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Allocation of fishing opportunities in Regional Fisheries Management Organizations:

from power to law?

Extended abstract

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Regional fisheries management organizations (RFMOs) are the mechanism through which States cooperate for the conservation and sustainable use of high seas fish stocks (i.e. highly migratory stocks, straddling stocks, and discrete stocks). They are the “institutionalization” of the duty of cooperation established in the United Nations Law of the Sea Convention and the United Nations Fish Stocks Agreement (UNFSA). RFMOs have the mandate to adopt binding conservation and management measures to ensure long-term conservation and sustainable use of the high seas stocks. Among those conservation and management measures, the establishment of

a total allowable catch (quota) or total allowable effort (number of vessels or fishing days), and its allocation among participating States, is considered a fundamental tool for effective management. They have become “best practices” in international fisheries management.

Allocation of fishing opportunities is amongst the most difficult decisions that an RFMO has to adopt. On too many occasions, it becomes the deadlock of cooperative efforts, jeopardizing conservation. The difficulties arise from a variety of different factors, most of them not unique to allocation. There are difficulties associated with the complex interrelations of stocks and their ecosystem; with data gathering; scientific uncertainty and variability; institutional constraints; and control and enforcement mechanisms. One difficulty particular to allocation is its distributional implications. Determining allocation implies deciding on who can fish for high seas stocks, and how much. Despite that, equity considerations have been mostly absent both in academic analysis of high seas fishing management and in its practical implementation.

The distributional conflicts with allocation are multi-faceted. The most sensitive and prominent conflict is the one between coastal States in whose economic exclusive zones the high seas stocks also occur, and the distant water fishing nations. Conflicts between existing members and new participants are also frequent. Conflicts between developed and developing States are both explicit, and implicit in the previous two points. Conflicts between fishing gears and fishing fleets are also important to consider. Conflicts between present and future generations are at the root of conservation efforts. In the resolution of these conflicts, the interest less regarded is often the one which was supposed to be protected in the first place: the fish.

This study addresses the substantive norms that govern the distribution of fishing opportunities for high seas fisheries. For this purpose, it analyzes the history of total allowable catches (TAC) and its allocation, and the legal developments in global fora (*inter alia*, UNFSA, Food and Agricultural Organization (FAO) International Plans of Actions, FAO Code of Conduct for Responsible Fisheries, United Nations Informal Consultation Process on the Law of the Sea, the Informal Meetings of State Parties to UNFSA, and the World Summit on Sustainable Development). At the regional level, the constituent agreements of a selected number of RFMOs, allocation guidelines prepared by these organizations, and their actual allocation practices, were analyzed. For this purpose, the following organizations were selected: the Northwest Atlantic Fisheries Commission, the International Commission for the Conservation of Atlantic Tuna, the

South East Atlantic Fisheries Commission, the Western and Central Pacific Fisheries Commission, and the Commission for the Conservation of Southern Bluefin Tuna.

The study tracks the origins of TAC and allocation to the late 1950's and 1960's. At that time, a major revision of the fisheries management strategies took place in the fisheries organizations, in particular in the North Atlantic, in light of the evident inadequacy of traditional technical measures to stop overfishing. The revision was strongly influenced by the incipient discipline of fisheries economics. Indeed, the adoption of total allowable catches and its allocation among participating States as a tool of modern fisheries management has both a conservation and an economic objective. Equity considerations, however, were mostly not addressed. The subsequent developments in international fisheries law, both at the global and regional level, demonstrate that the search for principles to achieve fair access to, and distribution of, high seas stocks is persistent, and ongoing.

The international law of high seas fisheries does not explicitly contain a fundamental norm governing the allocation of high seas fisheries. This research analyzes whether equity can be considered such a fundamental norm. It then considers how that fundamental norm can be practically implemented at the regional level. For that purpose, it analyzes the applicability and practical contribution of two institutions of international law that pertain the distribution of common scarce resources and burdens of environmental protection: equitable use, and common but differentiated responsibility.

Equitable use is the widely accepted standard for the use and distribution of shared resources. Its application requires balancing the various considerations which are regarded as relevant in order to produce an equitable result. UNFSA and the RFMOs have identified those special circumstances. They include: the distribution of the stocks and their exploitation status; past and present fishing patterns and catches; the needs of the coastal communities which are dependent mainly on fishing for the high seas stocks; the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources; the contribution of the participants to conservation and management of the stocks to the collection of data and the conduct of scientific research; and the special requirements of developing States. In general, however, RFMOs have not developed appropriate parameters that give them a precise and objective content. Neither have they established a framework – equitable principles, process, and methods - for balancing, weighting, prioritizing and reconciling the relevant criteria. Considering

the experiences of maritime delimitation law and international watercourse law, it is argued that such a framework is required to provide the allocation process with predictability, transparency and objectivity, and also to improve RFMO accountability. It is also argued that the RFMOs are the appropriate fora to do so.

The principle of common but differentiated responsibility has become prominent in recent years, in particular because of its incorporation in the climate change regime. It is not explicitly included in the LOS Convention or UNFSA; however, this study argues that its main elements are. Thus, common but differentiated responsibility can serve as another mechanism through which equity could be introduced into allocation decisions. It is also noted that the principle of common but differentiated responsibility has had practical expressions in allocation practices. The study argues that the implementation of this principle can provide some benefits for allocation of fishing opportunities. However, some caveats are noted.

The conclusion is that the international community and RFMOs have made modest progress towards the definition of substantive norms to govern allocation of fishing opportunities. However, important elements that ensure transparency, objectivity and predictability are missing: objective parameters, decision frameworks and procedures. Until the regional organizations decide to discuss and adopt them, the balance of law and power in the decision making process will be tilted to the latter.

This is an extended abstract of the paper that will appear in the book *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles: Canadian and International Perspectives*, edited by Dawn Russell and David L. VanderZwaag (Leiden, Martinus Nijhoff, 2010).