FISHERY COMMISSION QUOTA TRADING UNDER INTERNATIONAL LAW

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ABSTRACT
Though in its 2001 Allocation Criteria the International Commission for the Conservation of Atlantic Tunas (ICCAT) set its face firmly against trading among members in quota, such trading could make adjustment of allocations easier and less likely to become mired in conflicting claims that hamper fishery commissions’ overall conservation efforts. In fact, trading in quota in such commissions (including ICCAT itself) has a substantial history.

Under a first-principles analysis from an international legal perspective, the standard concept of national allocations within a total allowable catch creates no tradable rights. Nor is trading in allocated catch or effort quotas generally contemplated in the constitutive treaties of most fisheries commissions. Yet it would be a relatively simple matter to set up a system for this – and without needing to amend any but the most rigid of treaties. Rather, the main novelty in what would be required is a moderately elaborate administrative machinery to support the trading, including rigorous systems of accounting for catch.

So, while such a system could not be established overnight, it is eminently feasible. And if it leads in the end to a new species of quasi-property in international law, it will have gone a long way towards overcoming the tragedy of the commons besetting high seas fisheries.

KEYWORDS
International law, national allocations, quota, trading, property

INTRODUCTION
There is now a large literature on international 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, which in the case of ITQs means having (or acquiring) sufficient quota to cover one’s catch. While many of the same ills bedevil international fisheries, the basic principle of freedom of fishing on the

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1 See e.g. in Australia cl 9.1 and 10.1 of the Southern Bluefin Tuna Fishery Management Plan 1995 (<scaleplus.law.gov.au/html/instruments/0/9/pdf/2004120201.pdf>) made pursuant to the Fisheries Management Act 1991 (Cth), 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. Websites referred to in this and succeeding footnotes were all visited on 5 February 2006 unless otherwise indicated.

2 While it is assumed in this paper that what is traded is allocations expressed as limitations of catch, much the same considerations apply if the limitation is on effort, however measured, rather than on catch: see Organisation for Economic Co-operation and Development (hereinafter OECD), Towards Sustainable Fisheries: Economic Aspects of the Management of Living Resources (Paris: OECD, 1997), 93-94.
high seas would appear, at least at first sight, to preclude any limitation of entry, so here the
developments are happening in reverse order. The notion of quota trading is now beginning
to appear – and in some cases to be resisted – in a number of fisheries commissions. There
are *ad hoc* examples of transfers of quota actually taking place in at least three such bodies:
the International Commission for the Conservation of Atlantic Tunas (ICCAT), the
Northwest Atlantic Fisheries Organisation (NAFO) and the International Baltic Sea
Fisheries Commission (IBSFC), and pressure is growing in a fourth, the Commission for
the Conservation of Southern Bluefin Tuna (CCSBT), to allow trading in quota.

**NATIONAL ALLOCATIONS UNDER OPEN ACCESS: WHAT ARE THEY?**
A State’s freedom of fishing on the high seas is now heavily qualified by Article 116 of the
United Nations Convention on the Law of the Sea (UNCLOS), whose three paragraphs
respectively subject it to (a) its treaty obligations; (b) the rights, duties and interests of
coastal States fishing in their exclusive economic zones for straddling stocks and highly
migratory species; and (c) the obligations in Articles 117-119 (most importantly, the
Article 118 duty to cooperate with other States fishing for the same stocks). Nonetheless,
even in its residual role the freedom of fishing still exerts a powerful influence. This is
because, despite these many qualifications, no *ex ante* quantifiable limit can be placed on a
State’s fishing on the high seas. Quotas are numbers, and the numbers must come from
somewhere. In practice, regional fisheries management organisations (RFMOs) are the fora
in which States interested in a given fishery engage in bargaining, usually yearly but for
some stocks on a longer cycle, to settle the numbers. When under the treaty establishing the
RFMO those numbers are transformed into binding limits, the exception to freedom of
fishing envisaged in Article 116(a) is at work – but only among the treaty’s parties: they
cannot exclude other States from entering the fishery.

This conclusion is strengthened for parties to the Agreement for the Implementation of the

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3 Created by the International Convention for the Conservation of Atlantic Tunas, done at Rio de
Janeiro, 14 May 1966 (hereinafter the Rio Convention), 673 UNTS 63.
4 Created by the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries,
done at Ottawa, 24 October 1978, Canada Treaty Series 1979, No 11.
5 Created by the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea
and Belts, done at Gdański, 13 September 1973, 1090 UNTS 54.
6 Created by the Convention for the Conservation of Southern Bluefin Tuna, done at Canberra, 10
7 Done at Montego Bay, 10 December 1982, 1833 UNTS 3.
8 The freedom is all but removed for anadromous and catadromous species: see UNCLOS Articles 66
and 67.
9 Nonetheless, in many, perhaps most, circumstances these days, the duty of cooperation will amount
to an obligation to negotiate in good faith with other interested States to establish such a limit.
10 The *pacta tertiis nec nocent nec prosunt* principle stands in the way of this: the rule of customary
international law, codified in Article 34 of the Vienna Convention on the Law of Treaties (done at Vienna, 23
May 1969, 1155 UNTS 331), is that treaties impose obligations on the parties to them, but not on non-parties
(though if the obligation later itself becomes one of custom, it will be binding on all States).
Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which undergirds the position of RFMOs by requiring that States give effect to their duty to cooperate with each other by joining the relevant RFMO or agreeing to apply its conservation measures. As long as the newcomer is prepared, by doing either of these things, to accept the same conditions as apply to existing members, those members cannot consistently with Article 8, paragraph 3 of the Agreement deny the newcomer’s rights to participate. Note, however, paragraph 4 of the same Article, by which only those States that are members of the relevant RFMO or participate in an equivalent arrangement, or agree to apply its conservation and management measures, shall have access to the fisheries resources to which those measures apply. Space permits no consideration here of how far such an obligation of States to refrain from fishing for a stock or in an area governed by an RFMO of which they are not a member may have entered the corpus of customary international law, but there is growing evidence that this implicit bargain may have achieved that status. At all events, it is safe to say that non-members owe the RFMO a duty of cooperation. This is because it would seem to be in the members’ power to make the RFMO the vehicle to receive on their behalf from non-members the cooperation which the latter owe them, i.e. to insist that the duty be discharged by cooperating with the RFMO rather than with the member States individually.

Yet the absence of exclusivity, a key characteristic of property rights, has not proved to be an obstacle to trading in national allocations, as is shown below. This may be because, as

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11 Opened for signature at New York, 4 December 1995, 2167 UNTS 3.
12 See for example in the Oceans and the Law of the Sea debate at the 2005 session of the UN General Assembly “Statement by Senator Robert Ray[,] Parliamentary Adviser to the Australian Mission to the United Nations” <www.australiana.org/unWeb/content/statements/internationalLaw/2005.11.28_LAW_Oceans.pdf> (visited on 11 February 2006), 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.”
14 According to A. Scott, “Introducing Property in Fishery Management” in Ross Shotton (ed), Use of Property Rights in Fisheries Management, Vol 1, FAO Fisheries Technical Paper 404/1 (FAO, Rome, 2000), 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 the ownership of it, 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 the following passage from K. Gray, “Property in Thin Air” (1991) 50 Cambridge Law Journal 252 at 299: "… 'property' 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.” See also M. Tsamenyi and A. McIlgorm, “Enhancing Fisheries Rights through Legislation – Australia’s Experience”, ibid., Vol 2, FAO Fisheries Technical Paper 404/2 (FAO, Rome, 2000), at 99 and the many authorities there cited.
the history of whaling on the high seas demonstrates, the risk of new entrants appearing can be reduced by various economic measures. Norway and the United Kingdom maintained several such measures which succeeded in keeping their number relatively small.

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 more useful to look for instances where trading might not be possible – in other words, to recast the question as “Under what circumstances is quota trading permissible?”

Before quota can be traded between States, it is necessary for there to be something for them to trade – that is, the total allowable catch (TAC) must be divided into national allocations. This is a relatively recent phenomenon in fisheries, though similar arrangements were known earlier in the regulation of high seas whaling. Although no national allocations were formally possible under the International Convention on the Regulation of Whaling, the States concerned agreed outside the International Whaling Commission (IWC) on the division among them of its catch limits.

National allocations in their modern international form have been with us for little more than 30 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 no universal limitation of entry being possible on the high seas] may be eased somewhat.

Even within RFMOs, whether quotas can work like ITQs depends on whether establishing a fishery commission of itself does away with the freedom of fishing for the stocks and in the areas 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, it is unable to set a TAC. If the freedom of fishing is displaced, then that would mean members may not fish at all without an affirmative decision of the RFMO to allow this; 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. When, however, such situations actually

\[\text{Done in Washington, 2 December 1946, 161 UNTS 72.}\]

\[\text{S.J. Holt, “Sharing the Catches of Whales in the Southern Hemisphere” in R. Shotton (ed), Case studies on the allocation of transferable quota rights in fisheries (FAO Technical Paper 411) (Rome: FAO, 2001), 322 at 343ff. The international legal status of the quotas is not clear, but potentially, had the subset of IWC members that negotiated them wanted them to be binding inter se only, there would have been no legal obstacle to this.}\]

\[\text{The pre-war agreements for freely transferable quotas negotiated directly among whaling companies of various States (ibid., at 327), in order to reduce the number of expeditions through limiting the catch and effort of each one, would have been binding not as treaties, but as contracts under the law of a single State.}\]

occurred in both ICCAT\textsuperscript{19} and CCSBT,\textsuperscript{20} there was no cessation of fishing – members, though in some cases they announced voluntary catch limits, all carried on harvesting.

So what precisely are States doing when they divide a TAC into national allocations? They are departing \textit{inter se} from the residual freedom fishing on the high seas, but what are they putting in its place? In theory the answer should lie in each RFMO’s constitutive treaty, but such treaties rarely say anything about it. For instance, Article 8(3) of the CCSBT’s treaty\textsuperscript{21} directs it in subparagraph (a) to adopt a TAC and divide it into national allocations, while preserving the possibility of some other measure being adopted instead; subparagraph (b) permits the Commission to introduce further measures in addition to these.

\textbf{First-principles analysis}

It is thus necessary to go back to first principles. On this basis, it is submitted, all that RFMO members are doing is that each is limiting its own catch, in return for similar limits (though not necessarily equal to its own) being accepted by each other member.\textsuperscript{22} In the

\textsuperscript{19} ICCAT’s failure to make any recommendation on a catch limit for northern bluefin tuna at its 2001 meeting is seen in \textit{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, \textit{Report for biennial period 2000-01 Part II (2001) - Vol.1} (hereinafter ICCAT Green Book 2002/1), 49 at \textsuperscript{23}. For 2002 reported catches totalled around 30,000 tonnes, and the true total was likely to be around 35,000 tonnes, little different from 2001, when a TAC was applied: \textit{Reports of the Meeting of Panels 1-4 (Annex 8 to Proceedings of the 18\textsuperscript{th} Regular Meeting of the International Commission for the Conservation of Atlantic Tunas (Dublin, Ireland - 17 to 24 November 2003)} (hereinafter ICCAT18 Report)), in ICCAT, \textit{Report for Biennial period 2002-03 Part II (2003) - Vol.1} (hereinafter ICCAT Green Book 2004/1), 177 at 182.

\textsuperscript{20} The CCSBT found it increasingly difficult to set a TAC from 1995 onwards, needing several meetings each year; this frequently led to these limits being decided after at least one 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 Third Meeting: CCSBT, \textit{Report of the Third Annual Meeting (Revised), 24 - 28 September 1996, Canberra, Australia} <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_3/report_of_ccsbt3_part1.pdf>, at \textsuperscript{25}. The issue was adjourned to a second session and in the interim Australia and New Zealand undertook that, if no decision on a TAC and national allocations had been made by the start of their next fishing seasons, they would abide by their previous allocations as though they were still in force: \textit{ibid}. Japan gave no comparable commitment, but described the commencement by Australia and New Zealand of fishing operations without a TAC as an “abnormal situation”: CCSBT, \textit{Report of the Resumed Third Annual Meeting (Revised), 18 – 22 February 1997, Canberra, Australia} <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_3/report_of_ccsbt3_part2.pdf>, at \textsuperscript{26}. Note that Japan was not alleging breach of any obligation, as the proposition that no fishing at all would be permissible absent a TAC would have allowed Australia or New Zealand to impose a moratorium by default. 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: see the catch history table, “Global Catch by Country” (Attachment 4 to \textit{Report of the Extended Scientific Committee for the Tenth Meeting of the Scientific Committee, 5-8 September 2005, Taipei, Taiwan} (Appendix 2 to \textit{Report of the Tenth Meeting of the Scientific Committee, 9 September 2005, Narita, Japan})), <www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_12/report_of_sc10.pdf>.

\textsuperscript{21} \textit{Supra} n 6.

\textsuperscript{22} Except where the context otherwise indicates or requires, “member” in this paper is taken to include not only each State that is party to the treaty establishing the RFMO, but any other State or fishing entity formally cooperating with the RFMO and accepting a quantified catch limit in token of that cooperation.
simplest classical type of national allocation, suppose there are three members A, B and C, whose fleets share a 1000-tonne TAC as follows: A 500, B 400, C 100, and that they all 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 their catches remains below 1000 tonnes, there is no effect on the stock from one member’s share of the TAC rising and another’s falling commensurately. If so, then the legal position is that 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 duty 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. If the following year’s allocation has not yet been made, they could bring this about simply by letting 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. Notice, however, that on the one hand there are many assumptions attached to this simple case, and on the other hand it does not necessarily, at this stage at any rate, involve trading as such of quota. Because RFMOs seldom fix TACs and national allocations for more than one year at a time, it is theoretically open to them to vary the allocation completely from one year to the next – say allocating 100% of the TAC to member X in one year and 100% to Y the following year. In the real world this does not happen because members value stability and predictability, hence the best prediction of a given member’s share of the TAC in any year is to see what it was last 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 that both parties concerned are below the lesser of the 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 less than 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 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. C’s duty to A thus remains one of limiting its catch to 100 tonnes, which it will breach if it makes use of the extra tonnage acquired from B.

Contrast the situation of non-equivalence of catch by B and C in terms of its effect on the stock. If a tonne of catch by C has less impact on the stock than a tonne caught by B, then there is no problem. But if its effect is greater (e.g. in the mid-1980s 1 tonne of surface fishery catch was having roughly the same impact on parental biomass as 2.25 tonnes of longline catch due to the far greater number of fish per tonne of surface catch: see A. Caton, K. McLoughlin and M.J. Williams, Southern bluefin tuna: scientific background to the debate (Canberra: Australian Government Publishing Service, 1990), at 28), then it would be reasonable for A to insist on an adjustment to restore equivalence. (Conversely, a member whose catch has less impact tonne-for-tonne might be able to justify applying a coefficient greater than 1 to any quota sold to it by B.)
The same is true if B purports to transfer all or part of its allocation to D, a State outside the RFMO. Here the transaction itself could be contrary to a provision like Article 15, paragraph 4 of the CCSBT’s treaty, 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 such provision exists, 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 it is doubtful that any existing RFMO treaty contains sophisticated enough provisions for them to be able to compel B to do this.

In the simple case, then, trading cannot take place as of right. A waiver must be obtained from all non-participants in the transaction. The easiest way of doing this, and the only one that occurs in reality, is for the waiver to be granted by the RFMO itself on behalf of all its members. If it is assumed that 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.

A complication: accounting for overs and unders
What about after fishing has ceased? This is more complex, because the only reason for trading quota in this situation is to cover overcatch. 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 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?

Opposition to this is seen in most RFMOs. This is understandable as a desire to maintain internal discipline, but in substance clearing overcatch through trade is not greatly different from the year-to-year accounting mechanism that some RFMOs have for carrying forward balances of overcatch and undercatch, adjusting the next year’s nominal national allocation commensurately to compensate. Under such a mechanism, 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. If in addition trading were possible, it would then be for C to decide whether it preferred to clear its overcatch by debit against its future catch, or purchase additional quota if any is available, or some combination of the two. Note that the relative attraction of the two courses would be affected by any penalty applicable to the...
overcatch. ICCAT has a flat 25% penalty, which would increase the attraction of purchasing-in quota to cover overcatch; the Australia-New Zealand South Tasman Rise orange roughy arrangement has no penalty for the first 100 tonnes of overcatch in a season, but a 100% 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 the limit, it will have an incentive to come to terms with C. In the example above, B could sell C enough quota to eliminate the latter’s overcatch and still have 5 tonnes left to carry forward into year 2.

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26 See paragraphs 7(b) and 8 of the 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, reprinted in E.J. Molenaar, “The South Tasman Rise Arrangement of 2000 and other Initiatives on Management and Conservation of Orange Roughy”, (2001) 16 International Journal of Marine and Coastal Law 77 at 119. On the other hand, possibly owing to the large tonnages involved, Taiwan’s overcatch of 8000 tonnes of bigeye tuna, and China’s of an unspecified amount, were permitted to be compensated for by yearly deductions of 1600 tonnes and 500 tonnes respectively in 2005 to 2009: Recommendation by ICCAT on a Multi-Year Conservation and Management Program for Bigeye Tuna, paragraph 5, in “Recommendations Adopted by ICCAT in 2004” (Annex 5 to ICCATSM14 Report), in ICCAT Green Book 2005/1, supra n 13, 189 at 191, the European Community proposed that there be a general rule for management and application of unders and overs, but debate on this matter was deferred to 2005. See “Draft Recommendation by ICCAT Concerning Management and Application of Underages and/or Overages of the Quotas/Catch Limits” in “Documents Deferred for Discussion in 2005” (Annex 11 to ICCATSM14 Report), ibid., 255.

27 ICCAT for example limits carryover for the northern albacore stock to 50%, 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 [03-06], paragraph 6, in “Recommendations Adopted by ICCAT in 2003” (Annex 5 to ICCAT18 Report), in ICCAT Green Book 2004/1, supra n 19, 141 at 144. For bigeye the maximum carryover is 30% of underage transferred to either of the next two years: Annex 5 to ICCATSM14 Report, supra n 26, paragraph 4(a).

28 A system designed with conservation in mind would 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. Although A has only 5 tonnes of 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,
Trading under a generalised waiver

If the analysis of the classical case requires RFMO members to waive their rights for any quota transaction, trading that is not *ad hoc* but systematic will require institutionalising the waiver somehow. As there is no general rule against this, it is only in particular RFMO treaties that any legal obstacles will be found. Most such treaties describe the conservation measures the RFMO may adopt with sufficient generality to allow for the institution of trading. This is true of ICCAT, the IBSFC, NAFO, the North-East Atlantic Fisheries Commission (NEAFC), the Commission for the Conservation of Antarctic Marine Living Resources, the Indian Ocean Tuna Commission, the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, the South-East Atlantic Fisheries Organisation, and will also be true of the revamped Inter-American Tropical Tuna Commission once its new treaty is in force.

More rigid is the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea which does not set up a commission, but works through an annual conference. Article IV, paragraph 1 lists the functions of the Annual Conference:

(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;

reflecting the 50% penalty it would thereby have avoided. A would pay no penalty because the sale would leave it with overcatch of only 15 tonnes. So as not to undermine the penalty’s deterrent effect, it would be prudent to permit A to sell B no more than 5 tonnes, and/or provide that quota purchased should first be applied against ordinary overcatch and only then against penalty overcatch.

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29 See Article VIII(1)(a) of the Rio Convention, *supra* n 3.
30 See Article X(f) and (g) of its constitutive treaty, *supra* n 5.
31 See Article XI(4) of its constitutive treaty, *supra* n 4.
32 See Article 7(e) and (f) of the Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries, done at London, 18 November 1980, 1285 UNTS 129.
33 See Article IX(1)(f) and (2) (a) to (i) of the Convention on the Conservation of Antarctic Marine Living Resources, drawn up at Canberra, 20 May 1980, 1329 UNTS 47.
35 See Article 10(1) (a), (b), (c), (g), (k), (o): (2) (a), (b) and (c) and (4) of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, done at Honolulu, 5 September 2000, (2001) 40 *International Legal Materials* (hereinafter ILM) 277.
36 See Article 6(3) (b), (c) and (d) of the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, done at Windhoek, 20 April 2001; 2221 UNTS 189.
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 could be classed as a management measure even though it is not directly linked to conservation. The express direction to the CCSBT by its treaty to have national allocations is also of this type.

The only outright prohibition on national allocations, and thus on trading, is found in Article V of the IWC’s constitutive Convention.\(^\text{39}\) Paragraph 1 lists several types of conservation measures that the IWC may adopt (among them “(e) …the maximum catch of whales to be taken in any one season…”)) by way of amendments to the Schedule to the Convention in which the regulations on conservation and utilisation of whale resources are set out. By paragraph 2(c), however, these amendments “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”.

**CONSIDERATION OF TRADING BY RFMOs**

**ICCAT**

The history in ICCAT has been one of ambivalence towards trading of quota: a concerted opposition to allowing it to occur freely, balanced by a general tolerance of it when *ad hoc* transactions come before it for approval.

At the Working Group on Allocation’s second meeting in 2000, the European Community (EC) argued that commercial transactions in quota should not be allowed.\(^\text{40}\) It accepted, however, that countries that already had quotas could swap them, as long as this had no negative impact on conservation – a stance that Japan agreed with, but Brazil opposed.\(^\text{41}\)

It is not clear why the EC should adopt this attitude. From one point of view, it might have suited the Community, as a member seeking fishing opportunities for its overcapitalised Iberian fleets, to be able to induce Atlantic Ocean coastal States to forgo for value their right to fish ICCAT stocks. One conjectural explanation is that the EC’s insistence on no change for an already allocated stock, for which it wanted historic catch to be the only criterion, suggests a preference to treat this situation as one of vested rights, even if the quotas were theoretically up for renegotiation every two or three years.\(^\text{42}\)

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

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\(^\text{39}\) Supra n 15 and accompanying text.


\(^\text{41}\) Ibid., at 85. Contrast the view of Iceland at 92 that in some circumstances it may be effort-efficient.

\(^\text{42}\) This accords with the implication of the EC’s question (in Annex 8 to ICCAT18 Report, supra n 19, 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.
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.”

ICCAT accepted this recommendation of the Working Group. In the Allocation Criteria it ultimately adopted, paragraph 27 forbids transfer: “No qualifying participant shall trade or sell its quota allocation or part thereof.” In the same year, however, ICCAT showed itself willing to approve ad hoc transfers, adopting a recommendation consisting in its operative part of a single line requiring Commission approval: “Any temporary quota adjustments shall be done only under authorization by the Commission.” Panel 1 approved a transfer of 1000 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 Chairman noting that the transfer should be provided in writing to the Secretariat for approval by the Commission. While 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, some noted that if the quota allocations were adjusted to meet the Parties’ needs, no transfers would be necessary.

Thus 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 between the EC and Japan; Japan’s excess North Atlantic swordfish bycatch for 2001 was allowed to be counted against unused United States (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 may be harvested in the northernmost 10 degrees of the southern area, and vice versa for Brazil’s quota of southern swordfish in the northernmost 10 degrees of the southern area.

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44 “ICCAT Criteria for the Allocation of Fishing Possibilities” (Annex 8 to ICCAT17 Report), ibid., 211 at 212.
45 “Recommendation by ICCAT Concerning the Temporary Adjustment of Quotas” (Annex 9-2 to ICCAT17 Report), ibid., 216. Note that this leaves open the question of permanent transfers – it would in theory be possible to devise a system of trading that gives members an indefinite share of the TAC but, rather than allowing those shares to be traded freely, subjects each transaction to Commission approval.
46 Reports of the Meeting of Panels 1-4 (Annex 13 to ICCAT17 Report), in ICCAT Green Book 2002/1, supra n 19, 297 at 300 (paragraphs 6.6.8 and 6.6.10); “Statement by Japan on Agenda Item 6 of Panel 1 (Appendix 5 to Annex 13 to ICCAT17 Report), ibid., 326. See also the transfer of 1100 t without objection for 2002: Reports of the Meetings of Panels 1-4 (Annex 13 to ICCATSM13 Report), in ICCAT Green Book 2003/1, supra n 50, 303 at 305 (paragraphs 6.1.5 [both] and 6.1.6); see also “Statement by Japan to Panel 1” (Appendix 5 to Annex 13 to ICCATSM13 Report), ibid., at 322, noting possible like action the next year.
47 ICCAT17 Report, supra n 19, at 52.
48 Panel 4 Rept, prob Annex 8 to ICCATSM12 Report, in ICCAT GB 2001/1, supra n 40, xx at 177.
area. For the eastern stock of northern bluefin tuna, underages from Iceland’s successive yearly allocations of 30, 40, 50 and 60 tonnes in 2003-06 are transferred to the EC.

ICCAT’s 2003 meeting saw a transfer of 2000 tonnes of bigeye quota from Japan to Taiwan, to accommodate vessels reregistered by Taiwan from other flags in an attempt to control their hitherto unregulated catch. The US opposed on procedural grounds, however, a Japanese request by letter for temporary quota adjustment; suggesting that ICCAT should consider the appropriate process for authorising them, it argued that only a positive decision from ICCAT by way of a recommendation would suffice; a mere letter from a Contracting Party was inadequate. Two resolutions authorised the transfer from Japan to China and Taiwan of 1250 tonnes each for 2003, provided there was no carry-forward of underage, and of 100 tonnes of South Atlantic swordfish quota from Japan to Taiwan.

There are signs, however, of pressures building for a more systematic treatment of quota transfers. At ICCAT’s 2004 meeting Mexico called for transparent regulation of transfer of quotas, arguing that, as a form of allocation, it should not affect conservation measures. A working group has observed that a number of ambiguities exist on which it would be useful to have clarification: particularly the rules for transfer of fishing possibilities, but also guidance on how overcatch and undercatch of transferred quotas should be treated.

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.\textsuperscript{57}

**CCSBT**

The CCSBT has moved at a gentler pace. At its 2003 meeting there was consideration of a Secretariat paper, but the Commission’s conclusions were less than profound: it noted that 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 advice from all members and independent advice, although the precise question on which it should seek advice was not specified.\textsuperscript{58}

The following year, Korea described quota as a “legal asset”,\textsuperscript{59} apparently implying that national allocations could be traded without further ado, but it was alone in this view, which on the basis of the analysis above is premature. The Philippines, however, “strongly endorse[d] the quota trading that has recently been floated” as an alternative means of obtaining the increased allocation it sought.\textsuperscript{60}

Three opinions were reflected in the meeting report without attribution: (i) quota trading should be considered once the management procedure being worked out by scientists for the CCSBT’s approval was in place; (ii) while the stock is in a serious state, unused quota


\textsuperscript{60} “Opening Statement by the Philippines” (Attachment 5 to CCSBT-EC3 Report), in CCSBT11 Report, supra n 59.
should not be reallocated through trading, since that would result in increased catch; and (iii) in principle trading is undesirable because a member should not benefit by trading unused quota and allocations are not conferred on a permanent basis. Discussion was deferred for another year.  

The objection based on the state of the stock is sound to the extent that making more efficient use of quota in this way should mean that less of it is needed overall, i.e. the TAC should fall if actual catch is not to increase. This will take some negotiation to overcome: a pari passu reduction of national allocations to compensate for higher 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 them of any benefit of the trade.

The objection in principle is understandable in view of the recent history of CCSBT quota negotiations, 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. Were allocated shares in future to be made permanent (or rather indefinite), in view of the need for consensus on an initial distribution, a member with a persistently large unused portion of its quota could not realistically expect to keep all of it.

NAFO

Transfers of quota are also possible in NAFO, whose Annual Quota Table for 2000 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, and with no prohibition on payment. The squid transfer appears related to Japan’s residual access to the Canadian EEZ for this species, but which Japan has largely

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62 See in this context Arnason’s proof that under this system all quota will be used: Ragnar Arnason, “Minimum information management in fisheries”, (1990) XXIII Canadian Journal of Economics 630 at 652.


64 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 quota.
left uncaught. In addition, 370 tonnes of redfish quota were transferred from Canada to Japan in 2000, also without apparent specific authority.

There have been suggestions by France and the Republic of Korea that quotas that are too small to be commercially viable, and hence left unfished, should be transferred to other parties “in desperate need” of them, but NAFO has not discussed or made any decision on these. More recently, the US has tabled a paper on allocation adapting the ICCAT Allocation Criteria to NAFO circumstances; significantly, this omitted 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 redfish quota from Russia to Japan approved by the Fisheries Commission in 2005 being the first transaction reported since 2001.

**NEAFC**

This commission also permits trading, at least in relation to allocations of redfish. Since 2002 paragraph 2 of the annual recommendations on the pelagic fishery for redfish have stated that “Contracting Parties are free to transfer quantities of their quota to other Contracting Parties. All transfers 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.

**IBSFC**

Possibly the oldest systematic treatment of transfer of quotas is in the IBSFC. The first two paragraphs of Rule 2.1 of its Fishery Rules state that:

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[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.  

The Secretary of this RFMO has observed that:

[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.

The distinctive, indeed unique feature of the IBSFC scheme is the openness to trading with non-members. This may well be a paradoxical result of the ease of excluding them: because of the Baltic Sea’s narrowness, no part of it lies more than 200 miles from land, and thus everywhere within it fishing has for many years been subject to the sovereign rights of the coastal State in its EEZ (or of the EC as the delegate of its Member States).

The allocated shares also seem to have achieved a degree of semi-permanence. As noted by the Secretary in 2002, for the previous few years, members’ allocations had been based on fixed percentages for the individual species (cod, herring, sprat and salmon) by country.

CONCLUSION: FURTHER ALONG THE PROPERTY SPECTRUM TO PERMANENT NATIONAL ALLOCATIONS?

It may be concluded, therefore, that, although no fishery commission has yet made national allocations indefinite, apart from the IWC and the few fisheries treaties positively requiring either the RFMO they establish or the parties not only to set a TAC but also to divide it into national allocations, there is no obstacle in international law to trading of quota. Under a “classical” national allocation of limited duration, the consent of each member of the RFMO, or of that body as a whole, is needed for individual transactions. This may be given on a case-by-case basis, or alternatively, some trading mechanism can be set up. At its

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74 Agreeing with William T. Burke, “Extended fisheries jurisdiction 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, that in the EEZ “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”, Munro equates this with “virtually full property rights to the fishery resources within its zone” for the coastal State: Gordon R. Munro, “Coastal states, distant-water fleets and EFJ: Some long-run considerations”, (1985) 9 Marine Policy 2 at 4.
75 Ranke, supra n 73, 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 a member has different percentages of different stocks).
simplest, this mechanism could simply be a decision of the RFMO to approve in advance on a blanket basis any trade, or certain classes of trades, the only condition of their validity, and thus of being binding on other members, being their notification to the secretariat. 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. Detailed analysis of its features must be left for another occasion.

Rudimentary trading regimes for quotas of limited duration exist already but are reasonably seldom used, having emerged piecemeal from the various fisheries commissions grappling with allocation problems. Any systems roughly resembling international equivalents of ITQs, with quota shares becoming permanent (until alienated within the system), are likely to arise in the same manner, less a conscious creation of property rights than a response to specific pressures. For example, if certain new entrants obtain a permanent share of the TAC as the only thing that can entice them to join the RFMO, the existing members will surely want one too. But it is clear that this raises the question of initial allocation, which has been identified by Pearse among others as a major difficulty invariably needing to be tackled when ITQs are instituted. While much of his domestic-level analysis applies equally well on the international plane, the likely relative paucity of transactions among States and the consequent illiquidity of the market make it much more difficult to accept that this is true of 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, for once it is made, the RFMO will never again concern itself with national allocations; it simply sets the TAC and the shares depend on the subsequent course of trading. Hence it is not in coastal State RFMO members’ interest to permit this to come about until any outstanding grievances they have regarding allocation are resolved.

Finally, transferability of national quotas could itself help to induce the missing element of limitation of entry; the more elaborate the system the RFMO creates, the higher it can (legitimately) ratchet up the bar for non-member new entrants in discharging their duty of cooperation. This will tend to hasten the parallel crystallisation of the customary rule of cooperation in international fisheries law into a requirement that non-members abide by the RFMO’s rules in order to fish, as long as these are non-discriminatory. This test should not be hard to satisfy, since a would-be new entrant can at any time, by becoming a member of the RFMO or of any formal cooperation mechanism that it operates, make itself eligible to offer to buy quota from an existing member – and refusal of an offer is not discriminatory.

A number of propositions, then, may be advanced with varying degrees of confidence:

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76 Peter H. Pearse, “From Open Access to Private Property: Recent Innovations in Fishing Rights as Instruments of Fisheries Policy”, (1992) 23 Ocean Development and International Law 71 states at 78 that any system of this kind would depend heavily on a reliable register of rights and on a fast and efficient system of reporting catches, keeping records and enforcing rights, and that the biggest obstacle to its introduction is “anxiety and disputation” about the initial allocation of shares.

77 Ibid. Further complications occur if not all eligible coastal States are members of the RFMO – these are sufficiently intricate to warrant separate future treatment by the author.
• No existing RFMO operates a quota-trading system closely matching the ITQs found at domestic level, because two of the four main characteristics of property rights are absent: security (quotas are currently of limited duration, though in some cases they run for more than just one year) and exclusivity (the right underlying a national allocation is more of a contractual than of a property nature as long as it is not of the kind that confers a positive right to fish, which it cannot be unless in its absence fishing would not otherwise be permitted).

• There is no fundamental international legal obstacle to any RFMO either making quota shares permanent or introducing a rule that there must be no fishing by its members unless it has made a positive decision to allow it – but none is likely to do so for as long as there is no limitation of entry to the fishery.

• RFMOs cannot impose limited entry on outsiders fishery by fishery, but tradability of quotas may be assisting the process of it coming about via a parallel development of international fisheries law whereby members of any RFMO that adopts an ITQ-like system that does not discriminate against new entrants (i.e. allows them to buy into a fishery by acquiring quota from a current member, the sole condition being that they become members of or formally cooperate with the RFMO so as to be bound by its rules) can insist that new entrants cooperate with that system.

• The question is thus not whether trading of fishery commission quota is permitted at all by international law, but rather whether a given proposed quota transaction needs the approval of the relevant RFMO.

• Given the contractual nature of quota, what is required is either an ad hoc decision amounting to waiver, as happens in ICCAT, or consent must be given in advance expressly, as in NAFO, NEAFC and IBSFC. Any trading mechanism needs to deal with practical legal implications of trading, i.e. at minimum there needs to be a central register recording transactions so that catch can be accounted for properly. From the point of view of conserving both the fish and the fishery, successful schemes will in addition need to employ measures to ensure that on a relative tonne-for-tonne basis no transaction adds to pressure on the stock. This implies that such a mechanism will be interdisciplinary in design, with scientists, economists and lawyers all playing their part.