

From the TCAC Chair

8 April 2019

Dear Colleagues,

You will recall that, at TCAC05, in an effort to accelerate and assist the work of the TCAC, I was requested to develop a 'three column' document containing the elements of the two current proposals (i.e. two columns) and in the third column, a list of outcomes relating to elements that have been discussed, and in particular, any possible compromises or options on elements of the proposals, as well as matters that the Chairperson considers to be relevant and would benefit from being discussed. The TCAC indicated that this document should be made available to all CPCs as soon as possible, preferably not later than 30 days after the end of the session. The TCAC further clarified that the three column document was not an attempt to merge the two current allocation proposals (TCAC05 Report, paragraphs 33 and 34 refer).

I am attaching the 'three column' document that I have developed in response to the TCAC's request.

I hope that this document will assist us in focussing and accelerating our discussion, and in reaching agreement, when we next discuss the two proposals.

Kind regards

Don MacKay
Independent Chair

| <p>Elements of Proposal IOTC-2019-TCAC05-PropARev2</p> <p>[for ease of reference, this Proposal is referred to below as GCS]</p> <p>[note: for the complete text please refer to the Proposal itself]</p> | <p>Elements of Proposal IOTC-2018-S22-INF01</p> <p>[for ease of reference, this Proposal is referred to below as EU]</p> <p>[note: for the complete text please refer to the Proposal itself]</p> | <p>Outcomes relating to elements that have been discussed, possible compromises or options on elements of the Proposals, and matters that the Chair considers to be relevant and would benefit from being discussed (also includes Chair's assessment of difficulty of issues)</p> |
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| <p><u>Explanatory Memorandum</u></p> <p>See pages 1 and 2 of Proposal</p> | <p><u>Explanatory Memorandum</u></p> <p>See page 1 of Proposal</p> | |
| <p><u>Preamble</u></p> <p>See pages 3 and 4 of Proposal</p> | <p><u>Preamble</u></p> <p>See pages 2 and 3 of Proposal</p> | <p>Normal treaty drafting practice is to draft the Preamble last, since it will need to take account of the agreement reached on the substantive articles [Medium degree of difficulty]</p> |
| <p><u>Scope and Purpose</u></p> <p>See draft Articles 15(a) and (b)</p> | <p><u>Scope and Purpose</u></p> <p>No equivalent elements found in EU</p> | <p>Although elements not included in EU, (a) is straightforward; (b) may also be useful in the context of considering other articles</p> |

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| <ul style="list-style-type: none"> • (a) To ensure a fair, equitable and transparent system of allocation • (b) Any allocation, or part thereof, may be taken either within or beyond areas of national jurisdiction within the IOTC Area, without prejudice to sovereign rights of CPCs. | | |
| <p><u>Definitions</u></p> <p>See pages 4 and 5 of Proposal</p> | <p><u>Definitions</u></p> <p>EU does not include a specific definitions article, but various definitions are incorporated into substantive articles</p> | <p>As a general rule, definitions are easiest discussed in the context of the substantive articles to which they relate, even if they are contained separately in a specific definitions article [Medium degree of difficulty]</p> |
| <p><u>Allocation Principles</u></p> <p>See draft Article 14(b), and also 17(a) and 18(a)</p> <ul style="list-style-type: none"> • Covers establishment of TAC/ sustainability/ species covered etc. | <p><u>Main Principles</u></p> <p>See draft Article 1</p> <ul style="list-style-type: none"> • Covers establishment of TAC/sustainability/stocks covered etc. | <p>The elements contained in both Proposals are reasonably similar, and should be relatively easy to negotiate [Straightforward degree of difficulty]</p> |
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| <p><u>Non Prejudice to other rights</u></p> <p>See draft Article 14(c) and 14(f)</p> <ul style="list-style-type: none"> • Not to prejudice Coastal States' rights under UNCLOS, or High Seas rights and responsibilities under UNCLOS and UNFSA | <p><u>Non Prejudice to other rights</u></p> <p>EU does not include an equivalent provision,</p> | <p>Although elements not included in EU proposal, this should be relatively easy to resolve [Straightforward degree of difficulty]</p> |
| <p><u>Baseline Allocation Components</u></p> <ul style="list-style-type: none"> • Comprises two Baseline Allocations: (1) <u>Baseline Coastal State Allocation (BCSA)</u> which is [15%-45%] of TAC, and (2) <u>Baseline Historical Catch Allocation (BHCA)</u> which is [60%-80%] of TAC <p><u>(1) Baseline Coastal State Allocation</u></p> <p>See draft Article 19(a)</p> <ul style="list-style-type: none"> • Each Coastal State CPC with species catch history, is to receive an entitlement of BCSA (“status weighting”) based on: | <p><u>Baseline Allocation Components</u></p> <ul style="list-style-type: none"> • Comprises <u>Initial Baseline Allocation</u> Which is [85%] of TAC <p>See draft Article 8</p> <ul style="list-style-type: none"> • The initial baseline allocation of the TAC is to be based on historical catches within the EEZ and on the high seas covering the period [2000-2016] • historical catches taken within an EEZ to be reallocated between the respective coastal State and the flag state of the fishing vessel(s) that took the catches in a proportion of | <p>The Proposals contain some similar elements regarding Baseline Allocations. The GCS provides for an initial Baseline Allocation for <u>Coastal</u> States, based on various criteria, as well as a Baseline Historical Catch Allocation based on historical catch for each CPC. The EU provides an initial Baseline allocation for each CPC based on historical catch.</p> <p>Both then take different approaches in the way they provide for Additional or Supplementary Allocations.</p> <p>The GCS provides for a Supplementary High Seas Allocation which is <u>equally</u> shared amongst CPCs with a baseline</p> |

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| <ul style="list-style-type: none"> ➤ [20-40%] shared equally amongst Coastal State CPCs; ➤ [30%-70%] shared based on development status; ➤ [10%-30%] shared based on sizes of EEZs in IOTC Area; ➤ relative abundance of species being allocated in individual EEZs may replace current EEZ size criteria • Coastal State CPCs without species catch history may request allocation <p><u>(2) Baseline Historical Catch Allocation (BHCA)</u></p> <ul style="list-style-type: none"> • Allocated to each CPC, based on catch within the EEZ and on the High Seas | <p>[10/90] gradually over a transitional period of [10] years</p> | <p>historical catch, which would then be gradually transferred to developing States.</p> <p>The EU provides for a Complementary Allocation to developing States, and provides Correction factors applicable to all States according to various criteria.</p> <p>Both treat historical catches within EEZs differently, with the GCS giving 100% attribution to the Coastal State irrespective of the flag of catching vessel, and the EU a [10/90] split between Coastal State and flag State of catching vessel.</p> <p>These different concepts and approaches make negotiation on the elements quite difficult and complex, and this is exacerbated by the level of complexity involved in some elements of the proposals. [Very Difficult degree of difficulty].</p> <p>As regards GCS draft Article 19(a)(iv), the proponents indicated that an index of abundance, if available, may replace EEZ size as the principle proxy for fish</p> |
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| | | abundance in the allocation estimate procedure. Note also the Commission's relevant tasking of the Scientific Committee (see TCAC05 Report, para 41) |
| <p><u>Additional Allocations:</u></p> <p><u>Supplementary High Seas Allocation</u> which is [2.5-7%] of TAC</p> <p>See draft Article 21</p> <ul style="list-style-type: none"> • Shared equally amongst all CPCs with catch history for species anywhere in IOTC Area (except new entrant DWF CPCs) • Other CPCs may request an allocation • After 3 years, gradual transfer of this allocation over 5 years from DWFNs to DCS and SIDS | <p><u>Additional Allocations:</u></p> <p><u>Complementary Allocation (to developing States)</u> which is [8%] of TAC</p> <p>See draft Articles 9, 10, 11</p> <ul style="list-style-type: none"> • In addition to the Baseline Allocation, this is an additional Allocation to LDCs (1/2), SIDS (1/4) and other CDS (1/4) • No entitlement where individual allocation already exceeds [5%-10%] of TAC for species • Confirmation required of consistency with Fleet Development Plan <p><u>Additional Allocation: Correction Factors</u> which is [6%] of TAC</p> <p>See draft Article 12</p> | <p>Discussion of the EU Correction Factors at TCAC05 agreed in general that they could have relevance, but they needed elaboration with respect to how they would be quantified and operationalized (see</p> |

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| | <ul style="list-style-type: none"> • Correction factors to be applied to sum of the initial and complementary allocation in order to increase, where appropriate, the allocation for a particular CPC. • Factors are (in brief) : <ul style="list-style-type: none"> (a) Contribution to the effective conservation and management of fishery resources (b) Development and social factors (c) Fishery-related issues and trade factors • Each individual correction factor to be weighted at 1/3. • The application of the correction factors can't result in an increase of the total TAC | <p>TCAC05 Report, paras 42 and 43). The EU indicated it would do further work on this.</p> |
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| <p><u>Historical catches</u></p> <p>See draft Article 14(e)</p> <ul style="list-style-type: none"> • Reference period has 3 options: 5 year average (2012-16); 15 year average (2002-16); and best 5 years | <p><u>Historical catches</u></p> <p>See draft Article 8</p> <ul style="list-style-type: none"> • Initial baseline allocation to be based on historical catches covering period [2000-2016] | <p>This is a key issue which requires very careful consideration.</p> <p>A formula needs to be found which, for example, might take account of Coastal States' juridical positions, while also ensuring long-term access for DWFNs.</p> |

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| <p>averaged from within period 1950-2016</p> <ul style="list-style-type: none"> • Allocation scheme to recognise historical catches of bigeye tuna, skipjack tuna, yellowfin tuna, albacore, as an element in determining allocations • For purposes of allocation of future fishing opportunities, all historical catches taken within an area under the national jurisdiction of a CPC shall be attributed to that CPC, regardless of the flag State of the vessels that took such catches, referred to as the “baseline historical catch.” • Where historical high seas catches are used they shall be attributed to the flag State that took the catches. | <ul style="list-style-type: none"> • Historical catches within EEZ to be reallocated between Coastal State and flag State in [10/90] proportion • In accordance with principle of stability the change in attribution that results from this approach shall be implemented gradually over a transitional period of [10] years | <p>If it is not possible to reach agreement in the TCAC itself, other possibilities might include third-party involvement, such as ITLOS (which however risks a win/lose outcome), or discussion at the United Nations (which would take place in a broader political context, rather than just a fisheries context). It would however be far preferable to negotiate it to a win/win outcome in the TCAC.</p> <p>[Very Difficult degree of difficulty]</p> <p>As regards reference periods, note also those used for simulation outputs (see TCAC05 Report, paras 13 and 17)</p> |
| <p><u>Spatial separation of historical catch</u></p> <p>See draft Article 20(b)</p> <ul style="list-style-type: none"> • The spatial separation of historical catches, by each CPC, as between areas within and beyond national | <p><u>Spatial separation of historical catch</u></p> <p>See draft Article 8 (above)</p> <ul style="list-style-type: none"> • This reallocation of historical catches shall be dependent on reliable catch data being available | <p>Draft language was developed in open-ended Working Group discussions at TCAC05 convened by South Africa, <u>without prejudice</u> to the position of any delegation as to whether language on spatial separation will actually be required by the</p> |

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| <p>jurisdiction shall be made on the basis set out in draft Article 20(b)(i) to (v) in the Proposal</p> | <p>and validated for catches within the EEZ concerned.</p> | <p>allocation formula which is finally adopted (see TCAC05 Report, paras 37 and 38)</p> |
| <p><u>Special requirements/aspirations and Allocation for Developing Coastal States including SIDs</u></p> <p>See draft Article 14(d); and draft Article 14(h) on social and economic dependency</p> <ul style="list-style-type: none"> • Allocation scheme to integrate special requirements of Developing Coastal States (DCS) and SIDS, including development aspirations • Also to consider dependency of Coastal State CPCs, particularly DCS and SIDS, on fisheries in IOTC Area, measured by contribution of those fisheries to social and economic needs <p>Also see draft Article 21(g), above</p> <ul style="list-style-type: none"> • Gradual transfer of Supplementary High Seas Allocation (which is [2.5%-7%] of TAC) from DWF CPCs | <p><u>Special requirements/aspirations and Allocation for Developing Coastal States including SIDs</u></p> <p>See draft Article 9 on Complementary Allocation, above.</p> <ul style="list-style-type: none"> • In addition to baseline allocation, complementary allocation which is [8%] of TAC, to LDCs (1/2), SIDS (1/4) and other Coastal Developing States (1/4) • No entitlement where individual allocation already exceeds [5%-10%] of TAC • Confirmation required of consistency with Fleet Development Plan <p>See also Correction factors in draft Article 12, above, some of which are applicable to developing States</p> | <p>Agreement that there should be special treatment of Developing States including SIDs is common to both Proposals, and the principle itself is reasonably straightforward and uncontroversial (see also TCAC04 Report, para 17, (iv) and vii)</p> <p>Operationalising it is more difficult however [Difficult/Medium degree of difficulty], due to the different approaches taken by both Proposals. Note also discussion at TCAC05 (see TCAC05 Report, paras 26 and 27)</p> <p>See also below.</p> |

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| <p>to DCSs and SIDS, at 20% per year, beginning after 3 years</p> <p>Also see draft Article 19(a)(ii)</p> <ul style="list-style-type: none"> • Entitlement of Developing Coastal State CPCs to [30%-70%] of BCSA, based on development status | | |
| <p><u>Categorisation of Developing States for purpose of increased allocation</u></p> <p>See draft article 8 and draft Article 10</p> <ul style="list-style-type: none"> • Developing Coastal State (DCS) CPC means an Indian Ocean Coastal State CPC whose development status is considered to be in low, medium or high human development index (HDI) categories • Small Island Developing States (SIDS) CPC means an Indian Ocean Coastal State CPC defined as SIDS by UN DESA and OECD (listed in Appendix I) | <p><u>Categorisation of Developing States for purpose of increased allocation</u></p> <p>See draft Article 9</p> <ul style="list-style-type: none"> • Complementary Allocation is to be distributed amongst following CPCs in Indian Ocean in proportion to the size of their EEZs: • (a) Least developed countries (LDCs) on the list of LDCs established by UN Committee for Development (CDP)(1/2) • (b) Small Island Developing States (SIDS) (1/4) • Coastal developing States, excluding those in (a) and (b) (1/4) | <p>There was some preliminary discussion of this at TCAC05, with it being noted that the SIDS element is common to both Proposals, but no broader agreement has been reached at this stage (see TCAC05 Report, para 44). Nevertheless, it should not be unduly difficult to negotiate [Medium degree of difficulty]</p> |

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| <p><u>Compliance record as an element in Allocation</u></p> <p>See draft Articles 14(i) and 24(b)</p> <ul style="list-style-type: none"> • Compliance to be taken into account, by including a penalty for over-catch of a CPC's allocation, which is to be deducted from a CPC's future allocation at specified ratios | <p><u>Compliance record as an element in Allocation</u></p> <p>See draft Articles 4 and 5</p> <ul style="list-style-type: none"> • A CPC that has failed to report nominal catch data (exclusively) for one or more species for a given year, is not eligible to receive a TAC allocation. • If a CPC has provided incomplete reporting on nominal catch data it remains in principle eligible to receive a TAC allocation, but the Commission may consider prohibiting retention of the species following year. • A CPC having a compliance score of less than [60%] each year, for two consecutive years, without any indication of real progress in compliance, also not eligible to receive a TAC allocation. | <p>A draft text was developed at TCAC05 in an open-ended working group convened by Australia, which was tasked with addressing how and to what extent compliance matters should be taken into account in allocation (see TCAC05 Report, paras 30 and 31, and Appendix 5). Elements require further discussion on the basis of this text [Medium degree of difficulty]</p> |

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| <p><u>Burden of adjustment of allocation following reduction of the TAC</u></p> <p>See draft Article 27</p> <ul style="list-style-type: none">• When the TAC decreases from the previous allocation period, DCS and SIDS shall receive a smaller proportional reduction [1/4 - 1/3] in catches than other CPCs. | <p><u>Burden of adjustment of allocation following reduction of the TAC</u></p> <p>See draft Article 6</p> <ul style="list-style-type: none">• Any upwards or downwards revision of the TAC shall lead to a proportional adjustment amongst CPCs on the basis of their final allocation | <p>GCS provides a reduced downwards adjustment for DCS and SIDS. [Difficult/Medium degree of difficulty]</p> |
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| <p><u>Stability Principle</u></p> <p>No equivalent element found in GCS</p> | <p><u>Stability Principle</u></p> <p>See draft Articles 7, 8, and 16</p> <ul style="list-style-type: none"> To avoid sudden fishing or economic impacts, any allocation that results in a reduction in excess of [10]% of the of the average catches in the last 10 years or the precedent quota, if a quota was already established, shall be implemented gradually over a period of [5-10] years | <p>This element is included in EU as a grandfathering type adjustment, but is not found in GCS. Ultimately, however, all parties have a shared interest in ensuring that the impacts that result from the Allocation Scheme are viable, sustainable and manageable, and do not have major destabilising effects.</p> <p>In this respect, note final sentence under “Historical catches” in Explanatory Memorandum to GCS, which links the incorporation of temporary quota transferability with ensuring market access is maintained.</p> <p>[Difficult degree of difficulty]</p> |
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| <p><u>New Entrant's Allocation</u></p> <p>See draft Article 9 Definitions, and draft Article 22 [note: GCS currently sets out no specific percentage set-aside of TAC for new entrants]</p> <ul style="list-style-type: none"> • Each Coastal State CPC new entrant to receive an allocation (appears to require approval by Commission) • If not taken up (fished/transferred), then reallocation to other coastal State CPCs • DWFN CPC new entrants, no allocation unless approved by Commission. • If not taken up, then reallocation to Coastal State CPCs | <p><u>New Entrant's Allocation</u></p> <p>See draft Article 14 [set-aside 1% of TAC]</p> <ul style="list-style-type: none"> • Equally shared by all new entrants • If not taken up, distributed proportionately amongst Members on basis of their final allocation | <p>There are similar elements in both Proposals. GCS provides for slightly differential treatment between Coastal State CPC New Entrants and Distant Water CPC New Entrants, requiring each group to obtain Commission approval for new allocation, but the presumption is different in respect of each group. The EU treats all New Entrants the same. [Medium degree of difficulty]</p> |
| <p><u>CPC without catch history</u></p> <p>See draft Articles 19(b), 21 (c), 28</p> <ul style="list-style-type: none"> • Coastal State CPCs without a 'baseline historical catch' for a particular species may request and | <p><u>CPC without catch history</u></p> <p>Not specifically covered in EU</p> | <p>In EU it appears that entitlement to a Complementary Allocation and Correction Factors are contingent upon an Initial Baseline Allocation (which requires historical catch), but clarification should be sought on this</p> |

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| <p>shall receive a Baseline Coastal State allocation for the next allocation period for species</p> <ul style="list-style-type: none"> • CPCs without a 'baseline historical catch' for a particular species may request and receive a Supplementary high seas allocation for the next allocation period for species • IOTC Secretariat to develop applicable administrative processes | | |
| <p><u>Entitlement of CNCPs</u></p> <p>See draft Articles 19(c), 20(c), 21(b)</p> <ul style="list-style-type: none"> • Entitlement is generally no more than 50% of lowest CP | <p><u>Entitlement of CNCPs</u></p> <p>See draft Article 18</p> <ul style="list-style-type: none"> • CNCP eligible for maximum of 80% of its TAC • Downwards revision of TAC to CNCPs leads to proportional adjustment amongst CPCs on basis of their final allocation | <p>Although different approaches are taken to this in the proposals, it should not be very difficult to negotiate [Medium degree of difficulty]</p> |

Transferability

See draft Article 23, and draft Article 14(g)

- CP has right to temporarily transfer prior to 30 September each year (expires at end of calendar year) all or part of allocation to another CP, which may in turn allocate it or endorse arrangement between participating owners
- IOTC Secretariat to be notified in advance, and to notify other CPCs
- CNCPs not eligible to transfer or receive transfer

Transferability

See draft Article 20

- No CPC to trade or sell all or part of its quota allocation unless authorised by Commission
- Doesn't apply to international agreements between a CPC coastal State and another State or Regional Economic Integration Organisation providing for access to coastal State EEZ

Although the approaches taken in the two proposals are different, these elements should not be highly difficult to negotiate.

Note also area of common ground reached at TCAC04, that some provision on transferability should be contained in a final resolution and the process for the transfers should be fully transparent (see Report of TCAC04, para 17(iii))

[Medium degree of difficulty]

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| <p><u>Period of Allocation</u></p> <p>See definitions draft Article 1, and draft Article 29</p> <ul style="list-style-type: none"> • Period of allocation may vary by species • Allocation period to align with species stock assessment schedule and gTAC set by Commission • Default allocation period to be one calendar year unless otherwise agreed by Commission | <p><u>Period of Allocation</u></p> <p>See draft Articles 15 and 17</p> <ul style="list-style-type: none"> • Final Allocation (ie sum of initial allocation, complementary allocation, new entrants' allocation, plus correction factors) is for five years • Other increase/decrease in allocation is temporary • Not to be a precedent for future allocation | <p>[Medium degree of difficulty]</p> |
| <p><u>Weighting of the Allocation Criteria</u></p> <p>See draft Articles 25 and 26</p> <ul style="list-style-type: none"> • Weighting scheme to be simulated for TCAC05 within ranges specified • GTAC = CPC Baseline Coastal State Allocation + CPC Baseline Historical Catch Allocation + CPC Supplementary High Seas Allocation | <p><u>Weighting of the Allocation Criteria</u></p> <p>See draft Article 19</p> <ul style="list-style-type: none"> • Each Member commits to good faith effort to reaching agreement on weighting scheme for correction factors within 2 years | <p>The difficulty in negotiating this will depend on whether the actual weightings are to be negotiated at this stage, or are to be agreed in the Commission subsequently.</p> |

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| <p><u>Administrative Processes</u></p> <p>See draft Article 28, above</p> | | <p>The IOTC Secretariat prepared material on administrative processes, which was presented at TCAC05 (see TCAC05 Report, paras 19 to 21)</p> |
| <p><u>Long-term participating fishing fleet</u></p> <p>See “Eligibility” in Explanatory Memorandum</p> | | <p>Note area of common ground reached at TCAC04 , that any final and adopted allocation scheme should provide language that is inclusive of a long-term participating fleet (see TCAC04, para 17(ii). Note also TCAC05 Report, para 14</p> |