

Limited Entry on the High Seas: ITQs beyond Boundaries

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Abstract

Although the 1982 UNCLOS endeavoured to establish EEZs and assist coastal states in being able to manage the resources throughout their range to some extent, it became obvious that further agreements were necessary to expand upon states' international obligations in relation to conservation and management of living resources on the High Seas. The 1995 Agreement concluded as a result of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and a number of other international agreements have set the scene for significant change in High Seas fisheries management.

In particular, through the auspices of regional fisheries management organizations (RFMOs) and arrangements, state parties will be under an obligation to co-operate and agree, where appropriate, on participatory rights in High Seas fisheries, including allocations of allowable catch or levels of fishing effort. The 1995 Agreement, however, only indirectly confronts the principal underlying reasons for the often competing interests of coastal and High Seas states – namely, the allocation of limited resources. The same “tragedy of the commons” issues that have plagued fisheries management, notwithstanding the extension of coastal state jurisdictions out to 200 miles, are set to continue and will become more apparent on the High Seas.

This paper will discuss and explore the legal implications and authority for limited entry and rights-based fishing on the High Seas within this new international legal structure. In particular, the paper will set out the mechanism and advocate the benefits of the allocation of individual property rights on the High Seas to state nationals as a vital adjunct of the development of international conservation and management measures of living resources on the High Seas. These issues will be canvassed within the context of migratory (Bluefin Tuna) and demersal (Tasman Rise Orange Roughy) fisheries.

1.0 INTRODUCTION

The 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS)¹ gave international recognition and substance to a legal régime for the management and conservation of High Seas fisheries which, with a few exceptions², was primarily based on coastal state jurisdiction, sovereignty and management. While apparently resolving the potentially conflicting interests of Coastal states seeking control over exploitation of living resources in adjacent waters and those nations seeking to preserve traditional rights of navigation and transit, the establishment of Economic Exclusive Zones (EEZs) nonetheless constituted artificial lines in the sea which had no particular biological or ecological significance.

Since the 1970s scientific and political understanding of the integrated nature of ocean-based ecosystems has significantly increased. This has, in the case of fisheries, led to a recognition amongst states that their national

¹ Part V United Nations Convention on the Law of the Sea, opened for signature Dec 10, 1982, UN Doc A/CONF 62/122 (1982), 21 ILM 1261 (1982), hereinafter cited as “1982 UNCLOS”.

² 1982 UNCLOS, supra note 1, Articles 63(2) Straddling Stocks, 64 Highly Migratory Species, 65 Marine Mammals, 66 Anadromous Stocks, and 67 Catadromous Species.

interests, the health of fish stocks and the development of local fishing industries frequently cannot be divorced from the need to ensure sound management of inter-related stocks and ecosystems that range across national and international boundaries³.

These concerns, however, have also highlighted deficiencies in the international régime governing the management and conservation of High Seas living resources set out in 1982 UNCLOS. Many states and commentators regarded the provisions of 1982 UNCLOS, insofar as they concerned the management and conservation of High Seas stocks, as at best inadequate⁴.

Throughout the following two decades, considerable international effort went into addressing these perceived deficiencies resulting in various Conventions, treaties and codes of conduct that can now fairly be described as providing a legal and practical framework for international management of High Seas fisheries. Principal amongst these international initiatives has been the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (“UNFSA”)⁵.

Accompanying these developments in international law, there has been an equivalent revolution taking place at a national level, with the implementation of property rights based fisheries management régimes by a significant number of states⁶. While property rights in fisheries take many forms, the most developed rights are founded on Individual Transferable Quotas (ITQs)⁷.

The purpose of this paper is to explore within the context of two specific examples, Southern Bluefin Tuna and Tasman Rise Orange Roughy, whether this new management paradigm for High Seas fisheries now provides a legal basis under international law for the extension of fishing-based property rights, in the form of ITQs onto the High Seas.

2.0 LEGAL NATURE OF HIGH SEAS DEFINED

In international law there are two distinct régimes governing the High Seas. The First relates to those areas of the High Seas within national jurisdictions and the second relates to those areas of the High Seas beyond national jurisdictions.

2.1 High Seas within national jurisdictions

Those waters of the High Seas beyond the territorial waters of a coastal state but within the boundaries of a declared EEZ fall under the specific legal régime established by 1982 UNCLOS⁸. Within the EEZ, the coastal state does not have absolute sovereignty, and all states continue to enjoy the High Seas freedoms of navigation, overflight, laying and maintenance of submarine cables and pipelines, and related uses compatible with other

³ Formal recognition of this integrated ecosystem approach to fisheries conservation and management obligations under international law was given in Agenda 21, Chapter 17 of the Rio Declaration of Principles. A full text of Agenda 21 can be found at www.un.org/esa/sustdev/agenda2text.htm. For an analysis of the influence of Agenda 21 on the evolution of international fisheries management, see L Juda, “Rio Plus Ten: The Evolution of International Marine Fisheries Governance”: *Ocean Development & International Law*, 109-144, 2002.

⁴ In 1992, the FAO Fisheries Department summarised these concerns in the following terms:

“The legal aspects of High Seas fishing are not addressed comprehensively in the LOSC, and where High Seas fishing issues are considered, there is a general lack of clarity with respect to important matters such as the enforcement of conservation and management measures. There is a pressing need for these issues to be further considered and conceptually developed so that a framework for international management of High Seas fisheries might be agreed”.

FAO, Fisheries Department, *World Fisheries Situation II (Table for International Conference on Responsible Fishing, Cancun, Mexico, 6-8, (1992)*.

⁵ UN Doc A/CONF 164/33 (1995).

⁶ For examples refer Table 4.3. *Fisheries Managed with Individual Quota Programmes*, OECD (1997c), pp 81-82. ENV/EPOC/GEEI/BIO(97)14/FINAL.

⁷ In their purist form ITQs confer a right in perpetuity to catch a specified quantity and stock of fish in a specific location during a specific period of time. The actual ITQ in any year is equal to the individual’s share of each year’s total allowable catch (TAC). The quota share is assured from year to year, but the catch entitlement associated with that quota varies with the total allowable catch that is determined by a central authority. The TAC is usually set at a level which will move the fish stock towards a size, or maintain it at a size, which will support the maximum sustainable yield. ITQs are a form of property and can be traded, exchanged or mortgaged. The duration, transferability, flexibility, quality of title and divisibility of ITQ can and do vary across jurisdictions and fisheries ITQs as an incentive measure for the Conservation and the Sustainable use of Marine Biodiversity, OECD (1998), pg 4, ENV/EPOC/GEEI/BIO(97)14/FINAL.

⁸Part V, 1982 UNCLOS. Article 33 of the Convention also allows for the establishment of a contiguous zone beyond the Territorial Sea, but this zone has no application to the exploitation of High Seas resources.

Convention provisions. The coastal state has, however, sovereign rights for the purposes of exploring, conserving, and managing fishery resources⁹.

The coastal state's sovereign rights are subject to specific obligations to determine the allowable catch available for exploitation, using the best scientific evidence available to it, and to ensure that populations of harvested stocks are maintained or restored to levels that produce the maximum sustainable yield, as qualified by relevant environmental and economic factors¹⁰. In addition to other ancillary obligations, the coastal state has the prime responsibility to determine whether it has the capacity to harvest the entire allowable catch and, where it determines that other states may access any surplus, provide that other states fishing in its EEZ must comply with the conservation measures and other terms established in the laws and regulations of the coastal state in accordance with the Convention¹¹.

The decisions of the coastal state, in this context, are accorded significant primacy, with the coastal state having the right to refuse submission to the compulsory settlement procedures of any dispute relating to the exercise of its sovereign rights or discretionary powers for determining allowable catch, harvesting capacity, allocation of surpluses, or the terms and conditions of fishing established under its laws and regulations¹². In particular, 1982 UNCLOS specifically provides that, while coastal states' laws and regulations must be consistent with the Convention, the coastal state may determine the species which may be caught and may fix quotas of catch in relation to particular stocks or groups of stocks or catches per vessel over a period of time or relating to catch by its nationals or nationals of any other state during specified periods¹³.

While 1982 UNCLOS does not mandate property rights régimes based on ITQs, such rights in relation to the management and conservation of stocks within EEZs, are clearly not inconsistent with the provisions of the Convention. It might be argued in particular cases that allocation of ITQs in relation to EEZ stocks might preclude a coastal state's ability to comply with its obligations under Articles 62, 69 and 70 of the Convention. Article 62 imposes a general obligation for the coastal state to provide access to other states to surplus allowable catch where the coastal state does not have the capacity to harvest the entire allowable catch. Articles 69 and 70 impose more specific obligations on the coastal state to facilitate the right of landlocked states (LLSs) to participate on an equitable basis in the exploitation of appropriate surpluses of living resources. The better view, however, is that the rights conferred under Article 62 and even those conferred under Articles 69 and 70 are very contingent in nature and that the decisions of the coastal state as to whether any surplus exists and to what extent access will be provided will be determinative of the issue¹⁴.

As allocation of ITQs are therefore not inconsistent with the general principles of international law as set out in 1982 UNCLOS, the mechanics and extent of allocation of ITQ property rights then fall to be determined under the coastal state's domestic legislation and laws.

2.2 High Seas beyond national jurisdictions

There has, until recent times, been little scope for the development of property rights generally, let alone in the form of ITQs, on the High Seas. Under the traditional rules of international law, the principle of *mare liberum* (freedom of the seas) has been the guiding legal doctrine governing the use of the High Seas¹⁵. That doctrine, along with the categorisation of fish in the sea as *bomnuis omnium naturali jure*, has traditionally been cited as the legal foundation of the concept of "freedom of fishing", which entails the right of states and their nationals to an unfettered right to take fish beyond national jurisdictions in such manner and to such extent as they saw fit.

The effectiveness of property rights in governing the efficient use of natural resources is based on four pillars. These are: universality, exclusivity, transferability and enforceability¹⁶. In essence, the High Seas has been the

⁹ 1982 UNCLOS, Article (56)(1)(a). The sovereign rights extend to purpose of exploring and exploiting, conserving and managing all the natural resources of the EEZ, whether living or non-living.

¹⁰ 1982 UNCLOS, Article 61.

¹¹ 1982 UNCLOS, Article 62.

¹² 1982 UNCLOS, Article 297(3)(a).

¹³ Article 62(4b).

¹⁴ This is certainly the view of the learned author Professor William T Burke: refer *The New International Law of Fisheries*.

¹⁵ *UNCLOS 1982 and Beyond*, Clarendon Press, 1994, pp 68-75.

¹⁶ Tietenburg, T 1988 *Environmental and Natural Resources Economics* (2nd edition). Scott Forsman, Glenview 111 and London, p 559. Legal characterisation of "property" is somewhat different, with the classic definition being set out:

"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

ultimate expression of “a right of common” in which all participants were free from restrictions on the exercise of access and exploitation. Such a legal and economic environment is the very antithesis of that required for the development of stable property rights in any form. Of the four pillars of property rights, the most important is enforceability. It is inconceivable that fishers would be prepared to invest in property rights in High Seas fisheries that cannot be enforced. Weaknesses in the other three attributes are likely to be reflected in the value, but do not directly undermine the very existence of such property rights.

With the growing realisation of the limited abundance of the resources in the sea, the doctrine of unfettered freedom of fishing on the High Seas has come under increasing challenge. Commencing with the two 1958 High Seas related Conventions¹⁷, which were given authoritative recognition in the *Fisheries Jurisdiction Case (United Kingdom v Iceland)*¹⁸, the rights of fishing by states and nationals on the High Seas became subject to a basic duty to conserve and manage High Seas fisheries and other living resources.

These general conservation and management obligations have subsequently been codified in 1982 UNCLOS, confirming the shift in international law. While first enunciated as treaty obligations in 1958, they are now a norm of customary international law¹⁹. Nonetheless, those duties as set out in the relevant Articles are “a model of vagueness and imprecision”²⁰.

As has recently been noted by FAO²¹, however, the on-going development of the conservation and management obligations of living resources on the High Seas embodied in the 1982 UNCLOS coupled with conflicts over rights to catch fish in situations where stocks cross national jurisdictions and/or national and international areas²², has led to the development of two specific Agreements, which clarify and more precisely define the scope of property rights in High Seas fisheries.

In 1993, the FAO Agreement to promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993²³ (“FAO Compliance Agreement”) was adopted to strengthen the exclusivity of the property rights of those fishing on the High Seas²⁴. The Agreement focused on and has verified which vessels had the authority to fish on the High Seas, and it also underlined the responsibilities of fisheries management authorities in controlling such activity. Two years later, the adoption of the UNFSA extended the definition of property rights relating to the fishing of straddling and highly migratory fish stocks by strengthening both the flag state's responsibilities associated with the right of exploiting such stocks and the enforceability and security of the privileges conferred by those rights with provisions on compliance and enforcement²⁵. In addition to these Agreements, attempts are underway to develop an international plan of action to deal with illegal, unreported and unregulated (IUU) fishing which will also serve to define more clearly and enforce the property rights to harvest fish on the High Seas²⁶.

3.0 SCOPE FOR ALLOCATION OF PROPERTY RIGHTS (ITQS) UNDER CURRENT INTERNATIONAL AGREEMENTS

3.1 1993 FAO Compliance Agreement

The FAO Compliance Agreement is one of the more specific and detailed agreements relating to High Seas fishing and was the result of a “fast track” process running parallel with the elaboration of the FAO Code of

permanence or stability”.

¹⁷ The 1958 Convention on the High Seas (Apr 29, 1958, 13 UST 2312, TIAS No 5200, 450 UNTS 82) and the Convention on Fishing and Conservation of Living Resources of the High Seas (Apr 29, 1958, 17 UST 138, TIAS No 5969, 559 UNTS 285).

¹⁸ 1974 ICJ 3 (July 25).

¹⁹ W T Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, Clarendon Press [1994], at p 100.

²⁰ Kaitala, V and G R Munro, 1993: The Management of High Seas Fisheries, *Marine Resource Economics*, 8, 4, 313-329 at 316.

²¹ State of World Fisheries and Aquaculture, FAO, 2000.

²² For example, Canada's enforcement actions against Spanish vessels fishing for Greenland halibut in 1995.

²³ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov 24, 1993, S Treaty Doc No 24, 103d Cong, 2d Session (1994).

²⁴ *Supra*, note 24.

²⁵ *Supra*, note 24.

²⁶ The FAO International Plan of Action to prevent, deter, and eliminate illegal, unreported and unregulated fishing (IPOA IUU) is a voluntary plan adopted within the framework of the FAO Code of Conduct for Responsible fisheries. The Plan was endorsed by the FAO Council in June 2001. Under the Plan, states are required to develop and implement, as soon as possible, not later than 2004, national plans of action to further achieve the objectives of the IPOA.

Conduct for Responsible Fisheries. The Cancún Declaration along with UNCED Agenda 21 was the background for the initiative.

Twenty-five acceptances are required for the Agreement to come into force.

The primary tenet of the FAO Compliance Agreement is the obligation of parties to require that fishing vessels carrying their flags obtain specific authorisation to operate on the High Seas. Parties are also responsible for ensuring that their vessels do not undermine conservation and management measures that have been adopted by global or RFMOs.

The Agreement is also designed to discourage vessel owners from reflagging their vessels for the purposes of evading international conservation and management measures to which they would otherwise be bound. Parties to the FAO Compliance Agreement are obligated to disallow the licensing of a vessel of another country if it can be determined through an exchange of information that the vessel has been sanctioned by that nation within the last 3 years for violating international conservation and management measures. This measure is designed to deal with vessel owners intent on conducting fishing operations irrespective of international environmental considerations and measures.

In accordance with its obligations under the FOA Compliance agreement New Zealand, as from 1 May 2001, has required its vessels fishing on the High Seas to obtain a High Seas permit²⁷. Such permits may be conditioned as to a range of matters²⁸, but specifically include the ability to specify quantities of stock that may be taken by fishers and measures required to give effect to international conservation and management. Australia implemented High Seas fishing permits on 11 December 2001, such permits can require vessel monitoring systems, observers and log books on all vessels fishing on the High Seas²⁹.

3.2 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks

UNFSA concluded as a result of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, clearly represents a significant step forward in clarifying the competing interests of coastal and High Seas fishing states in straddling stocks and highly migratory species, left unresolved by 1982 UNCLOS. While the principal aim of the Agreement was to achieve a resolution to the problems presented by management and conservation of these High Seas Stocks by consensus, a substantial and inexorable erosion of the “freedom of fishing” on the High Seas has been the inevitable outcome.

While UNFSA contains many important aspects directed at conservation of High Seas fisheries, such as the emphasis on employing the precautionary principle in the conservation and exploitation of such stocks, the critical provisions relating to High Seas management régimes conducive to allocation of property rights are:

- (a) the ability of states to adopt emergency management and conservation measures where stocks are facing a significant adverse effect from natural phenomenon or serious threat to sustainability from fishing activity (Article 6.7);
- (b) the duty on coastal and High Seas states to co-operate in establishing compatible conservation and management measures and, in determining such measures, to take into account (amongst other matters) and ensure compatibility with conservation and management measures adopted and applied by the coastal states in accordance with Article 61 of the 1982 UNCLOS;
- (c) the enhanced role of RFMOs and subregional fisheries management organisation (SRFMOs) and arrangements in ensuing effective conservation and management of such stocks (Article 8) and in particular, the restriction of access to such stocks to states that are members of such organisations or participants in such arrangements or to those who agree to abide by the measures established (Article 8.4);
- (d) the application of the provisions of the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks to those states that are not members of such Organisations or Agreements (Article 17.1);

²⁷ Part 6A of the Fisheries Act 1996.

²⁸ Section 113K Fisheries Act 1996.

²⁹ Section 32 Australian Fisheries Management Act. Section 105(a) relates to permit offences.

- (e) the positive obligation on flag states to only authorise fishing by its vessels on the High Seas where it is able to effectively exercise its responsibilities, including enforcement, under the Convention and the Agreement (Article 18.1);
- (f) the emphasis on international co-operation in enforcement, either directly or indirectly through SRFMOs or RFMOs or arrangements (Article 20);
- (g) the provision for any state party which is a member of such organisations or arrangements to board and inspect any vessel flying the flag of another state party, irrespective of whether such state party is a member of that organisation or arrangement (Article 21.1);
- (h) the provision for, in default of appropriate response by a flag state in exercising its obligations under Article 21, the state party's inspectors to remain on board the vessel, secure evidence and direct the vessel to the nearest appropriate port where they have clear grounds for believing that the vessel has committed a serious violation (Article 21.8);
- (i) the establishment of default, boarding and inspection procedures (Article 22) in the absence of agreement, including the ability to use force where the safety of inspectors arises or the inspectors are obstructed in the execution of their duties. (Article 22.1(f));
- (j) the obligation to settle disputes by peaceful means (Article 27) and the application of Part XV of the 1982 UNCLOS *mutatis mutandis* to any dispute between state parties to the Agreement (Article 30).

UNFSA only indirectly confronts the principal underlying reason for the often competing interests of coastal and High Seas states, namely allocation of limited resources. Nonetheless, with ultimately too many fishermen chasing too few fish, sooner or later each SRFMOs and RFMOs or arrangements will have to address the inevitable issue; who gets an allocation, and how much, versus who doesn't. It is in this regard that UNFSA comes into its own. As between state parties, Article 10 of the Agreement provides that in fulfilling their obligation to co-operate through SRFMOs or RFMOs or arrangements, states have a positive duty to agree, as appropriate, on participatory rights, such as allocations of allowable catch or levels of fishing effort.

UNFSA does not provide or specify how this should be achieved, leaving this to the specifics to the RFMO or arrangement. Nor, apart from specifying certain matters to be taken into account, does it address in any detail the issue of what participatory rights should be allocated to new members or participants in such organisations or arrangements (Article 11). Importantly, however, if an irresolvable dispute over such issues in fact arises, then the issue can be referred to compulsory dispute settlement under the provisions of Part XV of the 1982 UNCLOS (Article 30(3)).

It has been argued that the provisions of UNFSA, while potentially more conducive towards a property rights régime than the 1982 Convention, lacks a specific mandate for rights that are transferable and exclusive in nature. In particular, criticism has been levelled at the ability of new members or participants to apply for and obtain a share of any stock managed within the context of an RFMO. Accordingly, it is argued, this means that quota arrangements under the auspices of RFMOs would not qualify as full property rights and are more likely to resemble access rights, which do not in themselves have the capacity to resolve common property resource problems³⁰.

While it is certainly correct that the issue of transferability of fishing rights will be at the discretion of RFMOs, will depend on the preferences of individual members, and it is highly unlikely that any country would willingly sell or lease its national allocations, that does not preclude the possibility of ITQs being allocated by each state to its nationals, with the ITQs representing a proportional share of that state's national allocation.

The transferability and exclusivity of a particular state's quota allocation would be governed by that state's domestic legislation. With the adoption of High Seas permitting régimes, mechanisms for setting the "rules" associated with the exploitation and access to those national ITQs can now be readily implemented and enforced.

While it is also correct that UNFSA does allow states to subsequently join an RFMO or arrangement and seek a share of access rights to fisheries managed under those auspices, in practice this aspect of UNFSA is not as

³⁰ See further, Stokes, A: *Property Rights on the High Seas: Issues for High Seas Fisheries*, Use of Property Rights in Fisheries Management, FAO Fisheries Technical Paper. No 404/2.Rome, FAO 2000.

open-ended as it might first appear. Access to fisheries resources under UNFSA is conditional upon membership of or abiding by the rules set by the RFMO, which involves the setting and allocation of TACs. UNFSA also provides an ability to discriminate in relation to membership and catch entitlements. In order to obtain an entitlement, the state applying for access must have a “real interest” in the fishery, and this requirement is likely to provide the mechanism in the future for maintaining stability and co-operation within RFMOs and arrangements.

In any event, the fact that a state’s “share” of any resource allocated within the auspices of an RFMO or arrangement might change will simply reflect on the value attributed to any underlying property rights allocated to that state’s nationals. Until varied, any ITQ rights allocated by a state to its nationals will have sufficient aspects of exclusivity, transferability and enforceability (if not universality) so as to have the characteristics of valuable property. The existence of valuable property rights in High Seas fisheries should then lead to a change in the incentives of the actual “fishers” (as distinct from the state itself) and ultimately lead to the long-term sustainability of the exploitation of High Seas resources.

The impact of national allocations increasing or decreasing over time on the underlying value and efficacy of the property right should not be over stated. In principle, such variations are no different than changes in the TAC consequent upon application of general fisheries management and conservation principles. In fact, the allocation of ITQs to a country’s nationals is likely to result in that country placing a greater emphasis on ensuring the long term viability and integrity of RFMOs or regional arrangements to which they are a party.

3.3 The issue of “free riders”

The real threat to property rights on the High Seas is the issue of free riders, that is, states seeking to obtain the benefit of High Seas resources while avoiding international conservation and management obligations. In this context, UNFSA, while not extending to or binding those states that do not become a party to it, provides that:

- “1. State parties shall encourage non-parties to this Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions.
2. State parties shall take measures consistent with the Agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement”³¹.

Article 23(3) directly empowers a state party to adopt regulations to prevent landings and transshipments in their jurisdictions where it is established that a catch has been taken in a manner which undermines the effectiveness of sub-regional, regional, or global conservation or management measures on the High Seas. In addition, non-parties are still bound by their obligations to cooperate with other states in respect of the management and conservation of High Seas stocks, including straddling stocks, under the provisions of 1982 UNCLOS.

In practice, if not in theory, most states will be reluctant to openly defy internationally recognized RFMO or regional arrangements directed at the conservation and management of High Seas fisheries.

4.0 SPECIFIC EXAMPLES – TUNA AND ORANGE ROUGHY

4.1 Southern Bluefin Tuna

Southern Bluefin Tuna (*Thunnus maccoyii*) or SBT are an existing example where a State has distributed quota share allocated to it under the auspices of an international convention in a High Seas fishery to its nationals in the form of property rights (ITQs).

SBT are a large, fast swimming, pelagic fish and are highly migratory. SBT are found throughout the southern hemisphere mainly in waters between 30 and 50 degrees south. The only known breeding area is in the Indian Ocean, south of Java, Indonesia. SBT can live for up to forty years, reach a weight of 200 kilograms, and measure more than 2 metres in length. Breeding takes place from September to March in warm waters south of Java, Indonesia. The juveniles migrate south down the west coast of Australia towards New Zealand, and also west through the Indian Ocean towards South Africa.

³¹ Article 33.

In the mid-1980s it became clear that the SBT stock had reached a level requiring a mechanism limiting catches. In 1985 Australia, Japan and New Zealand, the main nations fishing SBT at the time, voluntarily imposed strict quotas on their fishing fleets as a management and conservation measure to enable the SBT stocks to rebuild. In May 1994 these voluntary management arrangements were formalised when the Convention for the Conservation of Southern Bluefin Tuna³² (SBT Convention) came into force. The Convention created the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). The CCSBT is headquartered in Canberra, Australia³³.

In addition to Australia, Japan and New Zealand, a number of other fishing nations were active in the SBT fishery. The activity of these non-member states was viewed as significantly reducing the effectiveness of conservation and management measures adopted by the CCSBT. The principal non-member nations were Korea, Taiwan and Indonesia. There were also a number of other fishing vessels flying flags of convenience, which operated in the fishery. Both South Korea and Taiwan have now joined the Commission³⁴.

The objective of the Convention is to ensure, through appropriate management, the conservation and optimum utilisation of SBT. In determining measures relating to the conservation, management and optimum utilisation of SBT, the Commission is required to decide upon a total allowable catch and its allocation among the parties³⁵. In deciding upon allocations among the parties the Commission must consider, amongst other matters³⁶:

- (a) the need for orderly and sustainable development of SBT fisheries, the interests of parties through whose exclusive economic fishery zones SBT migrates;
- (b) the interests of parties whose vessels engage in fishing for SBT including those which have historically engaged in such fishing and those which have SBT fisheries under development;
- (c) the contribution of each Party to conservation and enhancement of, and scientific research on, SBT;
- (d) any other factors which the Commission deems appropriate.

Against this background, the approach to management of SBT in Australia and New Zealand has differed significantly.

In 1983, the Australian government implemented a total allowable catch limit of 21,000 tons in the Australian fishery as an interim arrangement³⁷. In October 1984 an ITQ system was introduced in the Australian SBT fishery with a catch quota of 14,500 tons. Quota allocations were based on catch history (75%) and investment in the SBT fishery (25%). Individual fishermen received quotas totalling an average of 40-60% of their total catch in the qualifying period. ITQs were allocated as Statutory Fishing Rights (SFRs) under the Southern Bluefin Tuna Fishery Management Plan 1995. This Plan provides for access to SBT in all waters of the AFZ and extends to the High Seas for Australian fishers.

Following the introduction of ITQs, the average market price of SBT rose from \$A988 per ton during the 1983-84 season to \$A2,000/t during the 1986-87 season (1986-87 dollars). While partially attributable to declining catch levels, most of the increase was due to the introduction of ITQs. Previously, fishermen tended to fish for as much SBT as possible, primarily for the canning market, resulting in smaller fish being caught. The introduction of ITQs, resulted in a change in focus, with most fishermen shifting their fishing efforts to larger SBT for the higher value Japanese sashimi market. The introduction of ITQs therefore allowed fishers to shift from a competitive fishing mode, to that of maximizing the value of their allocations by concentrating on the quality rather than quantity of catch. ITQs also forced substantial changes in the structure of the Australian fishery. Many fishers took the opportunity to sell their quotas and exit the fishery, while many of those who remained purchased additional quota and subsequently increased the scale of their operations. The end result of this classic example of economic restructuring that occurs on the introduction of transferable rights was fewer boats

³² Convention for the Conservation of Southern Bluefin Tuna, done at Canberra, 10 May 1993.

³³ See further the CCSBT website at <http://www.ccsbt.org/>.

³⁴ The Republic of Korea joined on 17 October 2001 and Taiwan was admitted to the extended Commission on 8 January 2002. Indonesia's membership is being pursued as a matter of urgency.

³⁵ Unless it decides upon other appropriate measures on the basis of reports and recommendations of the Scientific Committee referred to in paragraph 2(c) and (d) of Article 9.

³⁶ Article 3, SBT Convention.

³⁷ During the 1983-84 fishing season, Australian fishermen were only able to catch 16,000 tons, thus falling 5,000 tons short of the total allowable catch.

and fishers fishing for SBT, with higher average catches per boat³⁸.

In contrast to the orderly scene in Australia, New Zealand has managed SBT outside the Quota Management System (QMS) it established in 1986 and which has served as its principal focus for fisheries management since then. In addition, tuna species, including SBT, have been the only non-QMS fisheries since 1992 which have been managed as an open access fishery. All other non-QMS fisheries have been subject to a permit moratorium, limiting access to historical fishers and effort has been constrained in those fisheries by permitting policies. The effect, however, of this policy was that there was nothing to prevent catch exceeding the 420 tonne limit as the Ministry of Fisheries did not operate a workable real-time monitoring system and, as the catch limit is competitive, there was no legal obligation on permit holders to constrain their individual catches within the limit.

This open access régime has resulted in a large number of permits being issued for what is a relatively small fishery in New Zealand and led to increasing capitalisation³⁹. The lack of a moratorium on issue of further permits, the large number of unused permits, and the ability of permit holders to fish any number of vessels under their permits mean that there was no practical constraint on increases in capacity and catch. As was predictable, the New Zealand annual catch over the last decade has ranged from 165 to 529 tonnes, leaving New Zealand at times in at least technical breach of its obligations under the SBT Convention.

In recent times, however, New Zealand fisheries legislation has begun to place greater emphasis on New Zealand's international fisheries obligations⁴⁰ and, as a consequence of the competitive and open access nature of the fishery, it has been necessary for New Zealand to introduce specific restrictions relating to the taking and landing of SBT. These restrictions, set out in the Fisheries (Southern Bluefin Tuna Quota) Regulations 2000, apply to -

- (a) the taking and possession of SBT in New Zealand fisheries waters by any commercial fisher; and
- (b) the taking and possession of SBT in the High Seas south of 30°S, for the purposes of sale, by any New Zealand citizen or by any New Zealand vessel⁴¹.

The Regulations impose an annual catch limit of 420 greenweight tonnes for each fishing year ending 30 September⁴². Once that annual catch limit is reached, the Chief Executive is required to close the fishery by notice in writing to holders of permits that authorise the taking of SBT. This would include holders of appropriately conditioned High Seas fishing permits. Once the closure is effected, the permit holder may not target any further SBT until either the closure is lifted or the new fishing year begins⁴³.

New Zealand has recently announced, however, that SBT will be brought into the QMS⁴⁴. Significantly, the Fisheries Act 1996 specifically includes fishers High Seas catch as "eligible catch" for the purposes of calculating relevant quota entitlements for fishers⁴⁵. In essence therefore, New Zealand will tread down the path already taken by Australia, in allocating its national quota under the SBT Convention by way of ITQs and those rights will apply both domestically and on the High Seas.

4.2 Orange Roughy

The South Tasman Rise Orange Roughy Fishery (STR) is an example of a straddling stock managed under a bilateral arrangement which could be one of the first straddling stock/High Seas fisheries to be managed through allocation of national quotas to domestic fishers in the form of ITQs.

Orange Roughy (*Hoplostethus atlanticus*) (ORH) is a slow growing, long-lived species that is widely distributed

³⁸ For an in-depth analysis of the economic impact of introduction of ITQs in the SBT fishery in Australia see Geen, Gerry and Nayar, Mark, "Individual Transferable Quotas in the Southern Bluefin Tuna Fishery: An Economic Appraisal". *Marine Resource Economics* - V No 4 (1988): 365-388.

³⁹ 397 permits for SBT, each of which could use one or more vessels. Only an estimated 25 vessels landed SBT in 1998, increasing to 35-40 in 1999.

⁴⁰ Section 5 Fisheries Act 1996.

⁴¹ Regulation 5.

⁴² Regulation 6.

⁴³ Regulation 7.

⁴⁴ Letter dated 29 November 2001 from Chief Executive, Ministry of Fisheries, New Zealand, to Stakeholders: "Introduction of New Species or Stocks into the QMS on 1 October 2003, 1 April 2004 and 1 October 2004".

⁴⁵ Section 34 Fisheries Act 1996.

in temperate deep-water areas of both the southern and northern latitudes. Australia and New Zealand fish for ORH in domestic and international waters. The South Tasman Rise Orange Roughy fishery extends from the Australian fishing zone into the High Seas south of Tasmania. This area is significant in that it attracts spawning aggregations that are easily targeted. The species is particularly prone to overfishing due to its slow growth rate and low fecundity⁴⁶.

The STR had been managed under a Joint Memorandum of Understanding (MOU) executed by New Zealand and Australia since 1998. While not binding, the MOU was directed at the need for cooperative management and formalized allocations as between the two countries. The TAC was set at approximately 2,400t, of which Australia received 75% (1,800t) and New Zealand received to 25% (600t). This MOU lapsed in February 1999, following which there was disagreement between the two countries as to the appropriate shares of the TAC. While Australia restricted its nationals to its previous allocation under the lapsed MOU and closed the fishery in April 1999, New Zealand nationals continued to fish and ultimately caught in excess of 1,900t. As a result of the overfishing in 1999, New Zealand and Australia prohibited their nationals from fishing the straddling stock until March 2000, while negotiations were commenced with a view toward implementing a new MOU⁴⁷.

Under the new MOU signed by New Zealand and Australian Ministers in February 2000, Australia was again allocated 1,800t (75%) of the annual 2,400t TAC and New Zealand was allocated the remaining 600t (25%) less 100t a year (from 1 March 2000) for 7 years in recognition of past overcatches. New Zealand and Australia, however, manage access by their nationals to these allocations through distinctly different management measures. Australia manages the fishery as a limited access fishery with the number of permits currently restricted to 14, but fishing is otherwise competitive in nature with no individual allocations. The fishery is closed to Australia fishers once the Australian allocation of 1,800t is taken. Australia also employs a number of compliance requirements, eg deployment of VMS, shot by shot reporting of catch, prior to landing pager reports, etc⁴⁸. Conversely, New Zealand manages its allocation as an open access fishery to its nationals with no restriction on the number of authorisations issued to fish the fishery. As soon as practicable after becoming aware that New Zealand's annual catch limit for a season has been or is about to be reached, the chief executive is required to close the fishery by notice in writing to holders of appropriate authorisations⁴⁹. New Zealand, however, imposes similar compliance requirements as the Australian authorities on vessels fishing that fishery.

While access rights may differ in detail, both countries have established regimes that encourage a race for fish rather than enabling fishers to concentrate on quality and economic performance.

The efficacy of New Zealand and Australia's management of this shared straddling stock was also threatened in July 1999, when Australian authorities identified two large South African factory trawlers on the STR capable of taking over 300t of fish daily, along with another trawler flagged in Belize. The vessels were observed fishing a spawning aggregation of orange roughy only four nautical miles outside the AFZ. Formal complaints, however, to the respective Governments, resulted in the vessels ceasing all fishing in the region of the STR⁵⁰. The South African government revoked the licences of its vessels, while Belize deregistered its vessel. Both Australia and New Zealand also declared they would prohibit the landing of catches taken by unregulated vessels that attempted to take orange roughy from the STR⁵¹. Subsequently, Australia and New Zealand, by way of Joint Ministerial Statement, noted that the Countries had cooperated closely in achieving quick cessation of unregulated fishing by foreign fishing vessels on the STR and that this incident underlined the need to strengthen bilateral arrangements for responsible management and conservation of this stock⁵².

While the bilateral arrangements between Australia and New Zealand, in the form of an MOU, sufficiently discharge the obligations of both countries under 1982 UNCLOS to cooperate in the conservation and management of a shared straddling stock, the incident in July 1999 emphasized the limitations of such bilateral arrangements in dealing with non-parties disrupting or undermining management and conservation measures put in place.

In the absence of a means of regulating access to the STR, the ability to effectively manage this fishery, let alone

⁴⁶ See Stokes, A: *Property Rights on the High Seas: Issues for High Seas Fisheries*, Use of Property Rights in Fisheries Management, FAO Fisheries Technical Paper. No. 404/2.Rome, FAO. 2000, at Page 116.

⁴⁷ Ibid at 116, 117.

⁴⁸ <http://www.afma.gov.au/fisheries/south%20tasman%20rise/default.php>.

⁴⁹ refer Fisheries (South Tasman Rise Orange Roughy Fishery) Regulations 2000.

⁵⁰ <http://www.affa.gov.au/ministers/vaile/releases/99/99106v.html>.

⁵¹ <http://www.affa.gov.au/ministers/truss/releases/99/997wt.html>.

⁵² Joint Ministerial Statement, Canberra, Australia, 12 August 1999.

provide for property rights, has been limited ie the fishery exhibits the fundamental conundrums of High Seas fisheries management. As a result of the combination of the FAO Compliance Agreement and UNFSA, however, the STR fishery can now be managed in a fashion where access to the fishery can be effectively restricted to those countries and their nationals having a “real interest” in the fishery. While considerations of “real interest” under UNFSA is an exercise in competing (and at times conflicting) principles, with no definitive formula specified establishing access rights to and the means for distributing TACs, the emphasis on such states having a “real interest” in the fishery is likely to provide Australia and New Zealand with the means to exclude unregulated fishing from the STR. As one commentator noted, if the UNFSA had been in force during the incident of unregulated fishing, Australia would have been able to board, inspect, and potentially take enforcement action against the vessels⁵³.

In light of the provisions of the FAO Compliance Agreement and UNFSA, other States seeking to participate in the fishery will now be obliged to either join or abide by the terms of the Bilateral arrangement or otherwise take steps to ensure that their nationals do not undermine the terms of the Agreement. In addition, however, by limiting access and providing the necessary mechanisms for the enforcement of the conservation and management measures established, the new paradigm of international fisheries management has established an environment within which these countries can now allocate property rights (in the form of ITQs) to their nationals, which will enable them to capture the maximum economic benefits from this fishery. The Authors can see no legal impediments to Australia and New Zealand, who are leading proponents of ITQ management and who have all the requisite infrastructure in place, allocating ITQs in proportion to their national allocations as they have already effectively done or propose to do in the SBT fishery.

5.0 CONCLUSIONS

1982 UNCLOS, while recognising the right and freedom of fishing on the High Seas, marked the clear recognition that these rights are not unrestricted and are subject to the interests of the community of states generally, and the specific rights of coastal states in straddling stocks in particular. Subsequently, the FAO Compliance Agreement and UNFSA have built upon these foundations and herald a new era in international fisheries management.

These latter Agreements, in combination with other on-going initiatives on the international scene, now provide the mechanisms for introducing property rights (in the form of ITQs) onto the High Seas. While, the specifics as to allocations of allowable catches or levels of fishing effort are simply left to the RFMO or Regional arrangements, UNFSA contains a set of “rules” for the conservation and management of straddling fish stocks and highly migratory fish stocks that are substantially more specific than those in the 1982 Convention. In addition, the FAO compliance Agreement and UNFSA for the first time set out substantive mechanisms for regulating and enforcing those conservation and management measures on the High Seas.

While these Agreements go some way to addressing the issue of allocation of High Seas resources, it is equally the case that dwindling resources and overcapitalisation have necessitated hard decisions being made by many nations in respect of fisheries exclusively within their own jurisdiction, though few have done so. Whether state parties can, within the context of these new initiatives resolve such issues where decision-making involves an even greater need for compromise remains to be seen.

What is evident, however, is that property rights are now available to the international community of States as a mechanism for achieving the management and conservation objectives relating to fisheries resources on the High Seas. Timidity and conservatism are now the sole restraints.

⁵³ Stokes, A: *infra* note 44, at 117.