that it had restricted the number of vessels and set seasons for each fishing ground. It was expecting to fill its quota by 30 September, and would therefore close the season on that date.\textsuperscript{1101} New Zealand now “noted the difficulties of monitoring the catch of vessels on the high seas in real-time, but hoped that Japan had been able to establish a better system.” Japan’s reply was that, while having difficulty in monitoring 200 SBT fishing boats, Japan was implementing a new monitoring and enforcement system, including a new radio reporting system, together with restrictions on vessel numbers and length of season, and random inspections at time of unloading.\textsuperscript{1102}

The explanation for New Zealand’s milder attitude may be that in 1990 New Zealand had itself exceeded its quota because of unexpectedly good fishing conditions: New Zealand regretted the over-catch in 1990, explaining that it was due to a number of factors: it was difficult to monitor a small quota in real-time with a large number of vessels over a short time frame, and fishing conditions were particularly good that year. As a result of the over-catch, action was taken to ensure more accurate monitoring of catches as they occur. It is now possible to close the fishery

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\textsuperscript{1100} Draft 1990 Summary Record, \textit{supra} Ch II n 342, at 30. See also Draft 1990 Japanese Opening Statement, \textit{supra} Ch II n 344, at 1: “[Australia’s action in 1989] allowing fishing to commence before the end of talks was jumping the gun. This sort of action will damage the trilateral cooperative framework.” It may be conjectured that, had the 1990 summary record ever been finalised, Japan on reflection would have asked for its surprisingly incautious statement to be omitted: it presupposes that Australia had thereby breached a rule that there must be no fishing before quotas are agreed – but if there were such a rule, this would have allowed Australia to impose the very moratorium it advocated at the time (and might in future again advocate) by withholding agreement.

\textsuperscript{1101} \textit{Draft Summary Record Trilateral Management Meeting for SBT Wellington 30 September 1991} (unpublished, copy held by author extracted from DPIE files, hereinafter Draft 1991 Summary Record), at 1-2.

\textsuperscript{1102} \textit{Ibid.}, at 2.
\end{flushleft}
as soon as the limit is reached. Fishermen who continue to fish after this are liable to a $5000 fine.\footnote{1103}

Japan’s problem, however, remained unresolved: at the 1992 management meeting Australia and New Zealand expressed “serious concern” at three consecutive years of catch by the Japanese longline fleet in excess of national allocation;\footnote{1104} the report contains no mention of a compensating adjustment to future catch limits.

These were all examples of unplanned overcatch. A controversy erupted in 1993 when Australia proposed to bring forward to the current year 100 tonnes of the next year’s quota, in order to alleviate a specific problem faced by its longliners operating off New South Wales.\footnote{1105} At the management meeting later that year New Zealand said that Australia’s action “threatened the integrity of the trilateral management process.” Acknowledging New Zealand’s concerns, Australia confirmed that it would apply in full its “stringent quota provisions” to the quota brought forward and make a compensatory 100-tonne reduction in the 1993-94 quota year. Australia noted that it had never exceeded its quota and it was to be hoped that all parties would abide by their quota levels and institute effective measures to prevent overruns in catch in the future. Japan said that it had already advised that it did not oppose the Australian action on the basis that it was a “one-off decision taken to address specific difficult domestic circumstances.”\footnote{1106}

\footnote{1103} Ibid. Japan commented that “compared to New Zealand’s small catch limit, the level of overcatch was significant”: \textit{ibid.}, at 1. New Zealand’s catch of 529 tonnes in 1990 was 109 tonnes above its 420-tonne quota: see Table 1, \textit{supra} Ch I n 141. While it made no mention of a compensating adjustment for 1991, the catch in that year was so low (164 tonnes, \textit{ibid.}) that compensation was more than achieved in fact.

\footnote{1104} 1992 Conclusion, \textit{supra} Ch II n 350, at 5.

\footnote{1105} In D. Mussared, “NZ protest letter to Australian Fisheries”, \textit{Canberra Times}, 10 September 1993, 13, the New Zealand High Commission is reported as confirming that the New Zealand Minister of Fisheries, Mr Kidd, had written on this matter to his Australian counterpart, Mr Lee, but declined to give details.

\footnote{1106} October 1993 Draft Summary Record, \textit{supra} Ch II n 360, at 6. See also 1993 Conclusion, \textit{supra} Ch II n 348, at 8 (Attachment A, “Southern Bluefin Tuna 1993 Trilateral Management Discussions – Conclusion of First Session 21-23 October 1993”). Australia’s
In all likelihood Japan either felt, given its own history of overcatch, in no position to object to Australia’s request, or was aware that this history would be likely to continue, as at the CCSBT’s inaugural meeting a few months later it reported overcatch of 250 tonnes in 1993.\footnote{CCSBT1 Report, supra Ch I n 273, at 3.} Once the 1993 Convention was in force, however, Japan’s attitude changed. Its reaction to the case of the forty Japanese fishing vessels spotted by Australian reconnaissance aircraft in December 1996, their catch bringing Japan’s total to 6,373 tonnes, was to debit the 308 tonnes’ excess against the Japanese national allocation for the 1997 fishing year, as noted above.\footnote{Supra Ch II n 429; “Review of SBT Fisheries – Japan” (Attachment M to CCSBT4(1) Report), in CCSBT Blue Book 1999, supra Ch I n 126, 39 at 39.}

This informal self-policing system continued until the major crisis of 2006, when Japan was shown by market data to have been significantly overcatching its national allocation for many years, leading to a cut of 3,065 tonnes \textit{per annum} for five years thereafter.\footnote{CCSBT-EC5 Report, supra Ch I n 102, at 13 (paragraph 60).} Even then, the “nominal catch” remains at 6,065 tonnes, while it is the “allocated catch” that falls to 3,000 tonnes.\footnote{This is likely to be because under the 1993 Convention 70\% of the CCSBT’s costs are divided in proportion to the parties’ “nominal catches”; see Article 11(2)(b) of the 1993 Convention, infra Appendix C, Part I. Japan for many years had been bearing a share lower than its actual catch would have warranted if authorised in advance, and the unchanged nominal catch allows other parties to recoup some of their contributions.} Before then, the CCSBT had never itself had to reduce a Member’s national allocation to compensate for past overcatch. National allocations were left unchanged on the understanding that an amount equal to past overcatch would not be used. The same system continued even in the absence of TACs in 1998-2003, applied to the Members’ voluntary quotas, though recently willingness to take a 100-tonne reduction, even if its excess catch was less than that, may be contrasted with Japan’s (uncontested) claim that, based on its actual catch of 5,354 tonnes, it had forgone 711 tonnes under the ITLOS provisional measures \textit{(infra Appendix A, text at n 1407)}, even though it had opted to set itself a catch limit of 5,365 tonnes for the relevant fishing year, 700 tonnes below its most recent national allocation from the CCSBT, as its first instalment towards compliance with the ITLOS Order.
the pattern has been for overcatch in one year to be paid back not in the immediately following year but in the year after that.\footnote{1111} A possible explanation for this lag is that, by the time the catch figures for a year are compiled, the next year’s limit will have already been set – and even if there is no strict domestic legal bar to reducing a catch limit in mid-season, there may be a political reluctance to do so.\footnote{1112}

\footnote{1111}This collective nonchalance over prompt compensation, which the depleted state of the stock calls for (in fact catch when a fish stock is depleted risks causing greater loss to the stock than the amount of the catch: see the eighteenth criticism of Japan’s experimental fishing program by Dr Serge Garcia, a senior FAO fisheries official, cited to ITLOS by counsel for Australia, Professor Crawford, as evidence for the inadequacy of Japan’s offer to pay back to the stock its experimental catch if it could be shown to have damaged it: Transcript for afternoon of 18 August, \textit{supra} Ch I n 190, at 24), seems rather lax by comparison with the stringent standard set by Australia and New Zealand in paragraphs 7 and 8 of their 2000 (second) Arrangement between the Government of Australia and the Government of New Zealand on the Conservation and Management of Orange Roughy on the South Tasman Rise, \textit{supra} n 960 and accompanying text. The latter bespeaks a more serious determination to prevent overcatch and is to be preferred on that ground alone. Note that New Zealand agreed to reduce its catch by 640 tonnes spread over seven years, as a result of the large unregulated catch by its fleet in 1999 after it had agreed with Australia on catch limits for that year but before New Zealand’s limit could be enacted into domestic law: see Molenaar, \textit{supra} Ch II n 314, at 81 and 84 and sources there cited. Although this represents little more than half of the notional overcatch had the agreed limit been in force, it is more than a year’s worth of quota, a proportion unsurpassed in international fisheries practice, though now run close by ICCAT’s reduction of Taiwan’s Atlantic bigeye tuna catch limit from to 16,500 tonnes to 4,600 tonnes for 2006 in response to misreporting catch of around 15,000 tonnes (as estimated by Japan) from that stock as having been taken in the Indian Ocean where it was not subject to quota: see Recommendation by ICCAT Regarding Control of Chinese Taipei’s Atlantic Bigeye Tuna Fishery, in Recommendations Adopted by ICCAT in 2005 (Annex 5 to ICCAT19 Report), in ICCAT Green Book 2006/1, \textit{supra} Ch V n 956, 156 at 157-159 and \textit{Report of the Meeting of the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures (PWG)} (Annex 10 to ICCAT19 Report), \textit{ibid.}, 238 at 239.

\footnote{1112}See also ICCAT’s rule introduced in 1991 that “if the catch of [a relevant State] exceeds its annual or biannual scientific monitoring quota, then in the biannual period or year \textit{following reporting of that catch} to [the Commission], that [State] will reduce its catch to compensate in total for that overage”: “Recommendations (made in 1991) for Enhancement of the Current Management for Western Atlantic Bluefin Tuna” (Annex 7 to ICCAT12 Report) in ICCAT Green Book 1992, \textit{supra} Ch I n 245, 67 (emphasis added). For this reason a 2-year rule was
Thus Japan began the 2003 season with a catch limit of 5,839 tonnes, reflecting a 2001 season catch 226 tonnes over its voluntary limit, but not a further 127-tonne overcatch in 2002,\textsuperscript{1113} repaid instead in 2004.\textsuperscript{1114} An exception is New Zealand, whose season appears short enough for the reduction to be made in the immediately following season: overcatch of 16 tonnes in 1994 was paid back in 1995, 37 tonnes from 1999 was repaid in 2000, the 2001 quota was reduced by the “approximately 20 tonnes” overcaught in 2000, and that of 2002 by the 32-tonne overcatch of 2001.\textsuperscript{1115}

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  \item established in “Supplemental Recommendation by ICCAT Regarding Compliance in the Bluefin Tuna and Atlantic Swordfish Fisheries” (Annex 5-13 to ICCATSM11 Report) in ICCAT Green Book 1999/1, supra Ch III n 576, 76, extended by “Supplemental Recommendation by ICCAT Regarding Compliance in the Bluefin Tuna and Atlantic Swordfish Fisheries” (Annex 9-3 to ICCAT17 Report, in ICCAT Green Book 2002/1, supra Ch I n 228, 217. See also the contingent 125% compensation standard in these three fisheries, supra n 959. The present generalised rule is in “Recommendation by ICCAT Regarding Compliance with Management Measures which Define Quotas and/or Catch Limits” (Annex 7-14 to ICCATSM12 Report), in ICCAT Green Book 2001/1, supra Ch III n 571, 148:

  \begin{quote}
  For any species under quota/catch limit management, underages/overages from one year may be added to/must be subtracted from the quota/catch limit of the management period immediately after or one year after that year, unless any recommendation on a stock specifically deals with overages/underages, in which case that recommendation will take precedence.
  \end{quote}

  The rule thus yields to the two years specified as the norm in Annex 8.2 to ICCATSM13 Report, supra n 989, at 157 and Annex 8.8 to ICCATSM13 Report, supra Ch III n 615, at 168.

  Attachment 8-3 to CCSBT-EC2 Report, supra Ch I n 201, at 74-75.

  Attachment 8-3 to CCSBT-EC6 Report, supra Ch I n 141, at 2. 69 tonnes left uncaught in 2003 was added back at the same time: \textit{ibid.}, Japan claiming to be allowed to do this since there was no binding CCSBT decision for that year: CCSBT-EC6 Report, supra Ch I n 141, at 8 (paragraph 47).

  CCSBT3(1) Report, supra Ch I n 102, at 10; CCSBT6(2) Report, supra Ch IV n 675, at 57 (paragraph 49); CCSBTS3 Report, supra Ch IV n 683, at 112 (paragraph 36); Attachment 8-4 to CCSBT-EC2 Report, supra Ch I n 211, at 78. Given that the reported overcatch of 20 tonnes in 2000 included 23 tonnes of PBT, it appears that there was in fact no overcatch of SBT by New Zealand in that year, which makes the repayment somewhat puzzling: CCSBT7 Report, supra Ch III n 449, at 4 (paragraph 10). Another curiosity is that, at the time of New Zealand’s original announcement at the CCSBT’s 2002 meeting that it had overcaught its voluntary limit for its 2001-02 season by 32 tonnes, it undertook to refrain from catching a commensurate
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Australia reported to the CCSBT in 2003 an incident not treated as overcatch, though it now would be under the remedial measures adopted to prevent its repetition. A quantity of SBT estimated at 132 tonnes had escaped from a tow cage before they had reached the pens where the sampling would have taken place. On the best available information, 15 tonnes of SBT had died in the incident, which became the amount debited against the holder’s quota. As a result, Australia had decided to move from the system of deducting quota when the fish were transferred from tow cages to static cages (including mortalities during catching and towing operations) to provisional deduction of the estimated weight at the time of capture.\footnote{CCSBT-EC2 Report, supra Ch II n 353, at 18 (paragraph 31). A separate 126-tonne overcatch was, however, debited against the next year’s allocation: CCSBT-ESC3 Report, supra Ch I n 236, at 166 (paragraph 9).}

### 2 Institutionalised carryover of overcatch and undercatch

Crucial though adherence to quotas is for conserving fish stocks, a limited degree of flexibility around them may assist fisheries management. Allowing a modest portion of uncaught quota to be carried over into the next year removes the “use it or lose it” incentive to try to fill the quota, with its inherent risk of overcatch. Conversely, if a small amount of overcatch may be debited against the following year’s quota, this can act as a political safety valve, offering States facing domestic pressures to allow overfishing the alternative of legitimately borrowing from the stock, provided that repayment is guaranteed. A system these lines is developing \textit{ad hoc} in the CCSBT, though an earlier suggestion that one be introduced formally was rebuffed.

At the CCSBT’s Eighth Meeting in 2001 Australia indicated that it was prepared to countenance permitting Members to reconcile catches against national allocations over a three-year period with limits so as to provide operational flexibility, but not if

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\footnote{Taiwan too reacted rapidly to its 158-tonne overcatch in 2004, announcing that it would be paid back in 2005: Attachment 8-2 to CCSBT-EC4 Report, supra n 1088.}
those allocations were increased from their last levels, as Japan was proposing. As there was no agreement on national allocations, this could not be pursued.  

Australia’s 2002 overcatch, caused by a single operator, highlights an additional complex consequence where there are ITQs at the domestic level, but no year-to-year accounting mechanism allowing an individual quota-holder’s overrun to be debited against the holder’s quota for the following year. If in that situation the State concerned adheres to established CCSBT practice by declaring a commensurately lower domestic catch limit in the following year, all quota-holders, whose quota is expressed in terms of a fixed share of the total, compensate for the overcatch of one. This also creates a powerful incentive for compliance-oriented peer pressure within the fleet as long as overcatchers cannot remain anonymous – as was the case here.

At the CCSBT’s 2004 meeting New Zealand advised that the introduction of SBT into its Quota Management System with certain flexibility provisions was expected to affect its ability to balance catch from one year to the next, “however NZ will ensure that on average the catch from the fishery does not exceed the national allocation.” In not seeking the CCSBT’s blessing for this, New Zealand thus appeared to be implicitly asserting a claim to be permitted to do it, on the basis that it was by now established practice of other Members. If so, its assessment was correct: there were no protests.

At the 2007 meeting New Zealand tabled a draft resolution that would allow for carryover of undercatch into the immediately following year, and only if the national allocation for the next year were no less than in the year of undercatch. Overcatch of ten per cent would be permitted without penalty for a member whose national allocation was 500 tonnes or less, and two per cent for one of more than 500 tonnes, with penalties increasing in three steps, 50, 100 and 200 per cent, the highest rate reached at 50 per cent overcatch for a member whose national allocation was 500 tonnes.

1117 Attachment N-1 to CCSBT8 Report, supra Ch IV n 738, at 143-144.
1118 Attachment 8-4 to CCSBT-EC3 Report, supra Ch I n 203, at 76.
tonnes or less, and ten per cent for others. The overcatch and any penalty would be deducted over the following two years.\textsuperscript{1119} Taiwan and Korea supported the proposal, as did Australia in principle, though in its view the percentages required refinement so as to avoid giving an economic incentive to overcatch; Japan had concerns about carry-forward of undercatch given the low state of the SBT stock, and wished to consider the detail of the proposal further.\textsuperscript{1120} New Zealand was left to redraft the text in advance of the next meeting.\textsuperscript{1121}

Until this development, ICCAT had been somewhat more advanced than CCSBT. Carryovers were already permitted in the northern albacore fishery, though until 2007 not in its southern counterpart.\textsuperscript{1122} In 2004 the European Community proposed that there be a general rule for management and application of unders and overs, but debate on this matter was thrice deferred to 2007, and when it did occur the Community withdrew its proposal in favour of a new alternative one from the US that failed to be adopted for lack of support.\textsuperscript{1123} In the original draft recommendation

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\item \textsuperscript{1119} “Draft Resolution for under and over catch” (Attachment 12 to CCSBT-EC6 Report, \textit{supra} Ch I n 141).
\item \textsuperscript{1120} CCSBT-EC6 Report, \textit{supra} Ch I n 141, at 25 (paragraphs 134 (Korea), 135 (Australia), 136 (Japan) and 137 (Taiwan)).
\item \textsuperscript{1121} \textit{Ibid.}, at 26 (paragraph 140).
\item \textsuperscript{1122} See \textit{supra} n 961 (northern stock); Recommendation by ICCAT on the Southern Albacore Catch Limit for 2005, 2006 and 2007, in Annex 5 to ICCATSM14 Report, \textit{supra} Ch IV n 910, at 130 (Recommendation [04-04], paragraph 8: no carry-over of undercatch, partially relaxed by Recommendation by ICCAT on the Southern Albacore Catch Limits for 2008, 2009, 2010 and 2011, in Annex 5 to ICCAT20 Report, \textit{supra} Ch IV n 884, at 151 (Recommendation [07-03], paragraph 7)).
\end{enumerate}
\end{footnotesize}
tabled by the Community, there was an unclear distinction between “management measures” (for which overcatch would be debited against the next year’s allocation or that of the subsequent year, while undercatch of up to 10 per cent could be carried forward into future years, subject to a cumulative maximum of 30 per cent, although it is not clear what effect a change in national allocation in the interim would have had on the last figure) and “application measures”, for which overage would always be debited in the next year, and at a rate of 125 per cent if it occurred in two years in succession. It may not be coincidental that the Community lost interest in promoting its idea just when its own 2006 overcatch of eastern ABT came to be brought to account. Arguing in mitigation that quota would have been available to cover the excess had it not declined to carry forward its undercatch of 2004, the Community persuaded its fellow members to let it repay the excess over not two but three years – something not foreseen by the existing regulation, so that an amendment to it had to be adopted. On the other hand, possibly because of the large tonnages involved, Taiwan’s overcatch of 8,000 tonnes of bigeye tuna, and China’s of an

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1125 Annex 10 to ICCAT20 Report, supra Ch III n 568, at 214 and 218.

1126 Recommendation by ICCAT in regard to Compliance with the Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean, in Annex 5 to ICCAT20 Report, supra Ch IV n 884, at 152 (Recommendation [07-04]). Though not opposing this recommendation, the US called for the compliance process to be reformed (“Statement by the United States to the Compliance Committee” (Appendix 9 to Annex 10 to ICCAT20 Report), in ICCAT Green Book 2008/1, supra Ch III n 568, 248 at 249), and decried ICCAT’s “overall picture of persistent compliance lapses” and “unwillingness to apply the available corrective instruments, namely quota penalties”: “Supplemental Statement by the United States to the Compliance Committee” (Appendix 10 to Annex 10 to ICCAT20 Report), ibid., 249 at 249.
unspecified amount, were permitted to be compensated for by yearly deductions of 1,600 tonnes and 500 tonnes respectively in 2005 to 2009.\textsuperscript{1127} ICCAT’s Working Group considering the development of a compendium of its recommendations and resolutions has also requested clarification from the parent commission of how over- and underharvest of transferred quotas should be treated.\textsuperscript{1128}

3 Conversion factors

It is often necessary to carry out some initial processing of SBT such as gilling and gutting before each fish can be measured and weighed. Since national allocations are by necessary implication in whole weight, a formula is needed to convert the weight of every processed fish into what it would have weighed at the moment of capture. An inaccurate conversion factor can lead to overcatch of quota, deliberate or not, that would otherwise be hard to detect.\textsuperscript{1129} There would thus seem to be a need to impose uniform conversion factors (or at least a formula relating whole weight to processed weight for different weights of fish and different processing techniques). While the

\textsuperscript{1127} Recommendation by ICCAT on a Multi-Year Conservation and Management Program for Bigeye Tuna, supra n 961, paragraph 5. Note, however, that “Information Paper by Japan on the Import of Atlantic Bigeye Caught by Large-Scale Tuna Longline Vessels” (Appendix 6 to Annex 9 to ICCATSM14 Report), in ICCAT Green Book 2005/1, supra Ch IV n 910, 241 at 245 calculates China’s 2003 overage as 3,903 tonnes, greater than the 2,500 tonnes implied by the decision; the combination of this discrepancy and the lack of a precise figure for China’s overcatch in the report suggests that the figure was disputed and that the decision ultimately made was a compromise.

\textsuperscript{1128} Appendix 3 to Annex 4.3 to ICCATSM14 Report, supra n 1005, at 123. Failing to receive an answer to its specific question \textit{ibid.} whether the 50% northern albacore carry-over in paragraph 6 of the relevant recommendation (supra n 961) was applicable to the catch limit of 200 tonnes available by paragraph 3 to any member not mentioned by name, the following year it submitted to the Commission for approval its own affirmative answer: Report of the Second Meeting of the Key Contacts of the Working Group to Consider the Development of a Compendium of Recommendations and Resolutions (Madrid, Spain, June 27-28, 2005)(Annex 4.3 to ICCAT19 Report), in ICCAT Green Book 2006/1, supra Ch V n 956, 143 at 143.

\textsuperscript{1129} Or, as the Commission coyly put it, “inappropriate conversion factors will influence the number of fish which may be taken within the quota”: CCSBT2 Report, supra Ch II n 414, at 6.
CCSBT has not done this, it is aware, thanks to a 1996 report from its Scientific Committee, that a conversion factor of 1.15 was in use by agreement of the parties’ scientists – but also that it is unsatisfactory. According to Australia and New Zealand, it resulted in the total weight of the longline catch being underestimated. Japan, on the other hand, considered that, since the current TAC had been calculated on current conversion factors, if the CCSBT adopted the Scientific Committee’s new conversion factor, it should adjust the TAC commensurately. Australia and New Zealand acknowledged this in the following year and the CCSBT has not since taken any action on the matter.

4 Farmed fish

Farming of fish can be a complicating factor, as has been the case for Australia’s farming of SBT at Port Lincoln in South Australia. The reason is twofold.

First, because farmed fish are not killed on capture, it is much more difficult to ascertain their weight at the time, which is what is significant for quota purposes. At the CCSBT’s Third Meeting, Japan questioned Australia’s procedure for estimating tonnages of farmed fish catches to debit against quota, highlighting the likely high

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1130 CCSBT3(1) Report, supra Ch I n 102, at 15. In Australia, the conversion factor from processed to whole weight under the Fisheries Management (Southern Bluefin Tuna Fishery) Regulations (Cth) (Statutory Rules 1995 No 7), reg 7 is 1.176, while New Zealand law provides for a conversion factor for gilled and gutted SBT of 1.15 if the tail is removed, or 1.10 if the tail is left on: Fisheries (Conversion Factors) Notice 2005 (made under the Fisheries Act 1996 (NZ)), Schedule 2, Part II, item 26, at <www.fish.govt.nz/NR/rdonlyres/E264B2E8-4B02-4FA5-8540-91B737D45499/0/CFNoticeSchedules.pdf> (visited on 15 May 2008).

1131 CCSBT3(1) Report, supra Ch I n 102, at 19 (Australia), 22 (New Zealand).

1132 Ibid., at 22. It follows from the circumstances that the adjustment would have been upwards. This appears justified since the stock assessments are conducted on the basis of number of fish, not weight: CCSBT4(1) Report, supra Ch I n 126, at 11, corroborated by the Scientific Committee’s comment that, as long as the same conversion factor is used in both the projections and in calculating removals from the fishery, it should not result in any bias in the projections: CCSBT-SC2 Report, supra Ch I n 240, at 3.

1133 CCSBT4(1) Report, supra Ch I n 126, at 12.
mortality of purse-seined fish, suggesting that they could lose weight subsequent to capture and emphasising the need for observers on the vessels. In reply, Australia advised that all transfers were monitored by compliance staff, the fish counted using underwater video and sampled for weight to develop a tonnage estimate. There was an obligation to report for debit against quota all mortalities occurring at capture and before transfer to rearing cages. Dead fish were removed from cages during towing and their weight duly debited. Mortality during towing and transferring was reported at 1.4 per cent in the 1995 season and 1.5 per cent in 1996. As feeding in tow cages began soon after capture, they might have gained weight during the two or three weeks between their capture and arrival in the Port Lincoln fish farms.  

Updating this information some years later, Australia advised that in the 2000 and 2001 seasons compliance officers from the Australian Fisheries Management Authority (AFMA) were deployed on farm tow vessels to observe procedures; AFMA also conducted boat inspections in port and monitored all transfers of fish to farm cages. In response to further questioning in 2002, Australia confirmed that mortalities in purse seines and tow cages were factored into the catch data presented to the CCSBT. At the CCSBT’s 2003 Meeting Australia described the specific procedures introduced for research and monitoring of SBT farming operations. An independent company is contracted annually by AFMA to monitor the operations. All mortalities occurring during the capture and towing operations must be recorded on the appropriate form and be available for inspection if requested by an AFMA officer. When SBT are transferred from tow cages to the fish farms, the contractor must make a video recording of this, which is then used to count the fish transferred.

1134 CCSBT3(1) Report, supra Ch I n 102, at 11.
1135 Attachment K-1 to CCSBT8 Report, supra Ch II n 351, at 109.
1136 CCSBT-EC1 Report, supra Ch I n 293, at 19 (paragraph 35). See also Attachment 8-1 to CCSBT-EC3 Report, supra Ch I n 143, at 62.
into the farm. This count is multiplied by the mean weight derived from a sample of 40 fish, and debited against quota using the Farm Disposal Record.\footnote{Attachment 8-1 to CCSBT-EC2 Report, supra Ch I n 169, at 66. This requirement has been enacted into Australian law: see cl 22A-22D of the Southern Bluefin Tuna Fishery Management Plan, supra Ch I n 156.}

Secondly, even if, on the strength of the procedures just listed, the reported weights are assumed free of any systematic downward bias, with almost all of Australia’s SBT catch now fattened further in the farms, the weight of these fish when ultimately sent to market will be substantially higher than at their time of capture. Starting in 1997, Japanese import statistics began to show imports of SBT from Australia higher than Australia’s quota of 5,265 tonnes: above 6,000 tonnes in 1997 and 1998, nearly 7,000 tonnes in 1999, over 7,800 tonnes in 2000.\footnote{“Import Statistics of SBT by Japan” (Appendix 2 to “Review of Southern Bluefin Tuna Fisheries of Japan in 1999 Fishing Season” (Attachment F-2 to CCSBT7 Report)), in CCSBT Blue Book 2002, supra Ch I n 30, 39.}

In response to questioning by Japan of Australia’s adherence to its quota, Australia gave information to the CCSBT designed to show that its catch never exceeded its national allocation. At the Fourth Meeting Australia reported an average mortality after counting of 5 per cent, average time spent in pens being around four months. The losses were mainly due to seals, parasites and storms.\footnote{“Responses to questions raised by Japan at CCSBT4 (September 1997) regarding Australian SBT fishing operations” (Attachment P to CCSBT4(1) Report), in CCSBT Blue Book 1999, supra Ch I n 126, 46.} At the CCSBT’s Seventh Meeting Australia advised that it would carry out a scientific assessment of growth rates of farmed SBT,\footnote{CCSBT7 Report, supra Ch III n 449, at 6 (paragraph 31).} and at the Eighth Meeting duly presented a paper on growth rates on farms, reporting that weight increases in the order of 93 per cent were being obtained from farming SBT, and that further increases could be expected as techniques improved.\footnote{CCSBT8 Report, supra Ch I n 30, at 66 (paragraph 36). If 98% of Australia’s annual quota of 5,265 tonnes were farmed and exported to Japan after a weight increase of 93%, only}
The issue remains controversial and the subject of close questioning by Japan at CCSBT meetings, possibly – as from 2006 onwards it has invariably been raised in association with the issue of Japan’s past overcatch\(^{1142}\) – as a tactic to divert attention from the latter. Although doubts about the Australian accounting procedure were not fully dispelled at a special meeting on the two issues, the CCSBT as a whole appears to have accepted Australia’s criticisms of the statistical methods on which these doubts rest as flawed and took no remedial action.\(^{1143}\) If anything, the exclusion of fish smaller than 10 kg from the 40-fish sample produces an upward bias, which according to an independent expert would lead to a likely overestimation of catch by two to four per cent.\(^{1144}\) The Independent Review of Australian SBT Farming Operations Anomalies also concluded that “the regulation of the industry is a rigorous and well-managed process with no apparent anomalies and no scope for over-catch via misreporting.”\(^{1145}\) Instead, Australia was to carry out a study starting in 2007 to estimate, at Japan’s request: (a) representativeness or bias of the 40-fish sample used to estimate weight; (b) weight change during towing; (c) accuracy in counting of dead fish during towing; (d) accuracy in growth rate during farming; and (e) number of fish transferred into farming pens. Australia hoped to finalise (a), (c) and (e) during the first year and would report to the Scientific Committee in time for two successive years of imports above 9,958 tonnes would indicate overcatch. In 2001, however, Japan imported only 8,237 tonnes of SBT from Australia: Attachment 8-3 to CCSBT-EC2 Report, supra Ch I n 201, at 75. It is unclear, though, whether the 93% is gross or net of losses.

\(^{1142}\) See infra Ch VI, text accompanying nn 1331-1334.

\(^{1143}\) Two members of the independent panel found that the data were not sufficiently robust to support any finding of overcatch, while the other two, though agreeing, proceeded nonetheless to produce from those data estimates of overcatch ranging from 18% to 49.5%: CCSBT-ECSM Report; supra Ch IV n 683, at 2 (paragraphs 8-12) and Attachment 7, “Minimum Advice Requested from the SAG/SC Regarding the Impact of Overcatch Scenarios on Stock Status Advice”, esp the table on the second page.

\(^{1144}\) Quoted by Australia in CCSBT-EC6 Report, supra Ch I n 141, at 8 (paragraph 48).

\(^{1145}\) Quoted by Australia ibid., at 20 (paragraph 106). It is unclear whether the original report, which the CCSBT has not made public, is also the source of the estimate in the previous footnote.
its July annual meeting. This was not entirely achieved, but an extensive debate was held on the matter at the 2007 meeting.

Similar arguments have been mounted by Japan in ICCAT regarding farming of ABT by Croatia and Turkey, with similar responses from those States, and the adoption of successive recommendations on the matter. In 2002 a working group debated tuna farming and in 2003 there was further discussion in Panel 2, where the EC said that “farming does not constitute, in itself, a threat to fish stocks, as long as it is carefully monitored and controlled.” Japan, by contrast, was principally concerned about farming by non-members of ICCAT.

5 Bycatch and discarding

Although prohibition of the taking of fish below a certain size is a common fisheries management measure, either directly (the only option in the case of longlining, in

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1146 CCSBT-EC5 Report, supra Ch I n 102, at 7-8 (paragraphs 42-44).
1147 CCSBT-EC6 Report, supra Ch I n 141, at 15-20 (paragraphs 91-107); see also at 8-9 (paragraphs 48-51).
1149 The original was Recommendation by ICCAT on Bluefin Tuna Farming (Annex 8.10 to ICCATSM13 Report), in ICCAT Green Book 2003/1, supra Ch II n 427, 171; the latest, which completely replaces its predecessor despite its title (see paragraph 13), is Recommendation by ICCAT to Amend the Recommendation on Bluefin Tuna Farming [Rec. 04-06], in Annex 5 to ICCAT19 Report, supra n 1111, at 160-163.
1150 Report of the 11th Meeting of the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures (PWG) (Annex 11 to ICCATSM13 Report), in ICCAT Green Book 2005/1, supra Ch II n 427, 235 at 235-236 (paragraphs 4.4-4.8); Annex 8 to ICCAT18 Report, supra n 1128, at 184 (EC) and 185 (Japan).
1151 For example ICCAT has had a series of minimum size limits for ABT: these are listed in Appendix 3 to Annex 4.3 to ICCATSM14 Report, supra n 1005, at 123.
which the hooks do not discriminate between fish of different sizes) or in terms of mesh size of nets, the CCSBT has not sought at any stage to regulate the SBT fisheries on this basis. The size of fish taken is significant because of its differential impact on the stock per tonne of catch, should more spawning potential be lost in the larger number of small fish needed to make up a tonne than in a smaller number of large fish. The issue has been raised at CCSBT meetings in two contexts. One, the relatively greater impact on stock per tonne of catch of small fish, has already been discussed elsewhere. The other calls into question the continued desirability of discriminating by size at all when catch is limited by tonnage.

In 1996 Japan announced at the Third Meeting of the CCSBT that its industry had adopted a policy of returning to the sea fish of less than 25 kg alive at the time of retrieval. Responding to Australia’s query, Japan advised that it assumed a survival rate of 55 per cent of the returned fish and counted the 45 per cent mortality against Japan’s quota; this accounted for 711 tonnes of its declared catch for 1995 of 5,866 tonnes, the mean weight of non-retained fish being 20.1 kg. New Zealand called for the CCSBT to develop a uniform policy on non-retention of fish. It did not do so, merely calling on Parties to encourage their fleets to observe consistently whatever policy each might adopt. At the CCSBT’s Fourth Meeting Japan announced that from 1997 the policy of releasing small SBT no longer applied.

It may be noted that, if there were a positive requirement to debit against quota all fish taken on board a vessel regardless of their subsequent fate, there could be no objection on conservation grounds to the superimposition of a policy of returning smaller fish to the sea if still alive, although the difficulty of enforcement possibly explains why this is not done. It would depend on the balance of desirability

1152 Supra Ch I n 261 and accompanying text.
1153 Attachment G to CCSBT3(1) Report, supra Ch I n 102.
1154 CCSBT3(1) Report, supra Ch I n 102, at 9-10.
1155 Ibid., at 28.
1156 CCSBT4(1) Report, supra Ch I n 126, at 6.
between limitation of absolute catch by weight and influencing the size composition of the catch. The pendulum may be expected to swing back and forth from time to time, depending on the state of the stock.

A second reason for discarding fish is that the operator catching them may have taken them as bycatch in circumstances where quota is necessary. At the Sixth Meeting of the CCSBT in 2000, Japan, armed with Australian press clippings, raised allegations over the discarding of 250 to 400 tonnes of SBT by Australian east coast longliners for lack of quota and asked how catch discarded in this way was treated under Australia’s quota management regime, in particular whether and how it was debited against quota. Not replying directly, Australia stated that it was prepared to prosecute offenders given sufficient evidence, but pointed out the economic motives of those making the allegations and added that there had always been SBT taken on the east coast, with Australian quota remaining available to cover these catches.1157

The question was pursued further when the meeting resumed for a second session some months later. Australia now clarified that those likely to catch SBT along the east coast were free to purchase or lease quota. Implicitly admitting that there was substance to Japan’s allegations, Australia advised that it would nonetheless introduce a system of rolling closures following the progression of migrating SBT along the east coast, from May to September. Henceforth only those with 500

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1157 CCSBT6(1) Report, supra Ch I n 219, at 6 (paragraph 33), also “Opening Statement by Japan” (Attachment C to CCSBT6(1) Report), in CCSBT Blue Book 2001, supra Ch I n 242, 18 at 19. The reference to economic motives is an allusion to the East Coast Tuna Boat Owners’ Association Inc having lobbied for ITQs to be made available free of charge to its members whose longliners caught SBT as bycatch, despite the fact that they had previously held such quota but sold it to South Australian operators. The NSW longline catch was 475 tonnes in 1998, only 97 tonnes in 1999 when the allegations were raised, then 114 tonnes in 2000, 60 tonnes in 2001 and 22 tonnes in 2002 (including various combinations of Queensland and Tasmanian longline catch and NSW pole-and-line catch in successive seasons for confidentiality reasons, as data from groups of less than five boats may not be released): Attachment 8-1 to CCSBT-EC2 Report, supra Ch I n 169, at 64 and 67 (Table 1).
kilograms or more of quota could operate in the closed area, with the location and movement of vessels monitored through the requirement that each carry an approved satellite-based monitoring system. At the CCSBT’s Seventh Meeting, Australia declared a catch in the 2000 season of 5,257 tonnes, just eight tonnes under its voluntary limit, of which 114 tonnes were caught off New South Wales and Tasmania by 37 longliners that operated off New South Wales between May and November 2000, with closure of waters south of Sydney between June and August to those lacking sufficient quota. In the following year Australia advised that in the 2001 season it had introduced an ongoing audit of fishing records, and in 2003 that access to the waters off Western Australia through which SBT migrate had also been restricted in the same way since 2001.

That there is still a problem is shown by Australia’s most recent annual report to the CCSBT, which indicates that since 2004 the restricted access zone has been divided into core and buffer zones. From 2005 operators with less than 500 kilograms of quota have again been allowed into both zones between May and October, but only with 100 per cent observer coverage. In the buffer zone, those with more than 500 kilograms of quota must have 25 per cent observer coverage, while in the core zone 100 per cent coverage is required for those with less than two tonnes of quota, 75 per cent for those with between two and five tonnes, 50 per cent for those with between five and ten tonnes, then 25 per cent up to 20 tonnes, and 10 per cent coverage above that figure.

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1158 CCSBT6(2) Report, supra Ch IV n 683, at 57 (paragraph 54).
1160 Attachment K-1 to CCSBT8 Report, supra Ch II n 351, at 109.
1161 Attachment 8-1 to CCSBT-EC2 Report, supra Ch I n 169, at 66.
1162 Attachment 8-1 to CCSBT-EC6 Report, supra Ch I n 141, at 4 (Table 2 and preceding text).
In the longer term, bycatch by members must be distinguished from bycatch by non-members. Even if a system of trading were to lead to the de facto exclusion from any directed fishery for SBT of those remaining outside it, this will not on its own do anything to reduce their bycatch of the species. If the aim is to minimise mortality, it is immaterial whether the fish are dumped at sea or landed. Since, however, only if they are landed is verifiable scientific information gained, this is an argument for using the UNCLOS Article 118 duty of cooperation to discourage dumping. Yet, if there is too wide a gap between the legal consequences of deliberate catch and of bycatch, a perverse incentive is created to conceal the former as the latter.

The practice in some of ICCAT’s fisheries of tolerating small catches up to a given limit of species under quota – for instance 200 tonnes of northern albacore may assist in this regard. Since the number of States and fishing entities at any given time is finite, a rule which deems catch of less than, say, 10 tonnes of SBT to be bycatch not visited with any legal consequences under the Action Plan would equate to a tolerance limit of catch by non-members under this head of around 1,900 tonnes.

1163 Referring to anadromous species, Burke concludes that UNCLOS Article 66 applies to both directed fishing and bycatch, arguing (supra Ch I n 80, at 140) that “If a significant portion of the catch is beyond regulatory control, the coastal state either cannot act to take adequate conservation measures or can only take ineffective measures.”

1164 Australian legislation requires quota for all landed species subject to quota, but policy allows quota to be purchased or leased by the 15th day of the following month to cover over-quota landings of bycatch species: Geen et al, supra Ch I n 162, at 84. The same authors advocate use of a deemed value or surrender price method to discourage dumping of bycatch species without inadvertently encouraging their targeting: ibid., at 85; see also Falloon, supra Ch III n 566, at 57-58 – but these do not appear easily replicated on the international plane.

1165 Supra n 1128; see also infra Ch VI, text accompanying n 1283. Faced with a problem of discarding in the northern Atlantic swordfish fishery, ICCAT designed its rebuilding plan for the stock on the basis that it “must account for all sources of fishing mortality”: Recommendation by ICCAT to Establish a Rebuilding Program for North Atlantic Swordfish (Annex 5-2 to ICCAT16 Report), in ICCAT Green Book 2000/1, supra Ch I n 242, 69 at 69 (preamble). Note the part played in this by carry-forward of unders and overs: ibid., at 71 (paragraphs 4 and 5).

1166 Attachment I to CCSBT6(2) Report, supra Ch IV n 727, and following text.
Catch over the threshold would require quota to be bought from a Member to cover the State’s whole catch to avoid the Action Plan measures, which could only be done by acceding to the 1993 Convention or becoming a cooperating a non-member if the trading scheme were confined to these. For those within the system, the best policy may be to estimate bycatch mortality for building into TAC calculations.\footnote{Cunningham, \textit{supra} Ch I n 88, at 13.}

6 Fishing seasons

The staggered fishing seasons of CCSBT Members have caused few problems to date. The reason for August being named in the 1993 Convention as the month in which CCSBT annual meetings are to be held appears to be a tacit understanding that the national allocations apply to the next fishing season of each Member, whenever it may start.\footnote{“A scenario to illustrate possible ambiguities and one potential solution regarding some MP inputs” (Attachment 6 to \textit{Report of the Fourth Meeting of the Management Procedure Workshop, 16-21 May 2005, Canberra, Australia} (hereinafter CCSBT-MPW4 Report) <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_12/report_of_MPW4.pdf> (visited on 19 May 2008)), lists the quota years: only Taiwan and the Philippines use the calendar year; Australia’s quota year runs from 1 December to the following 30 November, Japan’s and Korea’s from 1 March to the end of the following February, and New Zealand’s from 1 October to the following 30 September. This understandably troubled participants at an earlier workshop meeting, who noted that any TAC change required by a given management procedure would most likely apply to quota years and therefore be implemented at slightly different times by different Members, perhaps making it impossible for a Member whose quota year starts at about the same time as the CCSBT’s annual meeting in October where the relevant decision would be made, to implement the change for at least 12 months. This in turn would create a lag of two years between the year for which a management procedure is evaluated and the implementation of any consequential TAC change. The CCSBT would therefore need to discuss and specify the quota year in which a TAC change arising from the management procedure would be implemented for each member: “Data Issues Relating To Management Procedures” (Appendix 6 to “Further development of operating model specifications” (Attachment E to CCSBT-MPW2 Report)), in CCSBT Blue Book 2004, \textit{supra} Ch I n 32, 288 at 288.} The superimposition of quota trading, however, would at the margin have conservation consequences. To avoid these, it would seem that, in any system that leaves the members to their own devices in transferring quota to each other,
either their fishing seasons would need to be aligned, or a restriction introduced such that a transfer can take place only from a relinquishing member to a gaining member whose season ends at the same time as, or later than, that of the relinquishing member. Such a restriction seems undesirable, however, since the timing of season dates is in this context essentially an arbitrary factor, but would result over time in trading concentrating the allocations in members with late-finishing seasons.\footnote{In the CCSBT, for example, it would mean that New Zealand, whose season starts and finishes earlier than any other member’s, could never purchase quota, only sell it. The scientists developing the CCSBT’s management procedure seem to have come to a similar conclusion for automatic adjustments under the procedure to the TAC and national allocations (\textit{pari passu or not}): CCSBT-MPW4 Report, \textit{supra} n 1168, at 24 (paragraph 100).}

Any alignment of seasons will also need compensating allocations or deductions for the longer or shorter transitional season. Depending on the pattern of catch through the year, it is not necessarily appropriate for these to equate a one-month adjustment with a twelfth of the previous national allocation (or of the new one if changed – this complication could be avoided, however, by making the alignment in a year when the TAC does not change).\footnote{On the other hand, a State that wished to make a one-off contribution to the biomass without jeopardising its initial share could elect to forgo compensation for a transitional year longer than 12 months. Human psychology being what it is, members whose seasons start early may be well advised to make the process easier by not objecting to a late starting date for the new uniform season that will avoid any member having a transitional season of less than 12 months.}

While there can be no objection on conservation grounds to extending the duration of a season longer than 12 months, shortening of the season can lead to abuse if it occurs in a situation where the full quota has been taken in less than 365 days, and the early closure leads to a new season opening the next day with fresh quota.\footnote{For an egregious example of this in the groundfish fishery on the Atlantic coast of the United States in the 1970s, see J.L. McHugh, “The Jeffersonian Democracy and Fisheries Revisited” in Rothschild (ed), \textit{supra} Ch III n 555, 73 at 89.} Australia has had two seasons of 13 months or more, and one season of 11½ months. The short season was preceded two years earlier by
a 13½-month one, however, so that the three seasons together lasted 37 months; this may explain why no other Member objected to it.\textsuperscript{1172}

7 Non-commercial catch

The nearer quota comes to being perceived as a tradable asset, the more interest members will have in ensuring that all sources of catch are accounted for, since it would be more obvious than under the traditional national allocation system that any perceived gain of an unfair advantage by one member comes at the other members’ expense. Bycatch is the most obvious potential source of friction in this regard, but other forms of non-commercial catch are recreational, indigenous and scientific catch. There may be some overlap among the categories.\textsuperscript{1173}

Recreational fishing limits typically impose a bag limit per person per day of a small number of fish. As there is generally no limit to the number of persons engaging in recreational fishing, or on how many days per year they may fish, it follows that no jurisdiction has an effective upper limit to its total recreational catch. Limits apply to SBT in most Australian States\textsuperscript{1174} and South Africa,\textsuperscript{1175} but not New Zealand.

\textsuperscript{1172} Australia’s SBT fishing years ran from 1 October to the following 30 September in 1988-90, 1 October 1991 to 31 October 1992, 1 November to the following 31 October in 1992 and 1993, 1 November 1994 to 15 December 1995, 16 December 1995 to 15 December 1996, 16 December 1996 to 30 November 1997, and 1 December to the following 30 November in 1998 and since: Attachment 8-l to CCSBT-EC6 Report, supra Ch I n 141, at 15 (Appendix 1, “SBT Season Dates 1988-89 to 2005-06”).

\textsuperscript{1173} At the 2004 CCSBT meeting, Australia advised that discussions were underway with its game fish association for all recreationally caught SBT to be tagged and released, with the release data to be provided to the CCSBT. Since the research tagging was opportunistic rather than a planned experiment, no research mortality allowance was made available to cover it; instead, any associated mortality would count against Australia’s national allocation: CCSBT-EC3 Report, supra Ch I n 78, at 26-27 (paragraphs 78 and 79).

\textsuperscript{1174} New South Wales has a combined possession limit of two tuna (albacore, yellowfin, bigeye, longtail, SBT) 90 cm or longer, and five of the same species smaller than 90 cm: <www.dpi.nsw.gov.au/fisheries/recreational/regulations/sw/sw-bag-and-size#Finfish-Bag-and-Size-limits> (visited on 19 May 2008); in South Australia the combined SBT and yellowfin tuna limit is two per person, six per boat: <www.pir.sa.gov.au/fisheries/recreational_fishing/catch_limits_
Recreational catch has become an issue within the CCSBT. Australia said in 2002 that it was discussing the matter with State Governments, but was far enough short of its national allocation to accommodate any recreational catch of SBT. This must be doubted if that year’s high recreational catch of 85 tonnes, an estimate by the New South Wales Government, is to be believed. Australia’s feeble response to the questions posed to it at the 2007 meeting does little for its credibility, but this may change if it carries out its intention to report to the CCSBT on the management of its recreational fishery. In 2003 New Zealand reported limited recreational fishing for SBT, though historical catches before records began may have been higher. It

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1175 In 1994 the recreational catch limit in South Africa was reported to be ten of any tuna species per person per day: A.J. Penney, “National Report of South Africa”, in ICCAT Green Book 1995/1, supra Ch III n 534, 258 at 259. It was unchanged in 2003, with the same size limits in the Marine Living Resources Act 1998 also applying to the recreational sector: “National Report of South Africa” in ICCAT Green Book 2004/3, supra Ch I n 88, 84 at 87.

1176 CCSBT-EC1 Report, supra Ch I n 293, at 19 and 24 (paragraphs 35 and 75).

1177 Attachment 8-1 to CCSBT-EC6 Report, supra Ch I n 141, at 8 and 10 (Table 6). The 2002 figure is the most recent, “insufficient data” being recorded opposite all years since.

1178 CCSBT-EC6 Report, supra Ch I n 141, at 9 (paragraph 53) and 20 (paragraphs 108-112).

1179 Attachment 8-4 to CCSBT-EC2 Report, supra Ch I n 211, at 80. The indigenous non-commercial catch was also counted against New Zealand’s national allocation: Attachment 8-4 to CCSBT-EC3 Report, supra Ch I n 203, at 76 and 79.
advised that it had reserved 4 tonnes of its national allocation to cover recreational catch, which it considered would be sufficient for its recreational fishery.\textsuperscript{1180}

Since the 1998-2001 dispute over Japan’s unilateral experimental fishing,\textsuperscript{1181} the CCSBT has also developed a history of allocating modest tonnages for scientific catches not counted against national allocations. Precedent for this exists in ICCAT, which has exempted participants’ ABT catches of up to 15 tonnes from otherwise applicable conservation measures.\textsuperscript{1182} For the various components of the Scientific Research Program the Members and the Secretariat from 2001 onwards requested, and the CCSBT approved, mortalities of 65 tonnes for tagging programs in 2002 and 40 tonnes in 2003, plus 3.6 tonnes of research mortality allowance for Japan in 2001, 6.5 tonnes in 2002 and 10 tonnes in 2003 for a series of spawning ground and acoustic surveys.\textsuperscript{1183} Research mortalities of 47 tonnes were approved in 2004 for an acoustic survey (1 tonne) and various tagging projects (46 tonnes); the like total for 2005 was 51 tonnes and in 2006 it was 22 tonnes. In 2007 Australia sought 10 tonnes to cover expected mortality of 7.5 tonnes in an experiment on stereo video recording of transfer of SBT into farm cages, but the meeting report does not reveal whether this or any other research allowance was granted to any member.\textsuperscript{1184}

\textsuperscript{1180} CCSBT-EC3 Report, \textit{supra} Ch I n 78, at 27 (paragraph 80).

\textsuperscript{1181} \textit{Infra}, Appendix 1.

\textsuperscript{1182} See “Recommendation by ICCAT on Bluefin Tuna Research in the Central North Atlantic Ocean” (Annex 7-8 to ICCATSM12 Report), in ICCAT Green Book 2001/1, \textit{supra} Ch III n 571, 141 (paragraph 3), continued since and with a further 15 tonnes of other tunas by “Supplemental Recommendation by ICCAT on Bluefin Tuna Research in the Central North Atlantic Ocean” (Annex 9-8 to ICCAT17 Report), in ICCAT Green Book 2002/1, \textit{supra} Ch I n 228, 222 (paragraph 3).

\textsuperscript{1183} CCSBT8 Report, \textit{supra} Ch I n 30, at 68 (paragraph 54) and 72 (paragraphs 95 and 97); CCSBT-EC1 Report, \textit{supra} Ch I n 293, at 27 (paragraphs 97-100); CCSBT-ESC2 Report, \textit{supra} Ch I n 32, at 130 (paragraph 106); CCSBT-EC2 Report, \textit{supra} Ch II n 353, at 27 (paragraphs 70 and 71). Not all the allowances were caught: in 2002 only 0.8 tonnes had been used for Japan’s spawning ground survey and 13.28 tonnes for tagging programs: \textit{ibid.}, at 27 (paragraph 69).

\textsuperscript{1184} CCSBT-EC3 Report, \textit{supra} Ch I n 78, at 27-28 (paragraphs 87-89); CCSBT-EC4 Report, \textit{supra} Ch I n 248, at paragraph 124; CCSBT-EC5 Report, \textit{supra} Ch I n 102, at 18
ICCAT too has dealt on several occasions with non-commercial catch, for example in 1999 passing an across-the-board resolution on recreational fishery statistics, and in 2006 creating a Working Group on Sport and Recreational Fisheries.\textsuperscript{1185}

8 Control of fishing by nationals

Since at international law States’ jurisdiction over their nationals applies no less to natural and legal persons than to vessels, a further source of perceptions of unfair advantage is the use by nationals of fishery commission members of vessels flagged to non-members. Here again the CCSBT’s experience is instructive. In 1998 New Zealand raised reports that Japanese interests had chartered bunkering vessels also used by fishing vessels flagged to non-members of the CCSBT, that it provided a market for non-member catch, and that there was considerable investment in non-member SBT fishing operations by Japanese interests. New Zealand advised that it had procedures in place to prevent New Zealand interests from entering into charter or joint fishing arrangements for SBT with non-members. It was not aware of any bunkering of non-member vessels fishing for SBT or any investment by nationals of New Zealand in non-member SBT fishing operations. Australia similarly stated that it prevented joint ventures with, and access to its ports by, vessels from States fishing for SBT outside the 1993 Convention regime. Japan admitted that its nationals were crewing non-member vessels and had issued a non-binding directive advising them to cease this practice; for constitutional reasons it could not be binding. It confirmed that it maintained no restrictions on the import of SBT and that it had a system for regulating investment by Japanese in non-member SBT fishing operations.\textsuperscript{1186}

\textsuperscript{1185} Recommendation by ICCAT on Improving Recreational Fishery Statistics (Annex 5-9 to ICCAT16 Report), in ICCAT Green Book 2000/1, \textit{supra} Ch I n 242, 78; Resolution by ICCAT to Establish a Working Group on Sport and Recreational Fisheries, in “Resolutions Adopted by ICCAT in 2006” (Annex 6 to ICCATSM15 Report), in ICCAT Green Book 2007/1, \textit{supra} Ch V n 995, 174 at 175.

\textsuperscript{1186} CCSBT4(2) Report, \textit{supra} Ch IV n 683, at 60.
In recent years the focus of attention has shifted to catch of SBT taken in Indonesian waters by vessels owned by Taiwanese interests but flagged to Indonesia, allowing Taiwan to maintain that their catch should be considered Indonesian.\textsuperscript{1187} This would have been unproblematic had Indonesia already become a member and the Taiwanese vessels been fishing against Indonesian quota; as it was, this is catch which it was in Taiwan’s power to control, with a duty to do so considering that, through the resolution establishing the Extended Commission of which Taiwan is a member, it had given a “firm commitment to respect” Article 15, paragraph 4 of the 1993 Convention.\textsuperscript{1188} Although the beneficial ownership of fishing vessels is often kept deliberately obscure, ideally all catch of SBT by vessels owned or controlled by nationals of CCSBT members should be brought into their mutual accounting.

**F Conclusion: further along the property spectrum to permanent national allocations?**

Although international fisheries law is still at a far earlier point on the road already travelled on the domestic level by the States that have introduced ITQs, the argument for moving to permanent or tradable quota shares is essentially that it provides an economic incentive to conserve the stock.\textsuperscript{1189} How easily might it be done?

It may be concluded from the foregoing that, although no fisheries commission has yet made indefinite national allocations, apart from the handful of commissions and treaties that either positively require the commission they establish or the parties to set not only a TAC but also to divide it into national allocations, there is no fundamental obstacle in international law to trading of quota. Since, however, a national allocation is an obligation of each member \textit{erga} all others to limit its catch to a particular amount, it follows that exceeding that amount through quota trading

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1187} Supra Ch IV, text at nn 882-883.
\item \textsuperscript{1188} See paragraph 6 of the resolution, reproduced \textit{infra} at Appendix D.
\item \textsuperscript{1189} Arnason, \textit{supra} Ch I n 105, at 648 has demonstrated that if quotas are not permanent, uncertainty leads to excessive discounting of future profits, diminishing the incentive to conserve the stock.
\end{itemize}
\end{footnotesize}
will result in breach of that obligation. Hence either an *ad hoc* decision amounting to waiver is needed, as happens in ICCAT and NAFO, or consent is given in advance on a blanket basis either expressly, as in NAFO, NEAFC and the former IBSFC, or by setting up a trading mechanism. At its simplest, this mechanism could simply be a decision of the commission to approve in advance any trade, or certain trades, the only condition of their validity, thus binding other members of the commission, being their notification to the secretariat.\(^{190}\)

A more sophisticated system would, however, in all likelihood be needed to ensure that such trading as takes place is not inimical to proper conservation and management of the stock concerned. Any such mechanism would need to deal with practical legal implications of trading, notably accounting for participants’ catch. It is possible to name and describe briefly its main features.

First, national allocation shares would need to be expressed as percentages of the TAC. Secondly, they must take into account new entrants, perhaps with different rules for coastal States and other States. If not all States in whose EEZs the relevant stocks occur are already members, those who are not will have a right to join the commission and receive some national allocation.\(^{191}\) Until they do, however, the existing members are in effect using those non-member coastal States’ share of the TAC, and it is thus necessary to have some pre-agreed mechanism for how existing members’ national allocations will be reduced to accommodate that of any new coastal State members. As this may prove very hard to achieve in practice, the introduction of indefinite quota shares may have to wait until all eligible coastal States have become members. In the CCSBT’s case, there is thus a question of how

\(^{190}\) The question of whether there is any consideration, and if so its amount, is not strictly one for the commission. Even so, both parties to the transaction are States, and as such may well have to make public the amount in their usual domestic accountability mechanisms, e.g. annual reports to a legislature. Thus, in the interest of transparency, the commission would have strong arguments to insist on disclosure of the consideration as a condition of registering the transaction.

\(^{191}\) See UN Fish Stocks Agreement, *supra* Introduction n 4, Articles 8(3) and 11.
the decision at its first meeting that New Zealand would have a 6 per cent share of
the TAC once it has recovered to a certain level would be implemented, now that
Indonesia, the Republic of Korea and Taiwan are members, and what allowance to
make for the likelihood that South Africa (the only coastal State with respect to the
SBT migratory path still outside the CCSBT) will eventually join them in that status.

Other States would be able to accede to the treaty in order to become members of the
commission, but would have to buy quota from an existing member if they wished to
fish. While they might object that to have to pay for the right to fish is inconsistent
with the freedom of fishing, under UNCLOS Articles 116 and 118 this freedom is
subject to the duty of cooperation with existing participants in the fishery. If, it is
submitted, these latter have through a fishery commission set up a scheme outside
which none is free to increase its catch, they are entitled to insist that any newcomer
cooperate with them by participating in the scheme according to its terms. This
conclusion is strengthened for parties to the UN Fish Stocks Agreement; its Article 8,
paragraph 3 requires them to discharge their duty to cooperate with other States by
joining the commission or agreeing to apply its conservation measures. As long as
the newcomer is ready, by doing either of these things, to accept the same conditions
as apply to the existing members, those members cannot consistently with the same
provision deny the newcomer’s rights to participate. Rayfuse’s review of State

1192 There is some evidence that this implicit treaty-based bargain may have achieved the
status of customary international law; see for example Australia’s statement in the debate on
Oceans and the Law of the Sea at the 2005 session of the UN General Assembly (“Statement by
<www.australiaun.org/unny/f5281105.html> (visited on 19 May 2008)), where it was asserted
that: “it is Australia’s strong view that States have an obligation to either join relevant RFMOs
where entitled to do so, or to otherwise refrain from fishing in the RFMO regulated area unless
they agree to apply all relevant conservation measures.” In the 2006 session the same words
were repeated almost verbatim (“Statement to the 61st session of the UN General Assembly
Plenary 7 December 2006[,] Agenda item 71(a) & (b): Oceans and the Law of Sea and
Sustainable fisheries[,] Delivered by HE Frances Lisson[,] Ambassador and Deputy Permanent
practice supports this, showing that fishery commissions all now “demand either membership, cooperation or abstention [from fishing] from non-members” who in turn have in several ways “acquiesced in these assertions of jurisdiction”.  

It is clear, however, that quota shares of indefinite duration raise, in a way that time-limited shares do not, the question of initial allocation, which has been identified by Pearse as a major difficulty invariably needing to be tackled when ITQs are instituted at the domestic level. For, once the initial allocation is made, the commission would never again need to concern itself with national allocations; it simply sets the TAC and the members’ relative shares depend on the subsequent course of trading. While one can agree with Pearse’s domestic-level analysis that the biggest obstacle to the introduction of ITQs is “anxiety and disputation” about the initial allocation of shares, the likely paucity of transactions at the international level and the consequent illiquidity of the market make it much more difficult to accept his statement that, under transferability, the initial allocation has little long-run significance for either the efficacy of the system or the distribution of rights. Rather, this circumstance only adds to the significance of the initial allocation.

This is borne out by the experience of the participants in the SBT fishery during the years in the trilateral period when major cuts were made to the TAC. In the 1988 meeting, while Australia argued that “[w]e have accepted a disproportionate share of the burden”, Japan sought to maintain its share by countering that the value per

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1194 P.H. Pearse, “From Open Access to Private Property: Recent Innovations in Fishing Rights as Instruments of Fisheries Policy”, (1992) 23 ODIL 71 at 78. He notes ibid. that in New Zealand 80% of quota rights changed hands at least once within five years of their introduction – a level of churning unlikely to be replicated on the international plane.

1195 Attachment C to 7th Trilateral Management Meeting Report, supra Ch II n 359, Australian Statement, at 3.
tonne of longline catch was four times that of SBT caught by surface fishing.
Adding that “large catches of small fish in the 1982-83 year were responsible for
current low catch levels”, it advocated that “those who caused the decline should
take responsibility for the consequences.”

While adding the element of permanence to national allocations will not necessarily
lead inexorably to their being traded, it is likely to generate pressures to that end, as
producers seek to realise gains from differences in their marginal net benefits by
reallocating effort among themselves. No such permanence is presupposed in the
already existing trading regimes of the within-season type, but these are reasonably
seldom used, having emerged piecemeal from the various fisheries commissions
grappling with allocation problems. Any systems roughly resembling international
equivalents of ITQs are likely to arise in the same manner, less a conscious creation
of property rights (no single characteristic of property is crucial, but transferability is
surely one of the most important) than as an ad hoc response to specific pressures.

With discussion of the issue happening already in a number of fishery commissions,
its progress is less likely to encounter the sorts of objections enumerated by the
OECD, which are not automatically translatable to the international level. Firstly,
there is no reason to expect resistance from current members, even those whose
fisheries are less profitable than those of potential new entrants, as the choice to
retain or sell all or part of their national allocation will remain one for them alone.
If a member believes it derives significant non-monetary benefits from participating
in the fishery, it is entitled to resist offers. Secondly, while the wider concerns about

1196 7th Trilateral Management Meeting Report, supra Ch II n 359, at 14. No doubt part of
the reason why Australia and New Zealand did not find this persuasive was that simultaneously
Japan claimed credit for its past catches as an historic “contribution” to the fishery: ibid., at 9.
1197 OECD, supra Ch I n 53, at 79.
1198 This is not to say that such resistance if it occurs would be surprising; one reason for it
might be that, to the extent that the initial allocation is made on the basis of past declared catch, it
would effectively (if belatedly) penalise underreporting: Falloon, supra Ch III n 566, at 46.
the fairness of reserving an open-access resource for a privileged few with capital investment in the fishery and excluding all others have more substance, these can be met with two arguments: (a) at the international level those wanting to enter the fishery will most likely have made their investments already, and in any event there are few international fisheries in a healthy enough state for new investment in them to be encouraged; (b) their exclusion, if such it is, comes about not as a result of the adoption of trading by the fisheries commission, but by the parallel development of the putative elaboration of the customary rule of cooperation in international fisheries law into a requirement that non-members abide by the commission’s rules in order to fish, as long as these are non-discriminatory. This test should not be hard to satisfy, since the would-be new entrant can at any time, by becoming a full member of the commission or subscribing to any formal cooperation mechanism that it operates, make itself eligible to offer to buy quota from an existing member – and refusal of any actual offer to buy quota is not in itself discriminatory.  

In the longer term, the commission may well be able to capture some of the resource rent generated and distribute it among the commission members. Ideally, non-members, even those not interested in fishing at all, should be able to become eligible for a modest share of this surplus by joining the cooperation mechanism, in effect trading any residual high seas freedom of fishing for this revenue stream.

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1199 In reality, to avoid wasting time and money in joining a commission without any guarantee of quota, would-be new entrants would be likely to offer to purchase quota first. The existing member, if minded to accept, would ensure, on the commission’s behalf, that the transaction was not consummated until the eligibility criteria were met, on pain of remaining responsible to its fellow members for the purchaser’s catch if it proceeded before this had occurred, as the secretariat would not then register the transfer.

1200 Such a solution, namely the creation of a series of regional ocean organisations which become beneficial owners of the high seas resources and the States who are their members by transforming their high seas freedom to fish into a right to a share of the profits, has recently been proposed in G.T. Crothers and L. Nelson, “High Seas Fisheries Governance: A Framework for the Future?”, (2006) 21 Marine Resource Economics 341. To the extent that the bypassing of the step of national allocations is implied, this is an application of Edeson’s “extreme” solution –
Beyond that, it is possible to imagine a future legal rule in which monetary or other payments would be a way of compensating States for their compulsory exclusion from a share of the MSY, though the question of how to calculate the quantum of compensation is likely to remain vexed for many years and delay the emergence of any such rule.

There remain, of course, many problems of high seas fisheries that quota trading cannot solve. For one, it will not prevent stock collapse if the TAC is set too high, as the example of the North-West Atlantic cod fisheries shows; unless the TAC is

\[ \text{supra n 1041} \] – of allocations direct to operators. A similar idea was considered by Koers, supra Ch I n 285, at 253-258, but he concluded at 257 that, because it

would be required to function within an extra-legal context which would be largely unforeseeable at the time of its creation and...would have a virtual monopoly, the price of the organization's failure could be disaster. This also explains why States will be extremely reluctant to create such an organization.

This made it (at 258) “at best a blueprint for a remote future, although not necessarily...for utopia.” Crothers and Nelson do not clearly state what under their scheme would become of existing fisheries commissions whose mandate extends to the high seas. It is suggested, however, that overt creation of property rights would be more likely to provoke opposition than the gradual development of them by the existing commissions through trading, in the way that Molière’s Monsieur Jourdain resisted the idea of employing prose, only to discover that this was precisely what he had been doing all his life: “Par ma foi! il y a plus de quarante ans que je dis de la prose sans que j’en susse rien, et je vous suis le plus obligé du monde de m’avoir appris cela.” (Molière, Le Bourgeois Gentilhomme, Act II, Scene 4.)

\[ ^{1201} \] Having rejected the idea in the previous footnote, Koers, supra Ch I n 285, instead proposed, at 301-303, transferable rights of access to fully exploited stocks and levies for fishing them (as agent of the world community), which would be set at a level that made it equally attractive to fish or simply collect revenue, but adjusting this for the risks of fishing, so that the average fishing return should be somewhat higher. This revenue Koers would have distributed under a formula basing a State’s share on a “reverse” relationship with its share in total world catch and per capita national income. Nonetheless (at 311), it was “crucial” that any limitation of entry be effected at the global level, because “it should not be left to fishing nations alone to decide to what extent non-fishing States would have access to the...sea’s living resources.”
restrictive of effort, the value of allocations will be too low for them to fulfil their intended function of limiting entry.\footnote{1202}

If concentration of ownership internationally is a problem, as is sometimes said to be the reason at national level for reluctance to move to ITQs, a similar rebuttal applies: absolute purity of the system is not a prerequisite. It is perfectly possible for the rules adopted by a commission to place a cap on the share of the catch that a single member may lawfully accumulate; this would reduce somewhat the value of the asset, but not alter its character. Similarly, tradable catch shares would remain subject to other management measures such as closed seasons and areas. Nor need tradability be an immediate feature of any scheme adopted by commissions; there is nothing to stop them establishing their initial distribution but postponing trading for some time; at national level too, ITQ systems in many fisheries at first do not allow transfer but subsequently do.\footnote{1203} An intermediate alternative might be to start by permitting trading of small absolute amounts or percentages of an allocation, which would rise over time until no quota remained inalienable.

Considering the potential complexity of any accounting mechanisms,\footnote{1204} it would also be sensible to have some subsidiary means for enforcement of quotas; for

\footnote{1202} OECD, supra Ch I n 53, at 80-82.
\footnote{1203} Ibid., at 83.
\footnote{1204} Despite addition, subtraction, multiplication and division being the only mathematical operations used, the opacity of the tables in ICCAT reports make it difficult to see how catch limits worked out in this way are derived; see e.g. “Compliance Tables Adopted in 2007 (Compliance with Quotas and Catch Limits in 2006, Reported in 2007)” (Appendix 2 to Annex 10 to ICCAT20 Report), in ICCAT Green Book 2008/1, supra Ch III n 568, 224, a problem which the general and stock-specific comments at 224-226 do not entirely overcome. The problems that might arise under an excessively complicated accounting system are illustrated by Canada’s erroneous interpretation of an earlier measure (Annex 5-2 to ICCAT16 Report, supra n 1165, at 70), taking paragraph 3(c) to mean that Canada could carry over only 10% rather than all of its unused dead discard quota (the reference to 10% was in fact Canada’s share of the TAC). Canada did not subsequently reclaim the inadvertently forgone 90%. In M. Calcutt, S. Paul, J. Neilson and O. Murphy, “National Report of Canada”, in ICCAT Green Book 2004/3, supra Ch I}
example, IBSFC members may refuse landings of quota species from vessels flagged to States whose quota is exhausted.\textsuperscript{1205}

A property system created by a multilateral treaty would survive the withdrawal of individual members provided a sufficient number remains; in terms of its own internal logic, the rights of outsiders are taken into account within the system, so only the status of the departing member changes. At least one element of entry into a system would need to be made irrevocable, however, regardless of any subsequent denunciation of the treaty: a State should not be able to accede to the treaty, liquidate its quota for gain and then leave the system in order to fish for the species on the high seas again. This could be prevented by a rule that reduction of a quota to zero by trading would extinguish that member’s right at international law to fish for that species other than by purchasing quota, even if it subsequently ceased to be bound by the treaty (though it should not be prevented from reacceding).

If the aim is to overcome the tragedy of the commons besetting high seas fisheries, overall, it is hard to disagree with the OECD’s conclusion that the available evidence reinforces the need for an institutional accommodation of property rights, or with its advocacy of indirect enforcement by holding flag States accountable for the actions of their vessels and nationals, with quota or trade sanctions for non-compliance.\textsuperscript{1206}

This would require the effect of purchasing quota to be that the transferee member’s responsibility for reporting and compliance should be the same as if it had originally been allocated the entire amount by the commission. The wider implication of the

\textsuperscript{n 188, 11 at 11 there are useful worked examples in prose of how overage and unused discard quotas in ABT and swordfish work when carried forward to subsequent years.}
\textsuperscript{1205} OECD, supra Ch I n 53, at 154.
\textsuperscript{1206} Ibid., at 158. Kaitala and Munro (1993), supra Ch I n 120, at 325, note that, without some mechanism of this kind, even a successful stock-rebuilding program will remain vulnerable to a breakdown in cooperation caused by the shift of bargaining power in high-cost harvesters’ favour as the health of a stock is restored. Because of its objection procedure, this description is not met by NAFO (and presumably every other fisheries commission with a similar procedure): at 326.
OECD’s call – to apply to high seas fishing a form of State responsibility not dependent on there being a wrongful act\textsuperscript{1207} – is a logical consequence of the matters raised in this study, but remains beyond its scope, other than as a direction for future research in the concluding observations to which it is now opportune to turn.

\textsuperscript{1207} See \textit{infra} Ch VI, section I, esp text at and following nn 1308-1328.
CHAPTER VI
Conclusions: A Role for State Responsibility?

In this final chapter, a series of propositions and questions is posed, allowing conclusions to be drawn as to the implications of the matters covered in the preceding five chapters for international management of fisheries generally, including mechanisms for the setting of TAC and allocation of quotas and means for binding third parties as well as CCSBT members into the conservation and management of SBT.

If the success of a fisheries commission is gauged by the health of the stock(s) under its management, the CCSBT and its Members cannot be said to have succeeded in overcoming the problems of the past. Two statements from and about the previous era of international fisheries law in the 1970s remain true of the CCSBT. First, that fisheries commissions before the advent of the EEZ “were never particularly effective…With a few exceptions they had only limited success in preventing the depletion of stocks and no success in preventing economically excessive fishing efforts.”1208 Secondly, that this is largely because nation-state interests have tended to dominate the international concern about maintenance of fishery stocks and, with lax or nonexistent, enforcement, states have tended to follow their own short-term economic interests with the net result that the…stocks…have often received little if any assistance in terms of their ability to sustain an annual yield.1209

Instead the pattern of the last few decades has been for international fisheries law to develop only in response to crises, not to anticipate and prevent them.1210 This is also true of the UN Fish Stocks Agreement, which introduced the precautionary approach to fisheries, requiring pre-agreed action should pre-defined acceptable limits for the state of the stock and the intensity of fishing be breached or

1208 FAO Fisheries Circular No 853, supra Introduction n 15, at 28.
1209 Knight, supra Ch I n 52, at 48.
1210 Koers, supra Ch I n 285, at 37.
approached\textsuperscript{1211} – as a response to the Bering Sea pollock and Northwest Atlantic cod collapses of the early 1990s. As a rule of thumb, therefore, it may be said that the prospects for development of new law are likely to be in inverse proportion to observed recovery of straddling and highly migratory fish stocks around the world. Possibly because at the time of its negotiation issues of allocation were chronic problems rather than acute crises, the Agreement makes no concrete advances on these, despite Article 11 on allocation to new entrants in particular, beyond making the dispute settlement system available as a second-best alternative: see paragraphs 4 and 5 of Article 7. Fisheries simply happens to be more affected than most areas of international life by the general weakness of international law in recognising interests of third States and common interests.\textsuperscript{1212}

With no strong law to guide them, allocation negotiations all too often either break down or succeed only because the result is too accommodating of the competing claims, so that either way – whether via formal TACs or the catches taken in the absence of one – removals regularly exceed those recommended by the scientists. Having failed to reduce the risk of stock collapse, in this situation all that is left for States is to hope for the best. Such for example was the approach of the Taiwanese delegate who, after an unsuccessful attempt in ICCAT to allocate the catch of southern albacore, with parties announcing voluntary catch limits whose sum exceeded the TAC they were trying to allocate, “expressed the hope that God would look over the southern albacore in 1998.”\textsuperscript{1213}

\textsuperscript{1211} UN Fish Stocks Agreement, \textit{supra} Introduction n 4, Annex II, esp paragraphs 2 and 4. See also paragraph 5 which provides that “Fisheries management strategies shall ensure that the risk of exceeding limit reference points is very low.”

\textsuperscript{1212} Hey, \textit{supra} Ch III n 517, at 462.

\textsuperscript{1213} Appendix 14 to Annex 10 to ICCATSM11 Report, \textit{supra} Ch III n 583, at 183. At the next annual meeting it transpired that the stock was indeed robust enough to have withstood this combined catch – but relying on divine intervention, if that was the cause here, can hardly be an adequate substitute for the failure of human institutions.
Progress can at least be registered in Japan’s belated acceptance that capacity itself is not an argument for increasing a State’s share in an allocation: it is “important in an allocation exercise to differentiate between countries which acted responsibly to reduce their fleets and those that did not, as the latter would seek larger quotas than the former.”\textsuperscript{1214} To do otherwise would in effect be to penalise members for acting in the collective interest either by adopting capacity-reduction measures outright or by embracing ITQs which solve overcapacity problems automatically over time.\textsuperscript{1215}

Swept along by an undercurrent of near-intractable biological and economic factors, the abstract requirements of the law of highly migratory species float uneasily atop them and occasionally disappear beneath the surface. One is tempted to conclude that the law has relatively little to offer other than a framework of legal certainty for decision-making on a TAC and its allocation. Beyond the standard injunctions of equity and the duty to cooperate, it may well be no more sensible to expect a legal principle to settle the essentially political (who gets what) issue of allocation than to answer at the domestic level the question of whether and if so to what extent the tax system should attempt to redistribute income through progressive scales. Even so, the field is still open for several legal policy conclusions to be derived.

A The economists’ solution: property rights and quota trading

In the context of more general criticisms of the drafting of the fisheries provisions of UNCLOS, Judge Oda speculated a quarter of a century ago on the consequence of their failure to deal with the issue of allocation. This, he thought, was that sooner or later high seas fisheries would have to be brought under the same type of regime as Part XI of UNCLOS had just instituted for the mineral resources of the deep seabed:

\textsuperscript{1214} Annex 7 to ICCAT17 Report, \textit{supra} Ch III n 605, at 178 (paragraph 6.2).

\textsuperscript{1215} Contrast Japan’s earlier use of its overcapacity to argue for reallocation of SBT quota in its favour: see e.g. its 1990 statement, \textit{supra} Ch II, text accompanying n 342.
Surely, discussions similar to those now taking place on seabed mineral resources will eventually be held on the new concept of the common heritage of mankind as applicable to ocean fishing.\(^{1216}\)

This presupposes unification of ownership or at least management of the resource by an international authority in which States pool their rights to the stock. There is no single organisation competent to administer international fisheries, nor is anything short of the catastrophic collapse of many stocks at once likely to provide the political impetus required to create it, now that the chance to do so offered by the ILC has been missed.\(^{1217}\) The intermediate solution adopted in the UN Fish Stocks Agreement is to strengthen the role of regional fisheries management commissions, by requiring States fishing for the stocks they cover either to join them or cooperate with their management measures. It is possible that the *pacta tertiis* qualification on its general applicability has been resolved if Rayfuse’s argument on the customary status of Article 8, paragraphs 3 and 4 is correct.\(^{1218}\) Be that as it may, tension is likely to remain between the proprietorial attitude to quota of existing participants who wish to exclude outsiders to the extent possible,\(^{1219}\) and those outsiders who resist this as a solution to global overcapacity. Not wishing to be arbitrarily deprived

\(^{1216}\) Oda, *supra* Ch III n 657, at 755. Hayashi, however, has more recently come to the opposite conclusion: M. Hayashi, “Three Decades’ Progress in High Seas Fisheries Governance: Towards a Common Heritage Regime?”, in Nordquist *et al* (eds), *supra* Ch II n 437, 375 at 392.

\(^{1217}\) *Supra* Ch I nn 56-60 and accompanying text. Note, however, the suggestions made by speakers at the 2005 Conference on the Governance of High Seas Fisheries and the UN Fish Agreement that the FAO or the UN General Assembly should act as a residual body able to step in to impose emergency conservation measures on States concerned when there is no existing organisation covering the fishery in question on the high seas with the competence to do so: M.W. Lodge and S.N. Nandan, “Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995”, (2005) 20 *IJMCL* 345 at 373, E.J. Molenaar, “Addressing Regulatory Gaps in High Seas Fisheries”, *ibid.*, 533 at 551.

\(^{1218}\) See *supra* Ch V nn 1192-1193 and accompanying text.

of any future benefit from a fishery which they had no part in depleting, they prefer a solution much closer to a *tabula rasa* approach in which the existing investments in the fishery count for nothing.

A practical obstacle to quota trading, should it be adopted in the interim, is the idea of shares varying with TAC, as implicitly accepted in the CCSBT\textsuperscript{1220} by New Zealand and used by ICCAT in relation to the western ABT fishery.\textsuperscript{1221} Although this can be an attractive solution in the short term, and fits well with the Southey/Gulland model,\textsuperscript{1222} it risks perverse consequences in the longer term by giving high seas fishing States and States at the outer reaches of the stock’s migratory path, which would typically benefit from growing shares with a growing stock, a built-in incentive to resist lowering the TAC when the stock is declining. In a quota trading context, it loses altogether its purpose as a solution to allocative problems, as well as making for very complicated accounting, thus simple flat shares not dependent on the size of the TAC become the natural method to adopt.

\textsuperscript{1220} *Supra* Ch II, text following n 356.

\textsuperscript{1221} In “Recommendation by ICCAT to Establish a Rebuilding Program for Western Atlantic Bluefin Tuna” (Annex 5-7 to ICCATSM11 Report), in ICCAT Green Book 1999/1, *supra* Ch III n 576, 67 at 68 (subparagraphs 4(c)-(f)), there is one set of percentage shares of the TAC for Canada, Japan and the US when the TAC is below 2,413 tonnes and another when it is above 2,660 tonnes. Japan takes all of the difference between those tonnages. This is continued in the successor provision, Supplemental Recommendation by ICCAT concerning the Western Atlantic Bluefin Tuna Rebuilding Program, *supra* Ch V n 1000, at 145 (Recommendation [06-06], subparagraph 6(b)).

\textsuperscript{1222} Southey, *supra* Ch IV n 924; Gulland, *supra* Ch IV n 924. This is because distant-water fishing States can reduce a large stock to a small one by overfishing, but may be forced out of a fishery either by their higher costs at a point when fishing is still profitable for a small low-cost coastal fleet, as seems to have been the reason for Korea’s near-withdrawal from the SBT fishery (*supra* Ch I, text accompanying n 226), or because the range of the depleted stock shrinks so that it is thereafter found wholly or mostly only within the coastal State’s EEZ, as occurred with Norwegian spring-spawning herring: Churchill, *supra* Ch V n 1017, at 241-242 and sources there cited; G.R. Munro, “The Management of Shared Fish Stocks”, in FAO Fisheries Report No 695 (Supplement), *supra* Ch V n 1006, 2 at 24 and sources there cited.
If the establishment of some form of property rights is the solution to the tragedy of the commons, then at this juncture it is too early to predict how that will be achieved. The trends observed in this work are for States to resist the notion of such rights in principle while nonetheless gradually and perhaps unwittingly establishing them in practice. If this continues, ultimately the question of equity will be reduced to one of what share of the initial distribution of benefits a State should obtain. Ironically, while from an economic point of view it does not matter who is the owner – a high seas equivalent of the International Seabed Authority which can manage the living resources on a common heritage basis on behalf of its member States and subject to their direction, or empowering fisheries commissions to carve up catch shares among individual owners, be they States or operators – each will be opposed on ideological grounds by different blocs of States. All that can be ventured is an educated guess: that a sudden crisis may generate a surge of support for a common heritage regime, but in any other case the slow drift towards transferable rights is likely to continue.

**B Other possible solutions short of quota trading**

The real challenge in a world of limited fishing opportunities is to bring States to see that their interests are better served by claiming a share of the economic proceeds of fishing than by insisting on reserving a share of the activity of fishing for their own fleets. As the FAO Secretariat noted over a decade ago,

> [t]he management of straddling and high sea stocks is basically no different from the management of stocks lying fully within national zones except for the kinds of participants and the distribution of benefits. A first step would be to move from management based on physical quantities to management based on economic values. This step would necessitate the adoption of measures designed to maximize the net economic revenues that can be produced by the resources. Such measures would be based on transferable use rights which might be vessel licenses, individual shares of total allowable catch or total revenues or individual shares of total allowable investment. The choice would depend upon the characteristics of the fisheries, including the costs of enforcement.1223

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The Secretariat envisaged that the shares would be negotiated, suggesting that clearly, a significant proportion should be allocated to the coastal states, but the amount might vary according to the degree in which the managed stocks are found within their zones. The distant-water states, that are currently fishing in the zone, might also be accorded a significant share as a means for buying out their "historical" right of free fishing.  

Preference to coastal States would thus take the form of an increased share of the benefits, i.e. through the distribution process:

The benefits would be in the form of the economic rents net of the costs of achieving them. The costs would be those of the management body for administration, research and enforcement. These costs are likely to be relatively small so that there should be substantial surplus revenues available for distribution.

Distribution should be done in such a way that stability of the regime is assured; that is, that all parties feel they have more to gain by maintaining the regime than by proceeding on their own.

This last point is another way of expressing what Munro calls the “individual rationality constraint” – the idea that, in an unregulated fishery subject to the tragedy of the commons, States will voluntarily cooperate rather than destructively compete only if each is guaranteed at least the same benefit that it could expect to derive from competition. It leads to his compensation principle, under which the preferences of States with low implicit discount rates (i.e. placing greater weight on future returns) should be allowed to become dominant in the long run. The stability advocated by the FAO Secretariat then “entails allowing the most efficient producers to operate and compensating those who do not receive fishing privileges but who are in a position to affect the outcome of the regime.”

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1224 Ibid., at 42.
1225 Ibid., at 41.
1226 Munro, supra n 1222, at 10.
1227 Munro (1987), supra Ch I n 120, at 280-282.
1228 FAO Fisheries Circular No 853, supra Introduction n 15, at 42.
yields, restricting eligibility for distribution of the benefits to coastal States would not succeed. Excluded outsiders will have an individual rationality constraint of their own, and if they are not to be made worse off by, and hence resist, their exclusion, in legal terms any *de facto* power to exclude will need to be accompanied by some compensation mechanism. This suggests that eligibility for membership of the commission should “include all states with a potential, as well as a current interest in fishing.”\(^{1229}\) In this it stops short of Munro’s preferred solution of creating *de facto* property rights for current members by permitting the present distant-water fishing States and the coastal States as the “charter members” of a commission to reserve the benefits for themselves, with new entrants required to purchase quota as the only way to avoid being excluded.\(^{1230}\) The latter would work from an economic point of view, but, as demonstrated in section C below, has legal flaws.

Expressed in legal terms, this controversy turns on the question of what Article 8, paragraph 3 of the UN Fish Stocks Agreement means by a “real interest” giving a right to join a fisheries commission. For Munro this coincides with his notion of charter membership, but it is not necessarily wise to resist the idea that States should simply be allowed to bring themselves within its terms by self-identification, for a State told by a commission that it lacks a real interest in a fishery can manufacture one by commencing to fish – the very outcome that the existing members wish to avoid. Instead, it is submitted, all States (even landlocked ones and those remote from the fishery geographically) should be not merely permitted but compelled to commute their right to fish on the high seas into a right to a share of the economic rent from the fishery, subject to compensation to the extent of satisfying their individual rationality constraints, so that no State is better off by undermining the regime than by complying with it. Clearly for most States this would be a very small sum and may well not even cover the annual assessed contribution payable for

\(^{1229}\) *Ibid.*

\(^{1230}\) Munro (2000), *supra* Ch I n 120, at 276.
membership of the relevant commission. As an incentive to avoid compulsion, ideally a State whose vessels do not fish in the area or for the species managed by the commission should be exempted from any assessment towards its costs for that year, but should only be entitled to a share of the economic rent that exceeds that figure if it can prove that its individual rationality constraint requires it. In practice, however, commissions might be wiser to eschew such exemptions, lest this attract new members that have no interest in the fishery as such but wish merely to use their votes as bargaining chips, a development that has paralysed the IWC.\textsuperscript{1231}

\section*{C The relationship between the CCSBT’s target and the maximum sustainable yield standard in UNCLOS}

Broadening the categories of States that can expect a return from the fishery would also have the beneficial effect of helping to prevent a collective abandonment by the members of a fisheries commission of their conservation obligations. As shown below, the CCSBT is in danger of doing just that, since at a special meeting in 2004 all Members agreed that the former management objective of restoring the parental stock to its 1980 biomass ($B_{1980}$) by 2020 was not feasible.

The abandoned $B_{1980}$ by 2020 management goal was not set with reference to the biomass that produces the MSY ($B_{\text{msy}}$) – the 1980 level was simply one which up to then had seemed high enough to avoid any adverse effect on recruitment.\textsuperscript{1232} Hence, even if this goal had been met, it would not be safe to say that there would be no need to rebuild the stock any further.\textsuperscript{1233} Nor would the CCSBT thereby have

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1231} E.J. Molenaar, “Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organizations”, (2003) 18 \textit{IJMCL} 457 at 462.
\item \textsuperscript{1232} Oral submissions to ITLOS of Counsel for Japan, Mr Greig, Transcript for morning of 19 August, \textit{supra} Ch I n 285, at 16. For the definition of recruitment see \textit{supra} Ch I n 194.
\item \textsuperscript{1233} This is comparable to the use by the International Council for the Exploration of the Sea, from which the European Community obtains its fisheries science advice, of impaired recruitment as a limit (danger) reference point, perceived as less precautionary than NAFO’s use of MSY: O.S. Stokke and C. Coffey, “Precaution, ICES and the Common Fisheries Policy: A Study of Regime Interplay” (2004) 28 \textit{Marine Policy} 117 at 120. On the adoption of MSY in
\end{enumerate}
\end{footnotesize}
satisfied the target set in 2002 at the World Summit on Sustainable Development that action was required to

\[ \text{[m]aintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015[.]} \]

It is now all but inevitable that Members will have the uncomfortable task of explaining to any future such gathering why doing so by 2015 was not possible for SBT. Yet, even before its abandonment, there was no concerted effort to meet the original goal. The Chair of the Scientific Committee advised the Eighth Meeting of the CCSBT that the 2000 catch level of 15,579 tonnes appeared to be “roughly close to the replacement yield, with a 50 per cent chance that the stock could either decrease or increase at this harvest level.” While no effort had yet been made to estimate the harvest level required to achieve recovery of the parental stock to its 1980 level by 2020, most of the assessment results indicated low probability of attaining this target at that catch level. Yet New Zealand found no support when it stated that “[t]he logical and responsible conclusion we draw from this is that catch levels must be reduced in order to achieve our stated management objectives”, reasoning that cannot be faulted.

This should not be surprising: Burke’s New Zealand snapper example shows why the economics of fishing produce a paradigm shift when the B_{msy} barrier is breached.

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1234 WSSD Plan of Implementation, supra Ch IV n 917, paragraph 31(a). Note that subparagraph (e) of the same paragraph encourages fisheries commissions to “give due consideration to the rights, duties and interests of coastal States and the special requirements of developing States when addressing the issue of the allocation of share of fishery resources for straddling stocks and highly migratory fish stocks, mindful of the provisions of [UNCLOS] and the [UN Fish Stocks Agreement], on the high seas and within exclusive economic zones”.

1235 CCSBT8 Report, supra Ch I n 30, at 67 (paragraph 43).

1236 Attachment N-4 to CCSBT8 Report, supra Ch IV n 919, at 147.

1237 Supra Ch I, text at and following n 113.
so that operators will resist policies to restrict catches in order to rebuild the stock to \( B_{\text{msy}} \) from below. The fisheries economics literature predicts as much: if, as is typically the case, vessels and labour cannot be immediately redeployed elsewhere, the appropriate policy is not to close the depleted fishery altogether – which would be the quickest way to reach \( B_{\text{msy}} \) – but to rebuild the stock gradually.\(^{1238}\) That it may be profitable to continue to fish a depleted stock at the yield far below MSY, all that is sustainable at that level, instead of trying to rebuild it, is evidenced by the $300,000 per tonne being fetched by Australian SBT quota in mid-2002.\(^{1239}\) Since this figure represents the present value of one 5,265th share into the indefinite future of whatever catch limit Australian authorities impose, anyone willing to pay this price must have thought the fishery’s economic prospects bright, all the more so with the lower price being fetched on the Japanese market at the time.\(^{1240}\)

Against this economically unpromising backdrop, the precautionary approach to fisheries in Annex II to the UN Fish Stocks Agreement is less likely to succeed as a means of reversing depletion than in preventing it in the first place for stocks not overfished. Although setting \( B_{\text{msy}} \) as the limit reference point serves unexploited and lightly or moderately exploited stocks well (i.e. those that are above \( B_{\text{msy}} \)), left to their own devices, as the CCSBT’s attitude shows, those exploiting a stock already driven below \( B_{\text{msy}} \) will have insufficient economic incentive to rebuild the stock at all, to the detriment of States that could reasonably hope to profit from access to a healthier, rebuilt stock.\(^{1241}\) From this perspective, it matters little whether \( B_{\text{msy}} \) shifts

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\(^{1238}\) Munro and Scott, *supra* Ch I n 107, at 651.

\(^{1239}\) Serdy, *supra* Ch III n 491, at 242n.

\(^{1240}\) *Supra* Ch I, text following n 275. Note, though, that there is no reason to think that quota as an asset would be less prone to speculative bubbles than, say, shares.

\(^{1241}\) The Western ABT stock is another example of this phenomenon: with the spawning stock biomass estimated in 1996 at 13% of \( B_{\text{msy}} \), Panel 2 of ICCAT was informed that an annual catch of around 2,500 tonnes would roughly double it in 20 years, but to get to \( B_{\text{msy}} \) in 20 years would require a drastic reduction in catch to 500 tonnes *per annum*: Annex 7-1 to ICCATSMM10 Report, in ICCAT Green Book 1997/1, *supra* Ch III n 573, 107 at 112 (paragraph 5.b.2). Despite
to being a limit reference point under the precautionary approach from having been under UNCLOS a target reference point (in UN Fish Stocks Agreement Annex II terms); this will only become relevant after the stock has recovered. Even recovery to $B_{msy}$ would be a major advance for SBT, so that for the foreseeable future it will be enough for the CCSBT to set its management compass by UNCLOS alone.

Evidently, then, something more is needed to bring into alignment the legal and economic incentives for depleted stocks. The biological starting point is that, grim though the current state of the stock is, precedents from other comparable fisheries indicate that recovery is possible. Pacific halibut, for example, is similar in longevity and late maturity to SBT, yet was brought back from severe depletion: “A fishery which had been disastrously depleted by unrestricted fishing has been so restored as to be one of the best stabilized and most profitable to its fishermen.”

Although doubts raised by some on this score seem vindicated by the subsequent severe shortening of the fishing season and economic waste associated with the Olympic

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1242 In this species individuals older than are 20 common; females maturing from age 8 to 16 with a mean of 12 are far more susceptible to overfishing than males which do so between the ages of 5 and 11, on average at 9: H.A. Dunlop, “Management of the Halibut Fishery of the Northeastern Pacific Ocean and Bering Sea”, in UN doc A/CONF.10/7, supra Ch I n 28, 222 at 226-227.

1243 Ibid., at 223. It is not clear, though, where in relation to $B_{msy}$ the stock stood at its nadir.

1244 McDougal and Burke, supra Ch I n 271, at 482 and sources there cited.
fishery\textsuperscript{1245} for this species, it does not follow that one should deny the recovery was worth bringing about, even if it could have been done better.

Modelling was carried out some years ago to estimate the likelihood of returning the SBT stock to $B_{\text{msy}}$ by 2020 under a number of management strategies if removals were reduced in the short term. The significance of these is that the more successful models show average removals over the period to 2020 exceeding present removals, suggesting that the MSY itself would be over 20,000 tonnes.\textsuperscript{1246} For the CCSBT to adopt a management strategy that delays or prevents recovery of the stock to $B_{\text{msy}}$ is therefore, it is submitted, to deny all potential new entrants’ rights to share in the benefit that such a recovery would bring.

This, however, is precisely what it seems to be doing, to judge from the debate on the management strategy in 2003-04. Then only New Zealand said that any alternative objective to $B_{1980}$ by 2020 must be consistent with the 1993 Convention and the wider international legal regime, and even it qualified this: until there was an agreed management procedure to guide Members towards the new objective, the current one should stay.\textsuperscript{1247} Because of the state of the stock, it preferred a cautious procedure over an aggressive policy, but viewed TAC changes every three years as suitable.\textsuperscript{1248} Australia considered that the current objective should be replaced by an achievable one that resulted in “some re-building” of the stock – this could, but need not, be $B_{\text{msy}}$. Taiwan too believed that the current objective could not be reached and agreed in principle to its revision, but did not say how, beyond favouring gradual changes in TAC at 5-year intervals. Japan considered that the current “very strict” objective

\begin{footnotesize}
\textsuperscript{1245} This term is defined \textit{supra} Ch II, text at n 418.
\textsuperscript{1246} Polacheck et al, \textit{supra} Ch I n 287, at 819 (Table 3). This should be interpreted with caution, however, as it assumes the catch statistics on which the modellers relied were accurate: \textit{ibid.}, at 816.
\textsuperscript{1247} Attachment 4-4 to CCSBT-EC2 Report, \textit{supra} Ch II n 352, at 49-50.
\textsuperscript{1248} CCSBT-EC2 Report, \textit{supra} Ch II n 353, at 21-22 (paragraph 46). New Zealand said there had been little progress towards achieving the current objective because there had been no strategy for achieving it.
\end{footnotesize}
was not achievable; $B_{msy}$ would be more appropriate, but the period for achieving it could be decided “once more data become available”, and it also wanted to “explore more moderate policies” with biomass at 100 per cent and 110 per cent of the much smaller 2002 level. Korea “from an administrative perspective” said it would be best for the fishery to be highly productive and managed with an aggressive catch policy “so that a future increase in stock, if any, would be retained by members, without giving an incentive to non-members”.  

Australia and New Zealand both required an objective that would result in rebuilding of the stock – already an essential component of the management objective – but New Zealand was alone in drawing attention to how Members’ wider international obligations might constrain their choice of a new one. Taiwan preferred only gradual TAC reductions in the short term and would have been satisfied with a management objective of a spawning stock biomass only 90 per cent of that in 2002 ($B_{2002}$), Japan wanted an objective based on $B_{msy}$, while Korea could support either $B_{msy}$ or $B_{2002}$. The management procedure finally adopted aims at a probability of 50 per cent that the 2014 parental biomass is smaller than that of 2004, its lowest yet recorded, and a 10 per cent chance that by 2022 it will be below that of 2004.

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1249 Ibid., at 21 (paragraph 46). Note that if Japan is saying that $B_{msy}$ by 2020 would be less strict than $B_{1980}$ by 2020, there is a contradiction in its position unless either $B_{1980}$ is greater than $B_{msy}$ or Japan was not advocating reaching $B_{msy}$ until long after 2020; the former is very unlikely.  
1250 Ibid., at 22 (paragraph 46). The Korean attitude is a straightforward manifestation of the disastrous but rational reasoning engendered under the tragedy of the commons: supra Ch I n 127 and accompanying text.  
1251 Appendix 3 to CCSBTSM4 Report, supra Ch IV n 677, at 116 (paragraph 13); see also “Opening Statement by New Zealand” (Attachment 4-4 to Appendix 3 to CCSBTSM4 Report), in CCSBT Blue Book 2005, supra Ch I n 34, 134 at 135, where New Zealand argued that any objective that does not rebuild the stock “would be contrary to the [1993] Convention and our international obligations”, although there was “flexibility around the timeframe for achieving rebuilding.”  
1252 Appendix 3 to CCSBTSM4 Report, supra Ch IV n 677, at 117 (paragraph 13).  
1253 CCSBT-ESC4 Report, supra Ch I n 114, at 8 (paragraphs 37 and 38) and 9 (paragraph 45).
The proposed upper and lower bounds of parental biomass in 2022 of 1.5 and 0.7
times $B_{2002}$ were accepted, although a lower bound of 0.8 or 0.9 might be preferred;
emphasis was laid on exploring procedures around the “moderate level” of 1.1 as a
coefficient, i.e. aiming for the stock in 2022 to be only 10 per cent larger than its
depleted state of 2002. There was consensus on 3 years as the preferred TAC cycle,
with a one-year lag before implementation and some limit on maximum magnitude
of changes, particularly on increases so as to prevent market disruptions.\footnote{1254} In
settling on these parameters, Members appear to have been taking their cue from the
views of industry representatives consulted during the CCSBT’s development of a
management procedure discussed in sections D and E below, some preferring to aim
to rebuild the stock to its 2002 level, others favouring merely arresting its decline,
but none calling for rebuilding to $B_{msy}$.\footnote{1255}

In other words, even if the catch figures on which the CCSBT was working up to
2006 had been accurate and the 2004 management procedure had been fully
implemented, it is not clear when, if ever, the stock would have been rebuilt to $B_{msy}$
as Article 5 of Annex II to the UN Fish Stocks Agreement and (subject to economic
and environmental factors) Article 119, paragraph 1(a) of UNCLOS both require.

D The undesirability of delegating management decisions to scientists

Despite the well documented dangers of ignoring scientific advice, it would be a
mistake for any fishery commission to shift responsibility for management decisions
to scientists, a temptation for States having difficulty agreeing on how to manage the
stock. Although a rule that simply forces managers to do what the Scientific
Committee recommends in the absence of consensus for any alternative course of
action has superficial appeal, to put so much weight on the scientific advice would in

\footnote{1254} CCSBT-EC2 Report, \textit{supra} Ch II n 353, at 22-24 (paragraphs 47 and 48).

\footnote{1255} See Report of the Industry Consultation for the Management Procedures (Attachment G
to CCSBT-MPW2 Report), in CCSBT Blue Book 2004, \textit{supra} Ch I n 32, 292 at 293 (paragraph 7).
the longer term inevitably have the effect of politicising the science itself.\textsuperscript{1256} The undesirability of this was seen in the CCSBT, where the growing tensions around the conditions for experimental fishing were manifested by the presence in Scientific Committee meetings of managers: from Japan in 1996, thereafter Australia too\textsuperscript{1257} – and implicitly recognised in the establishment of the Stock Assessment Group, in which “[t]he participants …should be limited to scientists and discussion should be held on a basis of individual scientific credibility not as a representative of national interests.”\textsuperscript{1258} As one Member of the CCSBT put it:

Scientists must be allowed to be scientists, free from political influence or interference. It is not the role or responsibility of scientists to try and second guess the requirements of managers. Managers need to specify to scientists the information needed to make decisions to be able to manage the fishery soundly.\textsuperscript{1259}


\textsuperscript{1257} See the relevant lists of participants annexed to Scientific Committee meeting reports, \textit{supra} Ch IV n 683.

\textsuperscript{1258} Attachment E to Peer Review Workshop Report, \textit{supra} Ch III n 597, at 163. In proposing this, Japan appeared to distinguish between the “purely technical” aspects of the Scientific Committee’s functions – which were now to be devolved to the Stock Assessment Group – and its issuance of management recommendations to the CCSBT, which it regarded as political and hence requiring the presence of managers to represent national interests; \textit{ibid.}, at 162-163. The Scientific Committee’s discussion of stock assessment “should be limited to interpretations of results in relation to an examination of effectiveness of various management measures”, translating uncertainties into consequences relative to management decisions: \textit{ibid.}, at 165. Participants at the Scientific Committee’s 2001 meeting confirmed their desire to move away from expressing national views in the scientific process, particularly at Stock Assessment Group meetings, in favour of individual scientific views: CCSBT-SC6 Report, \textit{supra} Ch I n 291, at 248 (paragraph 81). The CCSBT’s subsequent failure to agree on a TAC despite unanimity being restored among the scientists (CCSBT8 Report, \textit{supra} Ch I n 30, at 70 (paragraphs 70-81)) demonstrates that the problem had all along been at management level.

\textsuperscript{1259} “Opening Statement by Australia” (Attachment C to Peer Review Workshop Report, \textit{supra} Ch III n 597), in CCSBT Blue Book 2001, \textit{supra} Ch I n 242, 155 at 156. New Zealand had spoken in similar vein as early as 1993 (Attachment C to November 1993 Draft Summary Record, \textit{supra} Ch II n 387, at 2):
Instead, good practice would require that scientists offer managers a range of options based on different degrees of risk to the stock, forcing managers to make an explicit trade-off between maintenance of catches in the short term and the longer-term health of the stock. This method appears to be favoured by the CCSBT’s scientists:

It was agreed that the Commission should be consulted on the best way to present information resulting from the assessment. A range of possibilities including the probability of recovery, current spawning stock biomass and fishing mortality rates in relation to several biological reference points were discussed. It was considered that the Commission should be asked for guidance on the format for the provision of advice from the Scientific Committee taking into account a range of options proposed to it.  

The same approach was taken into the development of a management procedure. The Extended Scientific Committee sought clarification from the CCSBT and its Members as to management objectives by posing a series of questions related to possible objectives such as optimising catch, optimising biomass and stability of TACs. By 2003 the CCSBT as a whole had embraced this approach. Responding to the Extended Scientific Committee’s questions, the Extended Commission provided the following guidelines: the existing objective was admitted not to be feasible and a new one, which might be related to MSY, was required; but it was not yet ready to specify a timeframe for achieving it. It asked for candidate

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In order to develop it [the management strategy] in more detail we need to provide guidance to scientists. The managers will need to agree on the short term goals of our arrangements and the risks we are willing to accept in moving towards those goals.


1261  CCSBT-SAG4 Report, supra Ch I n 295, at 185 (paragraph 70). The Committee decided that when it came to present options for consideration, it would provide average catch, average spawning biomass, spawning biomass relative to 1980 and 2002, frequency of TAC change and proportion of simulations exceeding specific thresholds as performance measures: CCSBT-ESC2 Report, supra Ch I n 32, at 116-117 (paragraph 30).
management procedures to be evaluated on their performance in attaining $B_{\text{msy}}$, and projections and performance measures over a period of 30 years in relation to this. Though its implementation has had to be postponed, the process that the CCSBT went through to elaborate a management procedure has had a beneficial effect, leading to more informed debate on the trade-offs faced by managers. This was shown by the Extended Commission’s recognition in 2003 that, in choosing among candidate management procedures, Members would face trade-offs along two axes: a strong inverse relationship between catch level and rebuilding of biomass, and a lesser one between TAC stability and magnitude of changes – frequent changes are likely to be smaller, but should also result in increased average catches over time.\(^\text{1262}\)

E Lack of management strategy as serious weakness

One of the main obstacles to the CCSBT’s efforts to gain the cooperation of non-members has been its lack of a management strategy. The basic element of such a strategy is that it defines long-term objectives for the management of the stock, linking these to short-term performance in achieving those objectives as measured by data considered informative to this end. Annual debates over TAC are then replaced by a formula for deriving each year’s TAC from the previous year’s catch and effort data, a particular attraction for New Zealand.\(^\text{1263}\) Such a strategy is essential for preventing the risk of Members themselves not being bound by catch limits in times of disagreement, leaving them with no basis for arguing that non-members should be bound. Although in economic terms it is true that the advent of new entrants can affect existing members’ individual rationality constraints and thus make cooperation

\(^\text{1262}\) CCSBT-EC2 Report, supra Ch II n 353, at 20 (paragraph 39).

\(^\text{1263}\) New Zealand sees the management strategy as a way of placing the political decision on allocation on a permanent basis, so as “to avoid protracted re-negotiation of national allocations every few years”: Attachment 4-4 to CCSBT-EC2 Report, supra Ch II n 352, at 50. This may explain its otherwise odd statement \textit{ibid}. – national allocations being a prime function of the CCSBT – that “we need to take the politics out of this Commission and stick to doing what we do best – managing fisheries.”
among them difficult, from a legal perspective this cannot be an excuse for failure to carry out their conservation obligations. The issue of opposability of conservation measures to non-members cannot even arise until such measures exist.

The formulae need not be complex: in Namibia’s hake fishery, for instance, a simple CPUE-based management procedure was used to make TAC revisions despite wide disagreement on stock trends.\textsuperscript{1264} A primitive form of management strategy, aimed more at encouraging political compromise to reach agreement than at managing the stock on a scientific basis, is to reduce the TAC and national allocations by a set percentage each year absent a positive decision to do otherwise. This is what an early Australian draft of what later became the 1993 Convention did, canvassing both a rollover without reduction and an automatic reduction of 10 per cent:

\begin{quote}
In the event that it is not possible to reach agreement on the total permissible level of catch, the total permissible level of catch for the previous management year shall continue to apply.\textsuperscript{*}\textsuperscript{1265}
\end{quote}

A stronger variant of the same idea (20 per cent reduction) was proposed recently by McDorman on the basis of precaution as well as an incentive to reach agreement.\textsuperscript{1266}

While it is a virtue of a sound management procedure that in normal circumstances it can operate as a “set and forget” mechanism, so that no intervention by managers is required,

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\textsuperscript{1265} Attachment B to Attachment F to 7th Trilateral Management Meeting Report, supra Ch II n 395, Article III(5). The note to which the asterisk refers reads: “It may be worth considering changing this Article to provide that if the parties failed to agree they would have allocations, say, 10% less than the previous year.”
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\textsuperscript{1266} McDorman, supra n 1256, at 440. Since not even the 0% reduction in the Australian draft found its way into the 1993 Convention, however, his caveat \textit{ibid.} that this “might deter states from becoming…members” of the commission concerned is surely an understatement.
\end{flushright}
It is always conceivable that circumstances in any fishery or stock may alter in such a dramatic fashion that the stock or fishery moves outside the range for which the management procedures were tested. If this happens, the operation of the formula can always be overridden under a fishery commission’s ordinary decision-making procedure if there is sufficient agreement on the urgency of doing so.

Among the commonly suggested objectives are maximisation of catches, minimising the risk of unintended depletion so as to safeguard the resource, or, in order to accommodate socio-economic issues, fostering industrial stability by minimising TAC variation and aiming to make only small changes in effort levels from year to year. Thus the CCSBT’s first (2000) workshop recommended the following objectives reflecting general management goals on which Members already agreed:

- maximise catch by weight in both short and long term
- achieve the rebuilding target for the parental biomass by the target year, and thereafter possibly also a target reference level (in terms of either biomass or fishing mortality) for the long term
- minimise the risk of the parental biomass falling below a predetermined level
- minimise the magnitude of short-term fluctuations in the fisheries.

At the same time, it noted that all objectives could not be simultaneously optimised and that implementation of any particular management procedure would involve trade-offs between them. For example low levels of interannual TAC variability (to minimise disruption of industry) would likely result in lower total exploitation, trading off socio-economic stability against size of catch.

1267 CCSBT-ESC2 Report, supra Ch I n 32, at 117 (paragraph 33).
1268 Management Strategy Workshop Report, supra n 1264, at 259. See also the informative discussion of decision rules at 260-261.
1269 Ibid., at 258. At the next meeting of the workshop it was decided that changes in TAC of less than 100 tonnes generated by whatever management procedure would be selected should not proceed, whereas the maximum change should be 3,000 tonnes: Attachment E to CCSBT-
The fishing industry’s own utterances confirm the desire for relative stability: its representatives wished the management procedure to be “constructed to avoid any large reductions with changes made gradually to allow time for adjustments to be made.”\(^{1270}\) Significantly, this applies not just to downward changes, where “the preferred harvesting strategy was staged ramping down of catch levels – not closure or large changes” but also upward: none would choose to increase catch levels by more than a “few hundred” tonnes \textit{per annum} even under substantial increases in stock levels,\(^ {1271}\) all fleets being sensitive to price and concerned that increases in global TAC could result in lower prices.\(^ {1272}\)

The conclusion to be drawn is that socio-economic considerations are legitimate; problems arise only when managers ignore the fact that one way or another they must lead to lower total catch. This they can ideally avoid by aiming for MEY rather than MSY, or by recognising the need for a larger cushion against uncertainty when dampening variations in TAC or effort – but if no account is taken of such factors, then the ecosystem itself imposes lower catch when the resource is lost or depleted through overfishing.\(^ {1273}\) The Bering Sea Pollock Convention\(^ {1274}\) and the later South

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\(^{1270}\) CCSBT-MPW2 Report, in CCSBT Blue Book 2004, \textit{supra} Ch I n 32, 263 at 272. See also the remarks in CCSBT-MPW2 Report, \textit{supra} Ch IV n 863, at 247 (paragraph 32), on the undesirability of TAC first increasing then decreasing or \textit{vice versa} in consecutive years. Further trade-offs emerged the following year, in particular regarding TAC performance in the first and second ten years – some rules reduced TAC immediately and by relatively large amounts, but then increased it in the last ten years; others reduced it much more gradually, but usually kept declining over the second ten years. There was a higher risk of low spawning biomass in the short-to-medium term for rules that reduced TAC slowly than for those that reduced it rapidly. See CCSBT-MPW3 Report, \textit{supra} Ch I n 306, at 295 (paragraph 17).

\(^{1271}\) Attachment G to CCSBT-MPW2 Report, \textit{supra} n 1255, at 292 (paragraph 3).

\(^{1272}\) \textit{Ibid.}, at 292-293 (paragraph 7). Only the New Zealand industry had indicated any desire to increase its catch: CCSBT-EC2 Report, \textit{supra} Ch II n 353, at 19 (paragraph 37).

\(^{1273}\) CCSBT-SAG4 Report, \textit{supra} Ch I n 295, at 172 (paragraph 14).

\(^{1274}\) \textit{Supra} Ch II n 316.
Tasman Rise orange roughy instruments\textsuperscript{1275} illuminate both sides of the coin: though they did not avert the collapse of the stocks which they govern because agreement on them was reached only afterwards, nonetheless they constitute valuable precedents thanks to the management strategies they enact.

**F Attrition and other allocative devices**

Since the allocation problem has apparently defeated lawyers, it is perhaps fitting that what may be the most promising way forward yet suggested is the “attrition” policy of a scientist, Butterworth. Under this each year States would give up a small portion of their quota, which is then reallocated on whatever principles the fishery commission sees fit.\textsuperscript{1276} Attrition was also advocated by South Africa in ICCAT.\textsuperscript{1277}

\begin{itemize}
  \item \textsuperscript{1275} Supra Ch II n 314.
  \item \textsuperscript{1276} Butterworth, \textit{supra} Ch I n 87, at 38-39; Butterworth and Penney, \textit{supra} Ch III n 553, at 181-182. As it would apply initially to only a small proportion of the TAC, this could also be a testing ground for an experiment with auctioning quota as a way of making benefits flow to all members, not just those actually fishing a given stock. The auctioned portion of the TAC would at the same time be an experiment in applying the common heritage principle, while the large remainder would satisfy those arguing that historic catch ought to be determinative of allocation. As Morgan has observed, \textit{supra} n 1219 at 380 and 382-384, of the three basic alternatives in allocating quota at national level (administrative decision, lottery and auction), auction seems to work best at the national level and would probably do so too within a fisheries commission – the problems experienced with it are not applicable to States, to which a lottery is in any event unlikely to be acceptable, while administrative decision has no close international equivalent because the commission is unable to impose its will on the States who are its members in the same way as a State can on its citizens. The application of game and auction theory to practical problems of allocation of scarce resources has been one of the great successes of modern economic theory: \textit{ibid.}, at 385-386. Auctioning the right to fish would require an agreement in advance that the highest bid from a member should be accepted. If preventing quota holdings from being concentrated in the hands of just a few States is thought desirable for equity reasons, this can be accommodated at some cost to the value of the quota: Clark, \textit{supra} Ch I n 101, at 341. (Clark was writing of New Zealand’s domestic experience with ITQs, but in principle the point is equally valid for legal relations among States.)
  \item \textsuperscript{1277} Appendix 10 to Annex 9 to ICCAT16 Report, \textit{supra} Ch III n 571.
\end{itemize}
This idea has much to recommend it. Despite its undesirable distributive effects, the notion that historic catch itself should give rise to vested rights has as its underlying purpose a legitimate concern: to protect current investment and employment in troubled fisheries. Thus the policy challenge is to find ways of doing this that do not extinguish others’ rights to benefit from the stock once it is restored to a healthy state. Since investments are depreciated over time, it is suggested that historic catch arguments should be conceded some validity in the short term in return for explicit recognition of their temporary character, allowing new entrants to vindicate their rights over time. As the latter’s catches grow, these too are factored into the equation and the disadvantage to them lessens. Note, however, that in order for the States who depleted a stock not to be rewarded in effect for having done so, it is their shares of the catch in past years, rather than absolute tonnages, that should be taken into account, and the weight given to them each year should progressively diminish. Any number of formulae could achieve this, for example weighting a fishing year by the reciprocal of the number of years that have since passed, so that in 2008, say, the shares in 1988 (twenty years ago) carry one tenth the weight of those in 2006 (two years ago), or a geometric decline as suggested by Butterworth and Penney, which gives historic shares a “half-life” rather than a limited term.\(^\text{1278}\) A minor variation could if desired see weight given only to the most recent fixed number of years – say twenty – at the time of calculation, representing the average life of a fishing vessel.

Here again advocates of an economic or game theoretical approach have left their mark. Anticipating Munro’s emphasis on the individual rationality constraint,\(^\text{1279}\) Southey argued that recognition of historic rights can be justified as part of the requirement that parties should not be made worse off by changes, while the special status of coastal States is a possible criterion for redistributive gains. He favoured gradually opening the whole TAC to bidding, with a maximum annual increment for

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\(^{1278}\) Butterworth and Penney, *supra* Ch III n 553, at 181.

\(^{1279}\) Munro, *supra* n 1222, at 10.
each participant “to avoid extravagant rivalries”. Kasahara’s advice to leave some quota unallocated to help accommodate new entrants has been heeded by the CCSBT with regard to Indonesia and South Africa. Indeed this would appear particularly desirable where there are potential new entrants that are coastal States with respect to the stock, as that would make it clear that actual entry of any State in this category would have to be accommodated by existing members, who are in effect temporarily benefiting from using those coastal States’ future quota.

The opposite method is also possible. Though not as systematic as attrition, one way to encourage coastal States to develop their fishing industry only to a point that does not put excessive pressure on the stock is ICCAT’s practice in many of its fisheries of not regulating most members’ catches, provided they stay below a given threshold tonnage. Despite the disadvantages of partly Olympic fisheries to which this leads, agreement may be easier to achieve in the short term if national allocations totalling more than the TAC are made, especially when they are sought for symbolic reasons rather than because of any real likelihood of catching the amount sought. A good example of a total smaller than the sum of its parts is ICCAT’s 2003 North Atlantic albacore recommendation, where the TAC is 34,500 tonnes but the catch limits of individual members clearly add up to more: 28,712 tonnes for the European Community, 4,453 tonnes for Taiwan, 607 tonnes for the United States, 270 tonnes.

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1280 Southey, supra Ch IV n 924, at 61.
1282 See Annex 5 to ICCAT18 Report, supra Ch V n 961, at 144 (Recommendation [03-06], paragraphs 1-5). Possibly this is what Kasahara means by recommending that quotas unfulfilled should be “declared open”, presumably to an Olympic fishery: Kasahara, supra n 1281, at 99. In the light of Chapter V above, however, it is not clear why at 100 he regards it as impractical to provide for trading of quotas in the fishery convention itself (he would instead have it done by direct negotiations instead, with reallocation after some number of years based on actual catch).
for Venezuela, 200 tonnes each for all other members bar Japan (i.e. around 8,000 tonnes, based on the current 46-strong membership\(^{1283}\)), 6 tonnes for other cooperating non-members, 4 per cent of Japan’s bigeye catch. Under the overall TAC of 29,000 tonnes established in 2007 for the southern albacore stock for 2008 to 2011, members targeting the stock have no individual limits, but a 100-tonne catch limit is imposed on those not targeting it whose average catch in 1998-2002 was less than that, while those who in 1992-1996 caught more than 100 tonnes have a limit of 110 per cent of their average catch in those years, apart from Japan which has a limit of 4 per cent of its bigeye catch south of 5° N.\(^{1284}\)

Further, although it does not provide a complete answer, use could be made of the “characteristic function game” approach of cooperative coalitions. This introduces the concept of the “Shapley value”, in which a player’s share depends on its average marginal contribution to all possible coalitions, and the “nucleolus”, which relates the gain of each player to its maximum contribution to any grand coalition (of all players) or subcoalition.\(^{1285}\) At the other end of the scale, for obvious reasons, the completely egalitarian division of the spoils, in which each of \(n\) players receives one \(\frac{1}{n}\)th share of the catch or profit, will not satisfy the most efficient, but has the virtue of simplicity (apart from a predictable controversy over whether the European Community should have one share or 27). Since these are pure mathematical operations, they may be less susceptible to manipulation than scientific advice of the traditional sort, and one can imagine a rule that requires each party’s share in any year to be no smaller than the smallest and no larger than the largest of its Shapley

\(^{1283}\) See supra Ch IV n 900.

\(^{1284}\) Recommendation by ICCAT on the Southern Albacore Catch Limits for 2008, 2009, 2010 and 2011, supra Ch V n 1122, at 151 (Recommendation [07-03], paragraphs 4-6). Semble other States not actively fishing the stock that fall into neither of these categories, as is perfectly possible, have no catch limit.

\(^{1285}\) Li, supra Ch I n 120, at 252-254; Costa Duarte et al, supra Ch I n 107, at 22.
value, its nucleolus and its one $n$th share. While fisheries managers are likely to prove just as hostile to placing allocative decisions in the hands of economists as they are to rules that appear to let scientists set, rather than advise on, catch limits, the mere coexistence of Shapley value and nucleolus shows that no single allocation is determined by economic theory as the optimum. Thus there will still be some political bargaining required, as the sum of the smallest will necessarily be less than 100 per cent and the sum of the largest more than 100 per cent – but setting these parameters in advance would mean that there is less at stake over which to squabble. The aim should be to minimise the risk of fishery commissions breaking down over allocation disputes, which suggests that they would be wise to heed the United States’ warning in ICCAT against mandating too many allocation criteria for panels to implement easily.

**G Why closed shops are not the answer**

The central difficulty facing any proponent of a firm rule to govern fishery allocation is that on allocative questions the basic legal and economic principles point in opposite directions. Legal writers are now beginning to pay attention to the fisheries economics literature, but for the moment the economists continue to make the running. In 1997 Kaitala and Munro demonstrated that if new entrants are required to be offered shares of a TAC in return for agreeing to be bound by the measures of a

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1286 See also supra, text at n 1231. Note that a party for whom the largest of these is less than its assessed contribution to the fishery commission will then be best served by remaining out of both the fishery and the commission.


1288 Such literature is cited in F. Orrego Vicuña, “The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use”, in Stokke (ed), supra Ch I n 124, 23, who at 45 mentions market economy mechanisms in the context of relations among States (referring however to ITQs rather than international quota trading, but also with a note of scepticism, e.g. noting at 46 that initial allocations are not solved thereby, nor are cooperation and compliance guaranteed).
commission, the States contemplating establishing the commission in the first place will calculate that they cannot obtain the full value of their restraint in the interim. This may lead at least one of them to conclude that in the long run it would actually be better off by not cooperating.¹²⁸⁹ Such considerations have led Munro to advocate that rights to a straddling or highly migratory stock be restricted to coastal States and existing distant-water participants in a fishery, giving them de facto joint property rights to the resources, with new entrants obliged to buy their way in, and the power to repel non-member interlopers and punish defectors within their midst.¹²⁹⁰ Some economically oriented international fisheries lawyers are sympathetic to this view, e.g. Miles and Burke who see no alternative to letting coastal States, or participants in a straddling stock fishery, prohibit fishing by new entrants if the stock is fully fished. They would, however, subject the scientific validity of any assertion of this condition being met to compulsory dispute settlement¹²⁹¹ – essentially the failed doctrine of abstention in modern guise. This is also consistent with the position advanced by the United States in successive drafts it put forward of what became the Bering Sea pollock convention: that new entrants should be allowed into the fishery by invitation only.¹²⁹² It is also reinforced by the tendency of the rhetoric of these States to dwell on the hardships suffered by their fleets though catch reductions.¹²⁹³

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¹²⁸⁹ Kaitala and Munro (1997), supra Ch I n 120, at 96-97.
¹²⁹⁰ Munro (2000), supra Ch I n 120, at 276-277.
¹²⁹² Kwiatkowska, supra Ch III n 493, at 338-339.
¹²⁹³ See e.g. text at supra Ch IV n 689. Characteristically, only New Zealand (Attachment C to 7th Trilateral Management Meeting Report, supra Ch II n 359, New Zealand Statement, at 1-2) argued against this approach:

[W]hatever actions have transpired in the past are now history, whereas the job of the present is the pressing need for consolidation and rebuilding of the resource.

...
The North Atlantic fisheries commissions and WCPFC have attempted to do as Munro suggests.\textsuperscript{1294} From a legal perspective, however, this overlooks the fact that history begins not at the point of deciding to establish a commission – by which time the resource has usually been depleted to bioeconomic equilibrium biomass ($B_{eq}$) by the very States that decide the fishery requires such institutional protection to survive – but at the point when the stock is first exploited. The dilemma is that rebuilding the fishery is economically impossible without enabling these States to exclude new entrants, but new entrants – who by definition played no part in the depletion – have a compelling case on equity grounds for resisting exclusion.

One way to resolve this dilemma may be to permit their temporary exclusion by way of what is in effect a compulsory investment by them in the stock’s recovery, but to do so only on the basis that excluded States have a right to compensation for this on the basis of State responsibility. In this way, the States that depleted the stock would indirectly be forced to account for their past catches. Quantifying the compensable loss is likely to be difficult, but the sums involved may not be unmanageable, as it has been pertinently observed that, even under open access, relatively few States participate in a given fishery.\textsuperscript{1295} Thus, while the creation of a commission managing a fishery for profit may well entice a few more would-be new entrants, this should not be fatal under any distributive rule that gives low reward to those who contribute little to any cooperative coalition. Existing members may find it unpalatable that they should have to buy off potentially damaging new entrants, but can console themselves with the thought that the compensation is not for exclusion from a share of the full MSY; rather, it is for some part of the difference between that share and the benefit that the excluded State could expect from a fishery in bioeconomic

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\textsuperscript{1294} See \textit{supra} Ch III, subsections E4 and E5.
\textsuperscript{1295} Li, \textit{supra} Ch I n 120, at 249.
equilibrium. Since the latter will in most cases be very little or nil, the compensation may not need to be much more than nominal.

Koers too favours open membership; he reasons that the obligation to contribute to the commission’s expenses would keep out those not really interested, but because the resources are open to all to catch, “all States have a general interest in protecting the living resources of the high seas, irrespective of…whether or not they fish for a specific stock;” hence limiting membership to those with “direct interest” would be “unnecessary and undesirable”.\textsuperscript{1296} Van Houtte takes a similar view: because of their right under UNCLOS Article 116 to fish on the high seas, “those who cooperate in conservation and management measures in accordance with article 119 should not in principle be excluded from a share in TAC”.\textsuperscript{1297} This simply extends the application of Munro’s individual rationality constraint to new entrants: if the duty to cooperate means in economic terms that each must be assured of obtaining at least the same benefits from cooperation as it would from non-cooperation, then it follows that zero is in many cases not even an economically let alone a legally acceptable quota.

On the other hand, the economic analysis should not be narrowly confined to purely monetary costs and benefits; there are political costs to non-cooperation too, which for most potential participants may outweigh the small expected gains from moving into a fishery that is already marginal. The gains from non-cooperation would need to be large in order to tempt States into it; by the time the fishery has recovered sufficiently to make them so, the doctrinal currents documented in this work may have substantially raised the legal risks of such a course.

\textsuperscript{1296} Koers, supra Ch I n 285, at 126. He was writing in the 1970s, before fisheries commissions began to formalise cooperating status, which normally entails no financial obligations.

In this light, transferability of quota is a halfway house: the fishery commission does not purport to exclude new entrants, but is entitled to their cooperation, which under a trading scheme extends to its method of acquiring quota. Compelling new entrants to buy their way into a fishery (who obtain in return a much more clearly defined right than would otherwise have been possible on the high seas) is thus a superior alternative to both their peremptory exclusion and an unconditional right of entry for them that destroys any economic incentive to rebuild the stock: “If… it were possible for prospective New Members to purchase quotas from existing members…, this would serve to ease the problem of quota allocation to New Members.”

If all are accountable to each other thanks to their right to fish on the high seas, then UNCLOS Article 116, as well as being the cause of the tragedy of the commons, paradoxically becomes part of the solution. Mere creation of a legal pecking order for access to stocks is not where the matter ends. Because it means that those States at the bottom risk being left with nothing, a duty thereby arises on those higher up to manage the fishery in a way that maximises the likelihood that something will in due course be left over for them, i.e. conservatively in accordance with the precautionary approach to fisheries in Annex II to the UN Fish Stocks Agreement. The paucity of State practice may stand in the way of a conclusion reached on classical lines that such a duty has achieved the status of custom, but the ultimate practical effect is much the same where, as here, the same conclusion can be derived from the duty of cooperation whose customary status is not doubted.

H Dispute settlement as a second-best method of allocation

The availability of compulsory procedures for the settlement of disputes between parties to UNCLOS and the UN Fish Stocks Agreement, though important in itself,
also serves a secondary function: that of providing a procedural means for arriving at an allocation where the members themselves have collectively been unable to do so. This is the virtue of the incorporation by reference of the compulsory procedures for dispute settlement in Part VIII of the UN Fish Stocks Agreement into other fisheries treaties by Article 30, paragraph 2. Article 7, paragraphs 4 and 5 of the Agreement, as noted above, expressly contemplate use of the dispute settlement mechanism to settle allocative questions. Because Article 7 is in Part II of the Agreement, it is not strictly encompassed by the incorporation by reference, but there is no reason why the question of catch share entitlements could not become the subject of an ordinary Part VIII dispute. The more important caveat is hence that, since jurisdiction over disputes in the current state of international law remains firmly rooted in the express consent of the putative respondent State, it is not capable of being applied to non-parties to those treaties. For the moment, therefore, this mechanism remains unavailable to the CCSBT because Indonesia is not, and Taiwan cannot become, party to the Agreement.¹²⁹⁹

¹²⁹⁹ This is an extension to secondary obligations such as dispute settlement of the confusion caused within fisheries commissions by differences in parties’ primary obligations, described by Rayfuse, supra Ch III n 525, at 113-114. Even if all members of the Extended Commission were bound by the UN Fish Stocks Agreement, it may be risky to assume the correctness of the dictum in the Award of the Annex VII tribunal in the 1998-2001 dispute (infra Appendix A, n 1338, at paragraph 71) that entry into force of the Agreement as among the parties to the 1993 Convention would restore the jurisdiction of a Part XV forum to settle disputes among them under UNCLOS as well as the 1993 Convention that it found had been ousted by Article 16 of the latter – see infra Appendix A, text at nn 1445-1449. D.A. Colson and P. Hoyle, “Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?”, (2003) 34 ODIL 59 at 70 have argued that the dictum is wrong because the incorporation by reference of Part XV of UNCLOS imports the continued application of Article 281(1), which was the basis of the Award, and “the Award offers no reason why the tribunal would not have reached the same conclusion regarding jurisdiction under Part XV if it had been pursuant to a referral from the UN Fish Stocks Agreement.” They concede, however, that the opposite view is possible, such as that of Oxman who concludes that the dictum is correct on either a literal or a teleological interpretation of Article 30(2): literally its effect is to import Part XV of UNCLOS into other fisheries treaties as
Although the decision of the Annex VII arbitral tribunal in the Southern Bluefin Tuna case that it lacked jurisdiction has been heavily criticised, it is significant that the Award went out of its way to say that the prior ITLOS decision granting provisional measures had been useful in bringing the parties’ positions closer together. Given the absence of any doctrine of stare decisis at the international level, a fresh dispute over SBT could, in theory at least, be relitigated with a differently composed tribunal that could come to the opposite result, even if Australia, Japan and New Zealand were the only parties. The Award is certainly not binding as between Korea or Indonesia and any of these States, and is in any event not applicable to non-parties to the 1993 Convention like South Africa. Even if it is accepted that ultimately there is no jurisdiction, there is still prima facie jurisdiction within the meaning of UNCLOS Article 290, paragraph 5 – from the very nature of the concept, so that provisional measures could be sought and obtained.

Although events have not yet borne out the prediction of Ørebech et al that the UN Fish Stocks Agreement, “a last chance for…co-operation amongst independently acting states, to arrest the decline in high seas fishery resources” would lead in the well as into itself, and its clear purpose is to fill any jurisdictional lacunae: B.H. Oxman, “Complementary Agreements and Compulsory Jurisdiction”, (2001) 95 AJIL 277 at 306-307. As is argued in the main text, this would certainly be the preferred outcome on policy grounds.

E.g. A. Boyle, “Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks”, in Stokke (ed), supra Ch I n 124, 91 at 104-105; Colson and Hoyle, supra n 1299; Oxman, supra n 1299.

Annex VII Tribunal Award, infra Appendix A, n 1338, paragraphs 65 and 67.

UNCLOS Article 296(2), modelled on Article 59(2) of the Statute of the ICJ, provides that a decision rendered by a court or tribunal under Part XV (which always has the jurisdiction to determine its own jurisdiction: Article 288(4)), “shall have no binding force except between the parties and in respect of that particular dispute.”

This is because even if jurisdiction is lacking, it is clearly not manifestly lacking – at least until such time, if ever, as there is a string of cases applying the reasoning in the Annex VII Tribunal Award. Sed contra B. Kwiatkowska, “The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle”, (2003) 34 ODIL 369, at 374.
“next generation of ocean resource treaties” to cooperation being imposed by deemed consent for the greater good, they correctly foresaw that there would be no “stampede” to use the UN Fish Stocks Agreement’s dispute settlement provisions.

In part this is because adjudication is reactive; its primary role thus begins only once a dispute has arisen, possibly about actions that have caused irreparable harm. Stephens rightly says that “The primary focus should therefore be on securing up-front compliance rather than assessing subsequent reparations through a formalised dispute settlement process.” On the other hand, the SBT dispute itself illustrates how the dispute settlement system’s binding nature reinforces the duty to cooperate through the mere fact that its availability to be invoked “may be employed to hasten a negotiated solution or to alter the negotiating dynamic of states in dispute.”

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1304 Ørebech et al, supra Ch II n 315, at 140-141. There is a danger in this that a State that becomes party to an agreement of this type in pursuance of its obligation finds that the other members are not in practice prepared to cooperate with it, using the weight of their numbers to deny it any real role in decisions that have in effect been made in advance by caucusing. An example is the Protocol on the Conservation, Rational Utilization and Management of Norwegian Spring Spawning Herring (Atlanto-Scandian Herring) in the North-East Atlantic, done at Oslo, 6 May 1996, available online at <www.intfish.net/treaties/herring96.htm> (visited on 4 September 2008), and subsequent Agreed Records – apparently of treaty status – under which the coastal States rather than NEAFC regulate this fishery. In the 1990s, before it joined the European Community, Poland voted against a recommendation on the basis that “it was wrong in principle for a majority of members of NEAFC to agree to something outside NEAFC and then present it to a meeting of NEAFC for adoption.” See Churchill, supra Ch V n 1017, at 244-248.


1306 Ørebech et al, supra Ch II n 315, at 133; accord B. Mansfield, “Compulsory Dispute Settlement after the Southern Bluefin Tuna Award”, in A.G. Oude Elferink and D.R. Rothwell (eds), Oceans Management in the 21st Century: Institutional Frameworks and Responses (Leiden and Boston: Martinus Nijhoff, 2004), 255 at 267. Sed contra Stephens, supra n 1305 at 191, who regards the deterrent effect as weak except where a high degree of legalisation exists, as within the supranational European legal order.
This does, however, require its continued availability within fisheries commissions, which the *Southern Bluefin Tuna Case* Award has done nothing to promote because its result is that “UNCLOS states parties which favour compulsory settlement of high seas fishery disputes…will be more securely protected under UNCLOS alone” than if they participate in regional fishery agreements.  

I  **Final word: State responsibility and a “theory of everything”**?

If a single solution exists to the dilemmas posed in this work, it may lie in restoring the application of an element hitherto strangely missing from international fisheries law discourse. It will not have escaped notice that section E of Chapter V above on accounting for catch makes no mention of the doctrines of State responsibility. It is striking how little attention is paid to them either in the scholarly literature or in fisheries commissions. Despite the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development providing in identical terms that States have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment

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1307 Boyle, *supra* n 1300 at 105. He thus criticises the Award as an “extraordinary reversal of the intentions underlying Part XV”, noting that it leaves high seas fishing States vulnerable to creeping coastal State jurisdiction if they enter a regional fishery agreement with no compulsory dispute settlement – “precisely the outcome UNCLOS dispute settlement was intended to deter.” This perverse consequence was summed up thus by counsel for Australia, Professor Crawford: “if you want not to co-operate with a State…, enter into a co-operation agreement with that State.” (Transcript for 8 May 2000, *supra* Ch III n 666, at 140).

1308 Despite its title, B.D. Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (Oxford: Clarendon Press, 1988) does not consider fisheries at all. At 245, however, he recommends that strict liability rather than due diligence should be the basis of responsibility “when the flag possesses meaningful authority over the violative conduct.” That is, “when the violation arises out of matters inherent or pre-existing, and thus susceptible to prior and effective flag state preventive action.”

of other States or of areas beyond the limits of national jurisdiction”, a survey by Boyle reveals very few instances of compensation being sought and granted for any sort of environmental harm. The single instance in fisheries – compensation by the United States to Japan in the 1950s, without admission of liability, for injury to fishermen on the high seas and contamination of fish by its atmospheric testing of nuclear weapons, did not distinguish between the physical and economic elements of the damage suffered. From this Boyle concludes of State responsibility that there is sufficient uncertainty regarding the subject, and its utility in preference to alternative approaches, to pose serious doubts about the concept…The most important objection to a strategy which relies on state responsibility, in the form of an obligation for states to compensate for harm, remains the argument that it is an inadequate model for the enforcement of international standards of environmental protection. Like tort law it can complement, but does not displace, the primary need for the setting and enforcement of adequate international standards of environmental protection.

Instead Boyle advocates the use of private civil liability remedies against those directly responsible for environmental costs, and application of the polluter pays principle, coupled with criminal law sanctions through prosecutions by the flag State. This, however, would require relevant States to be under an obligation to allow such litigation by injured parties in their domestic courts, of which at present, at least in international fisheries law, there is no sign. Thus Leigh argues that the

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1310 See too Principle 13 of the Rio Declaration, by which States are to “develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction”, language very close to Principle 22 of the earlier Stockholm Declaration.


1312 See also K. Leigh, “Liability for Damage to the Global Commons”, (1992) 14 Australian Yearbook of International Law 129 at 136.

1313 Boyle, supra n 1311, at 91.

1314 Ibid., at 92 and 98.
distinction between State and civil liability can be overstated, and that “[c]ivil
liability regimes are obligations entered into by States with respect to persons under
their jurisdiction. Civil liability can thus be one way of satisfying State liability.”

Since what is envisaged below for State responsibility concerning fisheries is
precisely the complementary role to international regulation that Boyle admits, and
the insufficiency on its own of such regulation is amply demonstrated throughout this
study, his misgivings do not appear sufficient to deter recourse to it.

The position is no better in fisheries commissions, where the concept is seemingly
displaced by members’ rhetoric about “responsible fishing States” rooted in the
Cancún Declaration of 1992, in which “responsible” seems to be no more than a
term of general approbation devoid of any specific meaning. So pervasive has this
process been that the State responsibility term “countermeasures” was recently used
in an ICCAT recommendation, otherwise drafted in orthodox legal language, in a
sense quite foreign to that in which it appears in Article 22 of the ILC Articles.

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1315 Leigh, supra n 1312, at 140.
1316 Declaration of the International Conference on Responsible Fishing, Cancún, Mexico, 6-
Subsequently this use has been perpetuated by the soft-law FAO Code of Conduct for
Responsible Fisheries, available at <www.fao.org/DOCREP/005/a9878e/a9878e00.htm> (visited
on 20 June 2008).
1317 Recommendation by ICCAT amending the Recommendation by ICCAT to Establish a
List of Vessels Presumed to have Carried out Illegal, Unreported and Unregulated Fishing
Activities in the ICCAT Convention Area, in Annex 5 to ICCATSM15 Report, supra Ch V n
995, 163 (fifth preambular paragraph).
1318 Draft articles on responsibility of States for internationally wrongful acts, in UN doc
A/56/10, Report of the International Law Commission on the work of its fifty-third session (23
April–1 June and 2 July–10 August 2001), reprinted in UN, Yearbook of the International Law
ICCAT would be admitting that the measures adopted in the instrument in the previous footnote
would otherwise be contrary to international law – and, since a prior breach by the targeted State
is necessary to justify this, they would presumably be ineffective by definition against
unregulated as opposed to illegal fishing, even though the former is the main intended target.
Yet State responsibility can be of service on several levels. At one level there is the attributability to States of fishing carried out by vessels of their nationality. The UN Fish Stocks Agreement and the FAO Compliance Agreement both provide in very similar terms that parties must not authorise their vessels to fish for straddling and highly migratory stocks and on the high seas respectively unless they can effectively exercise their responsibilities in relation to these vessels.\textsuperscript{1319} The State party must ensure that its vessels comply with the conservation and management measures adopted by any fishery commission of which it is a member, and refrain from fishing for any stock managed by a commission of which it is not.\textsuperscript{1320} These are the seeds of an incipient trend towards revival of the notion of State responsibility in international fisheries law. The requirement of a positive act of licensing or authorisation ensures at least some level of consciousness by the flag State of the level of fishing pressure it exerts on high seas stocks, and engenders awareness that other States expect it to exercise real control over fishing activities on the high seas by vessels it flags.

In general, States are not responsible for the activities of persons or vessels having their nationality – but the provisions just cited could be used as the basis of an argument that high seas fishing is, or ought to be, an exception. Alternatively, such an exception would not be necessary if the State’s responsibility were already engaged on the basis of its failure to prevent an outcome for which it was not directly responsible. This occurred recently in the context of genocide, where the ICJ held that Serbia was not responsible for the massacre at Srebrenica, but had failed to comply with a treaty obligation to prevent it.\textsuperscript{1321}

\textsuperscript{1319} UN Fish Stocks Agreement, \textit{supra} Introduction n 4, Article 18(2); FAO Compliance Agreement, \textit{supra} Ch III n 525, Article III(3).

\textsuperscript{1320} UN Fish Stocks Agreement, \textit{supra} Introduction n 4, Articles 17(2) and 18(1); FAO Compliance Agreement, \textit{supra} Ch III n 525, Article III(1)(a) and (2).

Secondly, although State responsibility is usually conceived as confined to the context of a breach of international law, this need not be a serious obstacle to this trend. It should not be excessively difficult to establish a breach either of the obligations cited above, or of the more general obligation to cooperate on high seas fisheries in Articles 117-119 of UNCLOS, now thought to bind all States, even non-parties, as customary international law. Article 42 of the ILC’s 2001 Draft Articles provides that:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
   (i) Specially affects that State; or
   (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.\footnote{1323}{Ibid., Article 42. In any event, Article 48 complementarily provides that:

Any State other than an injured State is entitled to invoke the responsibility of another State…if:

(a) The obligation breached is owed to a group of States including that State, and is established for the collective interest of the group; or

(b) The obligation breached is owed to the international community as a whole.}

It is argued here that overfishing on the high seas in violation of these obligations injures the economic interest of every State that could profitably fish the stock at $B_{msy}$, in other words any such State is a specially affected injured State for the purposes of Article 42. His general scepticism notwithstanding, Boyle concedes that a State whose fishing rights on the high seas are denied, or interfered with by pollution, could be an “injured State” for the purposes of the ILC draft articles, so that there is no need to rely on dubious arguments for an actio popularis so as to give

\footnote{1322}{The full title of the International Law Commission’s draft articles on State responsibility, \textit{supra} n 1318, indicates this.}
standing to any State prepared to take action.\footnote{Boyle, supra n 1311, at 93.} Leigh agrees: “Environmental damage can also cause pure economic loss to a State or its nationals, as in the case of decreased fish takes due to contamination or \textit{reduction} of fish stocks.”\footnote{Leigh, supra n 1312, at 143 (emphasis added). Since the loss thus formulated is that of States already involved in the fishery, at 144 she cautions that this leaves uncompensated loss of potential future use of the resource by other States. For a possible partial answer to this problem, see supra text at n 1231.} Logically, accountability for the consequences of fishing on the high seas must fall under one or other of State responsibility and the ILC’s incomplete work on the topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law,\footnote{See e.g. UN doc A/49/10, \textit{Report of the International Law Commission on the work of its forty-sixth session} (2 May – 22 July 1994), reprinted in UN, \textit{Yearbook of the International Law Commission 1994}, Vol II, Part Two (New York and Geneva: UN, 1997), at 153-178; UN doc A/50/10, \textit{Report of the International Law Commission on the work of its forty-seventh session} (2 May – 21 July 1995), reprinted in UN, \textit{Yearbook of the International Law Commission 1995}, Vol II, Part Two (New York and Geneva: UN, 1998), at 84-99, notably at 86 (paragraph 377) where damage to fish stocks is specifically mentioned as an instance of harm to the environment.} the injurious consequences in question being economic harm caused by (vessels flagged to) State A to (a fishery based in) State B. The latter topic was subsequently subdivided in way that made it clear that it was centred on transboundary harm from inherently hazardous activities,\footnote{UN doc A/52/10, \textit{Report of the International Law Commission on the work of its forty-ninth session} (12 May-18 July 1997), reprinted in UN, \textit{Yearbook of the International Law Commission 1997}, Vol II, Part Two (New York and Geneva: UN, 2000), 1 at 59 (paragraphs 162-168).} but may conceivably in due course yield formulations of principle that do away with the need to establish a breach of some obligation in order to hold States accountable for their acts and omissions on the high seas.\footnote{Which of the two it is may depend on whether the principle \textit{sic utere tuo ut alienum non laedas} still extends to the use of areas not under the jurisdiction of any State, notably the high seas; recently it has been argued to prohibit high seas fishing of straddling stocks to the extent that this damages the coastal State: Applebaum, supra Ch I n 124, at 301. Although the focus on}
be vigilant to ensure that the fact that fishing does not clearly belong in either category does not lead to a failure of accountability posing further risk to the stocks.

Nor would it be desirable for fishing to be split among both topics, with one set of compensatory rules for breach of an actual catch limit, and another for generally damaging overfishing in the absence of a quantified limit.

Thirdly, and arguably the most in need of development in its application to international fisheries, is the rule on the secondary obligation of reparation that arises as a result of the breach of a primary rule. In the Chorzów Factory case, the Permanent Court of International Justice laid down the standard that:

reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind territory as the “tuam” and “alienum” in the leading Trail Smelter arbitration, over pollution of land in the United States by fumes from a smelter located in Canada (Trail Smelter (United States v. Canada) (1941) 3 Reports of International Arbitral Awards 1905) has tended to obscure its wider applicability, in its origins the doctrine was seen as pertaining to rights rather than land, for example by the United States Supreme Court in relation to high seas navigation in the Marianna Flora (1825) 11 Wheat (24 US) 1 at 42, and is so treated by Molenaar, supra Ch III n 517, at 481. The same reasoning could equally be said to apply to damage to other States fishing on the high seas by virtue of their UNCLOS Article 116 right. The high seas is expressly contemplated by the ILC as the place where transboundary harm may be caused (UN doc A/49/10, supra n 1327, at 163), but (at 164) its work on this topic was intended to exclude “those activities which harm the so-called global commons per se but without any harm to any other State.” A.E. Boyle, “State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?”, (1990) 39 International and Comparative Law Quarterly 1 at 21-22 regards the conceptual distinction between this work and that on State responsibility as unsound: he believes that most of it could easily be subsumed into the latter, the small remainder being an almost incidental codification by the ILC of the modest substantive obligations of general international environmental law. It is submitted that State responsibility is the preferable approach for international fisheries law for the same reason, the only difference being that the substantive obligation already has a well settled label – the duty to cooperate – but its precise content is unclear.
or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.\textsuperscript{1329}

Possibly it is the extreme practical difficulty in applying these prescriptions to breaches of fishery catch limits that has deterred States from attempting to do so. Wiping out the consequences of any such breach would seem to entail a complex set of problematic and contestable biological and economic calculations in order to account to other States for their losses suffered by way of reduced catchability or availability of overfished stocks. Reparation in kind, which is the primary remedy whose feasibility must be investigated first, involves establishing what the state of stock would have been but for the breach, and what is needed to restore it to that state. This cannot simply be a matter of deducting a tonnage from future catch one or two years hence equal to the overcatch, with an additional penalty formula applied in defined circumstances, as has been the pattern to date. On the one hand, a stock whose biomass is above $B_{msy}$ may not be damaged at all by the overcatch (to the contrary, it may even enhance the productivity of the fishery for others), while a stock whose biomass is below $B_{msy}$ but growing will suffer less or more damage than the additional catch taken, depending on how high the TAC is. Thus, if restitution in kind would not restore the balance of benefits among States, an account of profits of some kind would be needed, though this may not be easily accommodated under the rubric of “damages for loss sustained”. On the other hand, a stock in a perilous state can be pushed over the brink to commercial extinction by a significant overcatch. In that situation, restitution in kind would not be possible and a monetary figure would need to be placed on the loss suffered by other actual and potential participants in the fishery – again, no easy matter, but one where a range of economic data will be available to guide those charged with the calculations. None of this, however, is an argument for not trying; the result may be imperfect and inexact, and the respondent State(s) will doubtless be entitled to the benefit of any doubt, but the very fact of

\textsuperscript{1329} \textit{Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits),} (1928) PCIJ Series A, No 17, at 47.
being held to account may well be enough to make States’ attitude to the fulfilment of their obligations significantly more rigorous.

Indeed, increased attention to State responsibility has other potential benefits for the management of international fisheries.\textsuperscript{1330} It makes accounting properly for catch all the more crucial. There are two issues here: defining and adhering to catch limits. As to the former, irrespective of whether quota trading hereafter becomes a reality in the CCSBT and other fishery commissions, it is clear that when such bodies set TACs, in order to guarantee that “total” means just that, they must ensure that it is clear whether their quota allocations cover only commercial catch or all sources of catch: bycatch, scientific research catch and recreational catch. On the latter, the disastrous effect of misreporting catch not only for the fishery but for the science that supports it became clear in 2006 when, just as the CCSBT’s painstakingly developed management procedure was about to be implemented, the Japanese catch figures on which it was partly based were exposed as grossly understated. The Chair of the Scientific Committee advised that implementation could not proceed, the revelations raising major uncertainties about the operating model, such as how much additional

\textsuperscript{1330} The variety of possible uses for invocation of State responsibility is considerable. With a modicum of imagination, it could have been for the CCSBT a way out of the impasse caused in 2002 by Japan’s insistence that there was 1,000 tonnes of “spare” quota (by its trade statistics, Indonesia’s catch was around this much less than the figures used by the scientists), of which 500 tonnes should be redistributed to existing Members and the rest retained for stock recovery: Attachment N-2 to CCSBT8 Report, supra Ch IV n 738; see also infra Appendix A, nn 1475-1477 and accompanying text. Instead of resisting Japan’s call, Australia and New Zealand could have invited Japan to assume international responsibility for Indonesia’s catch as well as its own, and on that basis could have consented to a combined quota for Japan and Indonesia of around 7,000 tonnes. Though Japan would have been wise to decline such an offer, as its confidence was soon proved misplaced (see the Global Catch table, Attachment 4 to CCSBT-ESC4 Report, supra Ch I n 141), this could only have come at the cost of being seen to lack the courage of its convictions. Had it accepted, the responsibility for remedying the combined overcatch would have fallen entirely on Japan.
fishing effort had been expended to make the belatedly acknowledged catch.\textsuperscript{1331} The timeframe for adoption even of an interim replacement management procedure would be three to five years,\textsuperscript{1332} with the CCSBT’s substantial investment – efforts put in by the working group convened for this purpose from 2000 through a series of resource-intensive workshops, the engagement of a number of outside consultants as an Advisory Panel, culminating in a Special Meeting of the Commission\textsuperscript{1333} and the choice of a management procedure from among the ones offered by the Scientific Committee\textsuperscript{1334} – in the interim set at naught.

Since past understatement of catches and profits will serve to diminish compensation due, raising the profile of State responsibility in fisheries should become a factor dissuading States from concealing the full extent of their fishing activity. Concern to limit potential compensation could also be a far-reaching way to integrate the WTO Doha Round work on disciplining fishery subsidies\textsuperscript{1335} into the broader international fisheries law framework. Since compensation at the international level is payable to States and not to the individual vessels or persons of their nationality who have

\textsuperscript{1332} CCSBT-EC5 Report; \textit{supra} Ch I n 102, at 8 (paragraph 46).  
\textsuperscript{1333} See CCSBT-MWS1 Report, \textit{supra} Ch IV n 683, CCSBT-MWS2 Report, \textit{supra} Ch IV n 683, CCSBT-MWS3 Report, \textit{supra} Ch IV n 683, CCSBT-MWS4 Report, \textit{supra} Ch IV n 683 and Appendix 3 to CCSBTSM4 Report, \textit{supra} Ch IV n 678.  
\textsuperscript{1334} CCSBT-EC3 Report, \textit{supra} Ch I n 78, at 23 (paragraph 51).  
\textsuperscript{1335} The Doha negotiating mandate is in the Ministerial Declaration Adopted on 14 November 2001, WTO doc WT/MIN(01)/DEC/1 (20 November 2001), paragraph 28. In paragraph 31 of the WSSD Plan of Implementation, \textit{supra} Ch IV n 917, subparagraph (f) notes the necessity to “[e]liminate subsidies that contribute to illegal, unreported and unregulated fishing and to over-capacity, while completing the efforts undertaken at WTO to clarify and improve its disciplines on fisheries subsidies…”. As at mid-2008, to judge from “Working Document from the Chairman [of the Negotiating Group on Rules]” (WTO doc TN/RL/W/232 (28 May 2008)), any outcome was still quite some way off.
suffered the loss, a State faced with a claim for compensation would naturally be inclined to insist as to quantum that the gross losses of those individuals be discounted for any subsidies, which do not represent a loss to the subsidising State. Considerations of this kind suggest that States ought not to be able to limit their liability even \textit{inter se} by according themselves high quotas in commissions. To the extent that a quota binds other members of the commission, quotas that are part of a TAC that is in biological terms too high leave members without legal recourse against States that fish within those quotas, and limit the compensation payable if the quotas are exceeded. Here too, then, the role of outsiders is crucial, as collectively the members have chosen to bear the risks associated with a dangerously high TAC, but will remain collectively responsible to non-members, if not to each other, even without any member exceeding its catch limit. Accordingly, quota decisions should not be taken as a voluntary assumption of risk by those members objecting to it as too high and not subsequently exceeding their own quotas under it, or those voting against it for this reason if there is no objection procedure. In this way, the revival of State responsibility will give States an incentive to move away from lowest common denominator decision-making procedures and promote efficacious alternatives in the fishery commissions of which they are members.

Clearly the matters set out in these last pages require a great deal more elaboration on the part of interested States and scholars in the years ahead before they can take their place in the developing international fisheries law landscape. For such an all-embracing “theory of everything” to emerge, however, it should be apparent that the role of new entrants – as potential participants in a high seas fishery for a stock like SBT keen to ensure that their rights are not infringed, by quota trading or otherwise – will approach in importance that of the actual participants to date as they attempt to capture the benefits of the fishery for themselves.
APPENDIX A

Third-party aspects of the dispute about Japan’s experimental fishing for SBT

Although formally dating from 31 August 1998, when Australia and New Zealand invoked Article 16 of the 1993 Convention, the proximate cause of the dispute, Japan’s unilateral experimental fishing program, had a significant pre-history and an underlying chain of causation of its own. This included both scientific disagreement and fundamental differences in fisheries management philosophy between Australia and New Zealand on the one hand and Japan on the other.

Japan had embarked unilaterally on a program of experimental fishing in excess of its last agreed national allocation after failing to persuade the applicants, Australia and New Zealand, of the utility of a joint program of such fishing, contrary to an agreement earlier in the CCSBT’s consideration of the concept. The applicants’ claim was that this was in breach of Japan’s obligations of cooperation with them to collaborate.

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1336 Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Award on Jurisdiction and Admissibility (2000) 39 ILM 1359 (hereinafter Annex VII Tribunal Award), at 1359 (paragraph 1).

1337 In 1996, the CCSBT decided on objectives and principles for design and implementation of an experimental fishing program, which required that any program should be the product of collaboration between the parties, not jeopardise the potential recovery of the parental stock, and be designed to deliver scientifically valid and meaningful results: see infra, nn 1363-1366 and accompanying text. A series of proposals for experimental fishing subsequently put forward by Japan were not accepted by Australia or New Zealand, and thus by the CCSBT itself, because they did not satisfy the 1996 Objectives and Principles. In their view the proposed experimental fishing was misdirected relative to the true impacts of uncertainty within the stock assessment and the experimental design and analysis were fundamentally flawed. The experiment targeted only one source of uncertainty which, even if it were resolved, would only slightly narrow the differences among the parties about stock recovery and appropriate TAC levels. Thus, in the applicants’ view, the objectives of the experiment did not justify the significant increased risk to the stock, especially when other mechanisms for reducing uncertainty were available that would require little or no additional catch: Statement of Claim, supra Ch III n 500, paragraph 17.
take measures required for the conservation and management of the living resources of the high seas, specifically SBT, under Articles 64 and 116-119 of UNCLOS. As subsidiary obligations going to the manner of applying those articles they also invoked Article 300 (the duty to act in good faith and avoid abuse of rights) and the precautionary principle.\(^\text{1338}\)

While Articles 117 to 119 have an obvious relevance to the merits of the dispute (considered in section 8 below), it may be noted here that the allegation of breach of Article 116 is puzzling, as this provision appears to create no obligation as such that is capable of being breached, except the implied one of other States, correlative to the fishing State’s right, to refrain from prevention of, or interference with, the exercise of the right. Even if Australia and New Zealand were arguing that breaches of the other provisions of UNCLOS mentioned in paragraph (b) or (c) of Article 116 deprived Japan of the right to fish for SBT at all on the high seas,\(^\text{1339}\) that would

\(^{1338}\) Australia and New Zealand sought by way of relief a declaration by the Annex VII tribunal that Japan had breached its obligations under Articles 64 and 116 to 119 of UNCLOS by “failing in good faith to co-operate with” them: \textit{ibid.}, paragraph 69(1)(d). Counsel for New Zealand, Ms Geddis, clarified before the tribunal (Transcript for 8 May 2000, \textit{supra} Ch III n 666, at 168) that this was not an independent allegation of bad faith. There is a hint in the Annex VII Tribunal Award, \textit{supra} n 1336, that the result might have been different had Australia and New Zealand invoked Article 300 in its own right. Paragraph 64 of the Award reads:

The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of UNCLOS. While Australia and New Zealand in the proceedings before ITLOS invoked Article 300, in the proceedings before this Tribunal they made clear that they do not hold Japan to any independent breach of an obligation to act in good faith.

\(^{1339}\) In all likelihood the applicants were not asserting this. Their Statement of Claim, \textit{supra} Ch III n 500, argued only that Japan’s conduct in undertaking experimental fishing unilaterally was “not authorised or permitted by Article 116” (the phrase occurs in both paragraphs 60 – because it was “calculated to defeat the object and purpose of the 1993 Convention” and 62 – because it was “in breach of its obligations under Articles 117, 118 and 119”), and the orders they sought called merely for limitation of Japan’s catch of SBT, not its cessation: at paragraph 69(2)(c) and (d). Nor is it clear where such an argument would end: if a State “breaches” Article
entail no more than asking the Tribunal to apply Article 116 as a consequence of those breaches, not a request to remedy an independent breach of Article 116. The better view must be that the obligations set out in paragraphs (a) to (c) condition the manner of exercise of the right, not its very existence.

The arbitration and its outcome have generated a considerable literature.\textsuperscript{1340} The issue of entry of third parties to the fishery, or their presence in it, though raised in the written and oral pleadings in the dispute, was tangential to it.

116 in respect of one species, does it thereby lose the right for its nationals to engage in fishing on the high seas for any species?  
1 Gestation of the dispute – interpretation of CPUE

The fishery indicators for SBT have historically relied heavily on the interpretation of CPUE. While the scientific analyses of the early 1990s were at one in concluding that the SBT parental stock was substantially depleted from its virgin biomass, there were significant discrepancies in their projections for the stock’s recovery, Japan’s scientists interpreting the CPUE data in an optimistic fashion and those of Australia and New Zealand pessimistically. The experimental fishing conducted by Japan in 1998 and 1999 was aimed at reducing one aspect of the uncertainty in the interpretation on which the CCSBT had been unable to develop an agreed approach, namely the fact that the locations in which fishing took place varied from year to year. According to Polacheck, the relative density of SBT in an


For an account of other aspects of fisheries science relevant to SBT see generally Appendix B infra.

See e.g. the oral submissions to ITLOS of Counsel for Australia, Professor Crawford, ITLOS doc ITLOS/PV.99/20/Rev.1 (hereinafter “Transcript for morning of 18 August”), available online at <www.itlos.org/case_documents/2001/document_en_139.pdf>, at 34.

This began as early as 1989, when Australia noted in the management meeting that catches by other parties had not been included in the virtual population analysis projections (explained infra Appendix B n 1517) considered by the scientists, which added to the need for a cautious approach: September 1989 Summary Record, supra Ch II n 368, at 27. When the meeting reconvened a month later Australia said the Taiwanese and Korean catch figures provided by Japan were substantially lower than its own estimate; Australia would thus not accept without further discussion the statement by Japan that future parental biomass estimates still increased even with catches by Taiwan and Korea included in the estimates: October 1989 Draft Summary Record, supra Ch II n 369, at 3-4.

“Status of the stock and fishery indicators” (Appendix 1 to 12th Trilateral Scientific Meeting Report, supra Ch II n 348), at 1 (paragraph 1) cautions that, although CPUE is of great value in indicating general trends, interpretation of relatively small and short term changes is very difficult because many factors can change CPUE other than abundance, especially for small fish; the data available have limited capacity to correct for their effects. The point was repeated
area and season in one year does not provide a reliable basis for estimating the relative density in that area and season in other years. For CPUE to provide a statistically valid index of abundance, it would be necessary to account for the relative density of fish in areas and periods with no fishing. For this purpose several different CPUE indices based on different mathematical models were developed, aggregating data typically at the monthly and 5° square level. Two of the CPUE series developed for SBT represented bounds for the relative density in unfished areas in a given year. The lower bound, known as the variable square model, took the density in the unfished squares as zero, in other words it assumed no SBT at all were present. The model was intended as a simplified representation of the effect of fishing effort being concentrated in areas of highest density (that is, it assumed that fishing masters have perfect knowledge of where the fish are). The upper bound, referred to as the constant square model, equated the relative density in unfished squares with that in the areas fished, i.e. fishing was assumed to be at random.

[1345] Polacheck, supra n 1340, at 287.
[1346] Over the years, the CCSBT Scientific Committee also considered a number of other models. Of these the one given the most weight in stock assessments is based on a geostatistical approach which estimates the density in areas without data as a function of the relative density in neighbouring areas and time periods: ibid. Note that, if the aim were purely to model fishing effort, the assumption of zero density would appear unjustified. Even if a vessel could move instantly and costlessly from one area to another, the logical consequence of the assumption that fishing masters are systematically able to target areas of higher density is simply that no unfished square may have a density higher than the lowest density of any fished square. The justification for zero density, if there is one, is that zero is a peremptory lower bound useful for modelling purposes. That is, if models that give a certain weight to the premise that there are no fish in unfished squares are shown to be consistent with the observed data, as was the case here, even the fact that the premise is accepted or proved to be wrong should not, as a proposition of science let alone of law, prevent their use.

[1347] See also Maguire, supra Ch II n 441, at 204-205 and Butterworth and Penney, supra Ch III n 553, at 178 for explanations of the constant or variable squares problem.
Australia and New Zealand were not opposed in principle to experimental fishing. In the trilateral period, indeed, they had supported a very similar concept, when, citing concerns about “the problem of overfishing, other uncertainties, and the concerns at the historically low levels of parental biomass,” 1,000 tonnes of Australian quota was “frozen” in 1990-91, of which 300 tonnes were to be used in a scientific research program to be formulated jointly by the three States. The detail was set out in an annex to the 1990 Resolution:

…The basic conditions under which the program would operate are as follows:

1. It will be carried out by Japanese fishing vessels unless it is specifically decided that Australian or New Zealand vessels should be involved.

…

5. Japan guarantees that the program will be implemented within the limit of 300 tonnes.

6. Japan will bear all reasonable costs associated with the research program.…

7. If the understandings in relation to the program’s implementation are not met, then the allocation of Australian quota can be cancelled by Australia immediately. …

Nor is experimental fishing of a highly depleted stock in itself objectionable; when commercial catches have been sharply restricted, experimental catch may be required in order to be able to monitor biomass trends. Where, however, the experiments involve substantial additional catch, managers must balance their information needs for improved (and less risky) future decision-making against the short-term increased biological risks associated with increased catches. Given the failure of the

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1348 “SBT Trilateral Management Discussions – Resolution”, supra Ch II n 341, at 1.
1349 Ibid., at 5 (Annex 2, “SBT Special Research Program”).
1350 Polacheck, supra n 1340, at 283-284. Morgan, supra n 1340, at 188 argues that, if the stock were truly in danger, scientific catch should have taken precedence over commercial catch. This is defensible, but was not Japan’s position – indeed, it was closer to the Applicants’: that if Japan considered the experiment so vitally important, it was at liberty to conduct it unilaterally, provided it did so within its last agreed national allocation. (In fact Japan had done just that some years earlier, adding 40 tonnes of its own allocation to a trilateral research quota because it
depleted SBT stock to recover, in which the recently increasing catch of third parties was an element, Australia and New Zealand argued that the flaws in the design of the experiment itself, and of the way in which Japan proposed to use its results in future stock assessments, deprived it of scientific value and were outweighed by the significant risk posed to the stock by the greater catch.

believed “the programme was necessary in order to understand the real state of the stock”: Draft 1991 Summary Record, supra Ch V n 1101, at 7-8.) On the need for additional catches as opposed to accommodating the experimental fishing within Japan’s previous national allocation, Polacheck argues at 292-293 that this need was never demonstrated in terms of the information supposedly to be gained; rather it was dictated by “political/economic realities”. If the same information could be obtained without increasing catches, the increased short-term risks of additional catches would not be justifiable simply for their potential to decrease long-term risks. Agreeing with Morgan, Polacheck states that if, on the other hand, some form of experimental fishing or scientific catch were required to provide information for management or for reducing risk, then such catch should take priority, commercial catches being added only if the recovery strategy leaves scope for them. He argues that any substantial scientific catches need to be considered within the context of the overall conservation and management of the stock, assessing increased short-term risk relative to long-term benefits linked directly to managing the stock.

Despite the 1989 reduction in the TAC, supra Ch II, text following n 338, the size of the spawning stock at the time of the dispute was between 25% and 53% of the 1980 level. Relative to stock levels in the fishery’s early years, Australian scientists estimated it at historically low levels in the order of 7-15% of its 1960 level, and Japanese scientists at 12% of the 1951 level, with recruitment (defined supra Ch I n 194) having declined markedly from the late 1960s to the mid-1990s to around a third of the 1960 level: see Statement of Claim, supra Ch III n 500, at 4 (paragraph 6). Polacheck, supra n 1340, at 292 states that the decades of intensive fishing of the SBT stock had rendered it significantly overfished and below commonly accepted thresholds for biologically safe parental biomass, below which the risk of poor recruitment increases. The greatest concern was that natural environmental variability could combine with the vulnerable state of the resource to cause abrupt recruitment decline and a subsequent (and consequent) further decline in the parental stock. This had been the mechanism associated with a large number of fisheries collapses. The principle underlying these thresholds, defined in terms of the level of depletion of a stock or in terms of the rate at which it is currently being exploited, is that they indicate a state for the stock or fishery which should be avoided. For SBT, the stock levels of the late 1990s were estimated to be below reference points based on the degree of depletion, while estimates of the rates of exploitation indicated a high likelihood that exploitation rate reference points were also being exceeded.
At the 1993 management meeting Japan proposed the use of non-commercial quota for a program to monitor the fishery in real time, but New Zealand noted that this had been discussed and rejected at previous meetings. Given the increasingly serious concerns about the stock, Australia and New Zealand said they could not consider an allocation of scientific quota outside the trilateral commercial catch limits.\footnote{1352} The first hint of experimental fishing came in a suggestion by an invited expert at the 1994 trilateral scientific meeting that difficulties in interpretation of CPUE could be addressed by the division of the TAC between currently fished areas and areas where fishing had been absent in recent years.\footnote{1353} These difficulties had arisen because the Japanese long-line fishery has contracted in recent years, and substantially in 1993 in [5°-square] areas fished each month. Such a contraction results in no CPUE data from many area-months and, because no information is available from unfished areas, increased uncertainty about total stock abundance. This uncertainty is largely responsible for the wide range of interpretations of recent CPUE increases of juveniles within the fished area-months.\footnote{1354}

A month later Japan proposed at the First Meeting of the CCSBT to instruct the Scientific Committee to formulate a real-time monitoring program for the 1995 season to cover areas and periods outside the commercial fisheries with a minimum level of catch required for scientifically valid research, the catch taken in the course of the program not to be counted against the global quota.\footnote{1355}

At the following Scientific Committee Meeting, Japanese scientists tabled a three-page proposal for extensive experimental fishing, which Polacheck criticises for lacking details on the experimental design, its analysis, the way the results would be

\footnote{1352} October 1993 Draft Summary Record, \textit{supra} Ch II n 360, at 5.  
\footnote{1353} Polacheck, \textit{supra} n 1340, at 287.  
\footnote{1354} 13th Trilateral Scientific Meeting Report, \textit{supra} Ch I n 46, at 3 (paragraph 12). The Report of the previous year’s scientific meeting had noted a recent pattern of longline fishing effort moving from areas that historically provided high catches of large and valuable fish to areas where smaller fish were now being caught: 12th Trilateral Scientific Meeting Report, \textit{supra} Ch II n 348, at 8 (Appendix 1, “Status of the stock and fishery indicators”, paragraph 4).  
\footnote{1355} CCSBT1 Report, \textit{supra} Ch I n 273, at 1 and Annex 1, Part 2, paragraphs 1 and 3.
used to manage the stock and the basis for the magnitude of the catch sought. At the April 1995 informal meeting Japan elaborated on its research quota proposal, arguing that it should be allocated to vessels to fish in areas and seasons not currently fished, so that data would be available for resolving uncertainties in the stock assessment, such as the “constant vs variable squares” question. Australia and New Zealand said it was unacceptable to contemplate quota increases, whether for commercial or research purposes, until a clear management strategy incorporating reference points had been established.

If Australia and New Zealand did not at first take the concept of an experimental fishing program seriously, the explanation for this lies in the context in which Japan introduced it into the Commission proper. At the Second Meeting of the CCSBT in September 1995, while Australia and New Zealand took the position that the TAC should be left as it was, with no change to Members’ national allocations, Japan sought an increase in the TAC of 6,000 tonnes without mentioning its earlier research quota proposal. As no consensus could be reached on the TAC and national allocations, the CCSBT decided to continue its deliberations on this matter the following month by convening a special meeting, as provided under Article 6, paragraph 5 of the 1993 Convention.

**Footnotes:**

1356 Polacheck, *supra* n 1340, at 288.

1357 *Supra*, text at and immediately following n 1346.

1358 CCSBT1 Report, *supra* Ch I n 273, at 8.

1359 CCSBT2 Report, *supra* Ch II n 414, at 1. Japan did not say how this increase should be divided among the Members’ national allocations.

1360 Article 6(5) provides that “Special meetings of the Commission shall be convened by the Chair at the request of a Party supported by at least two other Parties.” A special meeting may consider any matter relevant to the 1993 Convention: Article 6(6).
years, or a combination of additional TAC and experimental quota totalling 6,000 tonnes *per annum*.1361

With the impasse on setting a TAC for the 1996 season persisting, at a subsequent session of this meeting in January 1996 it was agreed to evaluate the possible implementation of an experimental fishing program.1362 In a further special meeting in 1996, the CCSBT adopted a document entitled “Objectives and Principles for the design and implementation of an EFP” and a process both to evaluate the impact of additional removals and to design and evaluate experimental fishing proposals.1363

The Objectives and Principles document set out the following agreed matters:

[An EFP] could happen where there is agreement within the Commission that the risks of such extra removals are outweighed by the benefits. […] Prior to the Commission deciding to proceed with any experimental fishing program it will need to agree on the way in which results…would be incorporated into the stock assessment and the future management decision-making for the fishery.1364

In addition, the development, evaluation, implementation and analysis of the program should be collaborative and agreed among all parties; prior to any such program being implemented, agreement should be reached on the specific criteria for determining whether any additional removals would jeopardise stock recovery. The criteria for judging an experimental fishing program “should be derived from management objectives” and any such program “should be designed to deliver scientifically valid and meaningful results”, with “appropriate monitoring of any program, designed and conducted in a collaborative manner amongst the parties.”1365

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1361 CCSBTSM1(1) Report, supra Ch I n 38, at 1 and the proposal appended to Annex 2 (“<<Japan’s Proposal>> on Special Experimental Fishing Arrangements (Additional Measures) for the Special Meeting of CCSBT October 1995 Canberra”).

1362 CCSBTSM1(2) Report, supra Ch IV n 682, at 2.

1363 The document forms Attachment C to CCSBTSM2 Report, supra Ch I n 289. EFP as used here and elsewhere in this Appendix stands for “experimental fishing program”.

1364 Attachment C to CCSBTSM2 Report, supra n 1363, at 1.

The evaluation process was specified in some detail, entailing three steps. Step 1 envisaged the reaching of agreement on the range of uncertainty to be considered in evaluating experimental fishing proposals, and on the weight to be placed on the various options within that range. In Step 2 there would be an evaluation of the effect of changed catch levels on the chance of recovery, including the effects on recovery of resolving the main uncertainties, and suggestions as to how the latter might be achieved. The aim of Step 3 would be to determine the most effective use of experimental catch, including the type of information provided by experimental fishing and how that information would be used by managers. This would involve empirical analysis of past fishing experience on possible results from the proposed experiment, simulation of those results and their analysis by agreed methods.\textsuperscript{1366}

2 Japan’s experimental fishing

Although Japan’s original 1995 proposal for experimental fishing appeared to be motivated more by the short-term economic benefits of increased catches than a need for additional information,\textsuperscript{1367} in 1996, the CCSBT initiated work to develop a joint experimental fishing program. This was predicated on the additional catch not jeopardising the primary management objective for the stock: rebuilding the parental biomass to at least the 1980 level by 2020.\textsuperscript{1368} The CCSBT held several workshops and meetings from 1996 to mid-1998 to develop and evaluate experimental fishing proposals based on the agreed objectives and principles and the three-step evaluation process. The failure of this process to reach consensus is attributed by Polacheck in part to the very different attitudes about the importance and rigour with which the criteria and process needed to be adhered to, as well as...a difference in perspective about whether the outcome of the process was to provide the basis for deciding on whether

\textsuperscript{1366} “Scientists report for evaluating the impact of additional removals for experimental fishing on the recovery of the SBT stock” (Attachment D to CCSBTSM2 Report, supra Ch I n 289), at 1-2.
\textsuperscript{1367} Supra, text at nn 1359-1361.
\textsuperscript{1368} Supra Ch I, text at n 289.
an EFP was worth conducting or whether fundamentally, this was already clear and only a technical design was required.\textsuperscript{1369}

According to Polacheck, the difference in perspective between Australia and New Zealand on one hand and Japan on the other as to what was required in terms of the linkage between the results from an EFP and an agreed management response was a key obstacle to agreement.\textsuperscript{1370} From the outset, the support of Australia and New Zealand for any such program was dependent upon a direct linkage: “Australia and New Zealand indicated that they would support collaborative and timely work on designing and evaluating an EFP, linked by means of predetermined management responses to clear management objectives.”\textsuperscript{1371}

Japan’s earliest proposals contained no reference to decision rules or management responses. Though some later ones included a section on decision rules, these did not extend to specific predetermined management responses, and allowed only for increases in TAC if the results were positive, but not for decreases in the TAC, beyond a possible payback of EFP catches, if the results were negative.\textsuperscript{1372}

\begin{itemize}
\item \textsuperscript{1369} Polacheck, \textit{supra} n 1340, at 288.
\item \textsuperscript{1370} \textit{Ibid.}, at 291, where a number of other factors are listed on which differences in perspective prevented agreement from being reached.
\item \textsuperscript{1371} CCSBTSM2 Report, \textit{supra} Ch I n 289, at 1.
\item \textsuperscript{1372} Polacheck, \textit{supra} n 1340, at 290-291. Japan argued that, over a timeframe longer than that of the additional short-term catch it proposed, the added risk of not meeting the recovery target could be negated by a compensating decrease in catch. It thus offered to make such a compensatory reduction if its experimental catches were shown to be detrimental to the stock. Australia and New Zealand found this unsatisfactory because Japan had put forward no standard or method for measuring detriment, and placed the onus of proof on them to show that it had occurred. Since the effects would not manifest themselves in the short term, without settling fixed time horizons and decision criteria, the default outcome would always be to prolong the period of additional catches and delay initiation of the compensating reductions. While the marginal increase in detriment of waiting one more year would always tend to be small, the cumulative effect of doing so repeatedly could be devastating. A further weakness of Japan’s proposal was that the risks at low stock sizes were not symmetrical nor well estimated, so that decrease of future catch might be of no use if the stock collapsed in the meantime: see \textit{infra} Appendix B, text following n 1506 and Polacheck, \textit{supra} n 1340, at 292.
\end{itemize}
The pattern of Japan seeking substantial increases in the TAC or alternatively a large experimental fishing quota continued for the rest of the decade.\footnote{\textsuperscript{1373}} It was Japan’s 1998 decision to fish experimentally on its own outside this framework that provoked the dispute under UNCLOS and the 1993 Convention.

In February 1998, Japan indicated that it would fish commercially at the level of national allocation fixed for its most recent fishing year (March 1997 to February 1998) and an additional 2,010 tonnes of SBT for three years, for the purposes of unilateral experimental fishing. From March to June 1998 Australia, Japan and New Zealand held talks, but these failed to resolve the differences over the Japanese proposal. On 1 June 1998, Japan made a revised proposal for experimental fishing of 1,400 tonnes to start on 1 July that year, to precede its three-year program. Australia and New Zealand replied that the proposal was unacceptable by reference to the agreed criteria, and requested Japan not to proceed. Despite those requests, Japan undertook unilateral experimental fishing in the southern Indian Ocean from 10 July to 31 August 1998, resulting in a combined commercial and experimental catch of SBT 1,464 tonnes in excess of its previously agreed national allocation.\footnote{\textsuperscript{1374}} In response, in July 1998, New Zealand advised Japan that no Japanese SBT vessels would be permitted access to New Zealand ports, bringing it into line with the position in Australia, where Japanese access had ceased at the end of February with the expiry of the last subsidiary agreement for fishing access to Australia’s EEZ.\footnote{\textsuperscript{1375}}

Then on 31 August 1998 Australia and New Zealand invoked the formal dispute settlement procedures under the 1993 Convention, requesting urgent consultations and negotiations under Article 16, paragraph 1. This led to consultations in December 1998, but no solution was reached beyond an agreement to continue intensive consultations in 1999 with a view to finding an acceptable joint program of

\footnote{\textsuperscript{1373} Polacheck, supra n 1340, at 287.} \footnote{\textsuperscript{1374} Statement of Claim, supra Ch III n 500, paragraph 13.} \footnote{\textsuperscript{1375} Supra Ch I n 265 (the last item listed).}
experimental fishing for that year.\textsuperscript{1376} Again, however, no agreement was reached between the parties in this framework.\textsuperscript{1377} Although the Working Group’s terms of reference required it to “decide on appropriate decision rules governing the interpretation of the results for the management and conservation of SBT”, this proved impossible because the CCSBT had not developed a management decision-making framework.\textsuperscript{1378}

Japan informed Australia and New Zealand in May 1999 that it planned to reinstitute its experimental fishing program; Australia and New Zealand responded on 1 June that its renewal would be considered a termination of the negotiations. Japan proceeded with its experimental fishing program, but simultaneously maintained that it did not intend to curtail negotiations.\textsuperscript{1379} On 23 June 1999, Japan requested that the dispute with Australia be resolved by mediation pursuant to the 1993 Convention, and made the same request of New Zealand the following day. Both applicants replied on 30 June 1999 that they were willing to submit the dispute to mediation if Japan discontinued its experimental fishing program.\textsuperscript{1380} When Japan rejected this, Australia and New Zealand notified Japan of their decision to commence compulsory

\textsuperscript{1376} For this purpose the parties established an Experimental Fishing Program Working Group of managers and other officials, national scientists and industry representatives as well as three invited external scientists. The Working Group’s terms of reference required that account be taken of the 1996 Objectives and Principles and listed eight specific tasks that were similar to and consistent with the basic development and evaluation steps agreed on previously: Polacheck, \textit{supra} n 1340, at 288.

\textsuperscript{1377} Polacheck, \textit{ibid.}, at 289 found this unsurprising given the complexity of the tasks that were assigned to the Working Group and the short timeframe of four meetings between February and April 1999 (see the list of past CCSBT meetings, \textit{supra} Ch IV n 683).

\textsuperscript{1378} The terms of reference are cited in Polacheck, \textit{supra} n 1340, at 291. Instead, the Working Group proposed a “metarule”, by which the experiment could continue into 1999 but not proceed into future years unless decision rules were first agreed; Australia and New Zealand found this unacceptable: Japanese memorial, \textit{supra} Ch II n 433, at 39 (paragraph 81), Applicants’ Reply, \textit{supra} Ch IV n 723, at 98 (paragraph A33).

\textsuperscript{1379} Annex VII Tribunal Award, \textit{supra} n 1336, at 1367 (paragraph 26).

\textsuperscript{1380} Japanese memorial, \textit{supra} Ch II n 433, at 44-45 (paragraph 90) and 46 (paragraph 94).
dispute resolution under Part XV of UNCLOS, submitting the dispute to an arbitral tribunal constituted under Annex VII, the default dispute settlement mechanism, instituting these proceedings by almost identical statements of claim on 15 July 1999. Pending the constitution of such a tribunal, they made similarly parallel requests to ITLOS to prescribe provisional measures, as provided by Article 290, paragraph 5 of UNCLOS. The provisional measures requested included the cessation of Japan’s experimental fishing program, the restriction of Japan’s future catches to the last agreed level, less the experimental catch for 1998 and 1999, and other orders protecting the rights of the parties. ITLOS heard the requests for provisional measures on 18-20 August 1999 at its seat in the German port of Hamburg.

3 The ITLOS hearing and Order

a The hearing

Third-party considerations made a reappearance before ITLOS. The Australian Attorney-General, Mr Williams, argued that Japan’s conduct was setting a terrible example for third States which are themselves increasingly imposing extra stress on the resource. By refusing to agree to a continuation of the measures of dispute settlement, it is deemed to have accepted arbitration under Annex VII. Article 290(5) of UNCLOS provides that, pending the establishment of an arbitral tribunal under Annexes VII or VIII, ITLOS, if it considers that prima facie the arbitral tribunal would have jurisdiction to hear the case, may prescribe any provisional measures it considers appropriate to preserve the respective rights of the parties or to prevent serious harm to the marine environment.

Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p.280, at 288-289 (paragraphs 31 (New Zealand) and 32 (Australia)).
previous total allowable catch, Japan has precluded the parties from relying on the total allowable catch as a basis for restraining the action of third States.\(^{1384}\)

Expanding on this argument, counsel for Australia cited among the reasons for preferring the applicants’ pessimistic stock prediction to Japan’s optimistic one the most recent trends in fishing, and the relations between the Japanese EFP and third-party fishing. The 1997 projections assumed a constant total catch for the next few years. That assumption is already wrong. From 1997 to 1998 the total catch went up by around 22% of which Japan was responsible for 43%, nearly half, with its EFP. So that gives added cause for concern.

Japan’s response to that…is to say that third parties are at least as much to blame, so why don’t we go off and sue the third parties. But the answers to that are obvious enough. …

As to the argument that the Applicants could have sued third parties for substantial new fishing, the fact that other parties may be acting in that manner does not justify Japan doing so. To the contrary, the fact of additional third State fishing provides a reason for reconsidering previous quotas down…, as well as taking other measures to contain or deter further increases. Far from acting as a deterrent, Japan’s action must be a positive encouragement to third parties to grab what they can as well, in what has become – because of Japan’s refusal to agree to a continuation of the TAC – a virtually unregulated fishery.\(^{1385}\)

Japan objected to the jurisdiction of ITLOS on the ground that the Annex VII tribunal, once constituted, would lack jurisdiction to decide the dispute. It argued that the dispute concerned the interpretation or application not of UNCLOS but of the 1993 Convention, and in the alternative that Australia and New Zealand had not met the preliminary requirements of UNCLOS Article 283 for invocation of the compulsory dispute settlement mechanism.\(^{1386}\)

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\(^{1384}\) Oral submissions of the Australian Attorney-General, Mr Williams QC, Transcript for morning of 18 August, supra n 1342, at 14-15. Accord the oral submissions of Counsel for Australia, Professor Crawford, ibid., at 33: “Japan’s action also limits the Applicants’ opportunity to engage third parties in relation to their fishing of SBT.”

\(^{1385}\) Oral submissions of Counsel for Australia, Professor Crawford, Transcript for afternoon of 18 August, supra Ch I n 190, at 18.

\(^{1386}\) ITLOS Order, supra n 1383, at 290 (paragraph 33) and 294 (paragraph 56).
In this phase of the dispute, however, Japan raised the question of non-party catch not as a ground of inadmissibility of the applicants’ claims, but as a debating point: Indeed, were this truly a dispute under the Law of the Sea Convention, the Applicants would surely have named as Respondents the other States that are both parties to UNCLOS and catch SBT…Australia’s and New Zealand’s scientific experts identify the unregulated catch of non-parties to the 1993 Convention as a source of potential damage to the SBT stock. That catch, as demonstrated this morning, far exceeds the tonnage involved in Japan’s EFP. Thus, if the Applicants in fact believed that this dispute arose under the Law of the Sea Convention, under their own theory, Japan could not be the only necessary party to a resolution of this matter. The Applicants’ failure to join the Republic of Korea and Indonesia, for example, demonstrates the Applicants’ lack of consistency in their approach to this issue.1387

Further, Japan contrasted the non-member catch both with the much smaller tonnage which it maintained was all that was in dispute between the parties:

Why are the three countries in dispute between themselves for a matter of, figuratively speaking, a few hundreds of tonnes of SBT when a new challenge is emerging of, to put it mildly, a few thousand tonnes of SBT catch which is coming from outside the framework of the 1993 Convention?1388

and with the total experimental catch tonnage:

This non-party catch in the aggregate far exceeds the amount caught in Japan’s EFP. Moreover…the non-parties have been able to increase their catch despite the dire recovery forecasts of Australia and New Zealand. There is, therefore, no reason to

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1388 Oral submissions of the Agent for Japan, Mr Togo, Transcript for morning of 19 August, supra Ch I n 285, at 10. The “few hundreds of tonnes” were the difference between Japan’s proposed tonnage and the amount Australia and New Zealand had indicated they were prepared to accept for a joint experimental fishing program, but was not the only matter in issue, given the significant differences between them on the design of the experiment and the use to which the resulting data would be put: see infra nn 1484-1488 and accompanying text, as well as the relevant passage of the award of the Annex VII tribunal, infra text at n 1440.
believe that countries such as Indonesia would not continue to increase their catch to more than make up for any tonnage Japan might be proscribed from catching.  

Expanding the argument, Japan used the non-members as a reason for ITLOS not to restrain its catch:

[O]ther nations will not participate unless they can be assured that they will not be bound to national allocations absent their consent…that no one party be permitted to impose its view on the others…

Japan also used them as a policy argument for its experimental fishing program:

In Japan’s view, the only way to bring these non-parties into the cooperative framework of the 1993 Convention is to re-establish the proper functioning of that Convention; that is to say, scientifically establish the appropriate level of total allowable catch for long-term conservation and optimum utilization and offer appropriate allocation to each country. Without a share in the fishing of SBT, we cannot imagine any of these non-parties will choose to join the cooperative framework of the 1993 Convention.

Japan has been making constructive proposals to this end. Allegations have been made that Japan is diverting its responsibility by blaming these outside parties. On the contrary…it is only by demonstrating that the Convention for the Conservation of SBT can function normally and provide a reasonable basis for cooperation, based on a reasonable analysis of the best scientific data available that we will be able to induce non-parties to join its cooperative framework. This is Japan’s goal.

Mr President, Honourable judges, after prolonged and serious deliberations, we came to the conclusion that the only way to achieve our goal is to introduce and implement an effective mechanism of an Experimental Fishing Programme.

In effect, the non-members were reasons in themselves to conduct experimental fishing:

No state, I submit, will join the 1993 Convention unless it can be given a reasonable quota to make joining viable. If the EFP were to demonstrate that Applicants’

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1389 Oral submissions of Counsel for Japan, Mr Greig, Transcript for morning of 19 August, *supra* Ch I n 285, at 29.

1390 Oral submissions of Counsel for Japan, Mr Greig, *ibid.*, at 16.

1391 Oral submissions of the Agent for Japan, Mr Togo, Transcript for morning of 19 August, *supra* Ch I n 285, at 8-9.
pessimistic projections are realistic it will be practically difficult to induce non-parties to the 1993 Convention to participate. On the other hand, if the EFP leads to more optimistic conclusions, bringing the Republic of Korea and other non-parties into a regional Southern Bluefin Tuna management arrangement should be feasible.\textsuperscript{1392}

This provoked the following retort the next day from New Zealand:

Japan has tried to divert you Mr President from the importance of this case. It has tried to say that the real issue here is not Japan's behaviour, but the behaviour of others. It alleges that the catch of third parties provides a justification for Japan’s actions. Mr President, we agree with Japan that the increasing catch of non-parties is of serious concern, and have consistently said so within the SBT Commission. We do not agree that the appropriate response to third party catch is for a member of the SBT Commission to step outside that body and unilaterally take more fish. It is no solution to the increasing catches by non-parties for a member of the Commission to increase its own catch. Indeed, it only aggravates the situation.\textsuperscript{1393}

\textsuperscript{1392} \textit{Ibid.}, at 17. This argument comes close to begging the question, resting as it does on the assumption that the experiment would vindicate Japan’s optimism, and is undermined by the implication that, if the findings were instead pessimistic, they would have to be suppressed for policy reasons in order not to make entry unattractive to the prospective new members. This was not the first display of a certain naivety about the consequences of the reduction of scientific uncertainty. At the 1990 trilateral meeting, noting that the recommendations of the scientists as to quota incorporated a discount for uncertainty, Japan’s understanding (Draft 1990 Summary Record, \textit{supra} Ch II n 342, at 10) was that “if the catch is closely monitored and reliable scientific data obtained, so the uncertainties in the models are reduced, then it would be possible to increase catch levels this year.” That ignores the possibility that the more reliable information thus obtained might reveal that a lower base level of quota was appropriate, wholly or partly negating the smaller discount than hitherto that could be made as consequence of the reduced uncertainty – but it is far from clear that Japan grasped this.

\textsuperscript{1393} Oral submissions of the Agent for New Zealand, Mr Caughley, Transcript for 20 August, \textit{supra} Ch II n 434, at 22. Note that cessation of cooperation is predicted by bioeconomic theory as a reaction to new entrants (see the works cited \textit{supra} Ch I n 120); while this raises an economic issue as to whether forcing those already cooperating to continue doing so will discourage them from beginning to cooperate in the first place, it is submitted that to qualify the obligation so as to take this into account would fatally undermine the cooperative edifice of international fisheries law.
Finally, Japan used the fishing by new entrants as an argument in favour of its own counter-request for a provisional measure ordering the parties to resume negotiations, calling on ITLOS to restore to the CCSBT the consensual element that is central to its functioning. This in turn would provide the basis for non-parties to become parties, or to coordinate with parties, which is essential if the long-term management goals of the Convention are to be reached.

b The Order

ITLOS issued its decision on 27 August 1999. Finding the applicants’ arguments persuasive, ITLOS held that it had jurisdiction in the dispute on the basis that prima facie the Annex VII arbitral tribunal would have jurisdiction over it. Rejecting Japan’s argument, ITLOS found that a dispute arising under UNCLOS did exist; the fact that the 1993 Convention might also apply did not preclude recourse to the procedures of Part XV. There being no obligation to persist with negotiations beyond the point where it was clear that they would not lead to settlement of the dispute, ITLOS was satisfied that the jurisdictional requirements of Articles 281, 283 and 286 were met.

1394 ITLOS Order, supra n 1383, at 290-292 (paragraphs 33 and 35).
1395 Oral submissions of Counsel for Japan, Mr Greig, Transcript for 20 August, supra Ch II n 434, at 33.
1396 ITLOS Order, supra n 1383, at 295 (paragraph 62).
1397 Ibid., at 294 (paragraphs 52-55).
1398 Ibid., at 295 (paragraphs 60 and 61). Accord the MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001 (hereinafter MOX Plant Case Order), ITLOS Reports 2001, p. 95 at 107 (paragraph 60: “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted”), the view of the Annex VII tribunal infra, text at n 1446 and the Virginia Commentary, (S. Rosenne and L.B. Sohn (Volume Editors), Virginia Commentary, supra Ch III n 471, Vol V (Dordrecht/Boston/London: Martinus Nijhoff, 1989), at 23) which affirms the proposition that a State may submit a case to Part XV procedures whenever it concludes that the current procedures are no longer likely to lead to a settlement, but adds that, if the other party
ITLOS mentioned in its Order that “catches of non-parties to the Convention of 1993 have increased considerably since 1996”, which was one of its reasons for its admonition to the parties that they “should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna”. Pending a decision of the Annex VII tribunal, ITLOS prescribed a number of provisional measures in the dispositif of its Order. In particular it ordered that the parties should each ensure that their catches did not exceed the annual national allocations they had last agreed and that they should each refrain from conducting experimental fishing programs unless the catch was counted against the allocation, except with the agreement of the others. It also ordered the parties to resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of SBT. Crucially, there was also an order, for which 20 judges voted and two against, that Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.[1]

objects, “the tribunal or court to which the matter is submitted will have to decide this preliminary objection to its jurisdiction.”

1399 ITLOS Order, supra n 1383, at 296 (paragraph 76).
1400 Ibid. (paragraph 77).
1401 Ibid., at 297-300 (paragraph 90.1). The orders in relation to catch limits and counting towards them of experimental catch and resumption of negotiations are at subparagraphs (c), (d) and (e) respectively. Among the ancillary orders was the submission of an initial report on compliance with the substantive Order by 6 October 1999: at 300 (paragraph 90.2).
1402 Although ITLOS granted in essence the orders sought by Australia and New Zealand rather than those Japan would have preferred, the inclusion of subparagraph (f) indicates that evidently the third-party issue found some resonance with ITLOS. See also ibid., at 296 (paragraph 78).
The dissentients on this point were Judges Vukas and Warioba. No reason for Judge Vukas’s dissent is given in his Separate Opinion, but Judge Warioba made it clear in his Declaration that he dissented not because he disagreed with the call, but because it fell outside the subject matter of the dispute, to which he considered that the Order ought to be confined.\textsuperscript{1403} Judge Laing expressed slight doubt about its utility,\textsuperscript{1404} but Judge \textit{ad hoc} Shearer said that an order of this nature was within the power of ITLOS to make.\textsuperscript{1405}

Although the ITLOS Order did not refer to the precautionary principle, some judges in their Separate Opinions found it relevant in support of the overall decision.\textsuperscript{1406}

\textbf{4 The interval between the ITLOS Order and the arbitral tribunal’s finding of lack of jurisdiction}

Following the ITLOS Order Japan stated that, as a first step towards compliance with subparagraph (d) of the ITLOS Order, its commercial catch for the 1999 season already underway would be reduced by 700 tonnes, with the remaining 1,498 tonnes held over to the following season. In the event, Japan’s commercial catch fell 11 tonnes short of the revised limit, leaving 1,487 tonnes to be repaid in 2000.\textsuperscript{1407}

The three parties held negotiations in Canberra in September 1999. As they subsequently reported to ITLOS, progress was made on a number of issues including the introduction of a trade information system to assist in the management of the global catch of SBT and an action plan aimed at bringing the other major exploiters

\textsuperscript{1403} Declaration by Judge Warioba, ITLOS Reports 1999, p. 303.
\textsuperscript{1404} Separate Opinion of Judge Laing, ITLOS Reports 1999, p. 305 at 309 (paragraph 11).
\textsuperscript{1405} Separate Opinion of Judge \textit{ad hoc} Shearer, ITLOS Reports 1999, p. 320 at 329.
\textsuperscript{1406} Separate Opinion of Judge Laing, \textit{supra} n 1404, at 309-315 (paragraphs 12-21); Separate Opinion of Judge Treves, ITLOS Reports 1999, p. 316 at 317-319 (paragraphs 8-11); Separate Opinion of Judge \textit{ad hoc} Shearer, \textit{supra} n 1405, at 326-327. Maguire, \textit{supra} Ch II n 441, at 217 referred to it as a possible manifestation of the fishing industry’s “worst fear with the implementation of the precautionary approach”.
\textsuperscript{1407} Attachment F-2 to CCSBT7 Report, \textit{supra} Ch V n 1138, in CCSBT Blue Book 2002, \textit{supra} Ch I n 30, 36 at 36 and 37.
of SBT within the 1993 Convention, but the dispute was not resolved. Indeed the actions of Japan in the IOTC in late 1999, repeating with greater intensity its attempt of the previous year to involve that body in the management of SBT despite the latter’s acknowledgement of the CCSBT’s primacy,\(^{1408}\) might have constituted a

\(^{1408}\) Despite having express competence over SBT under its constitutive treaty, supra Ch I n 7, by and large the IOTC has been content to leave management of that species to the CCSBT. It noted at the First Special Session in March 1997 that several international fisheries organisations’ activities would be relevant to its objectives and saw the need for collaboration and possibly joint activities with them; among these were CCSBT and ICCAT: IOTCSS1 Report, supra Ch IV n 719, at 5 (paragraphs 29 and 30). Significantly, the IOTC went on to recognise CCSBT’s “prime responsibility for conservation and fisheries management” for SBT, while not abdicating its own competence in this regard: ibid., at 6 (paragraph 31). This was a sensible step on its part. As a fledgling body managing 15 species other than SBT, it would have made no sense for the IOTC to divert to SBT, in which its majority of developing country Members had no interest, and in competition with the CCSBT, effort and resources that could be devoted to the tropical tunas and other species in which that majority did have interests. Australia then reported this development to the CCSBT’s Fourth Meeting: CCSBT4(1) Report, supra Ch I n 126, at 7. In early 1998, however, the deteriorating relationship between CCSBT Members (supra text following n 1373 and CCSBT4(3) Report, supra Ch IV n 683, at 90-94 (agenda items 2, 3 and 4.2)) had spillover effects on the IOTC. In part this was a deliberate step by Japan, which indicated at one CCSBT meeting that, since that Commission was unable to agree on a TAC, the IOTC might be better placed to do so; see CCSBT4(2) Report, supra Ch IV n 683, at 61: “Japan considered that there was little room for future progress in the Commission and hence it saw value in moving the functions of the CCSBT to the IOTC.” At the IOTC’s next meeting in December 1998, Japan called for the establishment of a working party either on SBT or on temperate tunas. (In practice a temperate tunas working party would have spent most of its time on SBT. This is because the only other temperate tuna over which the IOTC has competence is albacore – and, since Indian Ocean albacore is targeted almost exclusively by Taiwanese vessels (see Report of the Second Session of the Scientific Committee, IOTC doc IOTC/99/04 (Appendix VII to IOTC4 Report), in IOTC doc IOTC/S/04/99/R[E], supra Ch III n 633, 22 at 29 (paragraph 70)), there was a practical obstacle to examining the albacore fishery in any depth: on this aspect see Serdy, supra Ch IV n 669, at 207-210.) Australia opposed the move, and advanced several reasons why it would not be in the IOTC’s interest to take on a management role in respect of SBT. Reluctant for the meeting to become entangled in a bilateral dispute, the Chair encouraged Australia and Japan to work out a solution to the problem themselves for inclusion in the meeting report. They did so in the form of a Resolution brought to plenary by both States and adopted by the Commission, “Resolution
breach of subparagraph 1(a) of the Order (“ensure that no action is taken which might extend or aggravate the disputes submitted to the arbitral tribunal”).

In parallel with further progress made in CCSBT meetings in November 1999 and March 2000, the constitution of the Annex VII tribunal proceeded pursuant to Article 3 of that annex. It comprised Sir Kenneth Keith (then of the New Zealand Court of Appeal), Professor Chusei Yamada (the Japanese member of the ILC) and Professors Florentino Feliciano (of the WTO Appellate Body), Stephen Schwebel (the recently retired former President of the ICJ), and Per Tresselt of Norway (then a Judge of the EFTA Court).

Because Japan objected to both the tribunal’s jurisdiction and the admissibility of the applicants’ claims, a hearing on these preliminary points took place in Washington from 7 to 11 May 2000, preceded by both sides’ filing of their memorials.

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1409 Sir Kenneth was nominated by the applicants under paragraph (b) of Article 3.

1410 Professor Yamada was nominated by the respondent under paragraph (c) of Article 3.

1411 The other three members were jointly nominated by the parties under paragraph (d) of Article 3. Professor Schwebel was chosen by the parties as president.

1412 Annex VII Tribunal Award, supra n 1336, at 1360 (paragraph 7). The parties engaged the services of the International Centre for the Settlement of Investment Disputes to provide the secretariat for the Annex VII arbitral tribunal and the venue for its hearings.
The arguments of the parties before the Annex VII arbitral tribunal

Written arguments

Despite ITLOS having held that the Annex VII tribunal would prima facie have jurisdiction, Japan continued to argue that its dispute with Australia and New Zealand related solely to the 1993 Convention and not UNCLOS, as Article 279 of the latter required. Alternatively, Article 281, paragraph 1 had not been satisfied since the Parties had not exhausted their dispute resolution efforts under the 1993 Convention; nor had Australia and New Zealand complied with Article 283, by failing to exchange views with Japan either about the dispute or on termination of negotiations. Australia and New Zealand denied both that the dispute arose solely under the 1993 Convention and that UNCLOS was inapplicable merely because the 1993 Convention was applicable; since both treaties were relevant, recourse to the UNCLOS Part XV procedures was not precluded. Rather, the applicability of a treaty was a question for “objective judicial or arbitral processes” to determine. They explained that negotiations “over the best part of a year” had been “extensive” and “intensive” and that Japan’s continuation of the experimental fishing program into a second year “was rightly regarded as tantamount to a termination of negotiations”, exhausting any possibility of settlement.

Apart from its ultimately successful argument on the relationship between the dispute settlement provisions of UNCLOS and the 1993 Convention, Japan put three arguments. The first was that, Japan having accepted a limit of 1,500 tonnes for its...

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1413 Ibid., at 1376 (paragraph 38(a)).
1414 Ibid., at 1377 (paragraph 38(h), on Article 281(1)) and 1379 (paragraph 39(d), on Article 283)).
1415 Ibid., at 1380 (paragraph 41(a) and (b)).
1416 Ibid., at 1381 (paragraph 41(d)).
1417 Ibid., at 1382 (paragraph 41(g)).
experimental fishing program, the dispute on the tonnage was moot.  Secondly, the rest of the dispute was non-justiciable because it related to science rather than law.  Thirdly, by entering into the 1993 Convention Japan had fully discharged its obligations to Australia and New Zealand in respect of SBT under UNCLOS and its conduct was to be judged only by reference to the former.

The Japanese Memorial now put the third parties in the fishery squarely as an objection to admissibility of the applicants’ claims:

[D]espite the fact that Indonesia and the ROK are parties to UNCLOS and are, therefore, exposed to the institution of proceedings against them by A/NZ in the same way as A/NZ have begun proceedings against Japan, no such proceedings have been started. This is in spite of the fact that the Indonesian catch is concentrated on the sole known SBT spawning ground and had long been recognized as particularly threatening to the stock. The ROK catch of SBT increased twentyfold in the 1990s; according to the ROK itself, its catch in 1998 was more than 2000 mt. The fact that A/NZ have not sued Indonesia or the ROK under UNCLOS procedures when they could have done so suggests that what really matters in the present proceedings is that the obligations involved are ones that exist under CCSBT and that Japan (unlike Indonesia and the ROK) is party to that convention, not that Japan is allegedly in breach of UNCLOS. If the proceedings genuinely have as their object the implementation of the provisions of UNCLOS which have been invoked by A/NZ, then Indonesia and the ROK are necessary and proper parties thereto in whose absence the proceedings against Japan cannot properly continue.

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1418 See the argument of Professor Lowe, counsel for Japan, Transcript for 7 May 2000, supra Ch II n 433, at 198-208.
1419 See Japanese memorial, supra Ch II n 433, at 83-88 (paragraphs 171, 172, 174, 180 and 181) and the argument of Professor Lowe, counsel for Japan, Transcript for 7 May 2000, supra Ch II n 433, at 181-193.
1420 See Japanese memorial, supra Ch II n 433, at 57-65 (paragraphs 116-131) and the argument of Sir Elihu Lauterpacht, counsel for Japan, Transcript for 7 May 2000, supra Ch II n 433, at 53-58, 63-66 and 71-122.
1421 Japanese memorial, supra Ch II n 433, at 48 (paragraph 97). See also the following passage at 86-87 (paragraph 178):

[T]he Parties to the present proceedings include only three of the major countries that fish on the high seas for southern bluefin tuna. If this Tribunal were to make any Award limiting
In addition, in support of its argument that the applicants’ claims all related to the 1993 Convention rather than to UNCLOS, the Japanese Memorial stated:

A/NZ have not relied upon UNCLOS provisions on their own to institute, as they could have, proceedings against other countries like the ROK or Indonesia, despite the fact these countries both fish for SBT and are parties to UNCLOS. Nor, even if A/NZ’s pessimistic stock assessments and criticisms of the design of the 1999 EFP were credited, could it plausibly be denied that the perennial fishing activities of such countries threaten the SBT stock every bit as seriously as does Japan’s limited EFP. Indonesia, for example, catches thousands of tonnes of SBT on the species’s sole known spawning ground; the ROK has dramatically escalated its catch of SBT by several hundred percent even as it has made ever-increasing demands upon Australia, Japan and New Zealand for assurances of the quota it would be allocated if it acceded to the CCSBT.1422

In their Reply Australia and New Zealand noted that they had made efforts, in conjunction with Japan and separately, to engage third States and other entities and to persuade them, either to accede to the 1993 Convention or at least to restrain their fishing efforts, which have increased in recent years and are indeed a source of serious concern.1423

But, the Reply went on, failure to proceed against third parties was no bar to the proceedings against Japan.1424 It cited a series of ICJ cases as authority for the proposition that the non-joinder of third States was only a ground for inadmissibility in very limited circumstances, absent in the instant case.1425 The legal interests of

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1422 Japanese memorial, supra Ch II n 433, at 79 (paragraph 163).
1423 Applicants’ Reply, supra n 1378, at 77 (paragraph 173).
1424 Ibid. (paragraph 174).
1425 The cases were Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections (hereinafter Nauru case), where it was held that only where the legal interests of a third State form “the very subject matter of the decision that is applied for” would a court or
third States such as Indonesia and Korea were not the subject matter of the claims raised by Australia and New Zealand against Japan: “at most they are part, albeit subsidiary, of the factual matrix.” The fact that other States had legal obligations under UNCLOS, and may have engaged in similar activity, did not prevent adjudication on the claims against Japan concerning the failure by Japan itself to discharge its obligations under UNCLOS, which were neither conditional on nor inextricably linked to any judgment as to acts of third States. In any event, the respective roles of Japan and third States (with whose position Japan’s was not comparable) in terms of the overfishing of SBT was a matter for the merits.

b Oral arguments

In oral argument on the third-party issue, Sir Elihu Lauterpacht pointed out that Australia and New Zealand could have proceeded against both Indonesia and the Republic of Korea under UNCLOS Part XV “on the basis of the same violations of UNCLOS as are alleged against Japan”, before concluding:

Japan drew two conclusions from this consideration. The first was that the fact that A/NZ have not sued Indonesia or the Republic of Korea under available UNCLOS procedures suggests that what really matters in the present proceedings is the relationship under CCSBT, not the relationship under UNCLOS.

Otherwise, why didn’t A/NZ direct its UNCLOS attack against other UNCLOS parties which participate in an unregulated taking of SBT that now exceeds 5,000 MT? This quantity of catch is far more harmful to the SBT than is the claimed tribunal be precluded from adjudicating on the claim (ICJ Reports 1992, p.240 at 261 (paragraph 55)); Monetary Gold Removed from Rome, supra Ch III n 526 and the Case concerning East Timor, supra Ch III n 526, both showing that the Court had only applied the principle where a decision against a third party was a legally necessary prerequisite to one against the respondent; and the Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility) (Nicaragua v. United States of America) (ICJ Reports 1984, p.392 at 431 (paragraph 88)) as an example of a case involving “concurrent tortfeasors” that was allowed to proceed against the actual respondent alone – as happened in the Nauru case itself.

Applicants’ Reply, supra n 1378, at 78 (paragraphs 175 and 176).

Oral submissions of counsel for Japan, Sir Elihu Lauterpacht, Transcript for 7 May 2000, supra Ch II n 433, at 59.
impact of the 300 MT that separates the figure for EFP proposed by Japan and the figure that was acceptable to A/NZ in the negotiations.

In its Reply…, A/NZ disregarded this point. They focussed instead on the second and lesser point made in the Japanese Memorial, namely that Indonesia and the Republic of Korea are necessary and proper parties to the proceedings. For present purposes, however, what matters is not whether A/NZ’s reaction on this lesser point is correct, but the fact that A/NZ chose entirely to disregard the first of the two points made in the Japanese Memorial… . A/NZ has offered no explanation of why in their capacities as self-appointed guardians of the integrity of the SBT stock, they chose to limit their initiative under UNCLOS to bringing proceedings against Japan when they could equally well have done so against Indonesia and the Republic of Korea, also. The conclusion that Japan draws from A/NZ’s failure to seek UNCLOS recourse against Indonesia and the Republic of Korea is that it eloquently demonstrates A/NZ’s realization that CCSBT is the only effective legal link between them and Japan in relation to SBT, and that proceedings based on UNCLOS alone will get nowhere.\footnote{1428}

The task of replying to this for the applicants the next day fell to Mr Serdy. After leading the Tribunal through the history of third-party fishing for SBT up to the time of the negotiations ordered by ITLOS,\footnote{1429} he sought to show that the tonnages Japan was comparing were the wrong ones:

The Commission has since made specific quota offers to Korea and Taiwan at levels that are some way below their current catch. As the negotiations with them are continuing, I hope the Tribunal will forgive me if I do not mention exact tonnages. What I can say, though, Mr President, is that both Korea and Taiwan have undertaken voluntarily to restrict their catch in the interim, and that if you subtract the sum of the offers from the sum of those interim limits, the difference at stake is below – well below – 1000 tonnes \textit{per annum}. That is less than half of Japan’s expected catch in each year of the EFP it began in 1999, namely 2000 tonnes.

Let me also mention Indonesia. A complicating factor in its case is that most, if not all, of its SBT catch is taken as bycatch from its yellowfin and bigeye tuna fishery. … Australia has been leading for the Commission in discussions with Indonesia

\footnote{1428} \textit{Ibid.}, at 60-61.  
\footnote{1429} Oral submissions of counsel for Australia, Mr Serdy, Transcript for 8 May 2000, supra Ch III n 666, at 181-183.
aimed at two things: at familiarising Indonesian fisheries officials with modern management methods and also at introducing the Indonesian fleet to methods of fishing that would reduce Indonesia’s SBT bycatch to a point where its adherence to a quota on accession to the 1993 Convention becomes feasible.\(^{1430}\)

Having described the division of labour between Australia and Japan in dealing with third parties on the Commission’s behalf,\(^{1431}\) Mr Serdy added that Japan is undoing the good work and making the task of all of us harder by the approach to the third parties that it takes in Commission meetings…Its approach is all stick and no carrot. Look at it from the third parties’ point of view. As long as Japan persists in berating them for their excessive catch, while continuing to try to ratchet up its own catch by any available means, no wonder they hesitate to join the Commission.\(^{1432}\)

Turning to the specific issue of non-joinder of Korea and Indonesia raised the previous day by Sir Elihu, Mr Serdy continued:

There is a sharp contrast between Japan’s factual situation and that of the third parties. The plain fact is that neither Australia nor New Zealand has any dispute with those two States at this stage, although there are concerns. We are in negotiations with them alongside Japan, and the talks have not broken down. These talks are about reducing their catch of SBT, while Japan seemingly is only interested in expanding its. Certainly, third parties are part of the problem, but there has never been a rule that you must solve your legal problems all at once and in a uniform fashion. If it is more efficient to tackle them piecemeal,…then that is the natural way for governments to go about it.

The Applicants’ difficulties with Japan are ripe for dispute settlement, whereas our collective difficulties with the third parties currently are not, and with luck they never will be.\(^{1433}\)

Referring to the statement in paragraph 163 of Japan’s Memorial that “The perennial fishing activities of such countries threaten the SBT stock every bit as seriously as

\(^{1430}\) Ibid., at 183-185.
\(^{1431}\) Ibid., at 185.
\(^{1432}\) Ibid., at 185-186.
\(^{1433}\) Ibid., at 187-188.
does Japan’s limited EFP”, which he interpreted as Japan “saying that the entire third-party commercial catch is bad, unlike its own”, Mr Serdy commented:

This point taken by Japan says a lot more about its attitude to the SBT fishery than it may realize. For in the abstract, Korea has just as much right to fish for SBT as Japan does, while Indonesia, most if not all of whose take of SBT occurs in its own [EEZ], has as a coastal State even more of a legal stake in the fishery.

Applicants do not for a moment deny the threat to the stock from third-party fishing. But the threat from extra fishing is cumulative, and Japan’s EFP is the newest and largest element of it, undertaken in full knowledge of the pressure already placed on the stock by other significant participants in the fishery.

Expanding on the discussion of the absent third party objection to admissibility in the applicants’ Reply, Mr Serdy said of the present case that it was

*a fortiori* by comparison with the *Nauru* case. As in that case, to the extent that the obligations of Indonesia and Korea are concurrent with Japan’s, no finding on their legal obligations is needed as a basis for the Tribunal’s decision on our claims against Japan. … [S]ince Indonesia and Korea have not been acting in concert with Japan, the consequences for them of a judgment that Japan has breached its obligations are, at most, tangential. A generally related set of facts such as we have here is not the same as a relationship of logical or legal dependence.

Referring specifically to two passages in the dissenting opinion of Judge Schwebel in the *Nauru* case, Mr Serdy argued that

If this arbitration does go to a judgment on the merits, Indonesia and Korea will still have the right, after it as before it, for their nationals to fish for SBT on the high seas

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1434 *Supra*, text at n 1422.
1435 Oral submissions of counsel for Australia, Mr Serdy, Transcript for 8 May 2000, *supra* Ch III n 666, at 189-190.
1437 *Nauru* case, *supra* n 1425, Dissenting Opinion of Judge Schwebel, ICJ Reports 1992, p.329 at 331 (“What is dispositive is whether the determination of the legal rights of the present party effectively determines the legal rights of the absent party”) and 335:

The Court should give weight to the intensity and not to the timing or logical derivation of the effects in question. If the legal interests of a third State will not merely be affected but effectively determined by the Court’s judgment, the Court should not proceed to give judgment in the absence of that third State.
provided only they do so consistently with UNCLOS. The most that can occur, as an incidental effect of the Tribunal’s Order, is that its reasoning may well afford them a better indication than they had before of the extent of that right. They may be able to assess more accurately the legal risk they may be running, in terms of the relevant UNCLOS provisions, especially if they were hypothetically to increase the tonnage of SBT they take. Whether or not they modify their behaviour accordingly, the extent of the right will itself remain unaltered and can hardly be said to be thereby effectively determined. That is far from being the very subject matter of the decision, to return to the celebrated passage in the *Monetary Gold* case.\(^{1438}\)

Because the tribunal found that it lacked jurisdiction, it did not need to consider the competing arguments as to admissibility of the claims, of which the third-party issue was one, hence its Award expressed no view on them. It is possible, however, that Korea’s relatively rapid progress thereafter towards accession to the 1993 Convention may have been hastened by the knowledge that its high seas catch of SBT had become the subject of international legal scrutiny.

### 6 The Annex VII arbitral tribunal’s Award on jurisdiction

The arbitral tribunal constituted under Annex VII to UNCLOS issued its Award on Japan’s objections to its jurisdiction on 4 August 2000. It decided that it lacked jurisdiction to hear the merits of the case and accordingly revoked the provisional measures prescribed by ITLOS. It noted *obiter*, however, that revocation of the ITLOS Order did not mean that the parties might disregard the effects of that Order or their own decisions made in conformity with it. Recalling the parties’ statements before it about the progress they had made in narrowing their differences, the tribunal reminded them that under the 1993 Convention they remained under an obligation to seek to resolve those differences and emphasised that they should refrain from any unilateral act that might aggravate the dispute before it had been fully resolved.\(^{1439}\)

\(^{1438}\) Oral submissions of counsel for Australia, Mr Serdy, Transcript for 8 May 2000, *supra* Ch III n 666, at 194-195.

\(^{1439}\) Annex VII Tribunal Award, *supra* n 1336, at 1391-1392 (paragraphs 67-70).
The Annex VII tribunal rejected Japan’s argument that the case was moot: Australia and New Zealand no longer accepted an experimental fishing program of 1500 tonnes by the time Japan moved to do so, but even if that offer were today accepted, it would not be sufficient to dispose of their dispute, which concerns the quality as well as the quantity of the EFP, and perhaps other elements of difference as well, such as the assertion of a right to fish beyond TAC limits that were last agreed. Japan now proposes experimentally to fish for no more than 1500mt, but it has not undertaken for the future to forego [sic] or restrict what it regards as a right to fish on the high seas for Southern Bluefin Tuna in the absence of a decision by the Commission for the Conservation of Southern Bluefin Tuna upon a total allowable catch and its allocation among the Parties.\footnote{Ibid., at 1386 (paragraph 46).}

It did not need to decide the question of the justiciability of scientific matters, which went to admissibility, but observed \textit{obiter} that its analysis of provisions of UNCLOS that bring the dispute within the substantive reach of UNCLOS suggests that the dispute is not one that is confined to matters of scientific judgment only.\footnote{Ibid., at 1391 (paragraph 65).}

On the relationship between UNCLOS and the 1993 Convention, the Tribunal recognised that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. … The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention.\footnote{Ibid., at 1387-1388 (paragraph 52).}

Expressing scepticism about the consequence of Japan’s argument that the obligations of UNCLOS as to SBT no longer bound the parties to the 1993 Convention \textit{inter se} but did still bind them as against all other States Parties to UNCLOS, the tribunal went on:
Nor is it clear that the particular provisions of the 1993 Convention exhaust the extent of the relevant obligations of UNCLOS. In some respects, UNCLOS may be viewed as extending beyond the reach of the CCSBT.\textsuperscript{1443}

It identified a number of UNCLOS obligations not found in the 1993 Convention “operative even where no TAC has been agreed in the CCSBT and where cooperation in the Commission has broken down”, which it was prepared to view as in force even where no measures had become binding under the 1993 Convention. Moreover, a dispute concerning the interpretation and implementation of the latter “will not be completely alien to the interpretation or application of UNCLOS for the very reason that the CCSBT was designed to implement broad principles set out in UNCLOS.”\textsuperscript{1444}

On jurisdiction, the Annex VII tribunal began its reasoning by finding that the dispute, while centred on the 1993 Convention, was “a single dispute arising under both Conventions.”\textsuperscript{1445} It then proceeded to determine whether the prerequisites to its jurisdiction under UNCLOS Part XV had been met. Characterising the 1993 Convention as an agreement by the parties to seek settlement of the dispute by a peaceful means of their own choice within the meaning of Article 280, the Annex VII tribunal next considered whether the requirements of Article 281, paragraph 1 had been satisfied. It found the first condition, of no settlement having been reached by the agreed alternative means, met by the “prolonged, intense and serious” negotiations conducted under Article 16 of the 1993 Convention. There was no obligation in that provision either to resort in succession to each of the listed means, nor “to negotiate indefinitely while denying a Party the option of concluding for purposes of both Articles 281(1) and 283 that no settlement had been reached.”\textsuperscript{1446}

As to the second condition, however, that the agreement “does not exclude any further procedure”, the Annex VII tribunal took the view that Article 16 of the 1993

\textsuperscript{1443} Ibid., at 1388 (paragraph 52).
\textsuperscript{1444} Ibid.
\textsuperscript{1445} Ibid. (paragraphs 52 and 54).
\textsuperscript{1446} Ibid., at 1389 (paragraph 55).
Convention excluded the dispute settlement procedures of UNCLOS Part XV, so that this condition was not satisfied. Although there was no express exclusion of other dispute settlement procedures, the tribunal found that this was not necessary for the purposes of Article 281, paragraph 1. Rather, since under Article 16 the consent of all parties to the dispute was necessary for it to be heard by an arbitral panel or the ICJ, absent such consent the Parties were obliged to continue to seek resolution of the dispute only by the peaceful means there listed, to the exclusion of all other mechanisms. Emphasising the consensual nature of the dispute settlement process under the 1993 Convention, despite the absence of any express exclusion of any procedure, the Annex VII tribunal read into Article 16 an intention on the part of its parties for this to be the sole avenue for settling disputes *inter se* concerning SBT, so removing such disputes from the compulsory processes of UNCLOS.\(^{1447}\) The tribunal concluded that Article 16 accordingly excluded “any further procedure within the contemplation of Article 281(1) of the LOS Convention.”\(^{1448}\) As a result, the tribunal held that it had no jurisdiction to proceed to the merits of the case.\(^{1449}\)

Sir Kenneth Keith dissented from this analysis. His view was that Article 16 of the 1993 Convention was not an agreement to resolve disputes by another method for the purposes of UNCLOS Article 281, paragraph 1, since it did not prescribe any particular method. In any event, he found that Article 16 only applied to disputes concerning the 1993 Convention and did not necessarily apply to disputes concerning UNCLOS.\(^{1450}\) Despite the central place within UNCLOS of the compulsory dispute settlement scheme, to which the exceptions were well defined, Sir Kenneth was prepared to concede that Article 16 could impliedly exclude UNCLOS Part XV if it

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\(^{1447}\) *Ibid.* (paragraph 57). As the Annex VII Tribunal saw it, the fact that the 1993 Convention included an annex detailing its own arbitral process reinforced its reasoning.

\(^{1448}\) *Ibid.*, at 1390 (paragraph 59).

\(^{1449}\) *Ibid.*, at 1391 (paragraph 65).

\(^{1450}\) Separate Opinion of Justice Sir Kenneth Keith, (2000) 39 *ILM* 1395, at 1396-1397 (paragraph 8). At 1397 (paragraph 12) Sir Kenneth added: “That the disputes may or may not also concern the interpretation or implementation of the [1993 Convention] is beside the point.”
were capable of deciding all disputes among its parties under both the 1993 Convention and UNCLOS, but in the absence of “strong and particular wording” to that effect, this was not the case.\textsuperscript{1451}

The Award has been widely criticised, most forcefully by Colson and Hoyle, who describe its interpretation of Article 281, paragraph 1 as “questionable” and “based on a view of compulsory dispute settlement under the LOS Convention that is not widely shared.”\textsuperscript{1452} They see Judge Wolfrum’s view in the \textit{MOX Plant Case}, that

\begin{itemize}
  \item Colson and Hoyle, \textit{supra} Ch VI n 1299, at 76. The nub of their argument is at 68-70: they see the flaw in the Annex VII Tribunal’s approach as lying not in its exegesis of Article 281(1) of UNCLOS, but in its interpretation of Article 16 of the 1993 Convention, in which no intention to exclude UNCLOS Part XV procedures is evident. Among their criticisms is that the Annex VII Tribunal’s view that the dispute under the 1993 Convention was identical to that under UNCLOS may have led it astray, since the standards and elements for cooperation and the parties’ obligations under the two treaties were not necessarily the same. If so, the 1993 Convention might not be another “peaceful means” to settle the UNCLOS dispute, since its terms did not deal with the specific alleged breaches of UNCLOS; the fact that it was negotiated by three interested States to conserve and manage SBT did not necessarily mean that they intended to make it the sole vehicle for the settlement of all disputes concerning the species. Moreover, if Article 281 were intended to have the broad meaning the Annex VII Tribunal gave it, Article 282, which provides that Part XV is displaced by another agreement that prescribes different compulsory procedures leading to a binding outcome, would not be necessary, as the same result would be produced anyway by the broad interpretation of Article 281. A further criticism was that the inferences drawn by the Annex VII Tribunal, though possible, are not in fact consistent with the reality of international fishery negotiations. Consensual dispute settlement provisions find their way into conventions such as the [1993 Convention] because there is no consensus among the parties to make the obligations undertaken therein subject to compulsory dispute settlement, not because the parties agree in any affirmative sense to deny compulsory jurisdiction under the LOS Convention for alleged violations of that Convention.

They find “a profound confusion” in paragraph 63 of the Award which justifies its conclusion by reference to the absence from many ocean-related agreements of compulsory dispute settlement mechanisms. It was precisely in order to overcome this unsatisfactory state of affairs that compulsory mechanisms were sought and to a great extent achieved by the drafters of UNCLOS:

\begin{itemize}
  \item In many regional ocean-related agreements,…states in Japan’s position will not agree to compulsory dispute settlement procedures, and countries in Australia and New Zealand’s
\end{itemize}
any intent to exclude Section 2 of Part XV must be “expressed explicitly” in alternative dispute resolution provisions,1453 as better aligned with the intent of the negotiators of UNCLOS and most of its States Parties.

They highlight the Annex VII tribunal’s view that because substantial categories of disputes are or may be excluded by Section 3 of Part XV, “UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions.”1454 While there can be no quarrel with this conclusion, nor with the statement in paragraph 62 of the Award that if parties wish to contract out of Part XV inter se, Article 281, paragraph 1 allows them to do so:

This general consideration supports the conclusion, based on the language used in Article 281(1), that States Parties that have agreed to seek settlement of disputes concerning the interpretation or application of UNCLOS by peaceful means of their own choice are permitted by Article 281(1) to confine the applicability of section 2 of Part XV to cases where all parties to the dispute have agreed upon submission of their dispute to such compulsory procedures.

they attack the Annex VII tribunal’s interpretation of the provision as permitting compulsory dispute settlement under UNCLOS to be defeated by consensual position must decide whether it is better to create institutional arrangements with only consensual dispute settlement possibilities to address the specifics of a particular set of circumstances. This problem is commonplace and it is global. Perversely, if compulsory dispute settlement is the sole consideration, Australia and New Zealand would have been better off not having a CCSBT to address the specifics of southern bluefin tuna conservation and management.

Accord on the last two points the submissions to the Annex VII tribunal of counsel for Australia, Professor Crawford, Transcript for 8 May 2000, supra Ch III n 666, at 139-140 (on the perverse consequences of a finding against jurisdiction) and counsel for New Zealand, Mr Mansfield in the course of the Applicants’ surrebuttal, in Second Round Presentation of Australia and New Zealand, May 11, 2000 (hereinafter Transcript for 11 May 2000), archived under the item of 7 May 2000 at <www.icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (visited on 23 June 2008), at 54-56 (on dispute settlement in international fisheries treaty negotiations).

1453 MOX Plant Case, supra n 1398, Separate Opinion of Judge Wolfrum, ITLOS Reports 2001, p. 131 at 132.

1454 Annex VII Tribunal Award, supra n 1336, at 1390 (paragraph 62).
arrangements even where there is no clear manifestation that the parties intended this. They regard this as substantially not in keeping with the intent of the negotiators of the Convention. From the outset, the effort at the Third U.N. Conference on the Law of the Sea was to establish a comprehensive dispute settlement framework relating to activities in the world’s oceans. To be sure, Section 3 of Part XV excludes a range of issues from the Convention’s compulsory dispute settlement system. Just as it was necessary to provide for a wide range of dispute settlement fora to overcome the predispositions of certain states to certain institutions, it was also necessary to carve out the exceptions to compulsory dispute settlement found in Section 3 in order to achieve international consensus on the entire Convention package. Importantly, certain key categories of issues were not excluded by Section 3, including disputes concerning living resources beyond coastal state jurisdiction (and southern bluefin tuna is certainly in this category)…

Commenting that [t]he approach of the Annex VII Tribunal, which in many ways mirrored Japan’s arguments, loses sight of the fact that the compulsory dispute settlement mechanism of [UNCLOS] is part of a package of issues and that there were many trade-offs to reach…a Convention that provides for compulsory dispute settlement on matters relating to the conservation and management of living resources of the high seas. they draw attention to the provisional measures phase of the MOX Plant Case heard by ITLOS a year later. Although the dispute as a whole between Ireland and the United Kingdom involved several treaties, ITLOS found that there was prima facie jurisdiction under Part XV of UNCLOS; in particular, the dispute before the Annex VII tribunal concerned UNCLOS alone. Similarly, ITLOS expressed a narrow view of Article 282, restricting it to agreements that provide for dispute settlement with regard to the “interpretation or application of this Convention.”

1455 Colson and Hoyle, supra Ch VI n 1299, at 67.
1456 Ibid., at 71.
1457 Ibid., at 72-73.
1458 MOX Plant Case Order, supra n 1398, at 106 (paragraph 52).
1459 Ibid. (paragraph 48).
The test of whether the dispute settlement mechanism under another agreement involves an interpretation or application of UNCLOS is whether it is capable on its face of resolving the UNCLOS dispute; the subject matter of the agreement is irrelevant. Thus ITLOS declined to follow the SBT case, in which the Annex VII Tribunal had found that the same dispute arose under both UNCLOS and the 1993 Convention, deciding instead that the matter before it was a dispute under UNCLOS that other agreements did not regulate unless they mentioned UNCLOS by name or it fell into a specifically mentioned class of treaties.\footnote{\textit{Ibid.} (paragraph 53).} Colson and Hoyle call for the Award not to be regarded as a precedent but instead to be limited to the specific facts of the case,\footnote{Colson and Hoyle, \textit{supra} Ch VI n 1299, at 70.} and conclude that ITLOS itself would be right to depart from the Annex VII tribunal’s reasoning regarding Article 281(1) in the SBT case. Judge Wolfrum, for example, observed (Separate Opinion of Judge Wolfrum, \textit{supra} n 1453, at 131-132) that the United Kingdom’s interpretation of Article 282 defeated the objective of Part XV of UNCLOS. Since more than one treaty might bear upon a single dispute, which could have diverse outcomes depending upon what treaty were invoked, “an intention to entrust the settlement of disputes concerning the interpretation and application of the Convention to other institutions must be expressed explicitly”. Judge Treves wrote (Separate Opinion of Judge Treves, ITLOS Reports 2001, p. 137 at 138 (paragraph 4)) that Article 282, reinforcing States’ “general freedom…to utilize whichever means of compulsory adjudication are available under treaties in force for them” was thus unlike Articles 281 and 283, which “set out obstacles to the possibility of resorting to compulsory adjudication in general.” Indeed (at 139 (paragraph 6)), had ITLOS come to the opposite conclusion on \textit{prima facie} jurisdiction, the dispute, though about the interpretation or application of UNCLOS, “would have been left to be considered in separate parts by different courts or tribunals, and taken away from the only tribunal competent to deal with it in its entirety.” By contrast, while Judge Anderson “retained doubts” as to whether an Annex VII tribunal’s jurisdiction could ultimately be sustained, he was prepared to uphold it \textit{prima facie} in the provisional measures phase on the basis of the applicable tests for Articles 282 and 283, which were whether these articles “obviously exclu[ed]” the jurisdiction of the Annex VII tribunal: Separate Opinion of Judge Anderson, ITLOS Reports 2001, p. 124 at 125.
“appears to have taken steps to direct the MOX Plant case away from Southern Bluefin Tuna case reasoning.”

7 Resolution of the dispute

a The SBT Scientific Research Program

Following the Award, Japan advised Australia and New Zealand that it wished to see a return to consensus and cooperation in the CCSBT. Proposing high-level negotiations for that purpose, Japan indicated that it did not intend to conduct any further experimental fishing unilaterally. In the subsequent negotiations it was agreed that the way to resolve the disagreement about the appropriate nature and extent of any experimental fishing was to engage independent external scientists to devise a scientific program to reduce the uncertainties concerning the SBT stock.

At a special meeting of the CCSBT in November 2000, the parties adopted terms of reference for the external scientists and agreed that whatever scientific program the external scientists recommended would become the CCSBT’s decision unless there was agreement to alter it. On this basis New Zealand the following month lifted the port ban it had imposed on Japanese SBT vessels at the commencement of the dispute.

At its next meeting in April 2001 the CCSBT adopted the scientific research program developed by the independent scientists. Providing for a wide range of research activities to improve understanding of the SBT stock, the program centred on work

1462 Ibid., at 74.
1463 Mansfield, supra n 1340, at 365.
1464 See “Development of a SBT Scientific Research Program including a Scientific Fishing Component by the CCSBT External Scientists” (Attachment L to CCSBTSM3 Report), in CCSBT Blue Book 2001, supra Ch I n 242, 139 at 141.
1466 CCSBT7 Report, supra Ch III n 449, at 4 (paragraph 12).
to determine the actual catch of SBT, to develop a more effective stock assessment model and a fish tagging program to provide a better indication of stock levels. It also contemplated the placing of observers on SBT fishing vessels to monitor their catch. At the same meeting the Republic of Korea indicated that it expected to be able to accede to the 1993 Convention towards the end of 2001. It was also this meeting that adopted the Resolution creating an Extended Commission and Extended Scientific Committee to allow Taiwan’s participation in the CCSBT’s work.

Although it would be an exaggeration to say that this resolved for all time disagreements about the measures necessary to manage the SBT stock, as a degree of difficulty and controversy is inevitable about TAC and national allocations, the agreed scientific research program has in time produced a much improved basis for decision-making. This culminated in the adoption of a management strategy at the CCSBT’s 2005 meeting, despite the fact that for other reasons the strategy could not be implemented and work on a replacement for it is underway.

b The 711 tonnes “lost” to Japan under the ITLOS Order

The Annex VII tribunal’s lifting of the ITLOS provisional measures led to renewed controversy over how to treat the 711 tonnes of commercial catch Japan had forgone in part-compliance with the two-year catch limit under that Order: was it entitled to reclaim it, or was the situation covered by the tribunal’s dictum on not disregarding the effects of decisions made in conformity with the Order?

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1468 CCSBT7 Report, supra Ch III n 449, at 5 (paragraph 21).
1469 Ibid. (paragraph 23). The resolution is reproduced infra at Appendix D.
1470 CCSBT-EC4 Report, supra Ch I n 248, at paragraph 69.
1471 See supra Ch VI, text accompanying nn 1331-1332.
1472 Annex VII Tribunal Award, supra n 1336, at 1391 (paragraph 67).
the settlement of the dispute Australia and New Zealand agreed that in 2001 Japan would be able to add half of this amount, or 356 tonnes, to its commercial catch.\footnote{See the Hon Wilson Tuckey MP, Minister for Fisheries, Forestry and Conservation, “Tuckey Announces End to Southern Bluefin Tuna Dispute with Japan” (Press Release No AFFA01/42TU, 29 May 2001).}

It is submitted, however, that it is wrong to view any of the 711 tonnes as catch that Japan again became entitled to take as a result of the decision on jurisdiction. That would be so only if Australia and New Zealand had lost the case on the merits. As it was, the decision left standing, although incapable of being decided or enforced, their claim for repayment by Japan of a further 2,951 tonnes (so that it would have repaid in full the total of 3,662 tonnes of experimental catch in 1998 and 1999), alongside Japan’s claim that it had never been obliged to pay back anything. Japan’s demand to retake the 711 tonnes was hence logically no more persuasive than an equivalent demand by Australia and New Zealand that Japan pay back the remaining 2,951 tonnes they claimed it owed the fishery. In these circumstances it would have been more in keeping with the compromise spirit necessary for settlement for the \textit{status quo} to be frozen by both sides abandoning their claims against each other.

\textbf{c The new-old quota of 2003}

The unanimity of the Scientific Committee report in August 2001\footnote{CCSBT-SC6 Report, supra Ch I n 291.} was not sufficient to prevent a continuation of the pattern in quota negotiations when the report was considered by the Eighth Meeting of the CCSBT. Japan again demanded an increase, this time of 500 tonnes to be shared \textit{pro rata} among Members, which was resisted by the other parties, resulting once more in no TAC and national allocations being set.\footnote{CCSBT8 Report, supra Ch I n 30, at 70 (paragraphs 70-81); Attachment N-2 to CCSBT8 Report, supra Ch IV n 738. While there appears to have been substantial agreement on a “provisional catch limit based on current catch levels” (CCSBT8 Report, paragraph 75), with the uncertainty surrounding the Indonesian catch there was ambiguity as to what the “current” level actually meant; thus in the absence of an agreement on national allocations (paragraph 81).} Indonesia’s catch, according to Japan, was not the 1,500
tonnes estimated by the Scientific Committee but 500 tonnes; half of the difference should be distributed among the existing Members and the rest retained for stock recovery. Australia countered that it was “unteifiable for CCSBT members to be insisting on increasing their own catches while expressing justifiable concern about increasing catches by others.”

At the Ninth Meeting in 2002 Japan stated that in setting the TAC “account needed to be taken of both the Scientific Committee’s recommendation and socio-economic issues”. It believed that, even if the TAC were set at the level of the 2001 catch, there would be a surplus within it that could be reallocated to existing Members’ national allocations. Japan also said it might request further adjustments to national allocations based on the outcome of the review of the monitoring program of Indonesia’s catch to be conducted by the Extended Commission. This drew apparent support from Taiwan, but from no other Members, so that for a sixth successive year no agreement on TAC and national allocations was reached.

Agreement drew closer in April 2003 with the conclusion of participants at the Indonesian Catch Monitoring Review Workshop that, with improvements in dockside monitoring having resolved many of the uncertainties, “current Japanese import data should not be used to estimate total Indonesian SBT catch from no TAC was formally set. Nor is it clear whether Japan envisaged that the 500 tonnes should be divided among only the original three members, or whether Korea, newly acceded, should share in the increase, or both Korea and Taiwan should do so.

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1476 Attachment N-2 to CCSBT8 Report, supra Ch IV n 738.
1477 Attachment N-1 to CCSBT8 Report, supra Ch IV n 738, at 143.
1478 CCSBT-EC1 Report, supra Ch I n 293, at 24 (paragraph 77).
1479 Ibid., paragraph 76.
1480 Ibid., paragraph 80.
monitored landings.” Finally, at the Tenth Meeting a TAC of 14,030 tonnes was adopted, allocated as follows:

<table>
<thead>
<tr>
<th></th>
<th>Tonnes</th>
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<tbody>
<tr>
<td>Australia</td>
<td>5265</td>
</tr>
<tr>
<td>Japan</td>
<td>6065</td>
</tr>
<tr>
<td>Korea (Republic of)</td>
<td>1140</td>
</tr>
<tr>
<td>New Zealand</td>
<td>420</td>
</tr>
<tr>
<td>Taiwan (Fishing Entity of)</td>
<td>1140</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>14030</strong></td>
</tr>
</tbody>
</table>

In addition a global allocation of 900 tonnes was made to cooperating non-members, of which 800 tonnes would be offered to Indonesia. The remaining 100 tonnes was to accommodate other non-member countries; the Philippines were mentioned, but South Africa was not.

Note that the allocations of the three original parties are exactly the same as in 1989-1997, i.e. the level for which Australia and New Zealand had consistently argued in the intervening years but which Japan had rejected. It is ironic that while Australia and New Zealand in fact won the argument, given the belated acknowledgment by Japan of the impossibility of meeting the 1980-by-2020 target for parental biomass, their position ultimately prevailed for an entirely unrelated reason: the glut of SBT on the Japanese market.

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1482 CCSBT-EC2 Report, supra Ch II n 353, at 24 (paragraph 51).

1483 Supra Ch I, text following n 275.
8 Issues left unresolved because the case did not go to the merits

a Best scientific evidence (design of the experimental fishing program and analysis of its results)

It will be recalled that Japan’s experimental fishing sought to reduce the uncertainty in the interpretation of CPUE by collecting catch and effort data from area/month combinations in which no recent commercial fishing had taken place, in order to estimate the ratio of relative density in areas not fished commercially to the density in areas that would be fished under normal circumstances. According to Polacheck, there were numerous problems with Japan’s proposed methods for analysing and interpreting the experimental fishing results. These included the fact that the ratio concerned was unlikely to be constant spatially, temporally or across all age classes, confounding any extrapolation to other areas and past years. Moreover, estimates of the ratio would depend on their spatial and temporal scales, the criteria used to define fished and unfished areas and the model used to calculate SBT densities in the area not fished in the experiment. From the 1998 results, very different values for the ratio could be obtained depending on how these factors were dealt with.\footnote{Polacheck, supra n 1340, at 289-290.}

Further, Japan’s experimental design had no mechanism to ensure that sampling was distributed representatively throughout the area and time period of the experiment. The vessel deployment scheme did not constrain where half the vessels fished, and the other half had only minimal constraints. As a result, the actual experimental effort of 1998 was highly concentrated in or very close to the commercially fished area, only 3 per cent of the total effort in the experiment occurring 120 miles or more – that is, twice the length of an average longline – from the commercially fished area (see Map 2 on the next page).

More bizarrely yet, after refinement of its original proposal for experimental fishing, the reason Japan gave for the experiment that finally took place was simplified to the
Map 2. The area for which the Japanese 1998 experimental fishing intended to estimate the relative density of SBT in fished and unfished 5° squares and the relative amount of effort within different portions of this area.\textsuperscript{1485}

\begin{center}
\includegraphics[width=0.5\textwidth]{map.png}
\end{center}

point of absurdity. The simplified reason was to disprove the variable squares hypothesis. This was open to legal attack in two obvious ways and a more subtle one. First, Australia and New Zealand had never asserted the hypothesis reflected reality, even though their models that accorded it some weight appeared to have predictive power (a fact that would not have changed even if the hypothesis were definitively shown to be false). Secondly, even if Australia and New Zealand had maintained the hypothesis, an experimental catch of 6,000 tonnes over three years would not have been necessary to refute it; catching a single SBT in an unfished square for the relevant month would have sufficed. Thirdly, if, as Japan proposed, as a result of being disproved the variable squares hypothesis had to be removed from the models, the effect of the remaining hypotheses would by definition have been to

\footnotesize{\textsuperscript{1485} Taken from Polacheck, supra n 1340, at 290. Shaded black are the squares fished regularly in the 1990s. The adjacent vertical strips represent the area within 1° and 2° of those fished squares, while the grey region represents the rest of the area.}
shift the prognoses for the stock towards the optimistic end of the spectrum – and this irrespective of the actual state of the stock disclosed by the experiment.\footnote{1486}

For all the understandable reluctance of legal tribunals to evaluate competing scientific judgements, if the applicants had succeeded in proving the facts recited in the previous paragraph, it is difficult to see how the Annex VII tribunal could have stopped short of drawing the necessary conclusion that the experiment itself, and any measures said to flow from its results, would have failed to meet the standard of being based on the “best scientific evidence available” laid down in UNCLOS Article 119, paragraph 3(a). Japan would, it seems, have found it necessary to argue that “best…available” means “best that the commercial fleet can be persuaded to gather”. Commercial catch needs would thus be acting as a constraint on scientific ones rather than vice versa.\footnote{1487}

\footnote{1486} Note also the argument of Polacheck, \textit{supra} n 1340, at 289 that, although the relative weights given to the different CPUE models contributed to the differences in the parties’ estimates of the probability of recovery, they were not the principal source of differences in the projection estimates. The weights assigned to the different CPUE models by Australia and Japan were in fact quite similar, and the estimated probabilities from the 1998 assessment were largely insensitive to them. Moreover, even if the constant squares hypothesis, which was the most optimistic interpretation of CPUE, could be shown to be correct, the Australian scientists’ estimate of the recovery probability from the 1998 assessment was 36\% and it was 40\% for their New Zealand counterparts.

\footnote{1487} In proposing a CPUE component for the Scientific Research Program to settle the dispute, Japan noted that “the participation and collaboration of fishing industries are essential and their own decision with regard to a survey should be respected.” See \textit{Report of the Scientific Meeting for Development of a SRP for the CCSBT and Overview of Progress on Stock Assessment, 12-15 November 2000, Canberra, Australia, Japan}, in CCSBT Blue Book 2001, \textit{supra} Ch I n 242, 275 at 280 (paragraph 22). By contrast Australia and New Zealand favoured minimising the constraints on the scientists: \textit{ibid.} at 279 (paragraphs 16 and 17 respectively). Note Japanese unease about using boats from non-member countries to catch scientific quota, whereas Australia’s view was that the program’s objective should be to carry out research that would be most effective in reducing uncertainties, hence nationality of vessels should not be an obstacle to participation: \textit{ibid.} at 281 (paragraph 33).
As a matter of law, it is hard to disagree with Polacheck’s conclusion that catch taken in the name of science cannot be an end in itself. Had the SBT case gone to the merits, the main issue would have been the standard and burden of proof required for experimental fishing. More specifically, could substantial increases in catches be justified on scientific grounds in the absence of agreement on the validity of the experimental design to provide meaningful results and of any specific management framework in which those results would be used, and without demonstrating that the experiment, even if conclusive, would substantially change the existing scientific advice? Polacheck laments that, while the precautionary approach would require that the onus of proof lie on the proponents of taking increased risk, the Annex VII tribunal’s denial of its own jurisdiction under UNCLOS was a lost opportunity to set international standards. He concedes, though, that the provisional measures phase of the case before ITLOS provides some guidance.\footnote{1488}{Polacheck, supra n 1340, at 293.}

An interpretation of this to require favouring a conservative measure over a risky one may be too simplistic: possibly sufficient for depleted stocks, but it may not be appropriate to give it normative character for all stocks. Where scientific modelling is at issue, a compound condition suggests itself: if one model robust to error in assumptions favours conservation, and a less robust one does not (robust in the sense that slightly different assumptions generate slightly, not significantly different outcomes), then the law too should support the robust model.\footnote{1489}{Note that the Japanese models were indeed less robust: Japan’s estimated probability in 1997 of recovery of the parental stock to its 1980 level by 2020 was 79%, as against 36% for Australia and 29% for New Zealand, but additional Japanese analyses with a “slightly different” VPA structure gave 20%: CCSBT3(1) Report, supra Ch I n 102, at 14-15. In Australia’s view this indicated that the state of VPAs given high weights by Japan (only 24 of the 216 agreed on by the Scientific Committee), and thus the projection results based on only 12 of these 24, did not provide a robust measure of the status of the stock. Japan excluded the other 192 because it considered these to be outside the range of plausible hypotheses, although it was alone in this view: ibid., at 17; CCSBT-SC2 Report, supra Ch I n 240, at 7 and 9.}
While one can accept Japan’s view that “[e]xcessive conservatism of not accepting any additional risk under any circumstance will be adverse for the achievement of maximum sustainable use of resources”, which Japan regarded as “clearly supported” in the 1993 Convention, if this was intended to be a reference to the Australian and New Zealand position, then it is no more than a caricature of it. The latter States’ position was not one of unwillingness to accept any additional risk, but of doing so only if the additional risk could be shown to produce worthwhile benefits.

A trap into which the law should not fall is to require averaging in situations of scientific disagreement where the true position is much more likely to be closer to one of the contending camps’ view than somewhere in the middle: “an average is hardly likely to be correct when at least one of its components is wrong.”

b The relationship between conservation and optimum utilisation

The question here is whether the goals of conservation and optimum utilisation mentioned in Article 64 of UNCLOS are of equal legal importance or priority, or whether one – conservation – is logically anterior to the other and must first be assured before weight can be given to optimum utilisation. According to Koers, full utilization and conservation are not opposing concepts. The central concern of conservation is to prevent the waste of the living resources of the sea by over-exploitation and to preserve their productivity for the future. This implies that any long term full utilization programme must take into account the demands of conservation, since the long range productivity of a stock is normally adversely affected by exploitation beyond its maximum biological limits.

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1490 Ibid., at 16.
1491 Stock Assessment Workshop Report, supra Ch VI n 1260, at 222 (paragraph 21).

Accord Stephens, supra Ch VI n 1305, at 188:

Encouraging the parties to a dispute to reach a compromise may well produce more harmonious relations but it will not necessarily lead to optimal environmental outcomes. In many cases it may serve to restore (or enhance) comity but only at the expense of the protection and preservation of the environment.

1492 Koers, supra Ch I n 285, at 45.
Where the balance should lie may depend on how the stock’s biomass stands in relation to $B_{msy}$. For stocks significantly below that level, it is submitted that the primary obligation is to restore the biomass to that level, for the benefit not only of the present participants in the fishery but of all who might potentially wish to enter it. The role of optimum utilisation in these circumstances is at most to govern the speed of the rebuilding, i.e. to take economic factors into account but not to the extent of stopping or reversing it.\textsuperscript{1493} This is connected with the argument advanced in the concluding chapter that, if the existing participants wish to maintain the fishery at its depleted level for economic reasons, they have no legal answer to new entrants.\textsuperscript{1494} Only by active steps to rebuild the stock, which entails restricting their own short-term take, can they mount even a moderately convincing case for restraint by third parties who have not themselves contributed to the depletion.

\subsection*{c Meaning of high seas freedom of fishing “subject to” coastal States’ rights, duties and interests}

Finally, it may be asked to what extent a judgment on the merits in the dispute might have confirmed whether Australia and New Zealand as coastal States had a greater say in the management of the SBT fishery than Japan. More pertinently, what might the answer have implied for the relative rights of Indonesia and South Africa on one hand, as new entrant coastal States, and Korea, Taiwan and the Philippines, as new entrants to the high seas fishery on the other, vis-à-vis each of the original three parties to the 1993 Convention both singly and collectively?\textsuperscript{1495} Sooner or later a

\textsuperscript{1493} While it would have been in the applicants’ interests to adopt this view, Japan tended to argue that the two goals were in contradiction to, and must thus be balanced with, each other – see its contrast of optimum utilisation with conservation in CCSBT6(1) Report, \textit{supra} Ch I n 219, at 5 (paragraph 24) and its advocacy of optimum utilisation in general, and as a reason for raising the TAC by 3000 tonnes in particular, in Attachment C to CCSBT6(1) Report, \textit{supra} Ch V n 1157, at 18-19.

\textsuperscript{1494} \textit{Supra} Ch VI, section C.

\textsuperscript{1495} See in this vein Iceland’s strong statements on ABT, \textit{supra} Ch III nn 573 and 574, and Judge Oda’s questioning of the “duties” element in particular, \textit{supra} Ch III n 657, at 750-751.
case can be expected to be litigated on this point, but in the meantime it remains a fruitful, if speculative, area for research.
APPENDIX B

SBT fishery science

Maximum sustainable yield – the surplus production model of fisheries

Although fisheries management decisions must take the form of explicitly or implicitly fixed numbers, fish stock assessment is an inexact science, hence the advice to managers from scientists on the likely biological consequences of proposed management actions will inevitably be affected by considerable uncertainty. Managers thus find themselves balancing the conflicting pressures to avoid on one hand the short-term economic loss of unnecessarily forgoing catches and on the other hand the risk of depleting the stock, leading to longer-term economic losses. The history of fisheries management has revealed a propensity to favour short-term economic gain even in the face of evidence, in the form of actual depletion of many stocks, that the risk of this latter outcome is high.\textsuperscript{1496} This is so despite the fact that the mathematical models describing this risk are relatively simple.\textsuperscript{1497}

The surplus production model usually associated with Schaefer relies on a number of assumptions that, although not likely to be borne out in practice, are nonetheless plausible approximations of reality.\textsuperscript{1498} The model posits that fish populations in the long run and barring major environmental shocks tend to stay in dynamic balance, losses from mortality both from natural sources (predation, disease, old age) and by fishing being balanced by accessions from increased numbers and growth of

\textsuperscript{1496} Polacheck, \textit{supra} Appendix A n 1340, at 283.
\textsuperscript{1498} The following description is drawn from Schaefer, \textit{supra} Ch I n 77, at 672-673.

Scientists defend these simplifications on the basis that attempting to account for large numbers of variables produces models of such complexity that they cease to assist understanding of the underlying natural phenomena: B.J. Rothschild and A. Suda, “Population Dynamics of Tuna”, in J. Gulland (ed), \textit{Fish Population Dynamics} (Chichester: John Wiley & Sons, 1977), 309 at 317.
individual fish. If the rate of loss increases (or falls), so too does the rate of renewal, so as to restore the balance. For each size of population, there is a certain average natural rate of increase, that is, the rate is a function of the population size. The catch is also some function of both population size and fishing effort. The Schaefer model assumes that: (a) the instantaneous (logarithmic) rate of fishing mortality is directly proportional to fishing effort, however measured; and (b) the natural rate of increase of a fished stock at a given instant is directly proportional to the difference between its biomass at that instant and the average virgin biomass (that is, the environmental carrying capacity under average conditions with no fishing). The rate of increase is zero both when the population is zero and at virgin biomass, reaching a maximum at some intermediate value. A quadratic relationship is a

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1499 Fish grow throughout their lives, albeit at ever slower rates as they age; the widely used von Bertalanffy growth equation posits that the growth rate reaches zero when the fish is infinitely old. (See G.P. Kirkwood, “Estimation of von Bertalanffy Growth Curve Parameter using both Length Increment and Age-Length Data”, (1983) 40 Canadian Journal of Fisheries and Aquatic Sciences 1405 at 1406 where the equation in the form suitable for deriving age from length is given at equation (1); it is described at 1405 as “ubiquitous in the fisheries literature” and a discussion of its application to SBT follows at 1407-1409.) If a smaller number of fish are competing for the same prey, this could be expected to be reflected in empirical evidence such as an increase in the growth rate. Just such an increase has been observed for SBT since about 1980 as the stock has been reduced: Attachment 6 to CCSBT-ESC3 Report, supra Ch I n 45, at 204. The phenomenon was first noted in Report of the 9th Meeting of Australian, Japanese and New Zealand Scientists on Southern Bluefin Tuna, Hobart, Australia, 17-22 September 1990 (hereinafter 9th Trilateral Scientific Meeting Report), in Trilateral Scientific Meeting Reports Compendium, supra Ch I n 132, 75 at 84.
“reasonably good first approximation”.\footnote{1500} As shown in Figure 2 on the next page, under this model \(B_{\text{msy}}\) is often assumed to be around half of the virgin biomass.\footnote{1501} 

**Figure 2 – the yield function in the production model of fisheries**

Harvesting of fish by humans is thus treated as simply an additional source of mortality by predation, producing a compensatory increase in the rate of renewal to restore the balance at some lower absolute level of biomass. A fishery is said to be in equilibrium when the catch is equal to the replacement yield – that is, the natural \(B_{\text{msy}}\) as half of virgin biomass is described as a “rule of thumb” in D.H. Cushing, *Science and the Fisheries* (London: Edward Arnold, 1977), at 32 and is accepted by some States (see e.g. Canada in ICCAT13 Report, in ICCAT Green Book 1994, *supra* Ch IV n 816, 29 at 39 (paragraph 16a.6)). William W. Fox Jr, “An Exponential Surplus-Yield Model for Optimizing Exploited Fish Populations”, (1970) 99 *Transactions of the American Fisheries Society* 80 substitutes a logarithmic rate of change into the Schaefer model in place of the linear one, leading to the result (at 84) that yield is maximised when the biomass is reduced to \(1/e\) (around 37%, \(e\) being the base of natural logarithms) of the virgin biomass. The \(B_{\text{msy}}\) of 30% to 44% of virgin biomass for New Zealand orange roughy stocks cited by Serdy, *supra* Ch II n 314, at 498n is consistent with this.

\footnote{1500}{Schaefer, *supra* Ch I n 77, at 673. The quadratic nature of the relationship in fact follows necessarily by elementary integral calculus from the assumption of linearity in its rate of change in (b) above.} \footnote{1501}{Again this is true by definition if the equation describing the yield curve is quadratic.}
increase for given levels of population and effort – from which it follows that under
equilibrium the size of the biomass itself is a function of effort, as illustrated by
Figure 1 in Chapter I above.

The Schaefer model takes no account of the age structure of the stock, some
alteration of which is inevitable by fishing and its effect on recruitment. This is
important for SBT for several reasons. Firstly, SBT exhibits age-specific natural
mortality, with mortality higher for young fish and lower for old fish. Secondly,
when parental biomass is reduced to less than half of its unfished level, as that of
SBT has been, it may no longer reliably produce recruits. The risks at low levels
are not symmetrical, one of the main ones for depleted stocks being that in that state
environmental variability can cause an abrupt fall in recruitment and subsequent

As shown in Figure 2, the replacement yield can be low by comparison with MSY for
stocks that are underexploited or overexploited. Ideally the replacement yield would be close to
the MSY, as appears to be the case for South Atlantic albacore (MSY 30,915 tonnes, replacement
yield 29,256 tonnes): Annex 8 to ICCAT18 Report, supra Ch III n 612, at 187 (Report of the
Meeting of Panel 3).

The Beverton-Holt cohort model, which does take account of age structure, is much less
amenable to economic modelling than the Schaefer surplus production model, since cohorts are
rarely harvestable individually: Munro and Scott, supra Ch I n 107, at 625.

The advent of fishing reduces the average age of the stock: W.E. Ricker, “Stock and
Recruitment”, (1954) 11 Journal of the Fisheries Research Board of Canada 559 at 583. This
accords with common sense, as new fish of age 0 replace older fish whose removal from the
ecosystem has made room for them, whatever the age of the latter. Accord Caton et al, supra Ch
I n 36, at 26: harvesting a previously unfished stock reduces the parental biomass, as it is the
accumulated older fish that tend to be caught first in the initial “fish-down” phase of a fishery.
Ricker shows that in the absence of fishing, certain stock-recruitment relationships with random
variations can lead to substantial population oscillations of more or less regular periodicity, but
the effect of even light fishing is to dampen these oscillations, while moderately heavy fishing is
able to eliminate them: at 584-585. Contrary to the Schaefer model, for oscillating stock-
recruitment relationships light to moderate fishing can even increase the size of the stock from its
unexploited average: at 583.

Attachment 6 to CCSBT-ESC3 Report, supra Ch I n 45, at 204.

Infra, text at n 1519.
collapse of the parental biomass. While present techniques do not permit prediction of how low parental biomass can be driven before collapse occurs, or quantification of the probability of collapse at a given level, fish stocks are known where this has occurred as the result of overfishing at low stock sizes, the cod stock off Atlantic Canada being a widely cited example. Nonetheless, the lower the stock’s level and the longer it remains so, the higher the risk of such abrupt recruitment declines. Estimation of this risk requires an equation for the stock-recruitment relationship, but rarely is there information on this at lower stock sizes. Nor at these sizes are recruitment predictions based on past observations necessarily reliable if the natural variability around the predicted recruitment increases relative to higher stock sizes, or the normal processes determining recruitment break down altogether.\textsuperscript{1507}

An SBT recruit to the Australian fishery is 1-2 years old. On the basis of a yield-per-recruit analysis, which provides information on the yield in weight which can be obtained for a given number of recruits to the fishery if fishing commences at different ages and under various effort regimes, the benefits can be compared of harvesting fish when they are young and most plentiful, as against when they are older and larger, but reduced in numbers by natural causes. For SBT, such an analysis indicated that, given the intensity of fishing during the 1970s, Australia’s yield would be maximised by fishing as soon as fish were available, because migration of SBT away from the Australian fishery tended to negate any benefit obtained by waiting until the fish were older to catch them. From a global perspective, however, yield would be increased if young fish were protected.\textsuperscript{1508}

\textsuperscript{1507} See Polacheck, supra Appendix A n 1340, at 292; Caton et al, supra Ch I n 36, at 26; 13th Trilateral Scientific Meeting Report, supra Ch I n 46, at 5 (paragraph 25).

\textsuperscript{1508} Caton et al, supra Ch I n 36, at 18-19. Thus in the report of its inquiry the IAC cited CSIRO estimates that if age at first capture were increased from 1 to 5, global catch sustaining the parental biomass at 220,000 tonnes could be increased from 33,000 tonnes to 52,000 tonnes: IAC, supra Ch I n 70 at 25. See also the comparison of the relative effects of surface catch and longline catch, supra Ch I n 132 and accompanying text.
Shortcomings of the MSY

The MSY concept itself has been seen as increasingly problematic over the years. Although the difficulties with it were known well before the conclusion of the Third UN Conference on the Law of the Sea, a qualified version of MSY is the standard used in UNCLOS.  Apart from having no necessary relation with maximised economic yield, Knight in 1976 listed several complications of MSY both as concept and as management goal: the need to take into consideration the year classes of fish caught in order to ensure adequate future recruitment, the uncertainty engendered by variations in environmental and other factors, the impossibility of managing more than one of two or more stocks in a prey-predator relationship so as to take the MSY (and even to do so for one stock may reduce the yield of the ecosystem as a whole below what would be otherwise be possible), and the danger of overfishing the stock through failure to take bycatch into account or from undetected breaches of the limits by the regulated fleets.  MSY is also inherently risky: even if the scientific estimate is accurate, in every second year on average the stock is being reduced, and if there is a run of bad years in random environmental variability, the reduction will go on for several years and its cumulative effect could become significant.  If in addition the scientific estimate errs on the side of optimism, of which there is a 50 per cent chance, then catching the MSY as so estimated will in most if not all years in fact result in net removals from the stock, compounding the risk.

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See extracts from Articles 61(3) and 119(1)(a), supra Ch I, text between nn 79 and 80.

Knight, supra Ch I n 52, at 8, 35 and 39.

But if effort rather than catch is limited by reference to MSY, the catch would vary somewhat with the state of the stock. Taking its lead from the coastal State, Canada, NAFO for some years based its changing catch limits on $F_{0.1}$ (Applebaum, supra Ch I n 124, at 284), which is defined as fishing effort at that point on the yield/effort curve where the gradient is one tenth of that at the origin. (Although the quadratic approximation, supra n 1500 and accompanying text, would make this 90% of $F_{\text{msy}}$, yielding 99% of the MSY, according to Applebaum this level of effort yielded catches “significantly below” the MSY, in some cases only two thirds of it. Overestimation of the size of the stock and of the MSY might explain the discrepancy, if effort was thereby inadvertently allowed to go over the true $F_{\text{msy}}$.)
Scientists have hence tended to disparage and dismiss MSY as a worthwhile goal, most memorably in Larkin’s 1977 epitaph:

M.S.Y.
1930s–1970s

Here lies the concept, MSY.
It advocated yields too high.
And didn’t spell out how to slice the pie.
We bury it with best of wishes.
Especially on behalf of fishes.
We don’t know yet what will take its place.
But hope it’s as good for the human race.¹⁵¹²

Yet in its qualified form it has exhibited a notable tenacity in fishery treaties, for which there are two reasons beyond the status of UNCLOS itself. One is that MEY is not necessarily a better management goal for international fisheries than MSY: it would require a rule for deciding among the different MEYs of States participating in the fishery. (By contrast, MSY, elusive though it is, at least has the same meaning for all.) The other is that, even were there such a rule, under the dynamic economic model of the fishery presented in Chapter I,¹⁵¹³ B* is not necessarily greater than B_{msy}. The evidence supports the acerbic MSY definition attributed to Gulland:¹⁵¹⁴

A quantity that biologists say does not exist. That economists say would be irrelevant if it did exist. It is, in short, the most important concept in fisheries management.

So it arguably remains, albeit now under Annex II to the UN Fish Stocks Agreement as a limit rather than a target reference point, answering or avoiding the objection of “advocat[ing]” yields too high” as well as those listed above by Knight.

¹⁵¹³ That is, once discount rates are taken into account: supra Ch I n 107.
Virtual population analysis

Unlike the position in ICCAT, where MSY is specified as the management goal in the 1966 Convention, CCSBT scientific advice is not given in terms of the MSY (though this may change if a new management strategy is adopted) but rather in terms of the likelihood of rebuilding the parental biomass to the level of particular years under various levels of catch. For this the technique of virtual population analysis (VPA) is used. VPA projections can show, for a given set of

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1515 Supra Introduction n 6; Article IV(2)(b) speaks of the “maintenance of the populations of tuna and tuna-like fishes in the Convention area at levels which will permit the maximum sustainable catch and which will ensure the effective exploitation of these fishes in a manner consistent with this catch”; by contrast Article 3 of the 1993 Convention, supra Introduction n 5, requires only the “conservation and optimum utilisation” of SBT.

1516 This method predates the CCSBT, having been first adopted in 1993 as part of the mid-term management strategy, when the managers put the questions infra at n 1541 to the scientists.

1517 According to the definition of technical terms used by ICCAT, supra Ch I n 194, at 164-165, a VPA proceeds by analysing the catches from a given cohort (fish of a stock spawned in the same year, also known as a year class) over its life in the fishery, as follows:

If 10 fish were caught per year from the 1968 year class for ten successive years from 1970 to 1979, then 100 fish would have been caught from that year class during its life in the fishery. Since 10 fish were caught during 1979, then at least 10 fish must have been alive at the beginning of that year. Similarly there must have been at least 20 fish alive at the beginning of 1978, at least 30 at the beginning of 1977 and at least 100 at the beginning of 1970. The VPA calculates the number of fish that must have been alive if some fish also died from causes other than fishing. If the instantaneous natural mortality rate was known in addition to the 10 fish caught per year in the fishery – and normally this is known within a fairly small range – then the VPA calculates the number that must have been alive each year to produce a catch of 10 fish per year in addition to those that died from natural causes. If the fishing mortality rate for the last year for which data are available is known, then the exact abundance of the year class can be determined in each year if the catches are known with certainty.

Thus VPA eventually allows an estimation of the number of recruits produced each year. Until the development of the technique of counting rings on the otolith (see J. Thorogood, “Age and Growth Rate Determination of Southern Bluefin Tuna, Thunnus maccouyi, Using Otolith Banding”, (2006) 30 Journal of Fish Biology 7), the age of individual fish was formerly difficult to assess directly, becoming progressively more so as size increases. Instead the length composition of the catch was determined by sampling, from which it was possible to estimate the numbers of fish caught at each length of the entire catch. These lengths were then converted to ages through an accepted age-length relationship. See Kirkwood, supra n 1499; Caton et al,
assumptions, how the population size and structure would change under various
catch combinations. They are, however, extremely sensitive to the information
inputs used to derive them, particularly the form of the stock-recruitment
relationship. Since the real relationship is unknown, any projection is simply a
numerical representation of the assumptions used, both in the VPA and in the stock-
recruitment relationship.¹⁵¹⁸

For SBT, the drawback of VPA is that it can take several years to determine the
impact of recent fishing on recruitment. In the interim, it may not be possible to
detect a fall in recruitment sufficiently early to permit remedial reductions in catch
that could prevent the fall becoming substantial, making it all the harder to achieve
stock recovery. The VPA results were open to various interpretations owing to the
uncertainty in input data, but as the models for SBT were progressively refined over
the 1980s, a reasonable understanding developed of the extent to which this
uncertainty influenced the results, and the downward trend in parental biomass was
consistent notwithstanding the uncertainties. VPAs presented at the 1989 scientific
meeting showed that the parental biomass in 1988 was at worst 8 per cent and at best
25 per cent of that in 1960, which itself was below the unfished level by an unknown

¹⁵¹⁸ supra Ch I n 36, at 25. The otolith is a calcareous concretion in the inner ear of fishes, laid down
probably continuously in concentric layers which in most species have slight but observable
colour or density variations. The cause of these variations is unknown, but probably related to
the passage of the seasons either directly or, through cyclical changes in diet, indirectly: Everhart
and Youngs, supra n 1497, at 63. For some problems and shortcomings of cohort analysis see
374-377.

¹⁵¹⁸ Caton et al., supra Ch I n 36, at 26. In 1994 the scientists reported that the relationship
between parental biomass and recruitment at the recent low levels of parental biomass was
unknown for SBT, with all VPAs used in the assessment showing a parental biomass of about
50% of the lowest level for which reasonably precise recruitment estimates were available. Some
compensation (i.e. increased recruitment per unit of parental biomass) was observed in the
estimated recruitment between 1965 and 1989, for which the Japanese and Australian VPAs
indicated very similar trends: 13th Trilateral Scientific Meeting Report, supra Ch I n 46, at 2
(paragraphs 8 and 9) and 4 (paragraph 15).
amount, and confirmed previous predictions that a further decline for at least another year or two was inevitable.\footnote{\textsuperscript{1519}}

In the 1990s the accuracy of VPAs for SBT came to depend on the rate of population decline and the correctness of the starting value of the fishing mortality rate, which required additional information in the form of indices of abundance or fishing mortality rates (commonly referred to as tuning indices). Indices of age-specific catch and effort data from the Japanese longline fishery were the primary source of information for tuning, but analysis of these data was limited by their aggregated nature, all catch and effort within 5° squares of latitude and longitude being pooled month by month. Worse still, the size data used to estimate the age distribution of the catches were pooled quarter by quarter in blocks of 5° of latitude and 10° of longitude, not all of which, even at this level of aggregation, were sampled. In addition, data related to changes in fleet efficiency were lacking, making it difficult to distinguish the effects of changes in abundance from changes in efficiency in the observed catch rates. Nevertheless, the standard statistical analyses performed on these aggregated data indicated significant year-to-year variation in relative catch rates or densities among areas and seasons.\footnote{\textsuperscript{1520}}

**Scientific advice to managers**

The report of the scientists’ 1988 meeting summarises the history of their joint endeavours.\footnote{\textsuperscript{1521}} Although at previous meetings they had stressed that SBT parental biomass levels below those in 1980 were likely to cause a fall in recruitment, the evidence had been insufficient to conclude that this was occurring. Unsure of their ability to detect a decline early enough to advise managers on actions to reverse it, they had recommended substantial reductions in the global catches of SBT. In 1986, as a consequence of the accumulating catch and effort data and improvements in

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\begin{itemize}
  \item \textsuperscript{1519} Caton \textit{et al}, supra Ch I n 36, at 24. See also supra Appendix A n 1343.
  \item \textsuperscript{1520} Polacheck, supra Appendix A n 1340, at 285-287.
  \item \textsuperscript{1521} 7th Trilateral Scientific Meeting Report, supra Ch I n 132, at 42-43.
\end{itemize}
stock assessment methods, the scientists became more concerned about a possible fall in recruitment. In 1987 the scientists recommended *inter alia* that

1. Managers should recognise that there is a risk associated with maintaining the current catch limits. If catches were reduced, the risk would decrease.

2. Governments of the three countries take immediate steps to ensure that future major reductions in catch, if necessary, can be implemented quickly and effectively.\(^\text{1522}\)

By 1988, all VPA results were indicating that by 1979 biomass had fallen to a dangerously low proportion of its unexploited level, with recruitment having begun to decline before 1980 under some plausible assumptions, or fluctuated without apparent trend under others. For the period 1979-1987 the VPAs again uniformly showed that the parental biomass had suffered a considerable additional decline. Largely due to the high Australian catches of the early 1980s, under most plausible combinations of assumptions, at the then current level of catches, both parental biomass and recruitment were predicted to decline even further over the next few years, leading to a collapse of the population.

Though they described the need to decrease catches as “clear cut”, the scientists declined to specify the extent of the required reduction. Citing the uncertainty about the dynamics of the SBT population, they stated that only with a complete cessation of catching could they be confident of the stock’s recovery – though even with zero catch there existed biological mechanisms that meant recovery could not be guaranteed. Correctly anticipating that managers would prefer not to reduce catches to zero, the scientists unanimously advised that immediate reductions of at least half of current catches should be made to all sectors of the fishery, and not reversed until significant improvement to the SBT stock’s status could be demonstrated.\(^\text{1523}\)


\(^\text{1523}\) 7th Trilateral Scientific Meeting Report, *supra* Ch I n 132, at 43-44. Even this was accepted only with difficulty by Japan in the 1988 management meeting: stating (7th Trilateral...
Though there was no dissent from this diagnosis, and major catch reductions were
duly imposed in 1988 and 1989, from that point it was the prospects for the stock’s
recovery that divided the scientists. At the 1989 scientific meeting no agreement
could be reached, with different Australian and Japanese views presented in the
report. The Australian argument was that the exclusion from the Japanese scientists’
analysis of historic and future Indonesian, Korean, Taiwanese and New Zealand
catch, and of SBT bycatch in other fisheries, had the effect of underestimating the
extent of the decline in parental biomass to 1988 and afterwards. Moreover, their
assumption that recruitment did not decline on average between 1960 and 1975 was
optimistic and had led them to overestimate the likely stock recovery. The New
Zealand scientist present concluded that there was a risk of driving the parental
biomass below a critical mass at which it could sustain itself.

Management Meeting Report, supra Ch II n 359, at 6) that it “could not proceed to determine
management measures without exploring stock projections” which it expected to be more
substantive, suggesting that the scientists be given more time “to refine analyses and come up
with more definite recommendations”. It listed a string of apparently positive indicators “which
prove that the 1982 SBT cohort might not have been as damaged as is thought”. It suggested
“other factors associated with oceanography and climate may have influenced the stock situation
and enquired if the scientists had considered all those factors. Clutching at straws to forestall
catch reduction, Japan in effect even disowned its own scientists: it “questioned the objectivity of
the scientific report in choosing particular years so as to present more pessimistic stock
forecasts.” See also October 1989 Draft Summary Record, supra Ch II n 369, at 5, where Japan
believed that catches up to 1980 were at or below the MSY for the SBT fishery (implicitly
blaming the subsequent decline on the large Australian catches of small fish in 1982).

It may not be coincidental that, as pointed out by Polacheck, supra Appendix A n 1340,
at 285, while the earlier catch limits reduced catches and fishing mortality rates from the surface
fisheries, it was not until the 1989 fishing year that the catch limits became restrictive for the
Japanese longline fleet. That is, until 1989 the Japanese fishery had not been able to reach its
catch limit.

8th Trilateral Scientific Meeting Report, supra Ch I n 158, at 53 and 61.

Ibid., at 60. This would be contingent on the SBT stock being subject to critical
derpensation at very low levels, which was not asserted. If for a stock there is a biomass level
below which the stock cannot sustain itself, so that it inevitably dies out, it is said to be subject to
“critical depensation” – on depensation models see supra Ch II n 417 and Clark, supra Ch I n 83,
Little changed in the following years. In both 1990 and 1991 Japanese scientists took the view that the probability was very high that the stock would increase under current catch levels and even under slightly higher ones. The Australian and New Zealand scientists’ view was that the stock might well already be in the process of recruitment collapse. Because the information was ambiguous, all were prepared to recommend that no increase in catch should be considered until there was clear scientific evidence of recovery in the parental stock. On this point, however, while the Japanese scientists believed that the most reasonable range of assumptions led to projections which showed stock increases, their Australian and New Zealand

at 17. In other words the growth curve exhibits the property that for very small values of the population the growth rate is negative, meaning that the stock can be condemned to extinction by reducing it below the level at which the growth becomes negative, since beyond that point of minimum viability not even complete cessation of fishing will prevent its extinction. An example of a natural depensatory mechanism given by Ricker, supra n 1504 at 602 is predation on very vulnerable fry by fish that eat their fill of them and move on, however many or few the fry may be. Note that the Schaefer model, supra nn 1498-1502 and accompanying text, disregards depensation: Clark, supra Ch I n 83, at 50.

1527 9th Trilateral Scientific Meeting Report, supra n 1505, at 91; Report of the Tenth Meeting of Australian, Japanese and New Zealand Scientists on Southern Bluefin Tuna, Wellington, New Zealand, 23-29 September 1991 (hereinafter 10th Trilateral Scientific Meeting Report), in Trilateral Scientific Meeting Reports Compendium, supra Ch I n 132, 99 at 102 (paragraphs 10 (Japan) and 11 (Australia and New Zealand)). The latter meeting nonetheless saw agreement (ibid., at 99 (paragraph 3)) that there had been a continuous decline from 1980 to 1989 in the parental stock; a sharp decline from 1980 until 1986 or 1987, and thereafter a slight increase, in the pre-adult stock; an increase in small fish availability in many fishing grounds, an increase in CPUE and the reappearance of middle-sized fish on many fishing grounds, indications that escapement from the Australian surface fishery is increasing, but uncertainty whether present recruitment will guarantee recovery of the parental stock.

Similar recommendations against increases in catch were made in 1992 and 1993: 11th Trilateral Scientific Meeting Report, supra Ch II n 348, at 5 (paragraph 19) and 12th Trilateral Scientific Meeting Report, supra Ch II n 348, at 5-6 (paragraph 22) respectively.
counterparts found a broader range of assumptions plausible; some of the projections these yielded resulted in declines.1528

One of the factors in the long stasis initially was the contradictory signals from successive years of data. The Australian and New Zealand scientists recommended in 1991 that current catch levels should not continue beyond 1992 unless there was sufficient evidence to refute a strong fall in recruitment since the mid-1980s.1529

That evidence initially came in 1992, when new information showed that recruitment collapse had not occurred up to 1988, although concern remained about continued

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1528 10th Trilateral Scientific Meeting Report, supra n 1527, at 101 (paragraph 6). In the management meeting New Zealand said that its 1991 catch of only 41% of its limit was “primarily thought to be a result of the poor state of the resource”: Draft 1991 Summary Record, supra Ch V n 1101, at 2. By contrast, the picture provided by Japan to ICCAT was based only on its own optimistic assessments: Panel 3 heard that the trilateral scientific meeting determined that projections from current catch levels would see the parent stock “reach its lowest level in 1990 or 1991”, after which “[m]any projections predict recovery, even under increased catches of up to 20,000 [tonnes], with the parent stock attaining 1980 biomass levels by 2010”, with the possible revision of the catch limits maintained since 1989 “currently being considered as a result of this year’s scientific discussions”: Report of the Meetings of Panels 1 to 4 (Annex 6 to Proceedings of the Seventh Special Meeting of the Commission, Madrid, November 12-16, 1990 (hereinafter ICCATSM7 Report)), in ICCAT, Report for biennial period, 1990-91 Part I (1990), 60 at 71-72. A somewhat fuller story was told to the Standing Committee on Research and Statistics, with “socio-economic factors” (for which Japan was arguing at the time: supra Ch II, text between nn 341 and 344) given as an additional reason for revising the catch limits, along with the scientists’ recommendation “that there be no increase in present catch levels until there is clear scientific evidence of a recovery in the parental stock”: Report of the Standing Committee on Research and Statistics (SCRS) (Madrid, November 5-9, 1990) (Annex 10 to ICCATSM7 Report)), ibid., 137 at 193.

1529 10th Trilateral Scientific Meeting Report, supra n 1527, at 102 (paragraph 11). Again ICCAT was told only one side of the story: Panel 3 heard that lowest level should now be reached “in 1991 or soon thereafter”: Reports of the Meetings of Panels 1-4 (Annex 6 to ICCAT12 Report), in ICCAT Green Book 1992, supra Ch I n 245, 51 at 57, while the Standing Committee on Research and Statistics was informed (Annex 16 to ICCAT12 Report, supra Ch I n 245, at 135) that “most of the VPA projections show parent stock recovery. It suggests that the current regulations are effective for long-term southern bluefin tuna stock recovery.”
decline and the possibility of a future abrupt fall while the parental biomass remained at its very low level.\textsuperscript{1530} The report stated that

decreasing catch levels will increase the speed and possibility of recovery to the 1980 level of parental biomass. Maintaining the present catch level is expected to result in the low parental biomass seen in the 1980s continuing for many more years, so that the risk of an abrupt and unpredictable decline in recruitment would remain at about its present high level. A decrease in catch level is preferable from the biological viewpoint.\textsuperscript{1531}

Despite this, in view of the earlier catch reductions by the three States and the desirability of catch reductions by others exploiting the stock, the meeting stopped short of recommending a change in trilateral catch limits, merely encouraging changes to fishing practices to decrease targeting of SBT less than 15kg and greater than 100kg, though it called for “urgent and decisive management action” to be taken in the event of significant further declines. Instead, the meeting recommended that a strategy be developed for management action “to improve the chances of rebuilding the parental biomass to 1980 levels.”\textsuperscript{1532}

At the 1993 scientific meeting, the advent of direct ageing techniques for SBT\textsuperscript{1533} led to significant revisions of the growth assumptions.\textsuperscript{1534} It thus became evident (with

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\item \textsuperscript{1530} 11th Trilateral Scientific Meeting Report, \textit{supra} Ch II n 348, at 3 (paragraph 7).
\item \textsuperscript{1531} \textit{Ibid.}, at 5 (paragraph 17). The point in the last sentence was repeated the following year: 12th Trilateral Scientific Meeting Report, \textit{supra} Ch II n 348, at 4 (paragraph 16).
\item \textsuperscript{1532} 11th Trilateral Scientific Meeting Report, \textit{supra} Ch II n 348, at 5 (paragraphs 17 and 18). This was reflected in the report of the following year’s meeting, when the recommendation against raising catches until the parental biomass returned to the 1980 level, \textit{supra} n 1527, was newly qualified by the words “unless this is part of an agreed stock rebuilding strategy that can be shown to have a high probability of returning the stock to biologically safe levels.”
\item \textsuperscript{1533} \textit{Supra} n 1517.
\item \textsuperscript{1534} 12th Trilateral Scientific Meeting Report, \textit{supra} Ch II n 348, at 1 (paragraph 2) and 3 (paragraph 7). Specifically, the growth rate in the first year of life was faster than assumed in previous stock assessments; the overall growth rate of SBT had increased between the 1960s and 1980s; and the average size at maturity, about 145 cm, was larger than assumed in previous analyses (about 130 cm). The change in growth was substantial. For example, fish 100 cm long, which in the past had been taken as being about 5 years old, were now interpreted as being aged
“very serious and detrimental” consequences for prospects of stock rebuilding) that several recent year-classes had not contributed to stock rebuilding.\textsuperscript{1535} The reinterpretation meant that some positive signs previously reported were no longer as apparent: some year-classes that had passed through the fishery since the large reduction in surface fishery catches were well represented in the longline fishery as young fish, but had not resulted in rebuilding of older age groups in subsequent years. This was thought to be due to the reduced size of these year-classes and the large catches taken from them. VPA results showed no convincing evidence of recent increases in the number of young mature fish, with parental biomass was still decreasing steadily to at least 1992, rather than declining slowly or having become stable as previously thought. The combination of recent increases in the longline catch of juvenile SBT and the continuing, if reduced, Australian surface fishery limited the potential for recovery of the parent stock.\textsuperscript{1536}

A management strategy was first proposed in 1993 when the scientific meeting called for a stock rebuilding strategy to be developed as a matter of urgency,\textsuperscript{1537} a

\begin{flushright}
\textsuperscript{1535} 12th Trilateral Scientific Meeting Report, supra Ch II n 348, at 2 (paragraph 7).
\textsuperscript{1536} Ibid., at 3-4 (paragraphs 8-12). The growth revision also affected the recruitment projections, with the decline during the early 1980s to about 50% of the 1980 level by 1985 being “faster and greater than expected from standard stock-recruitment relationships, raising serious doubts about the ability of the population to recover under current catch levels.” Projections based on the improved information about growth indicated that the population was expected to continue declining under constant catches, with only a small probability that the parental biomass would increase from the current low levels by 2010, though for most assumptions about the stock-recruitment relationship there was “some possibility of recovery” by that year. Projections using the previous growth assumptions had indicated a probable slow recovery, with the parental biomass expected to remain below its 1980 level for about 15 years: ibid., at 4 (paragraphs 13 and 14).
\textsuperscript{1537} 12th Trilateral Scientific Meeting Report, supra Ch II n 348, at 6 (paragraph 23).
\end{flushright}
goal elaborated the following year into a stock rebuilding strategy that “can be shown to have a high probability of moving the stock to biologically safe levels”, with return to at least 1980 levels retained as an objective for rebuilding. In 1992 the three States had set the 1980 level of parental biomass as a reference level for the rebuilding of the stock “as soon as feasible”. They confirmed this in 1993 despite the more pessimistic outlook engendered by the improved understanding of growth and new maturity information and, building on the 1992 framework, developed a Mid-Term Management Strategy for the SBT Fishery, initially for the years 1993-1995. The 1993 management meeting made a start, putting a number of questions to the scientists which they were able to answer the following year.

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1538 13th Trilateral Scientific Meeting Report, supra Ch I n 46, at 6 (paragraph 29).
1539 1992 Conclusion, supra Ch II n 350, at 2.
1540 1993 Conclusion, supra Ch II n 348, at 2 and 27-33 (“Mid-Term Management Strategy for the SBT Fishery”, Attachment D). The strategy was described thus:

1. The objective…is to take management action that will provide for an increase in parental biomass and improve the potential for increase in recruitment over the term.

2. Future adjustments to management measures in the remaining term of the strategy will be determined after consideration of:

   (a) economic and social factors including the costs and benefits of rates of adjustment of management measures

   (b) the results of the scientific review [commissioned at the 1993 meeting]

   (c) advice from the scientific meeting on the questions as set out in Annex I.

1541 “Questions to Scientific Meeting” (Annex I to Attachment D to 1993 Conclusion), in 1993 Conclusion, supra Ch II n 348, 30. The questions were:

1. When the constant catch level from 1995 is varied from 50% to 150% of the 1992 level at 10% intervals, what is the year when the stock condition is estimated to be restored to the 1980 level with 50% and 75% probability?

   Note: this assessment should be made on several sets of plausible assumptions agreed by the scientists (at their January 1994 workshop), of stock recruitment relationships, catch at age matrices, age at maturity and natural mortality and using the two accepted VPA calculation methods.

2. Which variable catch scenarios changing catch annually or on a three-yearly basis, starting in 1995, would provide for greater than 50% and 75% probability of a steady rebuild to 1980 SSB [spawning stock biomass] levels by 2005, 2010, 2015, and 2020?
After the gloom of the 1993 stock assessment, that of 1994 was again optimistic, with the scientists reporting that, although the parental biomass continued its decline to a historically low level in 1993, the VPA results indicated that the quota reductions were having an effect, with fishing mortality rates in the early 1990s being less than those in the 1980s. The surface fishery catch reductions during the 1980s and increased recruitment in the late 1980s had resulted in an increase in the CPUE of the juvenile stock (fish of age 3 to 7) since 1986. There was clear sequential rebuilding in CPUE of juvenile year classes, reaching 6-year-olds in 1993. As the recent VPA recruitment estimates were all “well above the minimum level required to rebuild the stock given current catch levels”, stock

3. Which catch scenarios result in a 50% and 75% probability of recovery of the SSB to 1980 level by 2005, 2010, 2015 and 2020?
4. What catch level would allow a 50% probability for an increase in SSB by 1995?
5. What is the probability of decline of parental biomass from 1995 when adopting each of the various catch scenarios described in the items 1 and 2?
6. What is the minimum change in parental biomass from 1992 that can be detected after the 1995 fishing year?
7. What percentage change in recruitment in the period from 1990 to 1993 can be detected after the 1995 fishing year with confidence as a result of examination of the catch data, tagging and the results of aerial surveys?
8. What are the implications of altering age compositions, particularly the proportion of very small (2-3 years old) and very large (12+ years old) fish in the catch scenarios in question 1 and 2 above?

Responses to “Questions to the Scientific Meeting” asked by the Management Group (Appendix 2 to 13th Trilateral Scientific Meeting Report, supra Ch I n 46), 11 at 12-13.

13th Trilateral Scientific Meeting Report, supra Ch I n 46, at 8-9 (Appendix 1 (“Status of the stock and fishery indicators”), paragraph 4).

Ibid., at 9 (Appendix 1, paragraphs 5 and 6). By sequential rebuilding is meant the fact that the large increase in 3-year-olds in 1990 could be followed successive years of catch rate data through to SBT aged 4 in 1991, aged 5 in 1992 and aged 6 in 1993, though its magnitude depended on the interpretation of the 1993 data. Sounding a cautionary note, the scientists added that the simultaneous increase in 1993 in the catch rate of all ages of SBT from 3 to 10 suggested a general increase in catchability superimposed on the sequential rebuilding of age groups, i.e. only an unknown part of the increased catches reflected an actual rise in abundance.
recovery would be “assured” if these recruitments and catches were maintained during the 1990s. If the stock-recruitment relationship were highly compensatory, then these recruitment levels could be expected to be maintained on average, but not if it were only moderately compensatory.\footnote{\textit{Ibid.}, at 5 (paragraph 26). The Japanese analysis used two stock-recruitment relationships (one highly compensatory, the other moderately so) within one particular VPA and one interpretation of catch rates, while the Australian analysis used a range of VPAs and catch rate interpretations with a single moderately compensatory stock-recruitment relationship; \textit{ibid.}, at 4 (paragraph 17). Under a highly compensatory relationship high recruitment is maintained, on average, even at very low parental biomass levels. A moderately compensatory relationship predicts that average recruitment decreases as parental biomass decreases. While the Australian scientists regarded the highly compensatory relationship as an unlikely description of average recruitment for SBT, their Japanese counterparts considered both highly and moderately compensatory relationships equally likely. With a moderately compensatory relationship the parental biomass was expected to remain below the 1980 level for many more years, while under the highly compensatory hypothesis recovery would be faster. See \textit{ibid}. (paragraphs 23-25).}

Most of the VPAs predicted an increase in parental biomass for 1994. This was due to continued relatively constant catch rates of fish aged 12 and older, confounding the assumptions used in previous years, which had projected that by 1993 there would be insufficient fish of these ages to sustain the catches actually observed.\footnote{13th Trilateral Scientific Meeting Report, \textit{supra} Ch I n 46, at 3 (paragraphs 10 and 11). Even so, almost all VPAs indicated that parental biomass had continued to decline, albeit at a slowing rate, up to 1993. Though the Japanese and Australian VPAs differed in their estimates of the actual amount of parental biomass, they gave similar trends of change in that biomass. Its absolute scale, while difficult to estimate from VPA, did not greatly influence the trend: \textit{ibid.}, at 2-3 (paragraph 9). All 1994 VPAs showed that the recruitment each year from 1986 to 1989 was higher than the low level of 1985, though with higher uncertainty surrounding the more recent of these estimates. The interpretations ranged from a pattern of substantial increase to 1989 to a moderate increase to 1987 followed by smaller declines in each of 1988 and 1989 to a level slightly above that in 1985: \textit{ibid.}, at 3 (paragraph 13) and 10 (Appendix 1, paragraph 8).}

Given the estimated age structure of the current population, all projections indicated
that the parental biomass would increase from the 1993 level over the next few years if the age composition of the long-line catch remained similar to the past.\footnote{Ibid., at 4 (paragraph 18). Subsequent change would depend on the level of recruitment of the early 1990s and the catch levels in the next few years, most projections indicating a levelling off or slight decline in five or six years. This dip would last for about five years and be followed by increases or decreases depending on the year-class strength of fish spawned in the 1990s and the catch level: ibid. (paragraph 19).}

In the years leading up to the 1998-2001 dispute over Japan’s unilateral experimental fishing program, the SBT stock assessments continued to be characterised by large uncertainties in the input data and the biological parameters, which were ultimately to culminate in the dispute. These included recent catch levels, natural mortality rates, age of maturity, different models for estimating the size of the older age classes of the population and the CPUE indices, which remained the primary tuning indices for the VPA. In the 1998 assessments, varying assumptions about the mean age of maturity made the trend in the parental biomass after 1994 uncertain, but all results for ages of maturity greater than age 8 indicated that it had continued to decline. In addition, recruitment was estimated to have markedly declined from the late 1960s to about a third of the 1960 level. The 1998 data also indicated that there was no increase in recruitment between 1988 and 1992 (the most recent cohort for which a direct estimate was available because of the VPA time lag), but CPUE and other indices for the 1992 to 1998 cohorts suggested that recruitment had remained low.\footnote{Polacheck, supra Appendix A n 1340, at 285.}

Because of inconsistencies among the temporal trends in standardised CPUE indices for the different age-classes, a range of possible interpretations, hypotheses and model structures were considered, and weighted averages of the results were used to provide managers with advice on the current and projected stock status. The stock assessments undertaken by national scientific delegations within the CCSBT relied on different sets of hypotheses, model structures and weightings. Even so, they yielded robust conclusions about the status of the stock relative to historical levels,
all indicating that it was highly depleted. The Scientific Committee repeatedly concluded that “the continued low abundance of the SBT parental biomass is cause for serious biological concern”.1549

Stock projections under current catch levels indicated a wide range of possibilities, from rapid recovery to further substantial decline, depending upon which specific hypotheses were used to model uncertainties. The differences depended on the uncertainties considered, the weights assigned to different hypotheses and models, and the criteria (or lack of them) used for rejecting model prediction for lack of fit with the observed data. Thus, in 1998, the estimates by Australian and New Zealand scientists indicated a low probability of recovery of 14 per cent or less, while those of the Japanese scientists were in a much higher range: 76 per cent to 87 per cent. The Australian and New Zealand estimates also put at greater than 50 per cent the probability that the parental biomass would continue to decline. Retrospective analyses of the 1998 stock projections indicated that the estimates of probability of recovery decreased when updated with an additional year’s catch and effort data. This was consistent with the pattern of past years, when the projections on which the Scientific Committee had based its advice were repeatedly shown to be overly optimistic in the light of subsequent stock assessment results.1550

The CCSBT was unable to develop an agreed approach for dealing with the underlying disparity and uncertainty in the VPA projection results. The differences in the national delegations’ estimates of the probability of recovery were attributable

1549  Ibid. The phrase is used in the 1995 and 1998 reports of the Scientific Committee: CCSBT, Report of the first meeting of the Scientific Committee of the Commission for the Conservation of Southern Bluefin Tuna: Report to the Commission, Shimizu-shi, Japan, 10-19 July 1995 (unpublished), at 4 (paragraph 17); CCSBT-SC4 Report, supra Ch IV n 683, at 102 and was also used in the trilateral meeting reports to management in 1992 to 1994: 11th Trilateral Scientific Meeting Report, supra Ch II n 348, at 3 (paragraph 6, “serious” preceded by “very”); 12th Trilateral Scientific Meeting Report, supra Ch II n 348, at 2 (paragraph 6); 13th Trilateral Scientific Meeting Report, supra Ch I n 46, at 2 (paragraph 7).

1550  Polacheck, supra Appendix A n 1340, at 285-286.
to the different weights – which in some cases were zero expressly or by implication – that they assigned to the different hypotheses and models used to quantify the underlying uncertainty in the stock assessments. Over time the major identified factors changed somewhat as new data became available and as the assessment models evolved. In the late 1990s these included the form of the stock-recruitment relationship, natural mortality rates, the model for estimation of the numbers of older fish, interpretation of CPUE as indices of abundance and lack of fit of models to the observed data.1551

Since the end of the dispute the stock assessment reports have again been unanimous, though on occasion they refer to differences of emphasis among the delegations.1552 At first their advice was that since the full surplus was being taken, the stock had an equal chance of growing or declining;1553 but from 2004 they have again turned pessimistic because of successive years of low recruitment.1554 In 2005 the indicators reinforced the evidence of the previous year that the 2000 and 2001 year classes were considerably smaller than their predecessors and taken together convinced the Stock Assessment Group that “there have been at least two very low recruitments”.1555 The spawning biomass was at a “low fraction of its original biomass and well below the 1980 level…[or]…the level that could produce maximum sustainable yield.”1556 It was “highly likely that current levels of catch will results in further declines in spawning stock and exploitable biomass”.1557

1551 Ibid., at 286. By comparison, in 1990 the factors highlighted had also included an unknown stock-recruitment relationship and uncertainty in both the natural mortality rate and the relationship between CPUE and abundance, but at that time the others were catches not fully accounted for, uncertainty in the age composition of the catch and the time lag in estimation of recruitment: 9th Trilateral Scientific Meeting Report, supra n 1505, at 75.

1552 CCSBT-SAG2 Report, supra Ch I n 46; CCSBT-SAG3 Report, supra Ch I n 46; CCSBT-SAG4 Report, supra Ch I n 295; CCSBT-SAG5 Report; supra Ch I n 34.

1553 Supra Ch VI n 1235 and accompanying text.

1554 Supra Ch I, text at nn 298-299.

1555 CCSBT-SAG6 Report, supra Ch IV n 866, at 7 (paragraph 31).

1556 Ibid. (paragraph 36).
The major catch anomalies revealed in 2006 showed that in fact the spawning biomass was between 2.2 and 3.4 times as large as until then believed, but still required substantial cuts from the last TAC of 14,925 tonnes for recovery of the stock to occur. Interpolation between the figures given in the tables produced for various catch scenarios leads to the conclusion that the catch limit of 11,810 tonnes adopted in 2006 is unlikely to have much effect by 2014, but may lead to a modest increase in the parental biomass by 2022. The most recent report, that of 2007, has no new modelling, but states that the evidence is now stronger that the 2002 year class was also weak, and there are conflicting indications as to whether the 2003 and 2004 cohorts have returned to 1990s levels. Recovery of the SBT stock to B_{msy} thus remains a long way off under any management strategy involving continued fishing.

1557  *Ibid.*, at 8 (paragraph 37).
1558  *Supra* Ch I n 278 and accompanying text.
1559  CCSBT-SAG7 Report, *supra* Ch VI n 1331, at 19 (paragraph 94). This did not, however, negate the evidence of poor recruitment in 2000 and 2001 and remaining since below the levels of 1994-98: at 32-33 (paragraph 156).
APPENDIX C

Part I
Convention for the Conservation of Southern Bluefin Tuna

THE PARTIES TO THIS CONVENTION:

CONSIDERING their mutual interest in southern bluefin tuna;

RECALLING that Australia, Japan and New Zealand have already taken certain measures for the conservation and management of southern bluefin tuna;

PAYING DUE REGARD to the rights and obligations of the Parties under relevant principles of international law;


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 purpose of exploring and exploiting, conserving and managing the living resources;

RECOGNISING that southern bluefin tuna is a highly migratory species which migrates through such zones;

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;

ACKNOWLEDGING the importance of scientific research for the conservation and management of southern bluefin tuna and the importance of collecting scientific information relating to southern bluefin tuna and ecologically related species;

RECOGNISING that it is essential that they cooperate to ensure the conservation and optimum utilisation of southern bluefin tuna;

HAVE AGREED as follows:

Article 1

This Convention shall apply to southern bluefin tuna (Thunnus maccoyii).
Article 2

For the purposes of this Convention:

(a) "ecologically related species" means living marine species which are associated with southern bluefin tuna, including but not restricted to both predators and prey of southern bluefin tuna;

(b) "fishing" means:

(i) the catching, taking or harvesting of fish, or any other activity which can reasonably be expected to result in the catching, taking or harvesting of fish; or

(ii) any operation at sea in preparation for or in direct support of any activity described in sub-paragraph (i) above.

Article 3

The objective of this Convention is to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.

Article 4

Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea.

Article 5

1. Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under paragraph 7 of Article 8.

2. The Parties shall expeditiously provide to the Commission for the Conservation of Southern Bluefin Tuna scientific information, fishing catch and effort statistics and other data relevant to the conservation of southern bluefin tuna and, as appropriate, ecologically related species.

3. The Parties shall cooperate in collection and direct exchange, when appropriate, of fisheries data, biological samples and other information relevant for scientific research on southern bluefin tuna and ecologically related species.

4. The Parties shall cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents and vessels of any State or entity not party to this Convention.
Article 6

1. The Parties hereby establish and agree to maintain the Commission for the Conservation of Southern Bluefin Tuna (hereinafter referred to as "the Commission").

2. Each Party shall be represented on the Commission by not more than three delegates who may be accompanied by experts and advisers.

3. The Commission shall hold an annual meeting before 1 August each year or at such other time as it may determine.

4. At each annual meeting the Commission shall elect from among the delegates a Chair and a Vice-Chair. The Chair and the Vice-Chair shall be elected from different Parties and shall remain in office until the election of their successors at the next annual meeting. A delegate, when acting as Chair, shall not vote.

5. Special meetings of the Commission shall be convened by the Chair at the request of a Party supported by at least two other Parties.

6. A special meeting may consider any matter of relevance to this Convention.

7. Two-thirds of the Parties shall constitute a quorum.

8. The rules of procedure of the Commission and other internal administrative regulations as may be necessary to carry out its functions shall be decided upon at the first meeting of the Commission and may be amended by the Commission as occasion may require.

9. The Commission shall have legal personality and shall enjoy in its relations with other international organisations and in the territories of the Parties such legal capacity as may be necessary to perform its functions and achieve its ends. The immunities and privileges which the Commission and its officers shall enjoy in the territory of a Party shall be subject to agreement between the Commission and the Party concerned.

10. The Commission shall determine the location of its headquarters at such time as a Secretariat is established pursuant to paragraph 1 of Article 10.

11. The official languages of the Commission shall be Japanese and English. Proposals and data may be submitted to the Commission in either language.

Article 7
Each Party shall have one vote in the Commission. Decisions of the Commission shall be taken by a unanimous vote of the Parties present at the Commission meeting.

Article 8

1. The Commission shall collect and accumulate information described below:
   (a) scientific information, statistical data and other information relating to southern bluefin tuna and ecologically related species;
   (b) information relating to laws, regulations and administrative measures on southern bluefin tuna fisheries;
   (c) any other information relating to southern bluefin tuna.

2. The Commission shall consider matters described below:
   (a) interpretation or implementation of this Convention and measures adopted pursuant to it;
   (b) regulatory measures for conservation, management and optimum utilisation of southern bluefin tuna;
   (c) matters which shall be reported by the Scientific Committee prescribed in Article 9;
   (d) matters which may be entrusted to the Scientific Committee prescribed in Article 9;
   (e) matters which may be entrusted to the Secretariat prescribed in Article 10;
   (f) other activities necessary to carry out the provisions of this Convention.

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.

4. In deciding upon allocations among the Parties under paragraph 3 above the Commission shall consider:
   (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.

5. The Commission may decide upon recommendations to the Parties in order to further the attainment of the objective of this Convention.

6. In deciding upon measures under paragraph 3 above and recommendations under paragraph 5 above, the Commission shall take full account of the report and recommendations of the Scientific Committee under paragraph 2(c) and (d) of Article 9.

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

8. The Commission shall notify all Parties promptly of measures and recommendations decided upon by the Commission.

9. The Commission shall develop, at the earliest possible time and consistent with international law, systems to monitor all fishing activities related to southern bluefin tuna in order to enhance scientific knowledge necessary for conservation and management of southern bluefin tuna and in order to achieve effective implementation of this Convention and measures adopted pursuant to it.

10. The Commission may establish such subsidiary bodies as it considers desirable for the exercise of its duties and functions.

Article 9

1. The Parties hereby establish the Scientific Committee as an advisory body to the Commission.

2. The Scientific Committee shall:
(a) assess and analyse the status and trends of the population of southern bluefin tuna;

(b) coordinate research and studies of southern bluefin tuna;

(c) report to the Commission its findings or conclusions, including consensus, majority and minority views, on the status of the southern bluefin tuna stock and, where appropriate, of ecologically related species;

(d) make recommendations, as appropriate, to the Commission by consensus on matters concerning the conservation, management and optimum utilisation of southern bluefin tuna;

(e) consider any matter referred to it by the Commission.

3. A meeting of the Scientific Committee shall be held prior to the annual meeting of the Commission. A special meeting of the Scientific Committee shall be called at any time at the request of a Party provided that such request is supported by at least two other Parties.

4. The Scientific Committee shall adopt and amend as necessary its rules of procedure. The rules and any amendments thereto shall be approved by the Commission.

5. (a) Each Party shall be a member of the Scientific Committee and shall appoint to the Committee a representative with suitable scientific qualifications who may be accompanied by alternates, experts and advisers.

(b) The Scientific Committee shall elect a Chair and a Vice-Chair. The Chair and the Vice-Chair shall be elected from different Parties.

Article 10

1. The Commission may establish a Secretariat consisting of an Executive Secretary to be appointed by the Commission and appropriate staff on conditions as may be determined by the Commission. The staff shall be appointed by the Executive Secretary.

2. Until such time as a Secretariat is established, the Chair of the Commission shall nominate from within his or her Government an official to act as Secretary to the Commission to perform the secretariat functions set out in paragraph 3 below for a term of one year. At each annual meeting of the Commission, the Chair shall advise the Parties of the name and address of the Secretary.
3. The Secretariat functions shall be prescribed by the Commission, and shall include the following:

(a) receiving and transmitting the Commission's official communications;
(b) facilitating the collection of data necessary to accomplish the objective of this Convention;
(c) preparing administrative and other reports for the Commission and the Scientific Committee.

Article 11

1. The Commission shall decide upon an annual budget.

2. The contributions to the annual budget from each Party shall be calculated on the following basis:

(a) 30% of the budget shall be divided equally among all the Parties; and
(b) 70% of the budget shall be divided in proportion to the nominal catches of southern bluefin tuna among all the Parties.

3. Notwithstanding the provisions of Article 7, any Party that has not paid its contributions for two consecutive years shall not enjoy the right to participate in the decision-making process in the Commission until it has fulfilled its obligations, unless the Commission decides otherwise.

4. The Commission shall decide upon, and amend as occasion may require, financial regulations for the conduct of the Commission and for the exercise of its functions.

5. Each Party shall meet its own expenses arising from attendance at meetings of the Commission and of the Scientific Committee.

Article 12

The Commission shall collaborate with other inter-governmental organisations which have related objectives, *inter alia*, to obtain the best available information including scientific information to further the attainment of the objective of this Convention and shall seek to avoid duplication with respect to their work. The Commission may make arrangements with such inter-governmental organisations to these ends.

Article 13
With a view to furthering the attainment of the objective of this Convention, the Parties shall cooperate with each other to encourage accession by any State to this Convention where the Commission considers this to be desirable.

Article 14

1. The Commission may invite any State or entity not party to this Convention, whose nationals, residents or fishing vessels harvest southern bluefin tuna, and any coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, to send observers to meetings of the Commission and of the Scientific Committee.

2. The Commission may invite inter-governmental or, on request, non-governmental organisations having special competence concerning southern bluefin tuna to send observers to meetings of the Commission.

Article 15

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.

Article 16

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult
among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

**Article 17**

1. This Convention shall be open for signature by Australia, Japan and New Zealand.

2. This Convention is subject to ratification, acceptance or approval by these three States in accordance with their respective internal legal procedures, and will enter into force on the date of deposit of the third instrument of ratification, acceptance or approval.

**Article 18**

After the entry into force of this Convention, any other State, whose vessels engage in fishing for southern bluefin tuna, or any other coastal State through whose exclusive economic or fishery zone southern bluefin tuna migrates, may accede to it. This Convention shall become effective for any such other State on the date of deposit of that State's instrument of accession.

**Article 19**

Reservations may not be made with respect to any of the provisions of this Convention.

**Article 20**

Any Party may withdraw from this Convention twelve months after the date on which it formally notifies the Depositary of its intention to withdraw.

**Article 21**
1. Any Party may at any time propose an amendment to this Convention.

2. If one-third of the Parties request a meeting to discuss a proposed amendment the Depositary shall call such a meeting.

3. An amendment shall enter into force when the Depositary has received instruments of ratification, acceptance or approval thereof from all the Parties.

Article 22

1. The original of this Convention shall be deposited with the Government of Australia, which shall be the Depositary. The Depositary shall transmit certified copies thereof to all other Signatories and acceding States.

2. This Convention shall be registered by the Depositary pursuant to Article 102 of the Charter of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Convention.

DONE at Canberra on the tenth day of May 1993, in a single original, in the English and Japanese languages, each text being equally authentic.

For Australia:

[Signed:]

SIMON CREAN

For Japan:

[Signed:]

KAZUTOSHI HASEGAWA

For New Zealand:

[Signed:]

EDWARD WOODFIELD

ANNEX FOR AN ARBITRAL TRIBUNAL

1. The arbitral tribunal referred to in paragraph 3 of Article 16 shall be composed of three arbitrators who shall be appointed as follows:
(a) The party commencing proceedings shall communicate the name of an arbitrator to the other party which, in turn, within a period of forty days following such notification, shall communicate the name of the second arbitrator. The parties shall, within a period of sixty days following the appointment of the second arbitrator, appoint the third arbitrator, who shall not be a national of either party and shall not be of the same nationality as either of the first two arbitrators. The third arbitrator shall preside over the tribunal.

(b) If the second arbitrator has not been appointed within the prescribed period, or if the parties have not reached agreement within the prescribed period on the appointment of the third arbitrator, that arbitrator shall be appointed, at the request of either party, by the Secretary-General of the Permanent Court of Arbitration, from among persons of international standing not having the nationality of a State which is a Party to this Convention.

2. The arbitral tribunal shall decide where its headquarters will be located and shall adopt its own rules of procedure.

3. The award of the arbitral tribunal shall be made by a majority of its members, who may not abstain from voting.

4. Any Party which is not a party to the dispute may intervene in the proceedings with the consent of the arbitral tribunal.

5. The award of the arbitral tribunal shall be final and binding on all parties to the dispute and on any party which intervenes in the proceedings and shall be complied with without delay. The arbitral tribunal shall interpret the award at the request of one of the parties to the dispute or of any intervening party.

6. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.
Part II
International Convention for the Conservation of Atlantic Tunas, Article VIII

1. a) The Commission may, on the basis of scientific evidence, make recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch. These recommendations shall be applicable to the Contracting Parties under the conditions laid down in paragraphs 2 and 3 of this Article.

b) The recommendations referred to above shall be made:

   (i) at the initiative of the Commission if an appropriate Panel has not been established or with the approval of at least two-thirds of all the Contracting Parties if an appropriate Panel has been established;
   (ii) on the proposal of an appropriate Panel if such a Panel has been established;
   (iii) on the proposal of the appropriate Panels if the recommendation in question relates to more than one geographic area, species or group of species.

2. Each recommendation made under paragraph 1 of this Article shall become effective for all Contracting Parties six months after the date of the notification from the Commission transmitting the recommendation to the Contracting Parties, except as provided in paragraph 3 of this Article.

3. a) If any Contracting Party in the case of a recommendation made under paragraph 1 (b) (i) above, or any Contracting Party member of a Panel concerned in the case of a recommendation made under paragraph 1 (b) (ii) or (iii) above, presents to the Commission an objection to such recommendation within the six months period provided for in paragraph 2 above, the recommendation shall not become effective for an additional sixty days.

b) Thereupon any other Contracting Party may present an objection prior to the expiration of the additional sixty days period, or within forty-five days of the date of the notification of an objection made by another Contracting Party within such additional sixty days, whichever date shall be the later.
c) The recommendation shall become effective at the end of the extended period or periods for objection, except for those Contracting Parties that have presented an objection.

d) However, if a recommendation has met with an objection presented by only one or less than one-fourth of the Contracting Parties, in accordance with subparagraphs (a) and (b) above, the Commission shall immediately notify the Contracting Party or Parties having presented such objection that it is to be considered as having no effect.

e) In the case referred to in subparagraph (d) above the Contracting Party or Parties concerned shall have an additional period of sixty days from the date of said notification in which to reaffirm their objection. On the expiry of this period the recommendation shall become effective, except with respect to any Contracting Party having presented an objection and reaffirmed it within the delay provided for.

f) If a recommendation has met with objection from more than one-fourth but less than the majority of the Contracting Parties, in accordance with subparagraphs (a) and (b) above, the recommendation shall become effective for the Contracting Parties that have not presented an objection thereto.

g) If objections have been presented by a majority of the Contracting Parties the recommendation shall not become effective.

4. Any Contracting Party objecting to a recommendation may at any time withdraw that objection, and the recommendation shall become effective with respect to such Contracting Party immediately if the recommendation is already in effect, or at such time as it may become effective under the terms of this Article.

5. The Commission shall notify each Contracting Party immediately upon receipt of each objection and of each withdrawal of an objection, and of the entry into force of any recommendation.

Part III
Convention for the Conservation and Management of Highly
Decision-making

1. As a general rule, decision-making in the Commission shall be by consensus. For the purposes of this Article, “consensus” means the absence of any formal objection made at the time the decision was taken.

2. Except where this Convention expressly provides that a decision shall be made by consensus, if all efforts to reach a decision by consensus have been exhausted, decisions by voting on questions of procedure shall be taken by a majority of those present and voting. Decisions on questions of substance shall be taken by a three-fourths majority of those present and voting provided that such majority includes a three-fourths majority of the members of the South Pacific Forum Fisheries Agency present and voting and a three-fourths majority of non-members of the South Pacific Forum Fisheries Agency present and voting and provided further that in no circumstances shall a proposal be defeated by two or fewer votes in either chamber. When the issue arises as to whether a question is one of substance or not, that question shall be treated as one of substance unless otherwise decided by the Commission by consensus or by the majority required for decisions on questions of substance.

3. If it appears to the Chairman that all efforts to reach a decision by consensus have been exhausted, the Chairman shall fix a time during that session of the Commission for taking the decision by a vote. At the request of any representative, the Commission may, by a majority of those present and voting, defer the taking of a decision until such time during the same session as the Commission may decide. At that time, the Commission shall take a vote on the deferred question. This rule may be applied only once to any question.

4. Where this Convention expressly provides that a decision on a proposal shall be taken by consensus and the Chairman determines that there would be an objection to such proposal, the Commission may appoint a conciliator for the purpose of reconciling the differences in order to achieve consensus on the matter.
5. Subject to paragraphs 6 and 7, a decision adopted by the Commission shall become binding 60 days after the date of its adoption.

6. A member which has voted against a decision or which was absent during the meeting at which the decision was made may, within 30 days of the adoption of the decision by the Commission, seek a review of the decision by a review panel constituted in accordance with the procedures set out in Annex II to this Convention on the grounds that:

(a) the decision is inconsistent with the provisions of this Convention, the Agreement or the 1982 Convention; or

(b) the decision unjustifiably discriminates in form or in fact against the member concerned.

7. Pending the findings and recommendations of the review panel and any action required by the Commission, no member of the Commission shall be required to give effect to the decision in question.

8. If the review panel finds that the decision of the Commission need not be modified, amended or revoked, the decision shall become binding 30 days from the date of communication by the Executive Director of the findings and recommendations of the review panel.

9. If the review panel recommends to the Commission that the decision be modified, amended or revoked, the Commission shall, at its next annual meeting, modify or amend its decision in order to conform with the findings and recommendations of the review panel or it may decide to revoke the decision, provided that, if so requested in writing by a majority of the members, a special meeting of the Commission shall be convened within 60 days of the date of communication of the findings and recommendations of the review panel.
APPENDIX D

(CCSBT) Resolution to Establish an Extended Commission and an Extended Scientific Committee

The Commission for the Conservation of Southern Bluefin Tuna (the Commission):

RECOGNISING that ensuring the sustainability of the Southern Bluefin Tuna (SBT) stock requires that all those States and entities or fishing entities fishing this species work together through the Commission;

CONSIDERING that continued fishing for SBT by States and entities or fishing entities not adhering to the Commission’s conservation and management measures substantially diminishes the effectiveness of those measures;

RECOGNISING the continuing need to encourage all States eligible to accede to the Convention for the Conservation of Southern Bluefin Tuna (the Convention) to do so, and to encourage entities or fishing entities with vessels fishing for SBT to implement the Commission’s conservation and management measures;

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.

3. The Secretariat of the Commission shall function as the Secretariat of the Extended Commission.

4. The Extended Commission shall report forthwith to the Commission if the latter is in session, and in any other case before the latter’s next meeting or session of a meeting, all decisions it adopts. 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. Any decision of the Commission that affects the operation of the Extended Commission or the rights, obligations or status of any individual Member within the Extended Commission should not be taken without prior due deliberation of that issue by the Extended Commission.

5. The Rules of Procedure for the Extended Commission shall be as annexed to this Resolution. Any revision to the Rules shall be made by the Extended Commission.

6. Any entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, may express its willingness to the Executive Secretary of the Commission to become a member of the Extended Commission. The Executive Secretary of the Commission, on behalf of the Commission, will conduct an Exchange of Letters with the representative of such entity or fishing entity to this effect. In so doing, the applicant shall give the Commission its firm commitment to respect the terms of the Convention and comply with such decisions of the Extended Commission as become decisions of the Commission pursuant to paragraph 4.

7. If the Extended Commission decides to admit the applicant, it shall negotiate with the applicant a formula to govern the level of catch of SBT by the applicant pending the next decision of the Commission setting a total allowable catch and its allocation among the Members. Upon the successful completion of the negotiations referred to in the previous sentence, the Executive Secretary will exchange letters with the applicant as referred to in paragraph 6; the applicant shall thereupon assume the status of Member of the Extended Commission.
8. Any Member of the Extended Commission that is not a Member of the Commission shall be entitled to appoint one representative, to be accompanied by experts and advisers, as an Observer to meetings of the Commission and its subsidiary bodies, including the Scientific Committee. Such representative shall be entitled to be present and speak as an Observer at meetings of the Commission and its subsidiary bodies.

9. The Extended Commission shall decide upon an annual budget. The contributions to the budget of an applicant that is admitted as its Member shall be determined by application mutatis mutandis of Article 11 of the Convention.

10. The provisions of this Resolution relating to participation by entities or fishing entities in the operations of the Extended Commission are solely for the purposes of the Convention.

11. The Rules of Procedure are amended by omitting paragraph 3 of Rule 5 and substituting the following:

“3. A provisional agenda for each annual meeting shall be prepared by the Executive Secretary in consultation with the Chair. The provisional agenda shall be despatched by the Executive Secretary to all the Members not less than 60 days before the date for the opening of the meeting. The provisional agenda shall include:

(a) approval of decisions taken by the Extended Commission;

(b) all items which the Commission has previously decided to include in the provisional agenda; and

(c) all supplementary items the inclusion of which have been requested by any Member of the Commission.”
Annex

Rules of Procedure of the Extended Commission for the Conservation of Southern Bluefin Tuna

Rule 1

Representation

1. Each Member shall be represented on the Extended Commission by not more than three delegates who may be accompanied by experts and advisers. Each Member shall inform the Executive Secretary of the Extended Commission of the names of its delegates to the Extended Commission including identification of the head of the delegation and experts and advisers accompanying such delegates, and of any change thereof, as far in advance as possible before the commencement of each meeting of the Extended Commission.

2. Each Member shall designate a correspondent who shall have primary responsibility for liaison with the Executive Secretary during the periods between meetings and shall promptly inform the Executive Secretary of the name and address of such a correspondent and of any change thereof.

Rule 2

Other matters

Except for Rule 4(3) and Rule 9, the Rules of Procedure of the Commission for the Conservation of Southern Bluefin Tuna apply *mutatis mutandis* to the Extended Commission on other matters.
REFERENCES

Treaties Cited

1911

1945
(26 June, San Francisco) Charter of the United Nations (1 UNTS xvi, ATS 1945 No 1 (electronic))
(16 October, Québec) Constitution of the Food and Agriculture Organization of the United Nations (United Kingdom Treaty Series 1946 No. 47 (Cmd. 6955); ATS 1945 No 9 (electronic))

1946
(Washington, 2 December) International Convention for the Regulation of Whaling (161 UNTS 72; ATS 1948 No 18)

1948
(26 February, Baguio) Agreement Establishing the Indo-Pacific Fishery Council (120 UNTS 59; ATS 1949 No 4)

1949
(31 May, Washington DC) Convention for the Establishment of an Inter-American Tropical Tuna Commission (80 UNTS 3)

1951
(8 September, San Francisco) Treaty of Peace with Japan (136 UNTS 45; ATS 1952 No 1)

1952
(9 May, Tokyo) International Convention for the High Seas Fisheries of the North Pacific Ocean (205 UNTS 65)
1958
(29 April, Geneva) Convention on the High Seas (450 UNTS 11; ATS 1963 No 12)
(29 April, Geneva) Convention on the Continental Shelf (499 UNTS 311; ATS 1963 No 12)
(29 April, Geneva) Convention on the Territorial Sea and the Contiguous Zone (516 UNTS 205; ATS 1963 No 12)
(29 April, Geneva) Convention on Fishing and Conservation of the Living Resources of the High Seas (559 UNTS 285; ATS 1963 No 12)
(29 April, Geneva) Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (450 UNTS 169; ATS 1963 No 12)

1962
(6 June, London) Arrangements for the Regulation of Antarctic Pelagic Whaling (486 UNTS 263)

1966
(14 May, Rio de Janeiro) International Convention for the Conservation of Atlantic Tunas (673 UNTS 63)

1969
(23 May, Vienna) Vienna Convention on the Law of Treaties (1155 UNTS 331; ATS 1974 No 2)

1973
(13 September 1973, Gdańsk) Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts (1090 UNTS 54)

1977

1978

(25 April, Tokyo) Protocol amending the International Convention for the High Seas Fisheries of the North Pacific Ocean (1207 UNTS 325)

(1 September, Wellington) Agreement on Fisheries between the Government of New Zealand and the Government of Japan, Memorandum of Understanding and Exchange of Letters (1167 UNTS 441; NZTS 1978 No 12)

(24 October, Ottawa) Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (1135 UNTS 369; Canada Treaty Series 1979, No 11)

(18 December, Sydney) Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area known as the Torres Strait, and Related Matters (1429 UNTS 207; ATS 1985 No 4)

1979

(23 June, Bonn) Convention on the Conservation of Migratory Species of Wild Animals (1651 UNTS 333; ATS 1991 No 32)

(17 October, Canberra) Agreement on Fisheries between the Government of Australia and the Government of Japan and Subsidiary Agreement between the Government of Australia and the Government of Japan concerning Japanese Tuna Long-Line Fishing (1217 UNTS 3 (Head Agreement), 19 (Subsidiary Agreement); ATS 1979 No 12 (both Agreements))

1980

(20 May, Canberra) Convention for the Conservation of Antarctic Marine Living Resources (1329 UNTS 47; ATS 1982 No 9)


(18 November, London) Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries (1285 UNTS 129)
1981


1982


1983


1984


1985


(31 October, Canberra) [7th] Subsidiary Agreement [to Agreement of 17 October 1979] concerning Japanese Tuna Long-Line Fishing (1430 UNTS 9 (title page) and 22 (text); ATS 1985 No 26)

1986


1987
(2 April, Port Moresby) Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America; ATS 1988 No 42; (1987) 26 ILM 1048.


1988


1989


1990


1991


1992

(5 June, Rio de Janeiro) Convention on Biological Diversity (1760 UNTS 79; ATS 1993 No 32)


1993

(10 May, Canberra) Convention for the Conservation of Southern Bluefin Tuna (1819 UNTS 359; ATS 1994 No 16)

(25 November, Rome) Agreement Establishing the Indian Ocean Tuna Commission (1927 UNTS 329; ATS 1996 No 20)


1994

(15 April, Marrakesh) Agreement Establishing the World Trade Organization (1867 UNTS 3; 1995 ATS No 8; (1994) 33 ILM 13)


1995


1996

(6 May, Oslo) Protocol on the Conservation, Rational Utilization and Management of Norwegian Spring Spawning Herring (Atlanto-Scandian Herring) in the North-East Atlantic (<www.intfish.net/treaties/herring96.htm>)


1997

1998

(20 January, Canberra) Headquarters Agreement between the Government of Australia and the Commission for the Conservation of Southern Bluefin Tuna (2076 UNTS 527; ATS 1999 No 6)

2000


2001


2003


2006

(7 July, Rome) Southern Indian Ocean Fisheries Agreement, (<www.fao.org/legal/treaties/035t-e.htm>; not yet in force)
Legislation Cited

Commonwealth of Australia Constitution Act 1900 (Imp), Schedule

Fisheries Act 1952 (Cth)

Fisheries Act 1983 (NZ)

(thereunder)

Fisheries (Southern Bluefin Tuna) Regulations 1995 (NZ) (Statutory Regulations 1995/117)

Fisheries Act 1996 (NZ)

(thereunder)

Fisheries (Southern Bluefin Tuna Quota) Regulations 2000 (NZ) (Statutory Regulations 2000/79)

Fisheries (Southern Bluefin Tuna Quota) Amendment Regulations 2002 (NZ) (Statutory Regulations 2002/150)

Fisheries (Conversion Factors) Notice 2005 (NZ)

Fisheries Amendment Act 1978 (Cth)

(thereunder)

Proclamation of Australian Fishing Zone, Commonwealth of Australia Gazette S189 (26 September 1979)

Fisheries Legislation (Consequential Provisions) Act 1991 (Cth)

Fisheries Management Act 1991 (Cth)

(thereunder)

Fisheries Management Regulations (Amendment) (Statutory Rules 1994 No 419)

Fisheries Management (Southern Bluefin Tuna Fishery) Regulations (Statutory Rules 1995 No 7)

Southern Bluefin Tuna Fishery Management Plan 1995

Southern Bluefin Tuna Fishery Management Plan Amendment 2002 (No. SBT 04).
International Organisations (Privileges and Immunities) Act 1963 (Cth)

(thereunder)

Commission for the Conservation of Southern Bluefin Tuna (Privileges and Immunities) Regulations (Statutory Rules 1996 No 40).

Territorial Sea and Exclusive Economic Zone Act 1977 (NZ)
Cases Cited


Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits) (Germany v. Poland), (1928) PCIJ Series A, No 17.


Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, ICJ Reports 1984, p. 246.


Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), ICJ Reports 1974, p.3 and p.175.


New Zealand Fishing Industry Association and Ors v. Minister of Fisheries and Ors (High Court of New Zealand, unreported).


Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p.280.


Trail Smelter (United States v. Canada) (1941) 3 Reports of International Arbitral Awards 1905.


Bibliography


Davies, Peter G.G. and Catherine Redgwell, “The International Legal Regulation of Straddling Fish Stocks”, (1996) LXVII British Yearbook of International Law 199-274.


de Yturriaga, José A. The International Regime of Fisheries: From UNCLOS 1982 to the Presenceal Sea (The Hague; Boston: Martinus Nijhoff Publishers, 1997).


Grant, Ern M. *Fishes of Australia* (Scarborough, Qld: E.M. Grant Pty Ltd, 1987).


Munro, Gordon R. “The Management of Shared Fish Stocks”, in: Papers Presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks -


Roughley, T.C. Fish and Fisheries of Australia, 6th edn (Sydney: Angus and Robertson, 1966).


van Houtte, Annick. “Legal Aspects in the Management of Shared Fish Stocks – A Review”, in: Papers Presented at the Norway-FAO Expert Consultation on the


UN documents (in chronological order)


General Assembly Resolution 900 (IX), 14 December 1954.


General Assembly Resolution 2467 A (XXIII), 21 December 1968.

General Assembly Resolution 2750 C (XXV), 17 December 1970.


A/50/PV.80 (5 December 1995).


A/58/215 (5 August 2003), *The status and implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention for the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement) and its impact on related or proposed instruments throughout the UN system, with special reference to implementation of Part VII of the Fish Stocks Agreement, dealing with the requirements of developing States: Report of the Secretary-General*.

A/CONF.210/2006/12 (23 May 2006), Annex to the note verbale dated 22 May 2006 from the Permanent Missions of Argentina, Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Mexico and Peru to the United Nations addressed to the Secretariat.
FAO Circulars and Reports not attributed to any author (in chronological order)


Commission for the Conservation of Southern Bluefin Tuna
Reports and Blue Books (in chronological order)

First Meeting of the Commission for the Conservation of Southern Bluefin Tuna,
Wellington, May 1994, Conclusion.

Japan – Australia – New Zealand Southern Bluefin Tuna Consultations, Canberra 17-19 October 1994, Summary Record.


Reconvened First Commission Meeting, 11 September 1995, Tokyo, Conclusion (Part II).


Reports of the Meetings for the Fourth Year of the Commission (including Financial Statements).

Reports of the Meetings for the Fifth Year of the Commission (including Financial Statements).
Reports of the Meetings for the Sixth Year of the Commission (including Financial Statements).

Reports of the Meetings for the Seventh and Eighth Year of the Commission (including Financial Statements).

Reports of the Meetings for the Ninth Year of the Commission (including Financial Statements).

Reports of the Meetings for the Tenth Year of the Commission (including Financial Statements).

Reports of the Meetings for the Eleventh Year of the Commission (including Financial Statements).


CCSBT doc CCSBT-EC/0410/Info01 (undated), “Convention for the Conservation of Southern Bluefin Tuna "Quota Trading"”.


International Commission for the Conservation of Atlantic Tunas Green Books (in chronological order; all available at <www.iccat.int/pubs_biennial.htm>)

Report for biennial period 1974-75, Part II (1975)
Report for biennial period 1976-77, Part II (1977)
Report for biennial period, 1982-83 (Part I 1982)
Report for biennial period, 1984-85, Part II (1985)
Report for biennial period, 2000-01 Part II (2001) – Vol 1
Report for biennial period, 2002-03 Part II (2003) – Vols 1 and 3


Transcripts of legal proceedings


Other international documents (in inferred chronological order)


Unpublished documents extracted from governmental files (in inferred chronological order)

Files of the former Australian Government Department of Primary Industries and Energy

*Southern Bluefin Tuna Trilateral Management Discussions Seventh Round* (undated, ca 1988).

Untitled document (undated, ca 1989).

“Draft Opening Statement – Australia” (undated, ca 1989).


*Southern Bluefin Tuna Trilateral Management Discussions Eighth Meeting 18-21 September 1989 Summary Record.*

*Draft Summary Record Reconvened Trilateral Management Meeting for SBT Canberra 8 – 18 October 1989.*


“25 September 1990 Opening Statement – Australia”.

“New Zealand Statement for Plenary Session of Ninth Southern Bluefin Tuna Management Talks, Canberra 9 October 1990”.

“Southern Bluefin Tuna Trilateral negotiations – Australian Statement to plenary session on 10 October 1990”.

“Opening Statement – Australia, Reconvened SBT Trilateral Management Session 23 October 1990”.

P. Enright (Australian Fisheries Service), *Draft Summary Record Trilateral Management Meeting for SBT, Canberra 25 September – 26 October 1990.*


“Southern Bluefin Tuna Working Group on Institutional Arrangements, Wellington, 10-13 February 1992 Executive Summary Record”.

“Southern Bluefin Tuna Sixth Working Group on Institutional Arrangements, Canberra, 12-14 August 1992, Executive Summary Record”.


Southern Bluefin Tuna Trilateral Management Discussions, Tokyo, October 1992, Conclusion.


Southern Bluefin Tuna Trilateral Management Discussions, Canberra, October-November 1993, Conclusion.


New Zealand Ministry of Foreign Affairs file 40/12/10 “New Zealand Affairs: Economic Relations – Japan – Fishing”, Part 22

Cable No 3027, 22 October 1982, from New Zealand High Commission, Canberra to Ministry of Foreign Affairs, Wellington.

Cable No 4569, 23 December 1982, from New Zealand High Commission, Canberra to Ministry of Foreign Affairs, Wellington.

Cable No 1038, 25 March 1983, from New Zealand High Commission, Canberra to Ministry of Foreign Affairs, Wellington.

Cable No 659, 14 April 1983, from Ministry of Foreign Affairs, Wellington, to New Zealand Embassy, Tokyo.
Other documents (in inferred chronological order)


“Southern Bluefin Tuna Quotas Set” (Media Release PIE 89/328K, John Kerin MP, Minister for Primary Industries and Energy, 24 November 1989).


“Statement to the 61st session of the UN General Assembly Plenary 7 December 2006[,] Agenda item 71(a) & (b): Oceans and the Law of Sea and Sustainable fisheries[,] Delivered by HE Frances Lisson[,] Ambassador and Deputy Permanent Representative[,] Permanent Mission of Australia to the United Nations”, <www.australiaun.org/unny/il%5f071206.html>.
Websites not elsewhere included

<ec.europa.eu/fisheries/cfp/external_relations/rfos/ibsfc_en.htm>
	<treaties.un.org/Pages/Treaties.aspx?id=21&subid=0&lang=en>
		<treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=454&chapter=21&lang=en>
			(Status list for Convention on the High Seas)
		</treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=454&chapter=21&lang=en>
	</treaties.un.org/Pages/Treaties.aspx?id=21&subid=0&lang=en>
	(treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=455&chapter=21&lang=en>
		(Status list for Convention on Fishing and Conservation of the Living Resources of the High Seas)
	)
	(treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=457&chapter=21&lang=en>
		(Status list for Optional Protocol of Signature concerning the Compulsory Settlement of Disputes)
	)
	(treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=460&chapter=21&lang=en>
		(Status list for the Agreement for the Implementation of the Provisions of the United Nations Convention for the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks)
	)
	<www.ccsbt.org/docs/pdf/about_the_commission/financial_regulations.pdf>
	<www.ccsbt.org/docs/pdf/meeting_schedule/ccsbt_previous_meetings.pdf>
	<www.fao.org/fishery/collection/asfis> (Aquatic Sciences and Fisheries Information System electronic database maintained by the FAO)
<www.fao.org/Legal/treaties/013s-e.htm> (Status list for the Agreement Establishing the Indian Ocean Tuna Commission)

<www.fao.org/Legal/treaties/014s-e.htm> (Status list for the International Convention for the Conservation of Atlantic Tunas)


<www.iattc.org/HomeENG.htm>

<www.iccat.int/en/contracting.htm>

<www.intfish.net/docs/2003/ibsfc/rules.htm>


<www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm>