

Trading in fishery commission quota under international law

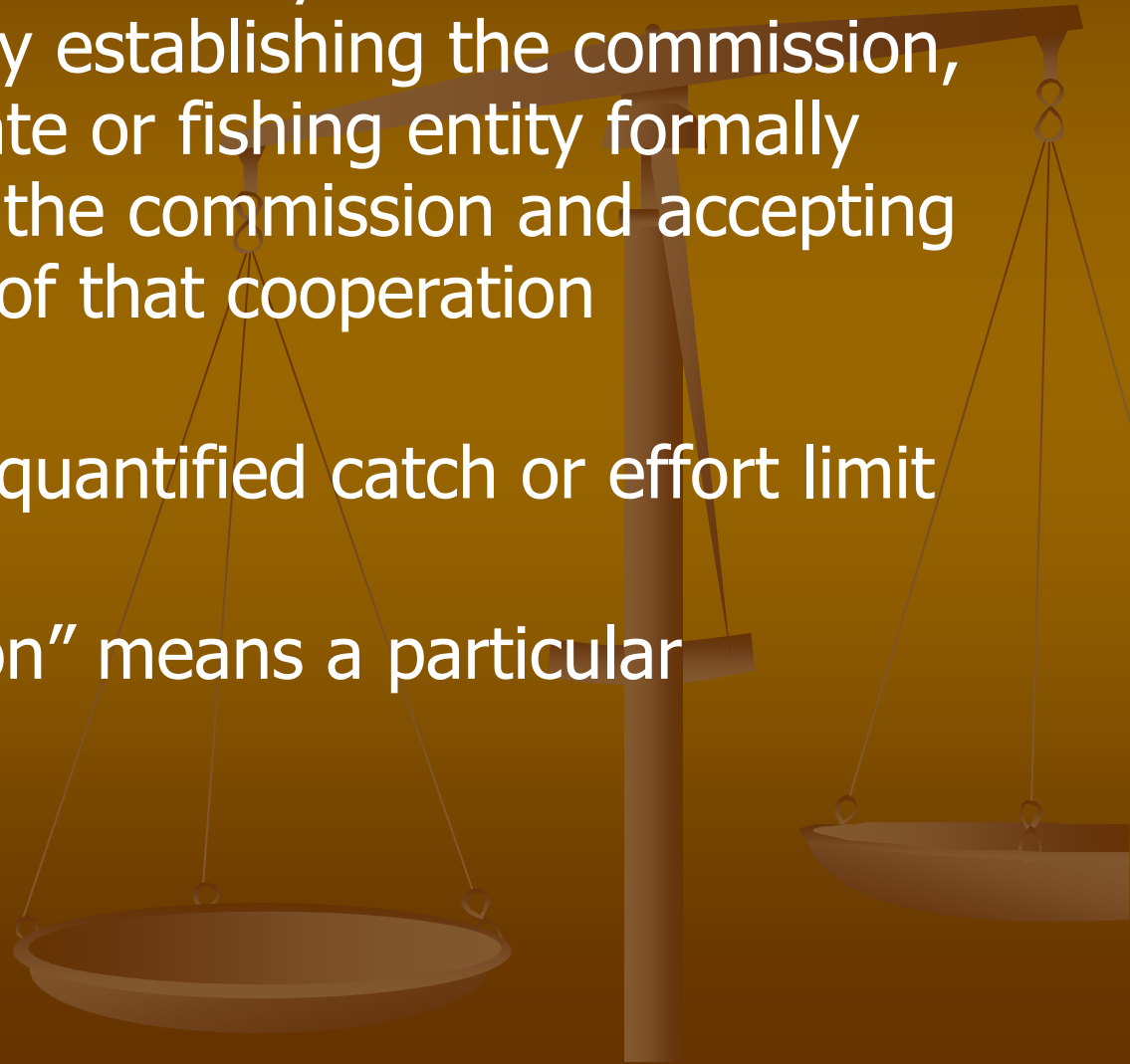
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Definitions

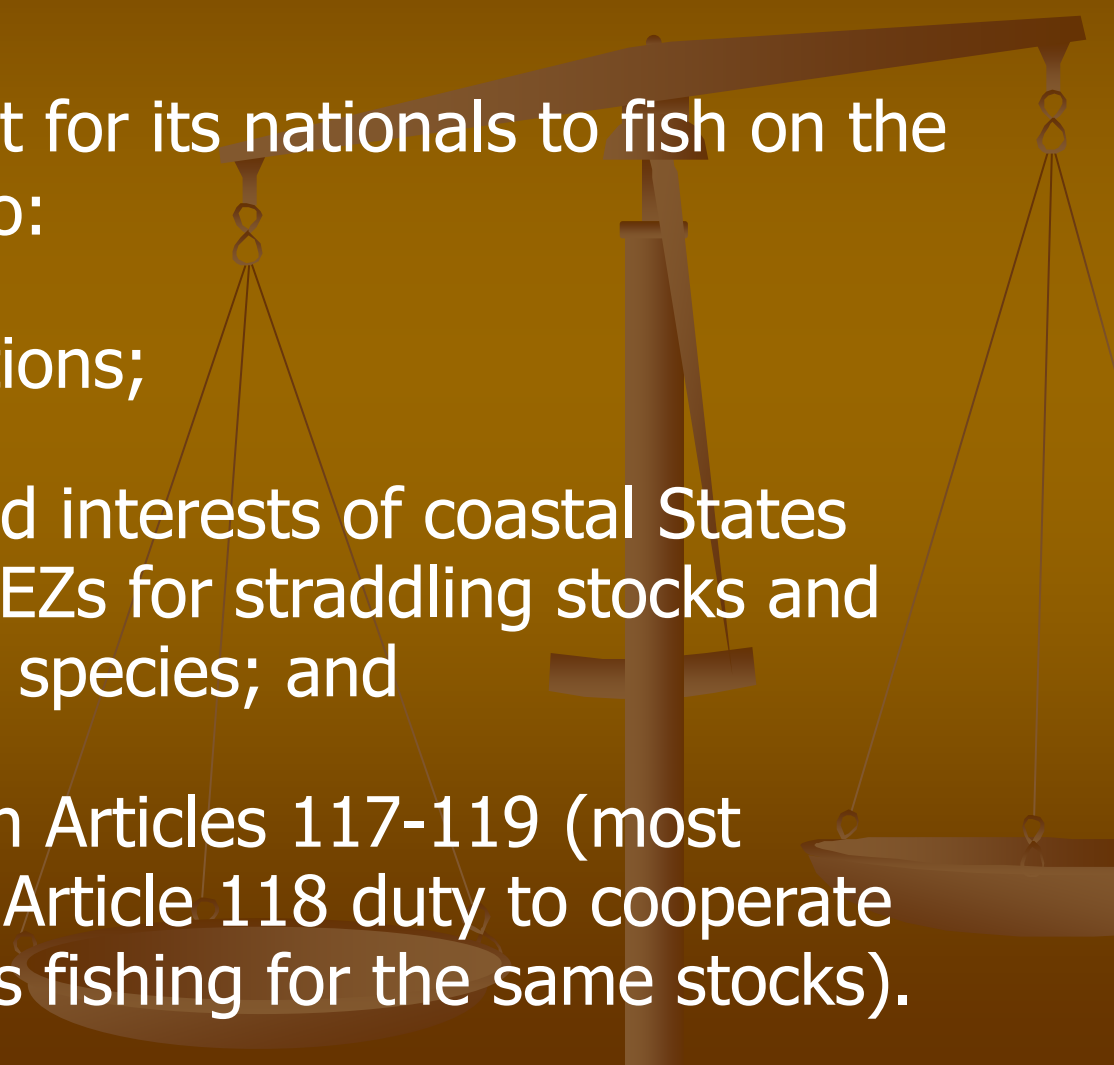
- “member” includes not only each State that is party to the treaty establishing the commission, but any other State or fishing entity formally cooperating with the commission and accepting a quota in token of that cooperation
- “quota” means a quantified catch or effort limit
- “national allocation” means a particular member’s quota



Freedom of fishing on the high seas – UNCLOS Article 116

A State has the right for its nationals to fish on the high seas, subject to:

- (a) its treaty obligations;
- (b) rights, duties and interests of coastal States fishing in their EEZs for straddling stocks and highly migratory species; and
- (c) the obligations in Articles 117-119 (most importantly, the Article 118 duty to cooperate with other States fishing for the same stocks).



Freedom of fishing on the high seas – the *pacta tertiis* problem

- RFMOs come under paragraph (a) of Art 116 – but non-members are not bound by any quantified catch or effort limit, a disincentive to the mutual limitations envisaged.
- But by Art 8(4) of the UN Fish Stocks Agreement, only States that join the relevant RFMO or agree to apply its conservation and management measures have access to the fisheries resources.
- Now custom? Rayfuse's review of State practice suggests so – RFMOs demand “join or don't fish” and non-members comply.

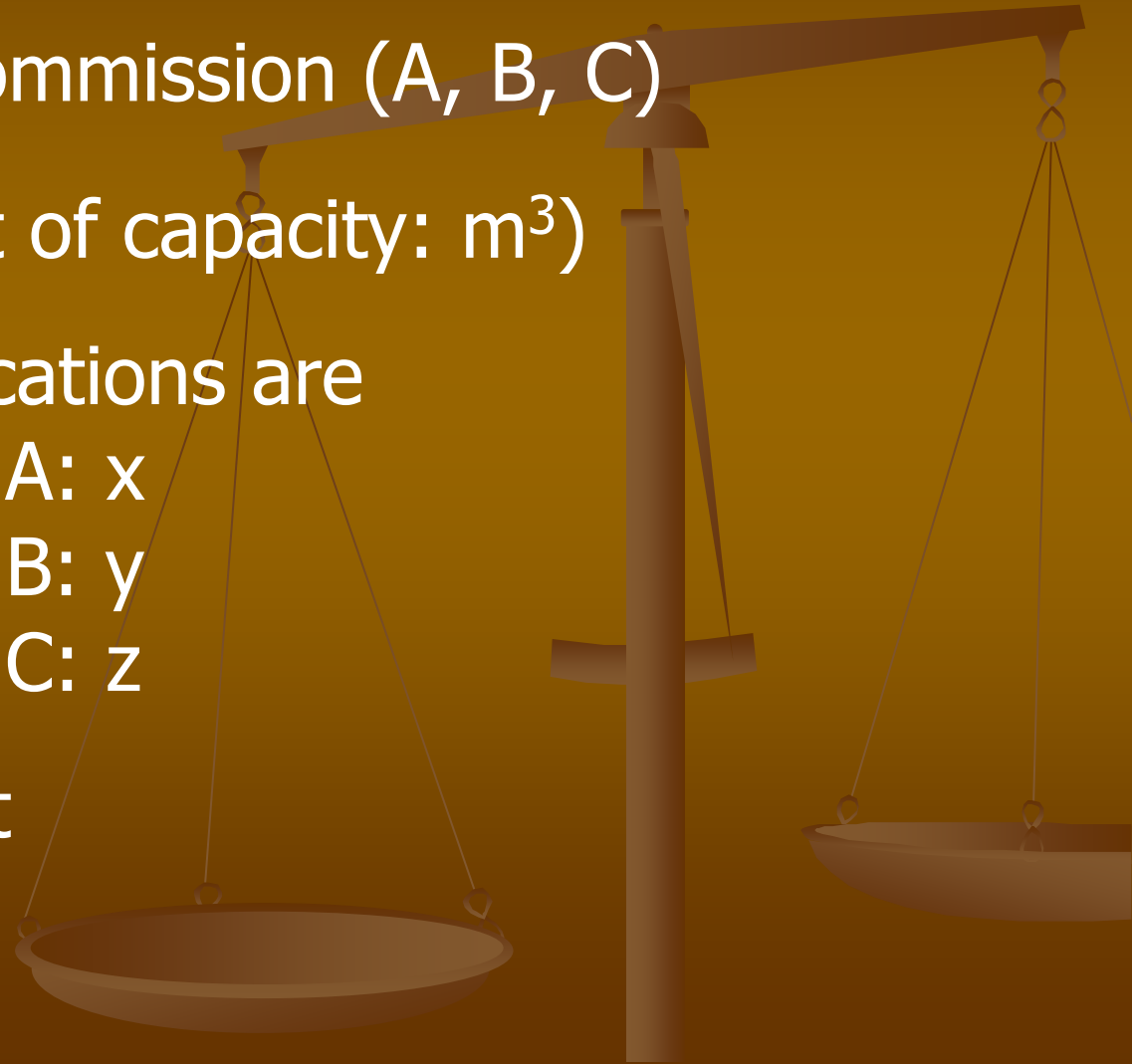
Freedom of fishing on the high seas – the significance of RFMOs

Merely creating the RFMO doesn't abolish its members' freedom of fishing for the stocks concerned

- i.e. no prohibition on fishing in the absence of a decision of the RFMO to permit it
- practice suggests the opposite: RFMOs slow to start regulating or failing to renew quotas
- in other words, RFMO catch and effort limits are negative constraints on a freedom rather than positive entitlements to take a certain amount of catch or expend a given amount of effort.

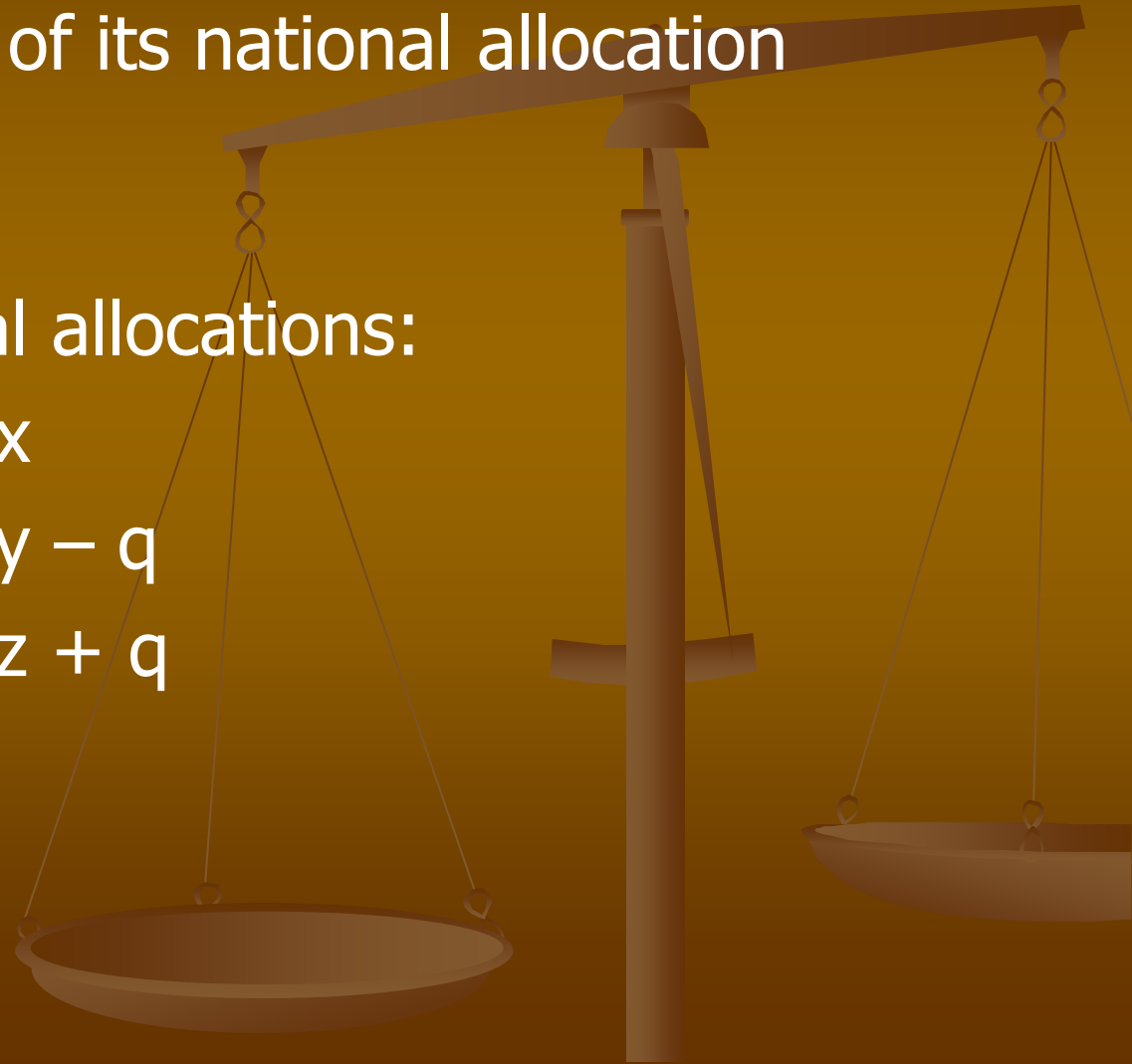
Trading of national allocations – the simple case (1)

- 3-member commission (A, B, C)
- TAE = t (unit of capacity: m^3)
- National allocations are
 - A: x
 - B: y
 - C: z
- $x + y + z = t$



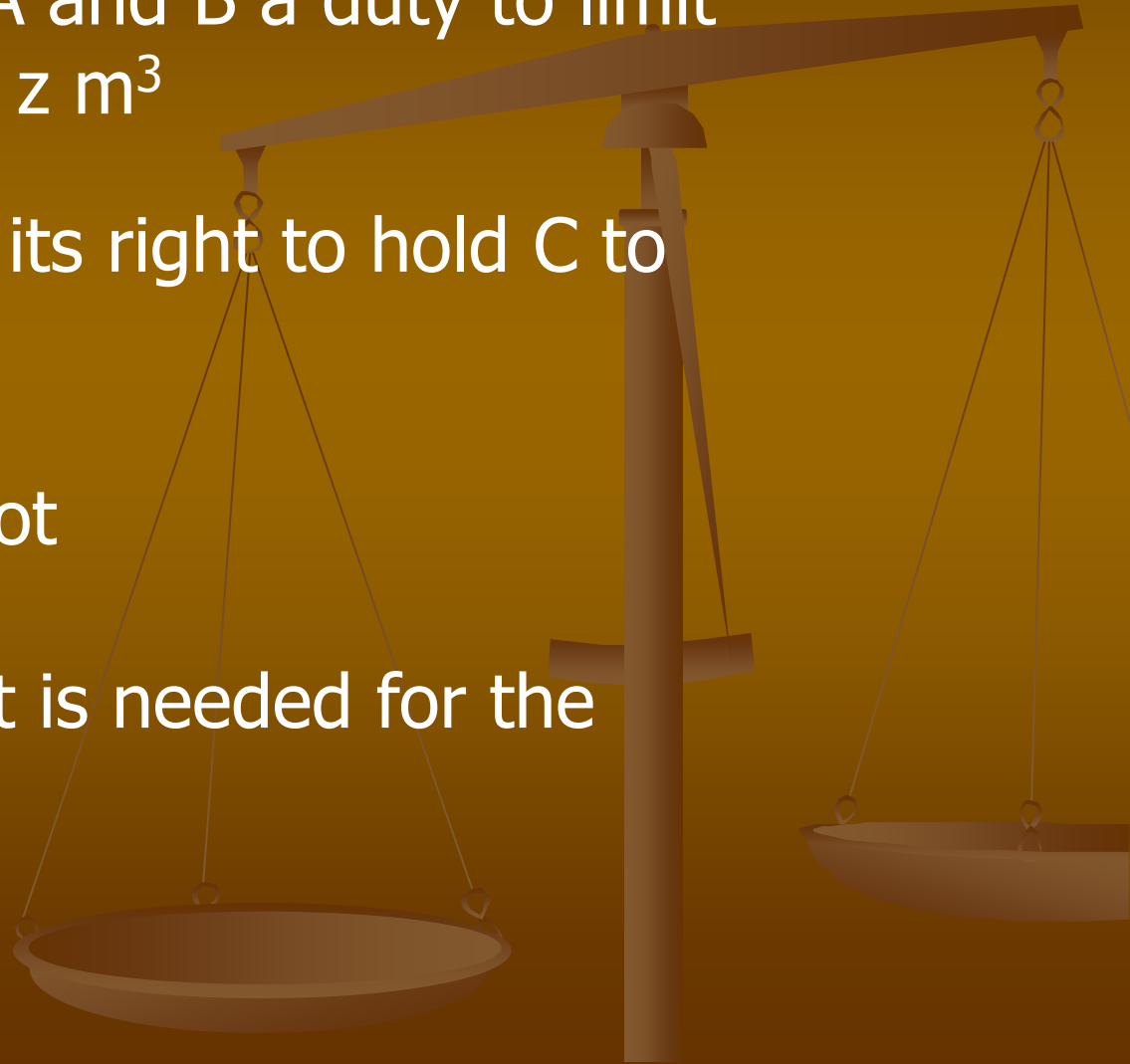
Trading – the simple case (2)

- B sells q m^3 of its national allocation to C
- New national allocations:
 - A: x
 - B: $y - q$
 - C: $z + q$



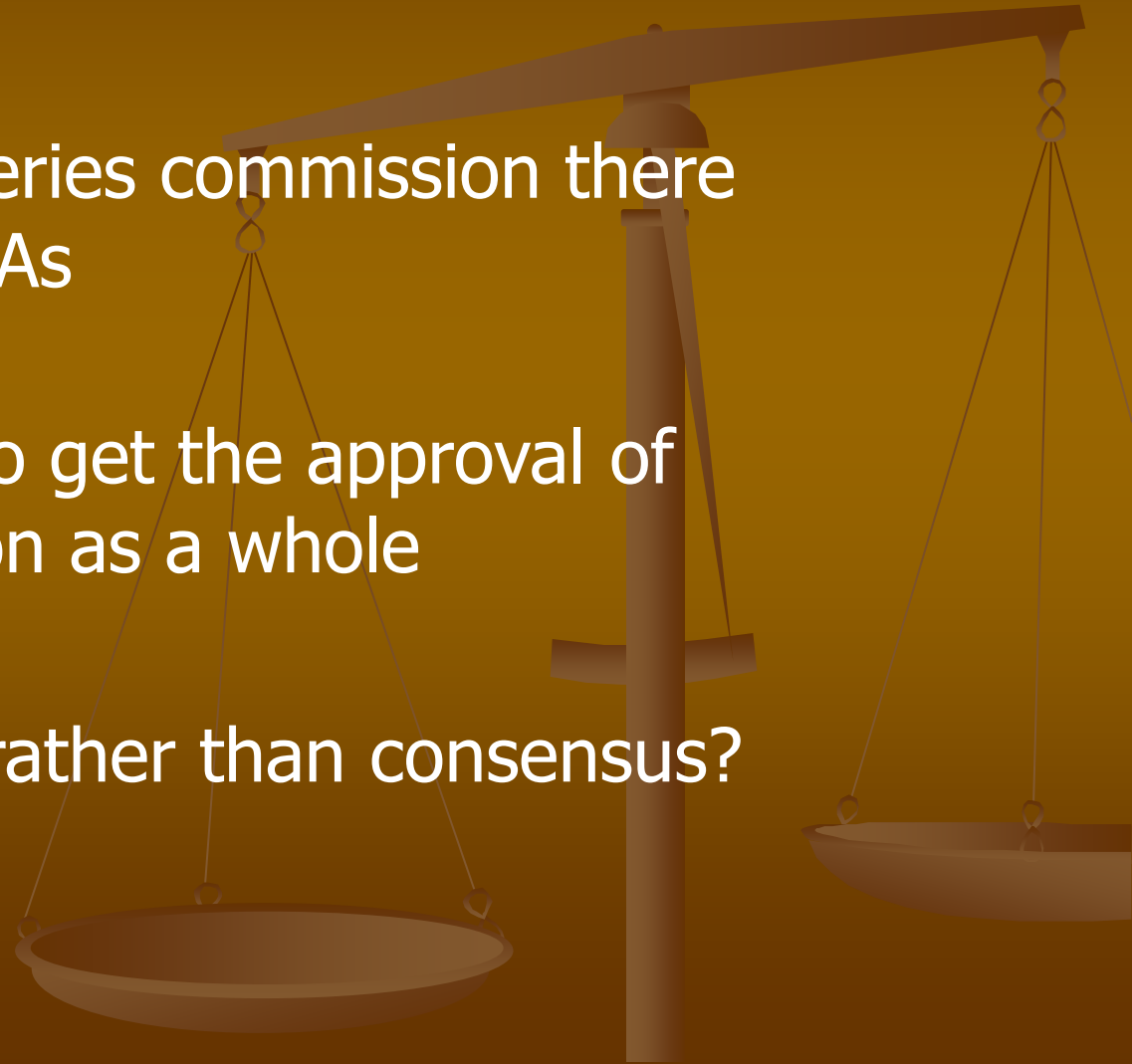
Trading – the simple case (3)

- C owed both A and B a duty to limit its capacity to $z \text{ m}^3$
- B has waived its right to hold C to this limit...
- ...but A has not
- so A's consent is needed for the transaction



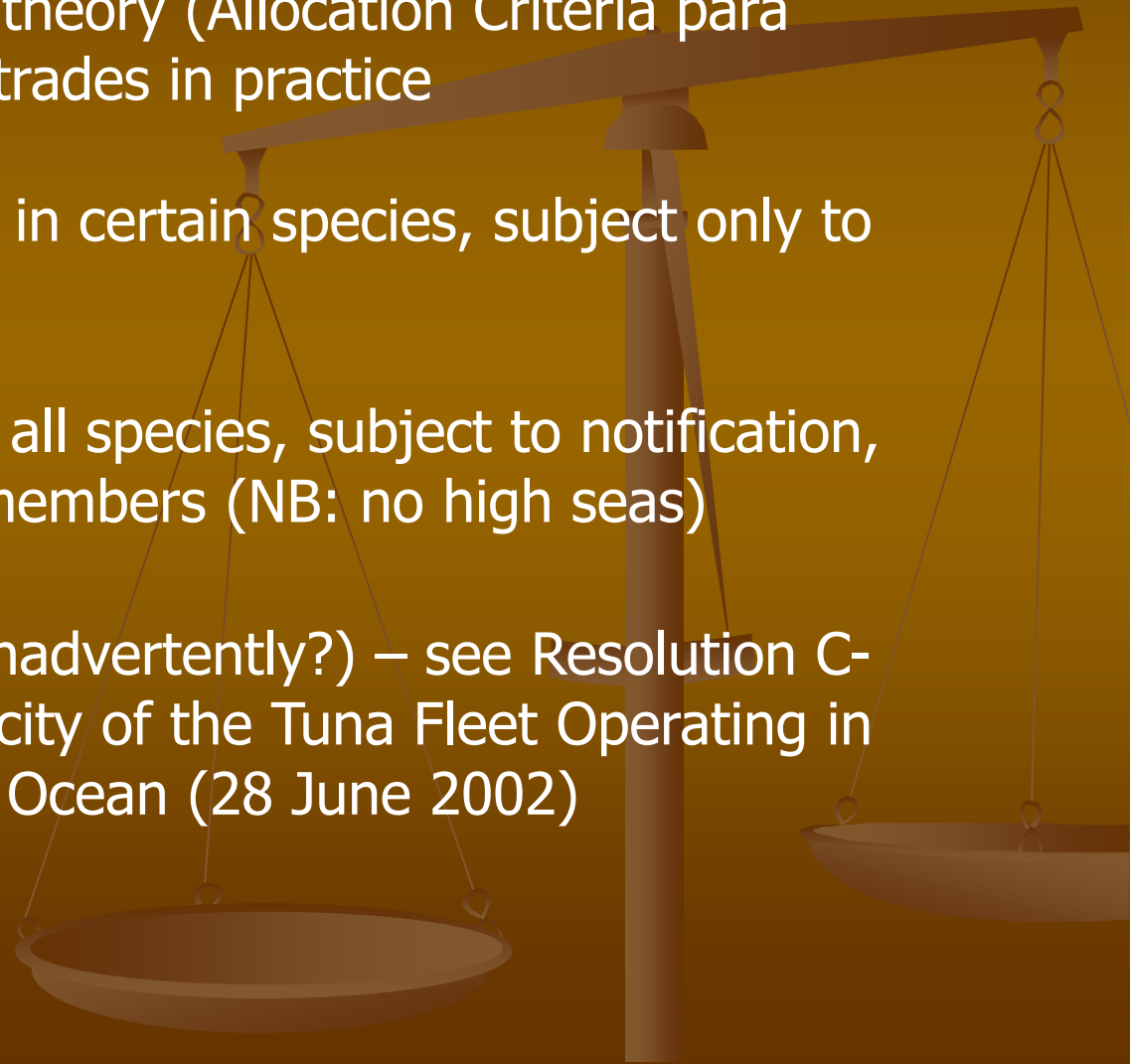
RFMOs and trading

- In a large fisheries commission there will be lots of As
- So it's easier to get the approval of the commission as a whole
- ...by majority rather than consensus?



RFMOs in which quotas are traded

- ICCAT: opposed in theory (Allocation Criteria para 27), but approves trades in practice
- NAFO and NEAFC: in certain species, subject only to notification
- the former IBSFC: all species, subject to notification, including to non-members (NB: no high seas)
- and IATTC itself (inadvertently?) – see Resolution C-02-03 on the Capacity of the Tuna Fleet Operating in the Eastern Pacific Ocean (28 June 2002)



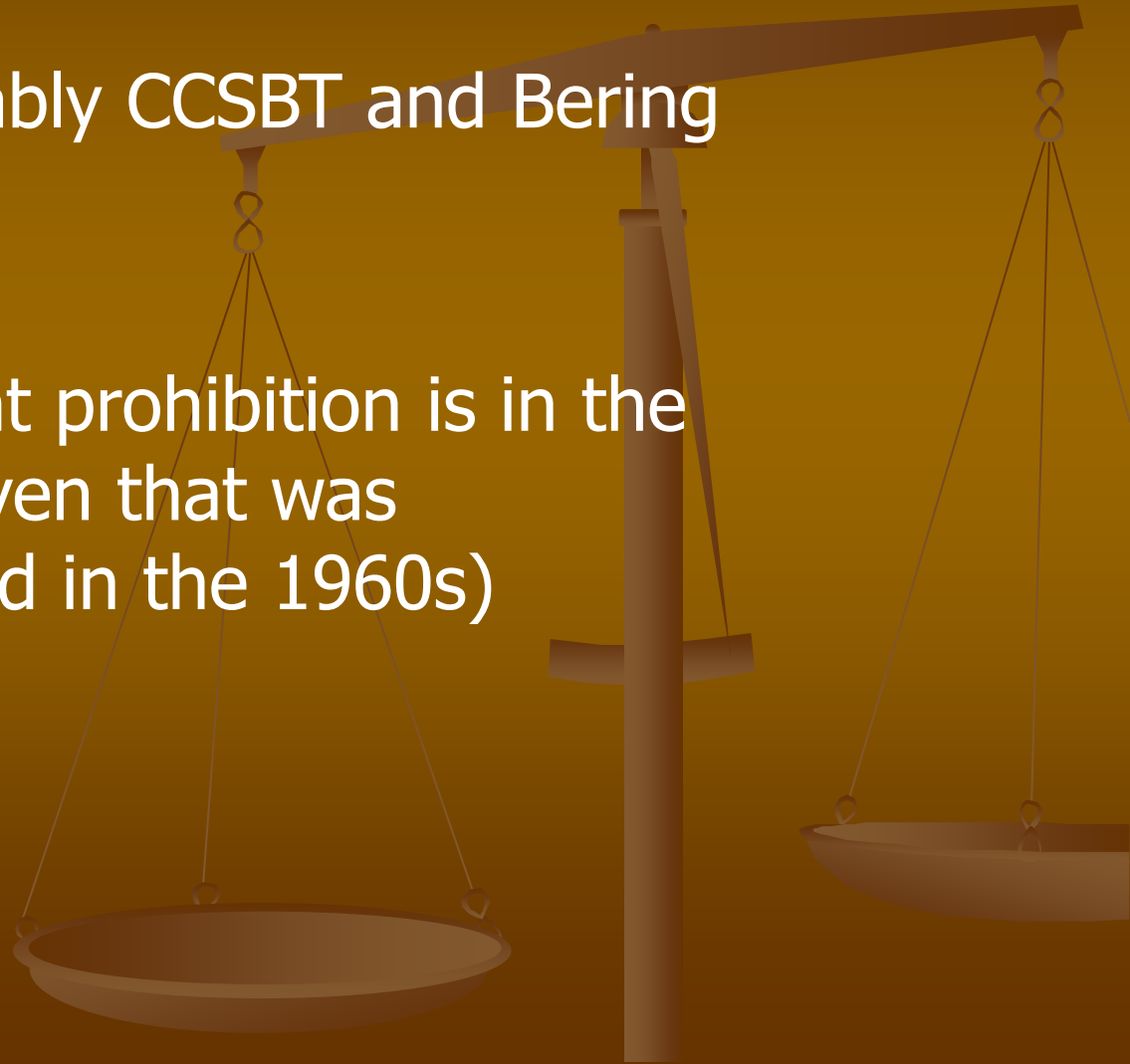
RFMOs whose treaties neither prohibit trading directly, nor indirectly by mandating national allocations exclusively

- ICCAT
- NAFO
- NEAFC
- CCAMLR
- IBSFC
- IOTC
- SEAFO
- WCPFC
- SIOFA



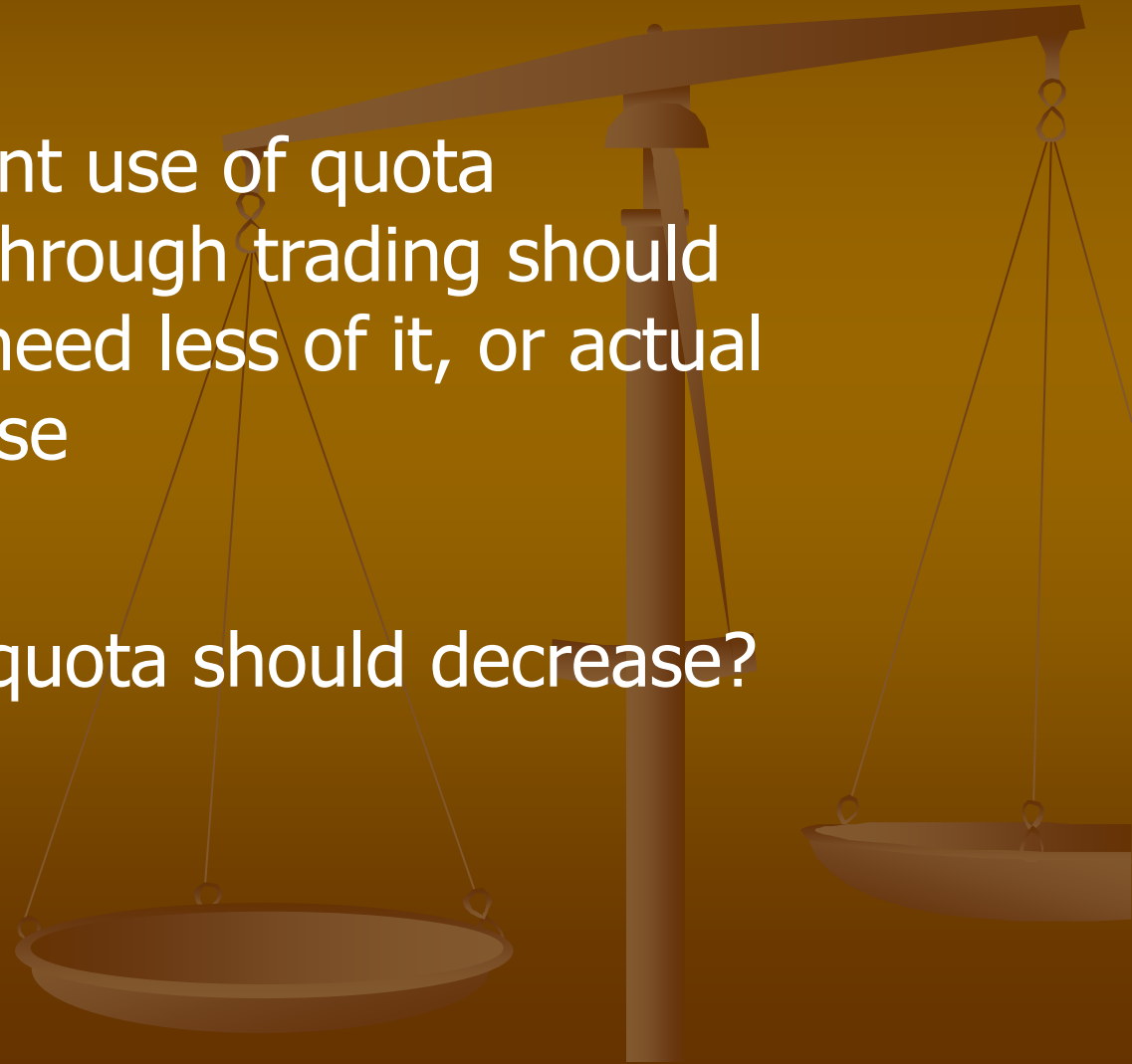
No direct prohibition on trading?

- ...and probably CCSBT and Bering Sea pollock
- only outright prohibition is in the IWC (and even that was circumvented in the 1960s)



Problem when stock is fully exploited or depleted

- More efficient use of quota (capacity) through trading should mean you need less of it, or actual catch will rise
- But whose quota should decrease?



Duty of non-members to cooperate with a trading mechanism

- Under Art 8(4) of the UN Fish Stocks Agreement, States must either join or cooperate with RFMOs such as IATTC on stocks for which it is competent, or refrain from fishing for them.
- If this too is now custom (as Rayfuse argues), then new entrants can no longer disregard non-discriminatory trading schemes that make buying capacity quota a condition of any State increasing its capacity beyond what it has already.



Duty of non-members to cooperate with a trading mechanism (2)

- This position is supported by:

(1) Australia's statements to the UN General Assembly in 2005 and 2006: "it is Australia's strong view that States have an obligation to either join relevant RFMOs where entitled to do so, or to otherwise refrain from fishing in the RFMO regulated area unless they agree to apply all relevant conservation measures."

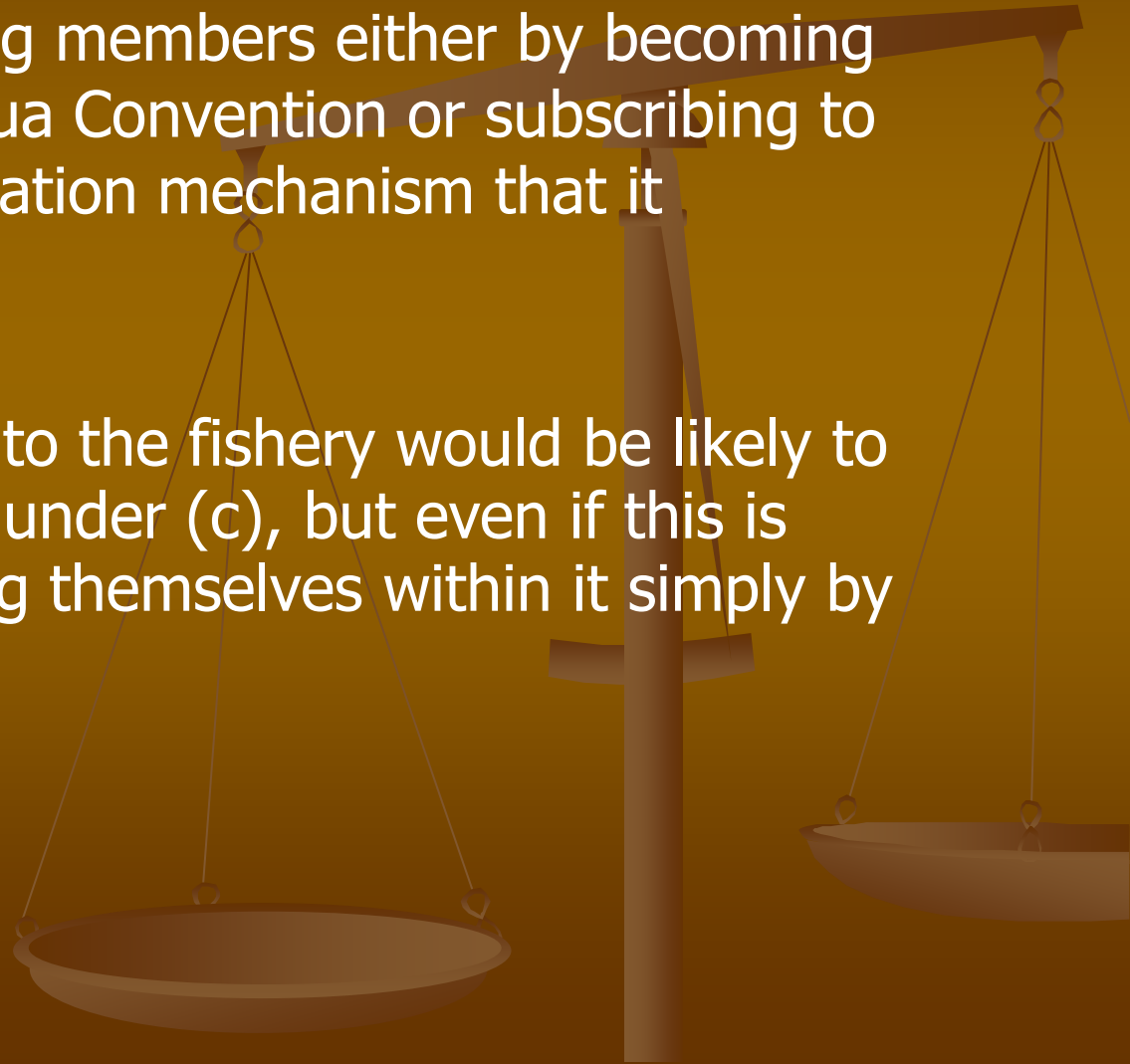
(2) IATTC members themselves in Resolution C-03-05 on Data Provision, whose preamble says non-member States fishing in the region have an obligation under international law to cooperate with IATTC.

But what if new entrants can't join?

- Risk of closed shop RFMOs, where “ins” discriminate against “outs”, insisting that the only way to cooperate with them is not to fish, is a problem in theory...
- ...but in practice relatively few RFMO treaties have restrictive membership clauses, and IATTC is not among them:
- Antigua Convention is open to:
 - (a) Parties to the 1949 Convention;
 - (b) other coastal States in the Convention Area; and
 - (c) “other States and regional economic integration organizations whose vessels fish for fish stocks covered by this Convention or that are invited to accede.”

How new entrants can join IATTC

- So new entrants can become eligible to purchase quota from existing members either by becoming party to the Antigua Convention or subscribing to any formal cooperation mechanism that it operates.
- States totally new to the fishery would be likely to seek an invitation under (c), but even if this is denied, could bring themselves within it simply by beginning to fish.

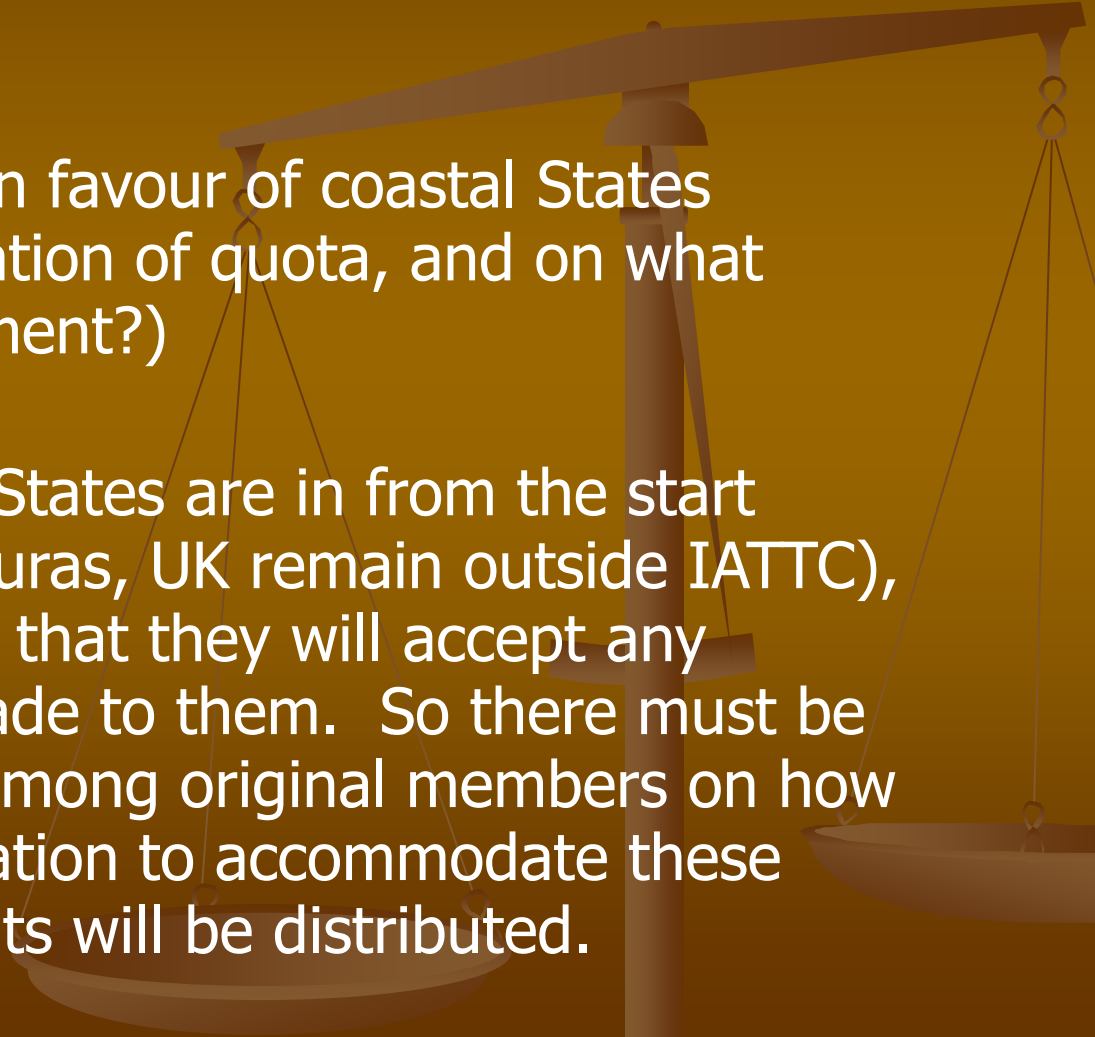


A caveat: the consequences of selling all your quota

- Members selling all their quota (or allowing vessel owners to do so) would be bargaining away their right to fish on the high seas for stocks IATTC manages – would they necessarily accept this?
- New entrants too should not be able to accede to the treaty, liquidate their quota for gain then leave the system to fish for the species on the high seas again. So you would need a rule that reducing a quota to zero by trading extinguishes the member's international law right to fish for that species except by buying quota, even if it later denounces the treaty (though it should still be allowed to reaccede).

Another problem: allocation to coastal States

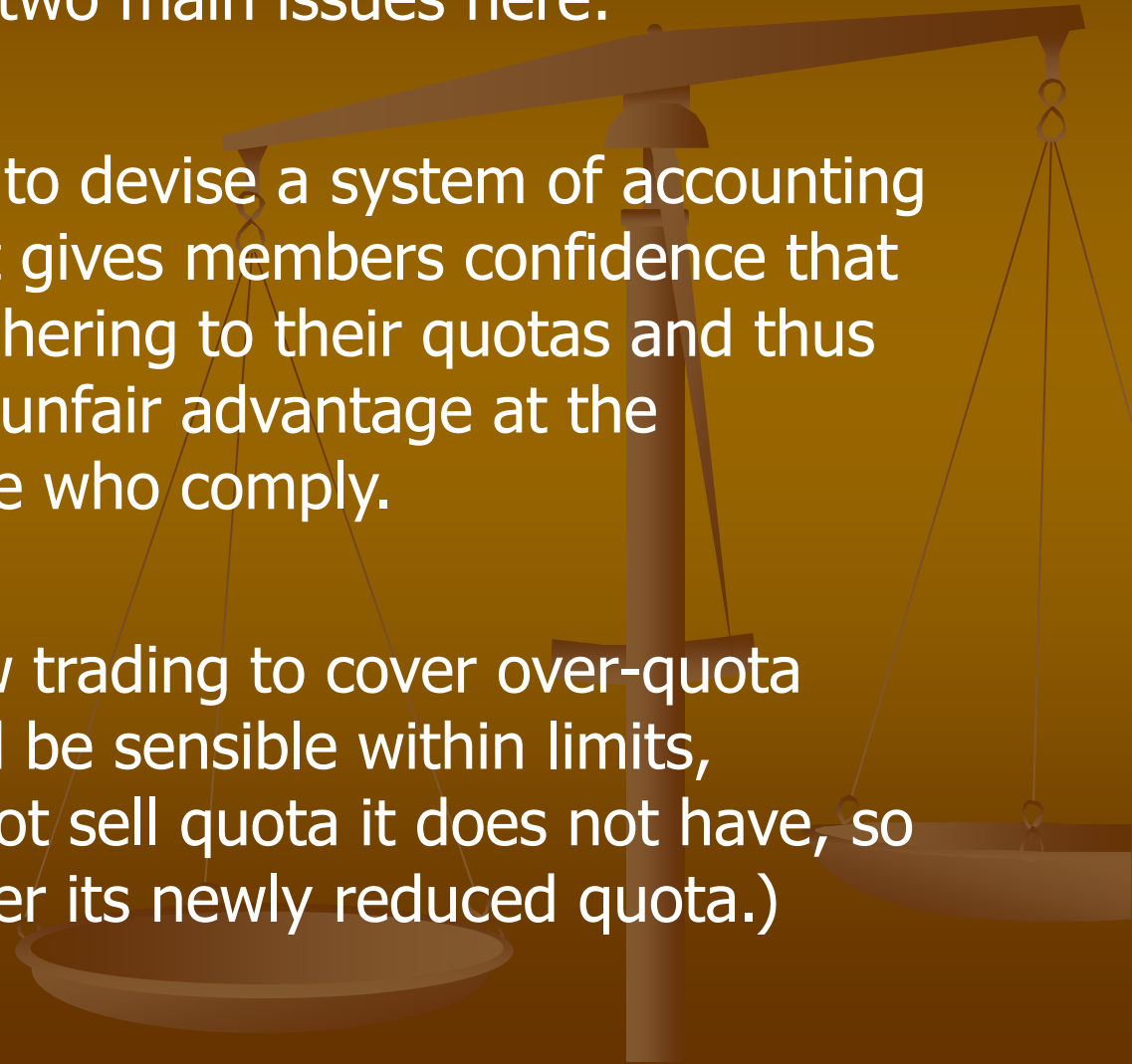
This has two facets:

- (1) What weighting in favour of coastal States generally in the allocation of quota, and on what basis? (zonal attachment?)
 - (2) If not all coastal States are in from the start (Canada, Chile, Honduras, UK remain outside IATTC), there is no guarantee that they will accept any notional allocation made to them. So there must be advance agreement among original members on how the burden of reallocation to accommodate these privileged new entrants will be distributed.
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A final consideration: compliance

In outline, there are two main issues here:

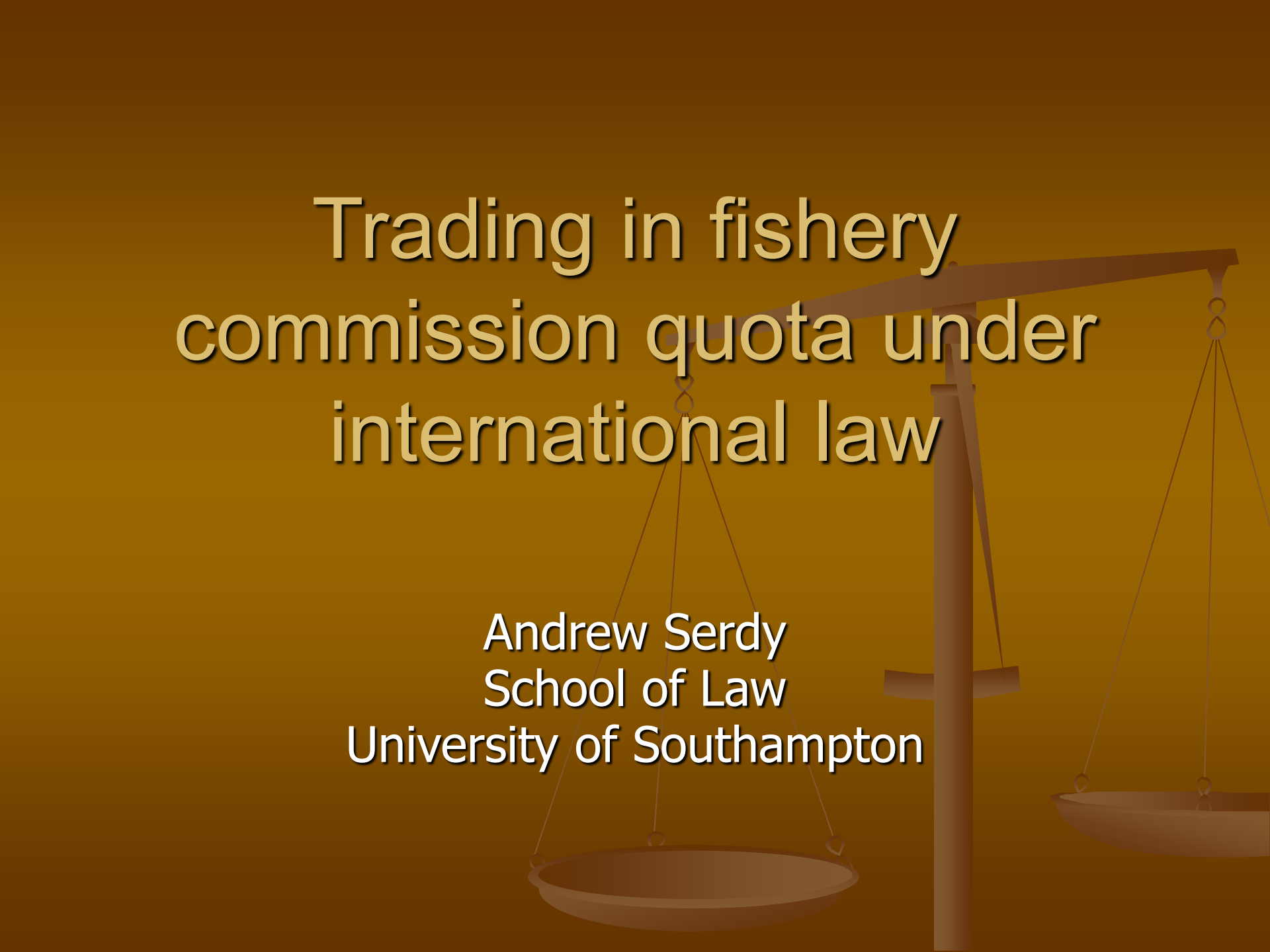
- (1) You would need to devise a system of accounting for capacity that gives members confidence that all others are adhering to their quotas and thus not gaining any unfair advantage at the expense of those who comply.
- (2) Should you allow trading to cover over-quota capacity? (Could be sensible within limits, e.g. seller may not sell quota it does not have, so as itself to go over its newly reduced quota.)



Conclusions



- Despite what was said earlier about quotas not being positive entitlements to catch fish or expend effort, in effect that is precisely what they become when:
 - (a) a general waiver for transactions to occur is given in advance by the RFMO (no treaty amendment necessary!); and
 - (b) the rules against free riding by new entrants are sufficiently robust (so that the crucial element of exclusivity, one of the mainstays of property rights that makes trading in them worthwhile, is much closer to being present).



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