

COMMENTARY

The Southern Bluefin Tuna Dispute Revisited: How Far Have We Come?

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Abstract

The Southern Bluefin Tuna dispute of the late 1990s will long be remembered as one of the most important fishery disputes of all time, influencing both ocean governance and international dispute settlement. This commentary explores the legacy of that dispute with a particular emphasis on the growth and development of the Commission for the Conservation of Southern Bluefin Tuna and how the regime is functioning with the addition of several new members. We will focus also on the specific challenges to the conservation and management of the southern bluefin tuna. This includes biological parameters and the legal and political landscape of global fisheries conservation generally. Finally, we will explore emerging conservation strategies to assist the recovery of this highly valuable fish species.

Keywords: Southern Bluefin Tuna, Commission for the Conservation of Southern Bluefin Tuna (CCSBT), Regional Fisheries Management Organization (RFMO), Fisheries Conservation and Management, Fisheries Dispute, International Tribunal for the Law of the Sea (ITLOS)

1. INTRODUCTION

The crisis in key commercial fisheries continues to expand. The debate over fisheries conservation and management is no longer the exclusive domain of policy makers and scientists. Increasingly, it is addressed in the popular media and discussed in forums devoted to regional security. Growing concern over fisheries causes us to focus on the various factors that contribute to the crisis. These include stressors on fishery ecosystems, climate change, over-capacity and bycatch. Among the most important concerns is the effectiveness of the organizations that are empowered to

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conserve and manage these stocks. These regional fisheries management organizations (RFMOs) have come under increasing scrutiny in an effort to instil greater accountability. One such organization is the Commission for the Conservation of Southern Bluefin Tuna (CCSBT or Commission). The CCSBT was created in 1993 by the Convention for the Conservation of Southern Bluefin Tuna (SBT Convention).¹ The CCSBT will always be remembered for how its members – Japan on the one hand and Australia and New Zealand on the other – could not agree on a sustainable catch limit in the late 1990s. This dysfunction gave rise to one of the most visible and studied disputes in international environmental law. The Southern Bluefin Tuna Dispute (SBT Dispute), for all of its technical elements and legal subtleness, was ultimately about the classic tension between consumption and conservation in global fisheries.

In general terms, the dispute arose from the fact that Australia, Japan and New Zealand could not agree on a catch limit for southern bluefin tuna (SBT) after 1994. In 1998, Japan conducted a unilateral experimental fishing programme, above its previously agreed quota, to study the status of the stock. Australia and New Zealand saw this as a breach, *inter alia*, of precautionary obligations under the United Nations Convention on the Law of the Sea (UNCLOS),² and instituted arbitration proceedings under the dispute settlement mechanism in Part XV of UNCLOS. The International Tribunal for the Law of the Sea (ITLOS) granted provisional measures against Japan, ordering it to cease the experimental fishing programme until the arbitral tribunal could rule on the merits. In a much analyzed ruling,³ the arbitral tribunal ultimately ruled that the SBT Dispute did not arise under UNCLOS at all, but rather fell entirely under the SBT Convention. It is largely this dispute and the contentious ruling that followed that brought so much attention to this regime.

Today, the regime comprises an expanded Commission with six regular members and three cooperating non-members. Perhaps most importantly, there is now agreement on a catch limit for SBT. However, this does not imply an improved status of the SBT stock, nor does it necessarily mean that the governance of the regime has been fundamentally improved.

This commentary examines the legacy of the SBT Dispute in the CCSBT and explores the current status of the regime. The extent to which the dispute led directly to the considerable changes in governance within the CCSBT reviewed herein may never be known, but it should be noted at the outset that, whatever may have changed, the status of the SBT remains poor. This scrutiny is warranted by the

¹ Canberra (Australia), 10 May 1993, in force 20 May 1994 (SBT Convention), available at: http://www.ccsbt.org/userfiles/file/docs_english/basic_documents/convention.pdf.

² Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, available at: http://www.un.org/depts/los/convention_agreements/convention_agreements.htm.

³ See, e.g., B.H. Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95(2) *American Journal of International Law*, pp. 277–312; D.A. Colson & P. Hoyle, 'Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get it Right?' (2003) 34(1) *Ocean Development and International Law*, pp. 59–82; B. Kwiatkowska, 'The Southern Bluefin Tuna Arbitral Tribunal Did Get it Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle' (2003) 34(3–4) *Ocean Development and International Law*, pp. 269–395.

growing sense that RFMOs generally need to improve their overall conservation and management of the commercial fish stocks for which they are responsible. International environmental law increasingly demands accountability and transparency in RFMOs. A study of the operation of the expanded CCSBT, how it makes decisions and utilizes scientific advice, will help to reveal how, if not why, the regime has evolved in the decade since the dispute. A good point of departure is a review of the status of the species at the heart of the regime.

2. THE SOUTHERN BLUEFIN TUNA

The SBT (*Thunnus maccoyii*) is a large, commercially valuable fish. A single SBT weighs more than 200 kilogrammes (kg), or 440 pounds (lbs), and grows to about two metres in length.⁴ The SBT is a fast-swimming, migratory species (on average they swim two to three kilometres per hour), found in the southern hemisphere in waters ranging from 30 to 50 degrees Celsius (°C).⁵ The SBT can live for up to 40 years, with an age of maturity thought to be approximately eight years⁶ (though some studies indicate that it may be as old as 12).⁷ Females produce over a million eggs in a single spawning period, and the SBT breed only in the Indian Ocean off the coast of Java (Indonesia).⁸ The breeding period of the SBT takes place from September to April (its peak being from October to February)⁹ in waters of 24°C or greater, increasing chances of egg and larvae survival.¹⁰

The SBT is a highly migratory species, recognized as such in Annex I of UNCLOS. The juvenile SBT migrate from their spawning ground within months of hatching, and are thought to use the Leeuwin current to bring them to warmer waters near the Great Australian Bight, where they remain until winter.¹¹ The juveniles migrate seasonally between the southern coast of Australia and the Indian Ocean.¹² They travel mainly west across the Indian Ocean towards South Africa and on into the Atlantic Ocean, or east along the southern coast of Australia and New Zealand and then on to the Pacific Ocean.¹³ The older fish (over five years of age) rarely appear near

⁴ CCSBT, 'About the Southern Bluefin Tuna', available at: http://www.ccsbt.org/site/about_bluefin_tuna.php.

⁵ Ibid.

⁶ Ibid.

⁷ C. Romano, 'The Southern Bluefin Tuna Dispute: Hints of a World to Come ... Like It or Not' (2001) 32(4) *Ocean Development & International Law*, pp. 313–48, at 315.

⁸ CCSBT, n. 4 above.

⁹ Ibid. To better understand the complexities of SBT breeding, see J.H. Farley & T.L.O. Davis, 'Reproductive Dynamics of Southern Bluefin Tuna, *Thunnus Maccoyii*' (1998) 96 *Fishery Bulletin*, pp. 223–36.

¹⁰ Government of Australia Department of the Environment, 'Southern Bluefin Tuna: *Thunnus Maccoyii*', available at: http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=69402 (*Thunnus Maccoyii*).

¹¹ Ibid.

¹² CCSBT, Report of the 16th Annual Meeting of the Commission, 20–23 Oct. 2009, available at: http://www.ccsbt.org/userfiles/file/docs_english/meetings/meeting_reports/ccsbt_16/report_of_CCSBT16.pdf.

¹³ *Thunnus Maccoyii*, n. 10 above; see also Romano, n. 7 above, at p. 315.

the surface, and can be found throughout the Pacific, Indian, and Atlantic Oceans.¹⁴

Fishing for the SBT takes place mainly in the Indian Ocean, the waters south of Australia, the south-east coast of Australia and the Tasman Sea (for long-lining), and the Great Australian Bight (for purse-seine surface fishing).¹⁵ The coastal states that have an interest in the SBT are Australia, Indonesia, New Zealand and South Africa, and most fishing takes place on the high seas.¹⁶

The SBT fishing industry is quite lucrative. Japan accounts for about 90% of SBT consumption; Australia and New Zealand are the biggest suppliers.¹⁷ In Australia alone, the industry accounts for AUS\$1 billion a year.¹⁸ One fish can be worth US\$100,000. In fact, in January 2013, a Pacific bluefin tuna sold in Japan at Tokyo's Tsukiji Fish Market's first auction of the year for an astounding ¥155.4 million (US\$1.76 million, or £1.5 million).¹⁹ Weighing 222 kg (489 lbs), this fish, caught off the coast of north-eastern Japan, sold for three times the previous record high of ¥56.4 million²⁰ (despite being 47 kg, or 103 lbs, lighter than the previous year's record-setting fish).²¹ If the price is broken down pound per pound, the price works out at ¥700,000 per kg (\$3,603 per lb), although this price will not be realized in the actual sale of the sashimi.²²

The demand is high for all bluefin and the SBT stock is quite vulnerable as a result of a combination of factors. Firstly, its status as a highly migratory species renders it vulnerable to changes in its migratory path. Secondly, it is a late maturing fish and it breeds in only one geographic region.²³ This fragility compounds the problem of its overfishing. This became evident in the 1960s, when the annual catch amounts were as high as 80,000 tonnes. By the 1980s, the numbers of mature fish had severely declined and consequently so did the annual catch.²⁴ It became clear that better management of the stock was necessary, and that steps had to be taken to address the declining status of the SBT.

¹⁴ CCSBT, n. 12 above.

¹⁵ Organisation for Economic Co-operation and Development (OECD), *Southern Bluefin Tuna* (Background Report for OECD, *Rebuilding Fisheries: The Way Forward* (OECD, 2012), at p. 2, available at: <http://www.oecd.org/tad/fisheries/Southern%20Bluefin%20tuna.pdf>.

¹⁶ *Ibid.*

¹⁷ Romano, n. 7 above, at p. 315.

¹⁸ Marine Education Society of Australia (MESA), 'Southern Bluefin Tuna, Mariculture in South Australia', available at: <http://www.mesa.edu.au/aquaculture/aquaculture23.asp>.

¹⁹ BBC News Asia, 'Japan Bluefin Tuna Fetches Record \$1.76m', *BBC News*, 5 Jan. 2013, available at: <http://www.bbc.co.uk/news/world-asia-20919306>.

²⁰ M. Foster, 'Bluefin Tuna Sells for Incredible Record \$1.76 Million at Tokyo Fish Auction', *Huffington Post – Food*, 4 Jan. 2013, available at: http://www.huffingtonpost.com/2013/01/05/bluefin-tuna-sells-for-incredible-record-tokyo-fish-auction_n_2415722.html.

²¹ BBC News Asia, n. 19 above.

²² Foster, n. 20 above.

²³ CCSBT, 'About the Southern Bluefin Tuna', n. 4 above.

²⁴ CCSBT, 'Origins of the Convention', available at: http://www.ccsbt.org/site/origins_of_the_convention.php.

3. COMMISSION FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA

The CCSBT is the principal organization responsible for effective conservation of the SBT. It provides an internationally recognized and collaborative forum for its Member States to discuss and address issues pertaining to the SBT.

The SBT Convention entered into force on 20 May 1994,²⁵ and its founding members were the main states fishing SBT at that time – Australia, New Zealand and Japan.²⁶ Although these states were already taking steps to manage the catch amounts within their respective economic zones in an effort to rebuild the SBT stock, there had been a severe decline in the numbers of SBT each year. These fishing nations, and the international community as a whole, became acutely aware of the immediate need to address the dwindling fish stock. Since the SBT is a highly migratory species and therefore inherently transboundary in nature, it was clear that a comprehensive rather than piecemeal management approach had to be established.

The SBT Convention has a two-part objective. Article 3 states: ‘The objective of this Convention is to ensure, through appropriate management, the conservation and optimum utilisation of the southern bluefin tuna.’ Similar to other treaties creating RFMOs, the SBT Convention balances conservation and optimum utilization, by acknowledging the importance of preserving this precious fish stock for future generations and of maintaining the sensitive ecosystem on which it subsists. It is obviously in the long-term economic and ecological interests of the members of the CCSBT to ensure the survival of this valuable stock. Consequently, the SBT Convention attempts to strike a delicate but necessary balance between conservation on the one hand and optimum utilization on the other.

It was clear that the states affected by this issue could all benefit from cooperating to share scientific research and other information pertaining to the SBT, to mitigate the adverse effects of their respective fishing industries on the stock, and to establish a collaborative approach to achieving the stated objectives of the Convention. Therefore, Article 6 of the Convention calls for the establishment of the CCSBT, which functions in much the same way as other RFMOs. The CCSBT has a voting procedure prescribed in the Convention. While some regimes reach decisions by majority vote, others require a consensus.²⁷ In the CCSBT each party has one vote, and decisions must be unanimous.²⁸ This can be regarded as a ‘veto’ for any single CCSBT member.²⁹ Membership of the Commission is not limited to the original three states of Japan, Australia and New Zealand; any state that fishes for

²⁵ N. 1 above.

²⁶ SBT Convention, n. 1 above, Art. 17.

²⁷ For a discussion of the decision-making procedures of various RFMOs, see H.S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes* (Martinus Nijhoff/Brill, 2008).

²⁸ SBT Convention, n. 1 above, Art. 7.

²⁹ For a detailed discussion of decision-making within the CCSBT, see Schiffman, n. 27 above, at pp. 119–26.

SBT, or through whose exclusive economic zone (EEZ) the SBT migrates, may join the SBT Convention.³⁰

In an effort to achieve the conservation and utilization objectives, Article 8(3)(a) states that the members of the Commission shall decide upon a Total Allowable Catch (TAC), which is based on the recommendation of the Scientific Committee. Operationally, this is the fundamental component of the Convention. In deciding the allocations for each member, the Commission considers a number of factors, which include the relevant scientific data and the interests of the parties that fish the SBT and through whose waters the SBT migrates.³¹

The setting of quotas by the key fishing states is extremely significant in that it establishes an agreed upon benchmark, theoretically backed by scientific data and research, to which these states are bound. Most significantly, these quotas are developed through the formal decision-making process of the CCSBT.

In order to arrive at these measures objectively, the Convention also establishes a Scientific Committee to advise the Commission. It is the Scientific Committee that carries out and coordinates scientific studies of the SBT and reports its findings to the Commission. The Scientific Committee also makes recommendations to the members of the Commission on conservation and management of SBT stocks.³² Each party to the SBT Convention is a member of the Scientific Committee and appoints 'to the Committee a representative with suitable scientific qualifications who may be accompanied by alternates, experts and advisers'.³³

4. THE PATH TO EXTEND THE COMMISSION

Since the SBT Convention entered into force, the CCSBT has doubled in size. In addition to the original members – Japan, Australia and New Zealand – the Fishing Entity of Taiwan, Indonesia, and the Republic of Korea have all joined as full members.³⁴ In April 2001, the CCSBT adopted the Resolution to Establish an Extended Commission and an Extended Scientific Committee.³⁵ The Republic of Korea joined on 17 October 2001, Taiwan on 30 August 2002, and Indonesia on 8 April 2008.³⁶ However, additional accession to the Convention was slow to occur: the Commission consisted of just the three original members for seven years after the Convention's entry into force. Critics argue that real and effective management of the SBT stock could not have occurred until all states with a real interest

³⁰ SBT Convention, n. 1 above, Art. 18.

³¹ *Ibid.*, Art. 8(4).

³² *Ibid.*, Art. 9.

³³ *Ibid.*, Art. 9(5)(a).

³⁴ CCSBT, 'Origins of the Convention', n. 24 above.

³⁵ CCSBT, 'Resolution to Establish an Extended Commission and an Extended Scientific Committee', available at: http://www.ccsbt.org/userfiles/file/docs_english/basic_documents/the%20Extended%20Commission.pdf.

³⁶ CCSBT, 'Origins of the Convention', n. 24 above.

in the SBT joined, and this was finally achieved in 2008 with the accession of Indonesia.³⁷ The addition of Indonesia is particularly important, as it is within this state's EEZ that the SBT breeds.

The famous SBT Dispute may have served as a catalyst for additional membership of the SBT Convention. The bipolarity that existed between the participants of the dispute, with Australia and New Zealand on one side and Japan on the other, would limit the effectiveness of the regime. The addition of new members to the Commission would allow for a more dynamic membership with perhaps an increased ability to reach a decision.

In addition, there are Cooperating Non-Members: the Philippines, South Africa and the European Union (EU). The Cooperating Non-Members have an interest in the SBT fishing industry and participate fully in the business of the CCSBT, but may not vote. Non-Members must adhere to the management and conservation objectives of the CCSBT, including the agreed upon catch limits. Non-member status is regarded as a transitional measure to full membership and accession to the Convention.³⁸

The Scientific Committee has also evolved and expanded in parallel with the Commission.³⁹ The CCSBT provided for:

an Extended Scientific Committee, whose Members shall be comprised of the Parties to the Convention and any regional economic integration organisation, entity or fishing entity, vessels flagged to which have caught SBT at any time in the previous three calendar years, that is admitted to membership by the Extended Commission pursuant to this Resolution.⁴⁰

The SBT Convention sets out the responsibilities of the Scientific Committee as follows:

1. The Parties hereby establish the Scientific Committee as an advisory body to the Commission.
2. The Scientific Committee shall:
 - (a) assess and analyse the status and trends of the population of southern bluefin tuna;
 - (b) coordinate research and studies of southern bluefin tuna;
 - (c) report to the Commission its findings or conclusions, including consensus, majority and minority views, on the status of the southern bluefin tuna stock and, where appropriate, of ecologically related species;

³⁷ CCSBT, 'Resolution to Establish an Extended Commission', n. 35 above, Preamble; see also OECD, n. 15 above, at p. 2.

³⁸ CCSBT, 'Report of the Extended Commission of the 19th Annual Meeting of the Commission', 1–4 Oct. 2012, available at: http://www.ccsbt.org/userfiles/file/docs_english/meetings/meeting_reports/ccsbt_19/report_of_CCSBT19.pdf.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, Attachment 14, at para. 1.

- (d) make recommendations, as appropriate, to the Commission by consensus on matters concerning the conservation, management and optimum utilisation of southern bluefin tuna;
- (e) consider any matter referred to it by the Commission.⁴¹

The Scientific Committee acts as an adviser to the political body. While this is common in the practice of RFMOs, it highlights the secondary, albeit supportive, role of the scientific process in the work of the Commission. Furthermore, the challenges experienced by the Commission in its requirement to achieve consensus apply also to the scientific process. Article 9(2)(d) requires the Scientific Committee to make its recommendations on conservation, management and optimum utilization by consensus; the expansion of the Scientific Committee in 2001 did not amend this requirement. A review of the SBT Dispute indicates that the consensus requirement was central and revealed a particular dysfunction in the regime.

‘In accordance with the recommendations of a 1998 Peer Review Panel,⁴² the CCSBT has established an Advisory Panel to provide external input to its stock assessment and Scientific Processes. It has also appointed an Independent Chairperson for the Commission.’⁴³ The Advisory Panel is clearly an outgrowth of the negotiations to break the governance deadlock in the regime.⁴⁴ Both the Advisory Panel and Independent Chairperson are advisory to the Scientific Process. The Advisory Panel is currently made up of nationals of the United States (US) (3), Argentina, and the United Kingdom (UK). The responsibilities of the Independent Chair are to provide typical procedural functions in the regime, including serving as a channel of communication between the Commission and the Scientific Committee.⁴⁵

The Advisory Panel participates in all meetings of the Scientific Committee, helps to consolidate parties’ views to facilitate consensus, incorporates their views in Scientific Committee reports, and provides its own views to the Scientific Committee and Commission on stock assessment and other matters.⁴⁶

The creation of responsibilities for the Advisory Panel and the Independent Chair does not ‘out-source’ the scientific advice procedure, but is nonetheless an obvious attempt to constructively involve outsiders to improve a process that had been dysfunctional up to that point. Argentina, the UK and the US are all states with considerable experience and interest in commercial fisheries, even if they do not have a direct interest in the SBT fishery. The inclusion of an Advisory Panel is

⁴¹ SBT Convention, n. 1 above, Art. 9(1)(2).

⁴² CCSBT, ‘SBT 1998 Peer Review Panel’, available at: http://www.ccsbt.org/userfiles/file/docs_english/operational_resolutions/report_of_the_1998_peer_review_panel.pdf.

⁴³ CCSBT, ‘Role of the Independent Chair’, available at: http://www.ccsbt.org/site/stock_assessment.php.

⁴⁴ OECD, n. 15 above, at p. 5.

⁴⁵ Ibid.

⁴⁶ Ibid.

largely unprecedented in the work of RFMOs and a signal that the organization acknowledged its limitations. The fact that the CCSBT is now able to agree upon a Total Allowable Catch (TAC) reflects well on this decision from a governance standpoint, even as the status of the SBT remains poor.

5. TOTAL ALLOWABLE CATCH

The TAC is probably the single most important operational component of the SBT Convention. The main objective of the current TAC is to achieve an interim rebuilding target of 20% of the original stock biomass.⁴⁷ The 1995 Fish Stocks Agreement⁴⁸ requires that RFMO measures ‘are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield’.⁴⁹ The SBT Convention requires that, in deciding upon allocations among the parties, the Commission shall consider, *inter alia*, ‘relevant scientific evidence’.⁵⁰ Requirements to use relevant and best scientific evidence place a significant responsibility on the Scientific Committee. Thus, the operation of the Extended Scientific Committee deserves scrutiny.

Even before the creation of the Commission, the fishing nations of Australia, Japan and New Zealand had set objectives for rebuilding the stock. The original objective was to rebuild the stock to the 1980 levels of parental biomass by 2010 (this was set in the early 1990s).⁵¹ However, in the mid-1990s, around the time the Convention came into being, it was evident that this was not a realistic objective, and the goal of achieving this level of reconstitution of the stock was pushed to 2020.⁵²

6. THE SBT DISPUTE

It has been about 15 years since the famous SBT Dispute. It is useful to examine the dispute briefly in order to understand the current dynamics of the CCSBT and the challenges it faces. The dispute arose from a disagreement between Australia and New Zealand on the one hand, and Japan on the other, regarding a catch limit for the SBT. In May 1994, shortly after the SBT Convention entered into force, the CCSBT

⁴⁷ CCSBT, Resolution on the Adoption of a Management Procedure, adopted at the 18th Annual Meeting, 10–13 Oct. 2011, available at: http://www.ccsbt.org/userfiles/file/docs_english/operational_resolutions/Resolution_Management_Procedure.pdf.

⁴⁸ 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, New York, NY (US), 4 Aug. 1995, in force 11 Dec. 2001, available at: http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm.

⁴⁹ *Ibid.*, Art. 5(b).

⁵⁰ SBT Convention, n. 1 above, Art. 4(a).

⁵¹ OECD, n. 15 above, at p. 2.

⁵² *Ibid.*

set the TAC at 11,750 tonnes.⁵³ The CCSBT was unable to revise the TAC thereafter, and attempts by Japan to increase the TAC were repeatedly thwarted by Australia and New Zealand.⁵⁴ Despite stern objections by Australia and New Zealand, in 1998 Japan conducted a unilateral experimental fishing programme with a harvest over its commercial quota.⁵⁵ Subsequent procedures before both the ITLOS and an arbitral tribunal revealed the very different dispositions of Japan, and Australia and New Zealand respectively towards the use of the SBT resource. Australia and New Zealand maintained that Japan's experimental fishing programme, which raised Japan's catch above and beyond previously agreed quota, was a violation, inter alia, of precautionary obligations under UNCLOS.⁵⁶

The ultimate decision of the SBT Arbitral Tribunal (SBT Award) affirmed, specifically, that the SBT Dispute did not arise from UNCLOS but from the SBT Convention. It was therefore not available for dispute settlement under Part XV of UNCLOS. This decision has been heavily criticized in academic scholarship.⁵⁷ Shortly after the SBT Award, the ITLOS deviated from this reasoning in the *MOX Plant Case* when it entertained and granted an application for provisional measures in a dispute between Ireland and the UK in a case concerning radioactive pollution.⁵⁸ Although Ireland ultimately withdrew its claim, the ITLOS did not appear hesitant in issuing provisional measures in a case arguably arising both under UNCLOS and the OSPAR Convention.⁵⁹ This suggests that the ITLOS at least disagreed with the limited view of UNCLOS jurisdiction in the SBT Award. Furthermore, Article 30 of the Fish Stocks Agreement extends the reach of Part XV UNCLOS to disputes arising in RFMOs where the parties are also parties to the Fish Stocks Agreement.

Thus, it appears that the broader legal and political impact of the SBT Award is limited. It is reasonable to conclude that this is at least partly because the decision did not address the merits of the SBT Dispute. Furthermore, the SBT Award had the effect of preventing pertinent environmental provisions of UNCLOS from applying to the SBT Dispute in the dispute settlement context. A legacy along these lines would be regrettable from a conservation standpoint.

⁵³ *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 Aug. 2000, paras. 22, 24 (SBT Award), available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive=AnnounceNo=7_10.pdf.

⁵⁴ *Ibid.*, at para. 24.

⁵⁵ *Ibid.*, at para. 25.

⁵⁶ For a detailed discussion of the SBT Dispute, the positions of the parties and the result of the dispute settlement process, see H.S. Schiffman, 'The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute' (1999) 2(3) *Journal of International Wildlife Law & Policy*, pp. 318–33; H.S. Schiffman, 'UNCLOS and Marine Wildlife Disputes: Big Splash or Barely a Ripple?' (2001) 4(3) *Journal of International Wildlife Law & Policy*, pp. 257–78, at 271–6. For a political and economic analysis of the dispute, including the positions of the parties, see Y. Sato, 'Fishy Business: A Political-Economic Analysis of the Southern Bluefin Tuna Dispute' (2002) 28(4) *Asian Affairs: An American Review*, pp. 217–37.

⁵⁷ See, e.g., Colson & Hoyle, n. 3 above.

⁵⁸ ITLOS, *The MOX Plant Case (Ireland v. United Kingdom)*, Order, 3 Dec. 2001, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf.

⁵⁹ Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris (France), 22 Sept. 1992, in force 25 Mar. 1998, available at: <http://www.ospar.org>.

CCSBT Member	2014	2015
Japan	3,361	4,737
Australia	5,151	5,665
Republic of Korea	1,036	1,140
Fishing Entity of Taiwan	1,036	1,140
New Zealand	910	1,000
Indonesia*	750	750
Cooperating Non-Member	2014	2015
Philippines	45	45
South Africa**	40	40
European Community	10	10

Table 1: Current Allocations of the TAC to CCSBT Members and Cooperating Non-Members⁶⁰

Notes

* The allocation to Indonesia from 2015 will be re-assessed once the planned independent Quality Assurance Review of Indonesia is completed. The above allocations do not take the re-assessment into account.

** The allocations shown here assume that South Africa accedes to the SBT Convention, n. 1 above, in time for its allocation to be increased. The allocation for South Africa will increase to 150 tonnes if it accedes to the Convention by 31 May of the respective year.

7. THE CCSBT TODAY AND THE NEW MANAGEMENT PROCEDURE

The self-imposed annual catch limit in 1985 was 39,650 tonnes, which demonstrates the degree to which the mind-set of the fishing states has shifted since the dispute.⁶¹ This amount was reduced by around 70% to 11,750 tonnes in 1989 (an allocation of 6,065 tonnes to Japan; 5,265 to Australia; and 420 to New Zealand).⁶² Today, the total annual TAC is 12,449 tonnes,⁶³ only 699 tonnes more than the 1989 figure, even though membership the Commission has doubled and there are three additional Cooperating Non-Members.

In order for the Commission to operate successfully, the TAC must be flexible with 'living' numbers. The goal is for these numbers to be updated to reflect scientific findings and anything new reported to the Commission that may affect conservation and management. States also have the option to carry forward any unused portion of the TAC.

Table 1 depicts the most recent TAC for 2014 and 2015 for the Members and Cooperating Non-Members of the Convention. South Africa may be close

⁶⁰ All information on TAC allocations has been accessed and reproduced from CCSBT, 'Total Allowable Catch', available at: http://www.ccsbt.org/site/total_allowable_catch.php.

⁶¹ Romano, n. 7 above, at p. 315.

⁶² *Ibid.*, at p. 315.

⁶³ CCSBT, n. 60 above.

to acceding to the Convention,⁶⁴ but as of April 2014 it was still a Cooperating Non-Member.⁶⁵

The procedure for arriving at the TAC has evolved since the inception of the Commission. During the 18th annual meeting, on 10–13 October 2011, the State Parties decided that a Management Procedure (MP) would be developed to guide the setting of the SBT TAC.⁶⁶ The stock assessment from the Extended Scientific Committee stated that the spawning stock biomass was only between 3% and 7%, falling well below the goal of an interim building target of 20%.⁶⁷ Even though the parties remain hopeful that the 20% target will be achieved by 2035, it is clear that the Commission has a long way to go. The Scientific Committee therefore recommended the establishment of the MP – also referred to as the ‘Bali Procedure’ – in July 2011.⁶⁸ The final version of the MP was the result of rigorous testing performed by the Scientific Committee on a number of different MPs.⁶⁹

The MP is a pre-agreed set of rules that can specify changes to the TAC based on the results of data monitoring.⁷⁰ The Scientific Committee uses data and analysis generated by national scientists, the Independent Chair and expert panels.⁷¹ Going forward, the MP will guide the setting of the global allowable catch, with the objective of achieving the interim rebuilding target.⁷² Ultimately, it is the Commission – and thus the CCSBT parties – rather than the Scientific Committee that sets the TAC. The TAC is set in three-year increments, and has been set based on the findings and outcome of the MP since 2012.

For the first TAC period under the newly established MP (2012–14), the TAC was set at 10,449 tonnes for 2012 (representing an increase of 1,000 tonnes above the 2010–11 TAC of 9,449 tonnes) and at 10,949 tonnes for 2013 (an increase of 1,500 tonnes above the TAC for 2010–11).⁷³ The TAC for 2014 and 2015 can be seen in Table 1.

The main parameters of the MP are:

- to rebuild the status of stock to an interim building target of the original 20% spawning stock biomass by 2035;
- the minimum increase or decrease TAC change will be 100 tonnes;

⁶⁴ South Africa was not able to inform the meeting of the likelihood and/or timing of its possible accession: CCSBT, ‘SBT 1998 Peer Review Panel’, n. 42 above.

⁶⁵ CCSBT, ‘Origins of the Convention’, n. 24 above.

⁶⁶ CCSBT, ‘Resolution on the Adoption of a Management Procedure’, n. 47 above.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ A Report Review of the Tuna RFMOs: CCSBT, IATTC, IOTC, ICCAT and WCPFB, compiled by AZTI Tecnalia 1, available at: <https://www.yumpu.com/en/document/view/7779673/a-report-review-of-the-tuna-rfmos-ccsbt-iattc-iotc-ixotx>.

⁷² CCSBT, ‘Resolution on the Adoption of a Management Procedure’, n. 47 above.

⁷³ *Ibid.*

- the maximum increase or decrease TAC change will be 3,000 tonnes.⁷⁴

The benefit of the MP is that it provides the industry with more stability. The fishing states know what their catch limits will be for the next three years and can plan accordingly. Moreover, they recognize and acknowledge that a great deal of history and scientific information went into the construction of the MP. It should be noted that the goal has been extended to 2035 as it became clear that the original objective of 2020 for the target was unrealistic.⁷⁵

As indicated in Australia's opening statement at the 19th annual meeting of the Commission, the MP will hopefully obviate the need for the Extended Commission to waste valuable time at the annual meeting discussing TAC numbers. This will allow the Commission to focus instead on other issues related to the SBT, including impacts on ecologically related species.⁷⁶

The increasingly important role of the Ecologically Related Species Working Group should further enhance the conservation and management of the SBT.⁷⁷ This Working Group considers the impacts of the SBT fishing on other species as well as other ecosystem impacts, and arose from concern for the status of sea birds, sharks and sea turtles that are affected during the fishing for SBT.⁷⁸ These considerations exemplify the ecosystem approach to conservation and management as well as the mandate under UNCLOS to consider 'effects on species associated with or dependent upon harvested species'.⁷⁹ This reflects a growing consideration in RFMO practice generally. The Ecologically Related Species Working Group reports to the Commission through the Scientific Committee.⁸⁰ Its members are the Parties themselves, represented by personnel from the national management authorities. The terms of reference for the Working Group were fashioned in the mid-1990s, when concern for ecologically related species in commercial fishing practices, particularly in the form of bycatch, became more prevalent. In recent years, this concern has expanded to reflect the increased understanding of the complex web of biological relationships in the marine environment.

⁷⁴ Ibid.

⁷⁵ Ibid. For a review of the path to the development of the MP, and some of the challenges to its implementation, see H. Kurota et al., 'Developing a Management Procedure Robust to Uncertainty for Southern Bluefin Tuna: A Somewhat Frustrating Struggle to Bridge the Gap Between Ideals and Reality' (2010) 52 *Population Ecology*, pp. 359–72; D. Kolody et al., 'Salvaged Pearls: Lessons Learned from a Floundering Attempt to Develop a Management Procedure for Southern Bluefin Tuna' (2008) 94(3) *Fisheries Research*, pp. 339–50.

⁷⁶ CCSBT, 'SBT 1998 Peer Review Panel', n. 42 above.

⁷⁷ CCSBT, 'Ecologically Related Species', available at: http://www.ccsbt.org/site/related_species.php.

⁷⁸ CCSBT, 'Recommendation to Mitigate the Impact on Ecologically Related Species of Fishing for Southern Bluefin Tuna', available at: http://www.ccsbt.org/userfiles/file/docs_english/operational_resolutions/Recommendation_ERS.pdf.

⁷⁹ UNCLOS, n. 2 above, Art. 119(1)(b).

⁸⁰ CCSBT, 'Terms of Reference for the Working Group on Ecologically Related Species', available at: http://www.ccsbt.org/userfiles/file/docs_english/basic_documents/terms_of_reference_for_subsidary_bodies.pdf.

At its 10th meeting in August 2013, the Working Group issued a series of recommendations to the Extended Commission to improve conservation of sea birds and sharks, including expanded use of deoxyribonucleic acid (DNA) technology.⁸¹

8. THE EMERGING CONSERVATION STRATEGIES

As the conservation status of the SBT remains problematic, other conservation strategies beyond those in the CCSBT are likely to become more important. The rapidly expanding role of non-state actors in environmental conservation is generally beyond the scope of this research but needs to be highlighted for its potential in commercial fisheries conservation. For example, in recent years non-governmental organizations (NGOs) have campaigned to include commercial fish stocks under the protection of other governance regimes. Consumer-oriented campaigns have also been attempted. It remains to be seen if such strategies can create leverage on traditional governance arrangements. It has long proven difficult to include commercial fish species within the appendices of the Convention to Regulate International Trade in Endangered Species of Flora and Fauna (CITES).⁸² As the commercial value of bluefin tuna increases globally, and the conservation status of both the Atlantic and Pacific bluefin continues to decline, the arguments for inclusion in CITES become more pressing. Additional strategies include environmental education campaigns to make the consumer more aware of sustainable fishery practices. Such campaigns typically involve sustainably oriented marketing strategies and allow for more informed decisions at the consumer level to support sustainable seafood practices. Programmes to inform the consumer of the status of key seafood stocks – such as the ‘Seafood Watch’⁸³ maintained by the Monterey Bay Aquarium in California (US) – could move conservation forward if they were to successfully change consumer behaviour.⁸⁴ Conservation efforts may even go a step further if consumer boycotts are introduced.⁸⁵ Future research into RFMO governance could assess the impacts of consumer behaviour and public opinion on RFMO decision making. As social media is used more widely to disseminate information about sustainable fisheries and the practices of RFMOs, its potential to influence the public will increase. It will be interesting to see if this will have an effect on RFMO decision making.

⁸¹ CCSBT, Report of the 10th Meeting of the Ecologically Related Species Working Group, 28–31 Aug. 2013, available at: http://www.ccsbt.org/userfiles/file/docs_english/meetings/meeting_reports/ccsbt_20/report_of_ERSWG10.pdf.

⁸² Washington, DC (US), 3 Mar. 1973, in force 1 July 1975, available at: <http://www.cites.org>. See R. Black, ‘Bluefin Tuna Ban Proposal Meets Rejection’, *BBC News*, 18 Mar. 2010, available at: <http://news.bbc.co.uk/2/hi/8574775.stm> (noting the failure of CITES to list the Atlantic bluefin for protection).

⁸³ See Monterey Bay Aquarium Seafood Watch, available at: <http://www.montereybayaquarium.org/cr/seafoodwatch.aspx?c=dd>.

⁸⁴ J. Jacquet et al., ‘Conserving Wild Fish in a Sea of Market-based Efforts’ (2009) 44(1) *Oryx*, pp. 45–56.

⁸⁵ ‘Bluefin Tuna Boycott Popular, Australia Protects Southern Bluefin’, *Environmental News Service*, 9 Dec. 2010, available at: <http://www.ens-newswire.com/ens/dec2010/2010-12-09-03.html>.

Furthermore, corporate social responsibility is increasingly relied on to harness the significant power of the seafood industry, and related corporate sectors such as supermarket chains, to make sustainable decisions on a large scale. Such decisions are not without obstacles for supermarkets, but addressing environmental impacts is a recognized focus of corporate social responsibility.⁸⁶

9. RFMO REFORM

The status of the CCSBT needs to be understood in the wider context of RFMO reform. The pace of change may seem glacial, but the call for RFMOs to improve their conservation endeavours and efforts to manage fishery resources is being heard. The Fish Stocks Agreement,⁸⁷ the UN Food and Agriculture Organization (FAO) Code of Conduct of Responsible Fisheries,⁸⁸ and the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas⁸⁹ are all about improving fishery governance generally and improving the work of RFMOs. The call for RFMO reform is widely accepted as part of the agenda for ocean governance.⁹⁰ It remains to be seen whether the expansion of the CCSBT and the changes to its scientific body not only involve growth but equally translate into meaningful reform. It is encouraging that the scientific process now receives outside support in the form of the Advisory Council and Independent Chair.

10. CONCLUSIONS

The poor status of the SBT mandates a careful evaluation of its governance structure. The newer, larger Commission reflects a greater involvement by new states: the Republic of Korea, Indonesia and Taiwan as Members, and the Philippines, South Africa and the EU as Cooperating Non-Members. Their involvement demonstrates a willingness to participate in the organizational arrangement of the CCSBT and have some ownership of the conservation and management outcomes. The amendment of the interim goal of the 20% stock rebuilding from 2020 to 2035 was both a recognition of the very poor status of the SBT and, to a certain degree, a recognition of the institutional failure to adequately conserve the species. The expansion of the scientific process to include an Advisory Panel and an Independent Chair similarly acknowledges past limitations. Recognizing that the scientific process needs independent

⁸⁶ See O. Chkanikova & O. Mont, 'Corporate Supply Chain Responsibility: Drivers and Barriers for Sustainable Food Retailing' (2012) *Corporate Social Responsibility & Environmental Management*, FirstView online publication, doi: 10.1002/csr.1316; see also S. Killian, 'Corporate Social Responsibility' (2012) 44(5) *Accountancy Ireland*, pp. 30–1.

⁸⁷ N. 48 above.

⁸⁸ Adopted by the FAO Ministerial Meeting on Fisheries, 10–11 Mar. 1999, Rome (Italy), available at: <ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf>.

⁸⁹ Available at: <http://www.fao.org/docrep/meeting/003/x3130m/X3130E00.htm>.

⁹⁰ See, e.g., OECD, *Strengthening Regional Fisheries Management Organizations* (OECD, 2009), available at: http://www.oecd-ilibrary.org/agriculture-and-food/strengthening-regional-fisheries-management-organisations_9789264073326-en.

support is a constructive sign for going forward. Optimistically speaking, this is a positive demonstration of RFMO reform. The CCSBT's ability to reach agreement on a TAC following the dispute is a good indicator of improved governance. An actual improvement in the status of the SBT, however, would be an even better indicator.

Emerging conservation strategies such as consumer-oriented campaigns, and possibly even consumer boycotts and corporate social responsibility initiatives, may impact on institutional efforts. At a minimum, they may provide ancillary conservation of the fishery resource. At a maximum, the loud voice of consumers and responsible corporate actors in the supply chain may provide necessary pressure on the CCSBT to improve its conservation efforts.

The scrutiny the CCSBT has received on this issue, and the expansion of the Commission and the scientific body all result on some level from the SBT Dispute and its failure to properly conserve and manage the resource. As the work of RFMOs becomes more public, it will become easier to ascertain how successful these institutional changes have been. For now and for the future, the CCSBT and the other RFMOs must live up to their profound responsibility to conserve and manage dwindling commercial fish stocks.