LEGAL BRIEFING NOTE ON THE

DISTRIBUTION OF UK QUOTA

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Nature of the report

This report was prepared by Tom Appleby MA Dip. Law Solicitor (non-practising) (qualified in England and Wales) for OCEAN2012. The author was a practising commercial property lawyer before becoming an academic and is now a Senior Lecturer in Law at the University of the West of England, Bristol, where he specialises in property law and environmental law.

The material provided in this report is of a general nature and should not be regarded as an attempt to cover every aspect of the particular issues being addressed. It is for discussion purposes and should not be relied upon nor treated as a substitute for legal advice in relation to individual situations.

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OCEAN2012

OCEAN2012 is an alliance of organisations dedicated to transforming European Fisheries Policy to stop overfishing, end destructive fishing practices and deliver fair and equitable use of healthy fish stocks.

OCEAN2012 was initiated, and is coordinated by, the Pew Environment Group, the conservation arm of The Pew Charitable Trusts, a non-governmental organisation working to end overfishing in the world´s oceans.

The founding members of OCEAN2012 are the Coalition for Fair Fisheries Arrangements (CFFA), the Fisheries Secretariat (FISH), nef (new economics foundation), the Pew Environment Group and Seas At Risk (SAR).

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Abbreviations

CFP	Common Fisheries Policy
Defra	Department for the Environment, Food and Rural Affairs
ECJ	European Court of Justice
EFZ	Exclusive fishery zone
EEZ	Exclusive economic zone
FPO	Fish Producer Organisation
FQA	Fixed quota allocation
ITR	Individual transferable rights
MMO	Marine Management Organisation
nm	Nautical Mile
NFFO	National Federation of Fishermen's Organisations
Non-sector	Fishers who are not members of an FPO
RBM	Rights-based management
SFF	Scottish Fishermen's Federation
TAC	Total allowable catch

Executive summary

Under EU law Member States are allocated a proportion of EU fishing opportunity in the form of total allowable catch (TAC). It is then up to Member States to distribute that TAC to individual fishers. The UK has 12 percent of the EU's landings and one of the largest exclusive economic zones (EEZs) in the EU. For much of the commercial sector, the UK has individually tradable permissions where quota can be traded between fishers, although there are a number of restrictions which apply to such trades. If the EU requires a more prescriptive individual transferable rights (ITR) system under a reformed Common Fisheries Policy (CFP), changes may be needed to the UK system to incorporate it.

There are two administrative functions carried out by UK fisheries authorities in respect of quota management: an ownership and a regulatory function. The ownership function derives from the public right to fish and the UK's sovereign rights in its EEZ. To 12 nautical miles at least, the right is held by the Crown in trust for the public. The right to fish cannot be *severed* or privatised without explicit statutory authority, because of precedent that refers to the Magna Carta, one of the UK's most important constitutional documents. Ownership of the UK's fishing rights has not been properly explored by academic commentators or UK fisheries administration. Before a rights-based management (RBM) system can be adopted in the UK, it is essential that the public nature of the fishery is fully acknowledged and that any proprietary instruments created dovetail with public and sovereign rights. It is likely that this will require primary legislation and a full and proper assessment of what would amount to a privatisation of a public right, should proprietary rights be granted to commercial enterprises.

The policy of tradable permissions has no formal statutory basis beyond the Minister's discretion. Quota is allocated via restrictions attached to vessel licences. A secondary or derivative market has grown up in the trade of these licence restrictions, but these do not amount to a property right in the way UK property lawyers would understand the term. It is unfortunate, in the UK context, that academic commentators have alighted upon the term 'individual transferable *rights'* to describe tradable quota, as it brings with it needless political and legal complexity.

Under human rights legislation the state must compensate individuals if their possessions are taken by the state in the public interest. UK fisheries authorities have tried to avoid creating permanent possessions or rights when they allocate quota. The vessel licence to which quota is attached is limited to

a duration of a maximum of two years. It is unlikely that alterations to the mechanics of quota allocation would result in a successful claim for a breach of a fisher's human rights which would require compensation. Unless there has been some additional property grant, which has not been discovered during the investigations for this report, vessel licences and quota are more akin to goodwill than a possessory right. Claims for property rights under adverse possession, prescription or custom are also unlikely to succeed; the common fisheries terms of 'grandfather rights' and 'track record' are alien to property law.

The strongest case for the maintenance of the current allocation of quota is via claims that existing quota holders may seek to judicially review any proposals on the grounds of *legitimate expectation.* This is a ground for judicial review that arises where a claimant has a legally enforceable expectation for the continuation of current administrative practice. There is an argument that recipients of quota have planned their businesses on the strength of future quota allocation, and have come to rely on their allocation. There are serious doubts whether this argument would succeed, as quota is one unchanging aspect in a broader environment of constant policy change. It is likely that the permanent loss of a valuable public asset (the fishery) and the undisputed need to reform the CFP would amount to an overriding interest and defeat claims of legitimate expectation.

There are a number of ways in which obstacles to the introduction of a reformed quota management system could be overcome. Practical measures, such as extensive consultation and a long lead-in period to any change, would permit the industry to make the necessary structural changes. There are also important legal drivers for change. Aspects of the current quota system are open to judicial challenge on the grounds of the illegality of the current arrangements. These grounds range from claims that UK fisheries authorities have illegally delegated powers to Fish Producer Organisations, to claims that public fishing rights are being privatised without the necessary powers to do so and claims of anti-competitive and discriminatory behaviour against new entrants to the market.

There is tremendous opportunity to control fishing practices through resource management contracts and RBM. In doing so, UK fisheries authorities need to work out whether they are dealing with an arm's length open market commercial transaction or allocating a public resource at below market value for public benefit. There is very clear guidance on the disposal of UK public assets from the Efficiency and Reform Group within the UK Cabinet Office, which sets out government standards for the disposal of public property on

the open market, and from the Quirk Review, which is a detailed examination of the disposal of public assets for broader community benefit. It is hoped that these best practices are incorporated into the UK's fishery administration through changes to its quota management system. As it stands, there is a danger that already profitable commercial enterprises are in receipt of public property at no cost with no discernible benefit to the broader community.

1 Background

1.1 The distribution of quota to UK fishing vessels is a complex and bureaucratic process, yet it is central to the way in which UK fisheries are managed. There is a general recognition that the Common Fisheries Policy (CFP)[i] has failed to deliver adequate social and environmental safeguards through sustainable management of the fishery resource. At least in the North Atlantic, quota is one of the key instruments for delivering the CFP. UK vessels landed 614,000 tonnes of sea fish and shellfish in 2006 with a first sale value of approximately € 770 million. The UK catching sector amounted to some 12 percent of EU landings[ii]. The fishery in the UK's exclusive economic zone (EEZ) extends to 737,000 square km[iii], which it shares with other EU Member States. UK vessels are permitted to operate exclusively inside the 6 nautical mile (nm) limit, with some vessels from other EU Member States able to fish in the 6 and 12 nm limits; this means that in the 0-6 nm limit the UK government and devolved administrations have day-to-day exclusive control of the fisheries management, while between the 6 nm limit and the edge of the of the EEZ management of the European fleet is undertaken via the CFP[iv]. The purpose of this briefing is to understand the current quota allocation mechanism and assess how changes to the quota allocation system may be brought about to reflect more sustainable resource use; it is not the purpose of this paper to postulate what those changes may be. In the EU context the UK position is extremely important for two reasons: the UK has one of the largest fisheries within the EU[v]; and the UK has a fairly advanced secondary market in the sale of quota[vi].

2 How is quota allocated in the UK currently?

EU legislation governing the allocation of quota

2.1 Article 20(1) of the CFP Basic Regulation[vii] sets out that the Council of Ministers, having decided on catch limits, shall allocate fishing opportunities among Member States. This is decided upon the basis of *relative stability.* Relative stability is a mechanism for allocating a proportion of total allowable catch (TAC) between Member States; it does not guarantee a fixed amount of fish but sets a predictable share of the total catch available. This feature of the CFP has been the subject of much litigation as it constitutes a derogation from the core

principles of the EU[viii], which otherwise would allow equal conditions of access to fishery resources among Member States, under EU competition law.

2.2 Relative stability is not the only criteria for setting TAC for Member States. Penalty measures were introduced to reduce TAC for Member States found to have overfished, and the Commission is in discussions as to how to alter TAC in response to climate change.

2.3 Once the level of TAC has been set for each quota species it is shared out between Member States. TAC is enforced upon Member States via a Council Regulation[ix].

2.4 Article 20(3) of the Basic Regulation states that each Member State shall decide, for vessels flying its flag, on the method of allocating the fishing opportunities assigned to that Member State, in accordance with Community law. It must then inform the Commission of the allocation method; it is up to the Member States to allocate quota.

2.5 The European Court of Justice (ECJ) in the case of *Lootus v. Council*[x] referred to a biennial Regulation setting TACs for deep-water stocks. The Court noted that Member States had broad discretion as to how they manage fishing opportunities, since the Regulation did not "lay down any specific system for the Member States to allocate fishing opportunities to individuals". In particular, the Court noted that "Member States are free to chose, for example, between a system for the allocation of fishing opportunities according to the 'first come, first served' rule, a system of equal distribution among all the undertakings concerned, or an auction." TAC for Member States may be set under the CFP, but it is up to Member States to allocate quota via their own domestic legislation, in whichever way they chose, so long as the Member State then complies with its own TAC obligations. This can include altering quota allocation in response to changed circumstances[xi].

UK legislation governing the allocation of quota

2.6 For historic reasons the UK, like many common law jurisdictions, has an exceptionally complex ownership and management system for its fisheries. Despite recent legislation in the form of the Marine and Coastal Access Act 2009 and the Marine (Scotland) Act 2010, very few changes were made to the administrative methods for the UK's

fisheries[xii]. UK fisheries authorities have two functions in the administration of the UK's fish stocks, firstly in respect of ownership and secondly in respect of administration. With most public entities these functions are kept separate, either by a 'Chinese wall', an arrangement designed to prevent confidential information leaking from one department of an organisation to another, or by placing the ownership and regulatory functions in two separate state entities. Unfortunately, in practice, UK fisheries authorities have ignored the ownership function of the state and as a result quota management has largely been through regulatory measures. The danger of this approach is that the regulatory and ownership roles of the authorities have become blurred. To get a full picture of the legal position it is essential that both the ownership function of the state and the regulatory function are properly understood.

Ownership of the UK's fisheries

2.7 Fish[xiii] are *ferae naturae*, or wild by nature, and as such are ownerless until captured, whereupon they become the property of the captor[xiv]. A captor only has *possessory* title to fish, so if they escape they become, once again, ownerless until recaptured. For practical purposes, once fish are crated and in a box they become the property of a fisher.

2.8 At section 1 of the Fishery Limits Act 1976, the UK declared an exclusive fishery zone (EFZ) up to the 200 nm limit. The declaration of the EFZ claimed sovereignty over fishing rights within the EFZ. In layman's terms, sovereignty gives the coastal state the right to regulate fishing in these areas. Unfortunately the Act was silent[xv] as to ownership of the fishing rights, and it must be left to a review of the common law and legal treatise to discover what has happened to fishing rights within the 200 nm limit.

2.9 Inside the 200 nm limit two slightly different legal regimes operate. In the 0-12 nm limit, known as the territorial sea, there is an identifiable owner of the seabed. The UK formally declared its 12 nm limit in the Territorial Sea Act 1987. This was an extension of the 3 nm limit, which had existed prior to that under customary international law.

2.10 Ownership of the seabed does not, of itself, deal with fishing rights. It has long been established that inside territorial waters any proprietary rights over the seabed are subject to the public rights to fish and to navigate[xvi]. There has been no express expansion of the public right to

fish in legislation from the 3 to 12 nm limit or to the edge of the EFZ. While the mechanism for the expansion has never been established in the UK courts, there is persuasive evidence from another common law jurisdiction that the public right to fish has been expanded at least to cover territorial waters, if not beyond; there are relatively few cases concerning the public right to fish and so a case in one common law jurisdiction is usually persuasive in another. In the case of *Commonwealth v. Yarmirr,* parts of the Croker Islands were brought within Australian territorial waters by the expansion from the 3 to 12 nm limit, and a question arose as to whether the common law and the public right to fish applied in this expanded area. Justice Kirby held:

> "The area of the territorial sea has changed over time, first by the adoption in 1983 of different baselines and then, in 1990, by the extension from three to 12 nautical miles. It follows that parts of the area the subject of the primary judge's determination lay outside what were, until those two events, the territorial waters of Australia… When Australia asserted sovereignty over those further areas, it did so in terms which are not different in any relevant way from the kind of assertion that was made in 1824 [the date of initial Australian sovereignty over territorial waters]."[xvii]

The case then went on to decide the limits of the public right to fish within this expanded 3 to 12 nm limit. In essence, the expansion of sovereignty to cover this area bought with it the common law, which in turn introduced the public right to fish, itself a creature of the common law. The nature of sovereign rights outside the territorial waters has not yet been established by the courts or by statute, however, it is a reasonable argument that, in the absence of any other proprietary mechanism, the public right to fish should expand into the legal vacuum created by the UK's declaration of sovereign rights in the EFZ.

2.11 The ownership of the public right to fish is a question that has not been frequently examined by the courts. Justice Heath in *Kelcey v. Baker* (1803)[xviii] stated that the King was, *prima facie,* seized of the public right to fish in trust for his subjects. This is also confirmed in the Irish case of *Murphy v. Ryan*[xix], and is supported by the great Victorian fisheries lawyers Charles Stewart[xx] and Stuart and Hubert Moore[xxi] when quoting Lord Hale in *De Jure Mare*:

> "But though the King is the owner of this great wast [sic], and as a consequent of his propriety, hath the primary right of fishing in the sea and the creeks and the arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick [sic] common of piscary, and may not without injury to their right be restrained from it, unless in such places or creeks or navigable rivers, whether either the King or some particular subject hath gained a propriety exclusive of that common piscary."

2.12 According to this precedent, ownership of the public right to fish rests in some aspect of the Crown rather than the fisheries authorities. A key limitation placed on this ownership function is that the Crown is unable to *sever* or privatise the public right to fish without express statutory authority[xxii]. Indeed the case of *Malcolmson v. O'Dea*[xxiii] held that the prohibition on privatising tidal fisheries dates from the Magna Carta. As a result, all private tidal fisheries in England and Wales either predate the Magna Carta or are established by *several orders* under the Shellfish Acts.

2.13 In Scotland, the position is slightly different. The public right to fish was imported into Scottish waters under the Fisheries (Scotland) Acts of 1705 and 1756, which overruled a number of local private arrangements for tidal fisheries[xxiv]. The Lord Advocate of Scotland even has a duty as guardian of the public right to fish[xxv] .

2.14 It is plain, from the above analysis, that the ownership regime of the UK's fishing rights is unnecessarily poorly defined. Despite extensive recent marine legislation in the UK, there has been a failure by the legislature to codify the ownership of the public right to fish and its scope. As a consequence, UK fisheries authorities have managed fisheries by regulatory tools rather than via the laws of property and contract, which would be more usual for natural resource exploitation.

The allocation of quota to vessels within and outside Fish Producer Organisations

2.15 There is no statutory definition of quota in UK law. Quota can be described as the allocation to an individual or organisation to fish commercially for a set limit of a given species

2.16 Quota is managed via the attachment of restrictions to fishing vessel licences[xxvi], which accord to the allocation of that vessel's quota; it is a tradable permission rather than the grant by the state of property interest. The UK does not, therefore, have a formal individual transferable rights (ITR) system. It is unfortunate, in the UK context, that commentators[xxvii] have alighted upon the term 'individual transferable *right*' to describe tradable quota, as it brings with it needless political and legal complexity. Much of the literature on the subject even uses the language of property lawyers, for example, the 'leasing of quota'. The staple case on leases for English property lawyers is *Street v. Mountford*[xxviii]*.* A frustrated Lord Templeman was confronted by draftsmanship that had attempted to evade statutory protection afforded to tenants by styling a document as a licence rather than a lease. He responded:

> "The manufacture of a five-pronged instrument for manual digging results in a fork, even if the manufacturer, unfamiliar with the English language, insists that he intended to make, and has made, a spade."

2.17 This is important for three reasons.

2.17.1 The UK fisheries authorities do not have the powers to grant property rights in fisheries.

2.17.2 Property rights confer additional benefits, such as protection from summary cancellation without compensation from the state, under human rights legislation[xxix].

2.17.3 Discussions about the benefits of property rights *per se* have a tendency to overshadow discussions about the content of any resource management contracts; the politics tends to eclipse the practicalities.

2.18 Quota is transferred in two ways.

2.18.1 For fishing vessels where the owners are not members of a Fish Producer Organisation (FPO), known as non-sector vessels, and for the under-10-metre fleet, a separate condition is placed on each fishing vessel, which sets a limit on that vessel's catch. Quota can be 'traded' between vessels and with FPOs but this needs to be orchestrated via the Marine Management Organisation (MMO).

2.18.2 For fishing vessels that are members of a FPO, quota is allocated to the FPO, which then decides how to manage that quota via its own set of rules. A condition is then placed on the fishing vessel licences of the FPO members requiring compliance with the FPO's quota management rules.

2.19 The statutory authority for the imposition of these conditions is s4(5) Sea Fish (Conservation) Act 1967, which states: "A licence under this section shall be granted to the owner or charterer in respect of a named vessel and may authorise fishing generally or may confer limited authority by reference to, in particular… the descriptions and quantities of fish which may be taken…"

2.20 Both for FPO members and non-sector vessels, quota is allocated at no charge by the state to the fisher. In contrast to the initial free allocation, a secondary or derivative financial market has evolved in the trade of quota between quota owners and fishers. It developed at first informally, then latterly with the tacit approval of fisheries authorities.

Allocation of quota within FPOs

2.21 Within FPOs quota is allocated on the basis of a fixed quota allocation (FQA). Each FPO is allocated their quota, which accords to the 'track records' of all the vessels that are members of their organisation. Track record has been decided with reference to fishing between 1994 and 1996. There is no permanent statutory mechanism for allocating quota in this way and this decision must be regarded as one of policy. The UK's Department of Food, Environment and Rural Affairs (Defra) has made it plain on its website that it does not intend to create property rights and reserves the right to make alterations to the allocation system, although after full consultation[xxx].

2.22 FPOs then decide internally how that quota should be allocated to their members. FPOs have no statutory basis under UK law. They are private limited companies and draft their own constitution and management arrangements. Within FPOs fishers are permitted to trade quota. FPOs may trade quota between themselves, and recently FPOs have been permitted to trade quota with non-sector fishing vessels[xxxi].

Legal issues associated with quota management arrangements

2.23 The delegation of the management function of quota to FPOs by UK fisheries authorities may not be permissible under the doctrine of *delegatus non potest delegare* or unlawful delegation. It is not permissible for the fisheries authorities to further delegate their management function without express authority from Parliament. Unauthorised delegation is a common reason for judicial review against public bodies. A good example is the case of *Barnard v. National Dock Labour Board*[xxxii]. Barnard had been suspended by his local port manager and argued that this was unlawful delegation. The Labour Board was given statutory authority to delegate specific functions to local dock boards, including the right to suspend workers. The Court of Appeal held that the right to suspend Barnard rested with the full board (which consisted of equal numbers of workers and employers) and not the local port manager, and overruled his suspension. Giving an FPO the responsibility to divide quota and draft quota management rules would appear to be an unauthorised delegation of statutory responsibility, since the authority to draft the restrictions on vessel licences rests with the fisheries authorities rather than FPOs.

2.24 By using fishing vessel licences to establish a secondary market, UK fisheries authorities can be criticised for giving the impression of a market in quota as a separate fishing right, rather than a tradable permission. This is reflected in the terminology used by the MMO in its guidance for the under-10-metre fleet leasing quota[xxxiii]. Leasing is the language of property law; it is impossible to 'lease' a restriction on a licence, in the same way as a term on a planning permission cannot be rented (see Lord Templeman's comments, above). None of the UK fisheries authorities currently have the power to sever the public right to fish, in order to permit a permanent tradable fishing right[xxxiv]. This would require primary legislation.

3 Legal obstacles to changes in quota allocation practice

Is quota a property right and, if it was, would it therefore require compensation if reallocated under the Human Rights Act?

3.1 Article 1 of the First Protocol of the European Convention of Human Rights states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his

possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." This has been incorporated into UK law under the Human Rights Act 1999. Removal of possessions by the state can only take place in the public interest and with full compensation.

3.2 The UK fisheries authorities have attempted not to create permanent possessions when they allocate quota. Quota restrictions are placed on vessel licences annually, and the licences themselves are renewed biennially[xxxv], by application in Scotland and automatically in the rest of the UK. The very nature of quota means that the amount of fish that a fisher may be permitted to catch fluctuates on a yearly basis, depending on scientific criteria. A change in the rubric for the allocation of quota will almost inevitably lead to reductions in quota for some fishers and expansion for others. Even if quota were suddenly removed at short notice, UK fisheries authorities have retained the right to cancel fishing vessel licences[xxxvi]. That would be an extreme case, as it is likely that any alterations to the current system would take place with plenty of notice and after extensive consultation.

3.3 The fact that track record and entitlements to licences have a value does not, of itself, make either of these possessions. Most businesses have goodwill associated with their operation, but this goodwill is not a possession; it can be destroyed without compensation by a change in regulation or the actions of a competitor. Some discussion has been raised over the fact that fishing vessel licences have been treated as property rights in some instances. The Scottish case of *Watt v. Watt*[xxxvii] concerned a share in divorce proceedings and the case of *Saulnier v. Royal Bank of Canada*[xxxviii] concerned bankruptcy. Although these cases go some way towards establishing a principle that fishing licences can be treated as having a value by the courts in some instances, it does not mean that they then become formal property rights in an action if the state seeks to revoke or amend them. It is, however, true that the longer the position is allowed to continue, where there is no controlled allocation of quota via a statutory allocation process, the courts may well step in and imply rights for fishers against the state. To date that has not happened.

Can grandfather rights or track record give additional rights to existing fishers and some nascent right to the allocation of quota?

3.4 There is no established precedent in law for the creation of proprietary rights that attach to an individual or group of individuals on the basis of 'grandfather rights', track record or FQA. It has been government policy to allocate quota on this basis, and that is perhaps (see above) something that is in the gift of the Minister at the time, but it is not a legal requirement. Indeed, quota allocation mechanisms have changed in the last 30 years, with the current quota management system dating from 1999[xxxix]. New quota species have been introduced and there is even the unlikely possibility of quota being removed for a stock if it recovers sufficiently. The research undertaken so far would suggest that UK fisheries authorities have not created immutable and lasting formal proprietary rights through the vessel licensing system. There are other methods in law where property rights can be informally created. These centre around what are known as 'squatters rights'.

There are two potential avenues for a claim[xl]: adverse possession and the laws of prescription.

3.4.1 **Adverse possession** Adverse possession occurs where property is used exclusively over a 12-year period by an individual or defined group of individuals. Such use has to be *nec vi, nec clam,* and *nec precario* (without force, without secrecy and without permission) and with use *as of right*[xli]*.* Assuming a fishery could be adversely possessed (which is a large assumption), and without delving too far into what is a relatively complex area of law, it is highly likely that any claim for adverse possession would be defeated because, firstly, it would be very difficult for a group of individuals to show they had exclusively fished an area *as of right* i.e. under the impression that it was theirs; and secondly, and perhaps more fatally, fishers are authorised to fish under the public right and therefore have permission. The existence of permission is fatal to a claim of adverse possession.

3.4.2 **Prescription** Very rarely, a *profit a prendre*, a right to take the fruits of another's land, can be acquired by prescription[xlii]. Prescription is a particularly complex area of the law. The minimum requirements are that the right has to have been exercised for 20 years consistently by the individual or defined group of individuals, under what is known as the doctrine of lost modern grant. Once again though the right must be

exercised *nec vi, nec clam, nec precario* with use *as of right*. The existence of a permission to fish under the public right is almost certainly fatal to this claim as well.

Are there customary rights associated with quota allocation?

3.5 Customary rights attach to people of a certain locality, and anecdotal evidence would suggest that fishers have sometimes used these claims in support of the continuation of some fishing practices. Customary rights attach to the inhabitants of a locality rather than to individuals and concern the continuation of ancient practices over generations. These can relate to the playing of sports on a village field or the drying of nets above the foreshore. The claimants need proof of at least 20 years' continuous use, and the claim can be defeated by showing that it was impossible for such a custom to have existed in 1189[xliii]. There may be some customary rights associated with fishing, such as keeping stores on the foreshore or drawing boats up on the beach, but the actual act of fishing is authorised under public rights. In the very unlikely event that custom would play any part, the rights would attach to the residents of a locality rather than individual fishers, and would attach to some ancillary activities rather than fishing itself.

Can fishers claim legitimate expectation that the current quota allocations will continue to be renewed?

3.6 Anecdotal evidence would suggest that UK fisheries authorities place much store in claims by fishers that they could successfully oppose significant alterations to the quota management system through a claim of *legitimate expectation*. Legitimate expectation is one of a number of grounds where an affected party may seek to judicially review the exercise of discretion by a decision-maker, through the courts.

3.7 A legitimate expectation may arise in two circumstances: firstly, from an express promise given on behalf of the public authority; or, secondly, from the existence of a regular practice, which the claimant can reasonably expect to continue[xliv]. UK fisheries authorities have fallen into the habit of distributing quota at no cost to the fishers and a sense of permanence is forming around the arrangement as more and more stocks become quota species. Those to whom quota are currently allocated are rapidly becoming accustomed to viewing what should be seen as a public resource as their own.

3.8 In the case of *R. (on the application of Bibi) v. Newham LBC (No.1)*[xlv] The court set out the current-three part test:

> "The first question is to what, whether by practice or by promise, has the public authority committed itself; the second question is whether the authority has acted or proposes to act unlawfully in relation to its commitment; and the third is what should the court do."

To what has the public authority committed itself?

3.9 Aggrieved fishers could claim that the current system of allocating quota to the existing recipients free of charge had become permanent, either through some promise or through regular practice.

3.10 Lodging a successful action for legitimate expectation requires more than either a simple promise or regular practice or the subjective views of fishers. A promise needs to have been made by the fisheries authorities which is clear, unambiguous and devoid of relevant qualification[xlvi]. It would be an impossible task to review all the communications between the commercial fishing sector and the UK fisheries authorities, but it is plain from the information available that there have been consistent efforts to retain discretion on quota allocation for the Minister. For example, the current quota allocation rules[xlvii] state in their short introduction: "The rules are reviewed annually in consultation with the fishing industry and reissued prior to the start of each quota year." Moreover, on page one they state: "Ministers may, <u>at their discretion</u>, [my emphasis] agree to issue quota allocations for the stocks covered by these rules …"

3.11 It is true that regular practices have been established in the allocation of quota in the UK. However, there are a number of reasons why an expectation for that practice to continue may be flawed.

3.11.1 Quota is part of fisheries management policy in general, which is constantly changing as it responds to the changing socio-economic and environmental needs.

3.11.2 Free allocation of quota is a permissible form of subsidy to the UK fleet, it is not a policy that is carried out throughout the EU[xlviii].

3.11.3 The EU and UK fisheries policies are also subject to permanent review.

3.11.4 Fisheries have effectively been unionised through organisations such as the FPOs, the National Federation of Fishermen's Organisations (NFFO) and the Scottish Fishermen's Federation (SFF). They have strong lobbying and legal representation and are fully aware of the changing administrative environment in which they operate.

3.11.5 It is not the UK that ultimately sets fisheries policy but the EU and therefore any UK fisheries policy is liable to change.

3.11.6 Fishing is a hugely speculative business. Reliance on the future allocation of quota is just one of the many speculative aspects of the fishing industry.

3.12 Assuming quota allocation can be regarded as a regular practice, there is still a further hurdle to a successful claim.

Has the authority acted, or proposes to act, unlawfully in relation to its commitment?

3.13 The current arrangement is that fishing vessel licences are allocated at no cost to fishers. These licences are short term but there is an understanding that they will be renewed and can be transferred. The Defra guidance on fishing vessel licences is contradictory. On one hand it states: "**All licences are issued at the discretion of Ministers and can be revoked or varied at any time for the purposes of regulating sea fishing** [Defra's bold][xlix]." On the other hand, earlier in the same document it states: 'If you wish to license a vessel for the first time you need to arrange for a transfer of a licence 'entitlement' [Defra's inverted commas] from an existing licence holder[l]."

3.14 It is difficult to reconcile a system which strongly represents that licences are purely temporary and at the same time permits the transfer of 'entitlements', thus inferring some sort of permanent right attendant to a fishing vessel licence. The use of inverted commas around the term entitlement is important; they are possibly used to imply that entitlement to a licence is not a formal relationship but one permitted by current fisheries policy. This interpretation is supported by the context of the rest of the document: "The licence enables UK Fisheries Administrations to control fishing so that the UK does not exceed the quotas set under the EU Common Fisheries Policy. The

licence allows Fisheries Administrations to set specific conditions and requirements, such as arrangements for the landings of stocks[li]."

3.15 The vessel licence is part of a suite of measures to control quota under the CFP. As a regulatory tool, the practices of quota division and fishing vessel licensing are a matter of policy for the current government and the EU. In allowing some trade in quota and vessel licences UK fisheries authorities are reflecting the reality of a permanently changing ownership structure of fishing vessels, and responding to a need to transfer quota between fishers to maximise fishing opportunity. There is no clear intention on the face of it to make this arrangement permanent; practice has arisen simply to make it easier for the fishers to comply with current policy and go about their business.

3.16 The most extreme claim possible for fishers under this system is that the vessel licensing and quota regime has created permanent rights for existing fishers; this would amount to a massive privatisation of the public fishery. There are some essential weaknesses in this argument. There does not appear to be any statutory authority for the UK fisheries authorities to privatise part of the fishery. It is plain from the case of *Malcolmson v. O'Dea,* that the severing of the public right to fish would require primary legislation. A promise to permanently sever the public right to fish by the UK authorities is likely to be *ultra vires*, or beyond their power. Any claim for legitimate expectation in that case is likely to fail, as the fisheries authorities could not make good on their promise.

3.17 The alternative explanation is that the practices of allocating fishing vessel licences and quota have become so established that they have become regular practice. This is possibly permissible under the existing regulatory regime. The FQA system commenced in 1999 and the vessel licensing regime in the late 1980s; in both cases the introduction was incremental, as not all vessels required licences and not all stocks were quota species (that is still the case). In the *Council for Civil Service Unions v. Minister for Civil Service*[lii], a case involving the peremptory de-unionisation of GCHQ, 35 years of prior practice was deemed sufficient for a legitimate expectation to arise. If, for argument's sake, quota and vessel licence allocation had been hived off from the general renegotiations of fisheries policy and subsidy, there would be a chance that the allocation of fisheries in this way would have become regular practice. Furthermore, if the Defra publications casting doubt on any permanent arrangement have

somehow been ignored by the fishing sector or overridden elsewhere in communications between the UK fisheries authorities and the fishing sector it is possible that some form of legitimate expectation may have arisen.

3.18 In the case of *R. v. North and East Devon Health Authority Ex p. Coughlan*[liii] Lord Woolf held that even if there was legitimacy of expectation the court has the task of weighing the requirements of fairness against any overriding interest relied on for changing practice. There may be many reasons for such an overriding interest to exist. Here are a few.

3.18.1 Quota stocks now account for a sizeable proportion of UK landings. Quota controls access to much of these landings yet, if the legitimate expectation claim succeeded, the rights to this massive and valuable resource would have been the subject of a *de facto* privatisation. Such a huge and unregulated transfer of public property to the private sector is not in the public interest, particularly at a time of significant budget cuts.

3.18.2 This would also unduly restrain the Minister's ability to conduct fisheries policy both at a UK and EU level, particularly in the context of rapidly declining fish stocks. It would involve severe limits being placed on quota policy, which is a macro-level regulatory tool. Courts are far less likely to support a legitimate expectation in the context of high-level policy: 'In that field, true abuse of power is less likely to be found, since with it changes of policy, fuelled by broad conceptions of public interest, may more readily be accepted as taking precedence over interest groups, which enjoyed expectations generated by an earlier policy[liv].'

3.19 On the available evidence the grounds for litigation to maintain the current allocation method look weak. There has been an action for legitimate expectation taken in the past by the fishing sector. In the case of *R. v. Minister of Agriculture, Fisheries and Foods Ex p. Hamble (Offshore) Fisheries Limited*[lv] fishers tried to claim a right to aggregate vessel licences on the basis of established practice. The court held that it was in the overriding public interest to permit changes to fisheries policy because of decline in fish stocks and changes to EU policy. The failure of the *Hamble* case speaks volumes.

Other procedural challenges

3.20 Judicial review is available for other reasons: illegality; irrationality; and breach of (another) right under the European Convention on Human Rights.

3.21 For reasons of space, it is not possible to investigate these much further. Any new fisheries policy needs to have a firm basis in law. Even with the Marine and Coastal Access Act 2009, it is likely new legislation may need to be passed if radical changes are proposed as a result of the CFP reform. There is always scope for judicial challenge if changes are brought in precipitously, without sufficient consultation and without sufficient statutory authority.

Differences in devolved administrations

3.22 Devolution in fisheries policy has meant the UK has created the potential for differing management regimes in England, Wales, Scotland and Northern Ireland. All would have to comply with EU fisheries policy and largely operate in similar ways. Fishers have also tended to move between jurisdictions, so in practice there has been a strong focus on consistency between the administrations. Research for this paper did not uncover significant differences with the issues identified here and fisheries law in the devolved administrations. It must be noted that the laws of Scotland and Northern Ireland have a different basis to the laws of England and Wales and the court system in Scotland is based on a very different legal tradition. Many of the issues identified here would be common to all four jurisdictions. This report is drafted with a view to the laws of England and Wales.

4 How these obstacles may be overcome

The use of extensive consultation and the co-operative approach to a solution

4.1 The problems facing a change in quota management practice in the UK seem to be more of a political than a legal nature. This is not an exhaustive report, and there are some threats of legal action, particularly in the realms of legitimate expectation, which may have some substance. There is a grave danger, though, that these claims are simply accepted by the UK Government without it fully assessing

the likelihood of them succeeding. The result would be an uncontrolled privatisation of a public resource with no consideration paid to the general public for the loss of public property. Before agreeing that any of these claims are valid, it is vital that the basis of any claim is properly identified and subjected to some form of independent scrutiny. In any negotiation, representatives of the fishing sector will use the threat of legal action, based on a favourable interpretation of relevant law. This has become part of the standard *modus operandi* for negotiations within this sector. The mistake is to give credence to such claims without thorough investigation.

4.2 An extensive consultation process will help to tease out these claims as well as setting the parameters for effective policy-making. It will also help meet legal requirements for procedural fairness.

An appeals mechanism embedded into any new quota allocation system to allow redress in a controlled manner

4.3 To have *locus standi*, i.e. an actionable claim, any legal claim must relate to specific circumstance. Placing an appeals mechanism within the legal framework of any quota allocation mechanism draws the sting of such a complaint. The likelihood is, then, that the complaint is dealt with within the new system, rather than leading to a challenge to the system itself.

Legal issues with the existing system

4.4 There are five areas where the current quota management system potentially breaches existing UK law. These issues are raised not so much to inspire legal action against current arrangements, but to make the point that while there may be arguments for maintaining the *status quo*, there may also be good legal argument that the *status quo* is itself legally flawed and that the whole quota management system needs to be placed on a proper considered statutory basis.

4.4.1 The quota management system has expanded, leading to trades in quota, resulting in a perception that a formal right has been created rather than a tradable permission. FPOs have dummy vessels[lvi] to ‘hold’ quota and there has been a new generation of ‘slipper skippers’ who do not go to sea but manage their quota. The Sea Fish (Conservation) Act 1967 does not contain the necessary provisions to permit the full establishment of an ITR regime. It is, at its heart, a piece

of regulation about regulating fishing vessels, not creating a derivatives market in a public resource. This raises questions of whether UK fisheries authorities are operating *intra vires* (within their powers) or whether new primary legislation is required to keep abreast with practice.

4.4.2 The delegation of rule-making function to FPOs for FQA is potentially an unlawful delegation of Ministerial authority under the principle of *delegatus non potest delegare.* The Sea Fish (Conservation) Act 1967 permits the fisheries authorities to put conditions on fishing vessel licences. Quota is managed via conditions placed on these vessel licences; there is no power contained within the Act to delegate that power to FPOs to draft their own regulations.

4.4.3 FPOs have undoubtedly been very helpful to the UK fisheries authorities, but this has come at a cost of creating entities within the private sector that have the potential to control the quota market and fishing opportunity within their areas. Such a dominant position, although not necessary illegal in itself, is open to claims of abuse under competition legislation[lvii]. It is easy to envisage a position under the current regime where new entrants to the market or others such as the under-10-metre vessels or non-sector vessels felt that they were at a competitive disadvantage.

4.4.4 The issue of competitive disadvantage for quota allocation based on track record also raised issues under the International Covenant of Civil and Political Rights leading to the case of *Haraldsson & Sveinson v. Iceland*[lviii]. In 1984 Iceland introduced a quota management system that allotted quota to operators of ships for demersal (bottom feeding) species. This quota was granted to those operators who could show a track record during the period November 1980 to October 1983; quota was allocated free of charge on that basis. In 1990 that allocation was made permanent. The claimants, although they had worked on demersal fishing boats during the requisite period, acquired their vessel afterwards. They found themselves excluded from quota and had to rent quota at high prices from other fishers. Their initial actions in the Icelandic courts failed and in 2003 they sought relief from the United Nations Human Rights Council on the basis that they were unfairly discriminated against. This action was successful, as the permanent allocation of quota in this way was seen as unreasonable and discriminatory to new entrants.

4.4.5 The actual ownership of fishing rights is in urgent need of clarification before a fully functioning RBM system can be established. In the UK the legal relationship between the state and fishers is exceptionally poorly defined. The UK state can trace its claim to fishing rights to the public right to fish and the common law, while fishers operate through a maze of complex bureaucracy and are left with arguments of legitimate expectation and human rights claims. Neither of these are satisfactory arrangements for a properly functioning RBM system. For an RBM system to be put in place there is an urgent requirement for professionally drafted resource management contracts from a clearly defined Crown ownership body.

Comparison of quota allocation with the disposal of property by UK state bodies

4.5 The Efficiency and Reform Group within the UK Cabinet Office (formerly the Office of Good Governance) has published extensive guidance on how government property should be properly disposed of. The key objective is for UK authorities to achieve an open market valuation upon the disposal of any asset[lix]. There may be reasons for the disposal of an asset at below market value if the disponee has some sort of social purpose. Such purposes were identified in a review carried out by Barry Quirk into the disposal of public assets for community management. His report *Making Assets Work*[lx] details many examples of the successful management of public property by community groups and social enterprises. The report then goes on to set out the criteria for good risk management to ensure that public assets continue to be managed in the public interest[lxi]. These include keeping close control of the contracts that permit the asset's disposal and managing the expectations of the recipient parties properly. There is a danger that in allocating a public resource at no cost, UK fisheries authorities are in the process of losing control of public fishing rights. This could easily lead to a position where already profitable commercial companies are receiving public property at no cost to themselves and with no discernible benefit to the broader community. This compares very unfavourably with the tight government controls over the disposal of public property practised, almost universally, elsewhere. It is hoped that the standard administrative practice from the rest of government is incorporated into fisheries administration.

NOTES

[i] See for instance the EC COM(2009)163 Green Paper on *The Reform of the Common Fisheries Policy*, p. 5.
[ii] MRAG Consortium (2009) *Rights Based Management Catalogue* FISH/2007/03 EU, p. 82. www.ec.europa.eu/fisheries/documentation/studies/rbm/index_en.htm
[iii] Royal Commission on Environmental Pollution (2004) *Turning the Tide* HMSO, p. 30.
[iv] Article 17 (2) of Regulation 2371/2002.
[v] The UK's EFZ is over 737,000 km^2. See Royal Commission on Environmental Pollution (2004) *Turning the Tide* HMSO, p. 30.
[vi] MRAG Consortium (2009) *Rights Based Management Catalogue* FISH/2007/03 EU, p. 82. www.ec.europa.eu/fisheries/documentation/studies/rbm/index_en.htm at
[vii] EC Regulation 2371/2002.
[viii] For a much fuller discussion on this section see Churchill, R. & Owen, D. (2010) *The EC Common Fisheries Policy* Oxford University Press, pp. 149–164 & 195–202.
[ix] EC Regulation 2015/2006.
[x] Case T-127/05 *Lootus Teine Osauhung (Lootus) v. Council*.
[xi] See also *Atlantic Dawn and others v. Commission* C372/08P.
[xii] The Marine and Coastal Access Act 2009 and the devolution settlement with Scotland and Wales have meant that the bodies that administer fisheries have changed recently.
[xiii] The definition of fish includes shellfish, see Halsbury's Laws of England vol. 1(2) 2007 Reissue, p. 801, but not whales, see Statute Edward II Prerogativa Regis 1324.
[xiv] See Halsbury's Laws of England vol. 2 (2008) 5th ed., p. 711.
[xv] This must be contrasted with the approach to oil rights where it is plain that the exploration rights vest in the Crown under s1 Continental Shelf Act 1964.
[xvi] See for instance Moore, H. & Moore, S. (1903) *The History of the Law of Fisheries* Stevens and Haynes: London, p. 95.
[xvii] *Commonwealth v. Yarmirr* [2001] HCA 56 per Kirby, J., pp. 74 & 75.
[xviii] See Marston, G. (1981) *The Marginal Seabed: United Kingdom Legal Practice* Clarendon Press, pp. 17–21.
[xix] (1873) 11 M. 309.
[xx] Stewart, C. (1892) *A Treatise on the Law of Scotland relating to Rights of Fishing* T & T Clark: Edinburgh 2nd ed., p. 20.
[xxi] Moore, H. & Moore, S. (1903) *The History of the Law of Fisheries* Stevens and Haynes: London, p. 98, quoting Lord Hale in *De Jure Mare*.
[xxii] The only statutory powers to sever the public right to fish concern shellfisheries under the Shellfish Act 1967.
[xxiii] [1862] 10 H.L. Cas. 593.
[xxiv] See Stair Memorial Encyclopoedia vol.11, p. 521.
[xxv] Scottish Law Commission *Report on Law of the Foreshore and the Sea Bed* (Scot. Law Com. No. 190).
[xxvi] This is sourced from anecdotal evidence with interviews of the fishing sector and fisheries administration; the researchers have not had sight of a licence.
[xxvii] MRAG Consortium (2009) *Rights Based Management Catalogue* FISH/2007/03 EU, p. 80. www.ec.europa.eu/fisheries/documentation/studies/rbm/index_en.htm
[xxviii] [1985] A.C. 809.
[xxix] See para. 2.28.

[xxx]See http://www.defra.gov.uk/foodfarm/fisheries/fishmanagement/quota/anquota.htm, accessed 20.03.10.
[xxxi] See Defra [online] *Fisheries Quota Management*, p. 4. www.marinemanagement.org.uk/fisheries/management/documents/quotas/fqm.pdf
[xxxii] [1953] 2 Q.B. 18.
[xxxiii]See www.marinemanagement.org.uk/fisheries/management/quotas.htm, accessed 20.09.10.
[xxxiv] See *Malcomson v. O'Dea* [1862] 10 H.L. Cas. 593, which was requently cited in this context.
[xxxv]See Defra [online] *Fishing Vessel Licensing: An introduction*. www.marinemanagement.org.uk/fisheries/management/documents/licences/introduction.pdf
[xxxvi] See s.4(9) Sea Fish (Conservation) Act 1967.
[xxxvii] [2009] CSOH 58.
[xxxviii] [2008] 3 S.C.R. 166, 2008 SCC 58.
[xxxix] See MAFF letter of 11 June 1998. www.defra.gov.uk/foodfarm/fisheries/documents/fisheries/fqa-letter.pdf
[xl] There are other methods of privatising fisheries such as severing shellfisheries under the Shellfish Acts, private fisheries granted prior to 1215 by the Crown, and a peculiar charitable arrangement established in the case of *Goodman v. Mayor of Saltash* (1882) 7 App. Cas. 633, but those circumstances were exceptional.
[xli] Gray, K. & Gray (2004) *Elements of Land Law* OUP 4th ed. at 6.91–6.145.
[xlii] *Ibid*. at 8.170–8.191.
[xliii] *Ibid*. at 5.28
[xliv] *Council for the Civil Service Unions v. Minister for Civil Service* [1985] 1 A.C. 374, p. 401, per Lord Fraser.
[xlv] [2001] EWCA Civ. 607.
[xlvi] *R. v. Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, p. 1569.
[xlvii] http://www.defra.gov.uk/foodfarm/fisheries/documents/fisheries/rules.pdf
[xlviii] MRAG Consortium (2009) *Rights Based Management Catalogue* FISH/2007/03 EU. www.ec.europa.eu/fisheries/documentation/studies/rbm/index_en.htm
[xlix] See Defra [online] *Fishing Vessel Licensing: an introduction* www.marinemanagement.org.uk/fisheries/management/documents/licences/introduction.pdf
[l] *Ibid*. p. 4.
[li] *Ibid.* p. 3.
[lii] [1985] 1 A.C. 374.
[liii] [2001] Q.B. 213.
[liv] *R. v. Secretary of State for Education and Transport Ex p. Begbie* [2001] 1 W.L.R. 1115 per Laws L.J. at 1130.
[lv] [1995] 1 All E.R. 714.
[lvi] Hatcher, A. *et al.* (2002) *Future Options for UK Fish Quota Management* , p. 52. http://www.port.ac.uk/research/cemare/publications/pdffiles/reportspdf/filetodownload,103921,en.pdf
[lvii] See Office of Fair Trading (2004) *Abuse of Dominant Position* http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft402.pdf
[lviii] Communication No. 1306/2004, *Haraldsson and Sveinsson v. Iceland* Views adopted on 24 October 2007, ninety-first session.

[lix] Office of Government Commerce [2005] *Guide for disposal of surplus property* http://www.ogc.gov.uk/documents/Guide_for_disposal_of_surplus_property_PDF.pdf
[lx] Department of Communities and Local Government [2007] *Making Assets Work: The Quirk Review of community management and ownership of public assets* [online] http://www.communities.gov.uk/documents/communities/pdf/321083.pdf, accessed 20.09.10.
[lxi] *Ibid.* Appendix A.