

Fact of fiction? Unpacking the terminologies used in fisheries allocation discussions

Information Paper

**Australian National Centre for Ocean Resources and Security (ANCORS),
University of Wollongong, Wollongong, NSW, Australia**

Bianca Haas, Camille Goodman, Hussain Sinan, Ruth Davis

Currently under review in Marine Policy



Executive summary

In fisheries management, allocating resources has been described as one of the most arduous and challenging tasks. Although most of the regional fisheries management organizations (RFMOs) for tuna have allocation processes in place, their equitability has been questioned. Negotiations on allocations are driven by national and geopolitical interests, which also influence the interpretation of commonly used principles in the negotiation process. This information paper aims to provide an objective interpretation of terminologies used in allocation negotiations in RFMOs, based on international law. It is shown that the frameworks for most of the terminologies are provided by the United Nations Law of the Sea and the United Nations Fish Stocks Agreement. However, terms such as 'real interest' are not clearly defined, leaving them open to a range of interpretations. To achieve sustainable fisheries management with an equitable allocation approach in place, it is imperative to have a common understanding of key principles, based on international law.

1. Introduction

The failure to equitably allocate resources has been recognized as one of the biggest threats to the stability of fisheries management regimes (Lodge et al., 2007). This is especially evident in regional fisheries management organizations (RFMOs) where highly migratory and straddling resources are managed jointly by a group of states. Although it is generally recognized that the decisions made by RFMOs in allocating resources should be ‘equitable’, the international legal framework contains very little guidance on what principles or interests should be included in an allocation framework, or how to weigh and balance them against each other (van Dyke, 2010). It has been suggested that the considerations listed in Article 11 of the 1995 United Nations Fish Stocks Agreement (UNFSA) regarding participatory rights for new RFMO members—the status of the stocks, historic fishing patterns, contribution to conservation and scientific research, the needs of coastal communities, the economic needs of coastal States, and the interests of developing coastal States—provide a useful starting point for developing allocation criteria (McDorman, 2005). In fact, the allocation criteria in the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the Western and Central Pacific Fisheries Commission (WCPFC) are to a large extent parallel to those in Article 11 of UNFSA (Henriksen & Hoel, 2011). However, even though most tuna RFMOs refer to equity principles as part of their allocation process, the weight or importance to be given to each criterion remains open and implementation of these principles is lacking (Seto et al., 2021).

Institutional, scientific, and political barriers often undermine fruitful discussions on fishing allocations (Sinan & Bailey, 2020). In most cases, member states of RFMOs base their claims for allocation on apparent rights (based on historical fishing patterns or practices, or coastal State rights) or duties (such as contributions to conservation and management of the resource or scientific research), or a mix of the two (Havice, 2021). However, it has been recognized that this approach is opaque and inequitable and will negatively impact the sustainability of the fish stocks (Lodge et al., 2007; Havice, 2021).

While almost all tuna RFMOs (other than the Indian Ocean Tuna Commission (IOTC)) have now developed allocation policies and guidelines, the allocation process generally involves a series of negotiations between members rather than the systematic application of a formula based on objective criteria and principles (Seto et al., 2021). The challenge to establishing a systematic allocation formula is to find a way to capture complexities and political dynamics in the relevant fishery (Havice, 2021). In the ongoing allocation negotiations in the IOTC, for example, even though several indicators have been proposed in an attempt to capture the socio-economic realities of member states—such as biomass distribution in an EEZ or development status of member States (e.g., developing coastal States or Small Island Developing States)—members are divided as to which indicator would accurately capture coastal states’ dependency on these fisheries, or their development aspirations (IOTC, 2021).

The principles embedded in the 1982 United Nations Convention on the Law of the Sea (LOSC), the UNFSA and other international legal instruments generally suggest that both national and collective interests are relevant in multi-state allocation processes (Havice, 2021). However, different views concerning flag and coastal states’ rights under international law hinder progress in allocation discussions (IOTC, 2021). Sinan (2021a) has also observed that states protect their political, economic and social objectives by using the gaps and ambiguities of the framework to offer differing interpretations of the law. Such disagreements and differing interpretations stall progress and undermine the effectiveness of allocation discussions. And even though most tuna RFMOs have allocation policies in place, many RFMOs are now revisiting these policies in the context of developing

harvest strategy policies (Holmes & Miller, 2022). This means that developing a common understanding of the international law concepts governing allocation is more important than ever.

The aim of this article is to provide an objective interpretation of key terminologies concerning allocation, based on international law, to avoid misinterpretation and misquotation in allocation discussions. These terms have been selected based on their occurrence in the IOTC allocation negotiations, which the authors have attended either as observers or as part of national delegations. This article is divided into three sections. The first section provides a basic international law ‘primer’, setting out the key rights and obligations of states in their various roles under the LOSC and the UNFSA. The second section seeks to fact-check concepts associated with allocation negotiations. It sets out the meaning and legal effect of a range of key concepts that are frequently drawn on by states during RFMO allocation negotiations by reference to relevant international law instruments and identifies what they do (and do not) mean in the context of allocation discussions. While each of these concepts is addressed independently, many of them are inextricably linked and dependent on each other. The last section links these terminologies to broader concepts applied in international law and summarises their effect and application in the context of RFMO allocation.

2. The international law

The LOSC provides the legal framework for oceanic fisheries and allocates rights and responsibilities between coastal and flag States. Maritime space is divided into zones that are classified as either being under coastal state sovereignty (internal waters, territorial seas and archipelagic waters), coastal state sovereign rights (the exclusive economic zone (EEZ) and the continental shelf) or as areas beyond national jurisdiction (the high seas and the deep seabed). Coastal state sovereignty over the territorial sea can extend up to 12 nautical miles from baselines and over all waters enclosed within archipelagic baselines, calculated in accordance with Part IV of the LOSC (Articles 2, 3, 47, 49) (United Nations, 1982). Where coastal states have sovereignty, they have ‘absolute and unfettered’ control over the conservation, management and exploitation of fisheries in those waters (Articles 2, 49) (United Nations, 1982). While other states have a right of innocent passage in the territorial sea and archipelagic waters, such passage does not include any fishing activities (with the exception of some traditional fishing rights in archipelagic waters) and these remain under the regulatory control of the coastal state (Articles 19, 21, 51, 52) (United Nations, 1982).

The LOSC allows coastal States to declare an EEZ beyond their territorial sea to a maximum distance of 200 nautical miles from the baseline. The coastal State has exclusive rights to fish and to regulate fishing in the EEZ, subject to obligations to ensure that stocks are sustainably managed (Articles 56, 61) (United Nations, 1982). Other states may exercise freedom of navigation in this zone and may fish here with the coastal State’s permission so long as they comply with coastal State fisheries regulations (Articles 58, 62) (United Nations, 1982). Fish stocks in the high seas may be exploited by any State under the principle of freedom of fishing, subject to a requirement to take necessary conservation measures and with due regard to the high seas interests of other States (Articles 87, 116, 117) (United Nations, 1982).

Complexities arise for high seas fish stocks exploited by multiple States, and for fish stocks that straddle one or more EEZs and/or the high seas. In this case, States with an interest in those stocks either as coastal States or as fishing States are obliged to cooperate in the development of appropriate conservation and management measures (Articles 63, 64 118) (United Nations, 1982). The UNFSA institutionalised the duty to cooperate in relation to the conservation and management of straddling

fish stocks and highly migratory fish stocks through RFMOs (Article 8) (United Nations, 1995). Pursuant to the UNFSA, coastal States and States fishing on the high seas are required to implement compatible conservation and management measures across the range of a stock (Article 7.2) (Nandan & Lodge, 2005; United Nations, 1995), including measures that apply in high seas and in waters under national jurisdiction (Elferink, 2001).

3. Unpacking the terminology of allocation

The legal framework for international fisheries provides significant rights for States in their roles as coastal States and flag States and also recognizes particular rights and interests for other categories of States, including developing States. However, as with all aspects of the LOSC, these rights are linked to duties, which are designed to balance the needs and interests of all States, and the international community as a whole. This section will consider the scope and effects of some of the key rights and duties of States under the LOSC and other international agreements and highlight some of the ways in which they may—and may not—be relied upon in the allocation of fishing opportunities. Allocation negotiations are influenced not only by the rights and duties of flag States and coastal States under the LOSC, but also by how States perceive themselves—by their history, development status, and interest in fishing. These issues allow us to consider allocation not only in terms of the geographical circumstances of states in relation to a fishery but by reference to a broader category of historical and economic circumstances.

Sovereignty

The term ‘sovereignty’ is widely used in RFMO allocation discussions as a way of referring to ownership of living marine resources and jurisdiction over maritime zones—but such references do not always accurately reflect the specific areas or ways in which sovereignty applies. Sovereignty is the exclusive competence to exercise the functions of a state within a particular geographic area (United Nations, 2006). In the maritime zones under coastal State sovereignty—the territorial sea and archipelagic waters—this exclusive competence applies to all natural resources, including fish stocks (Articles 2, 19, 21, 49, 52) (United Nations, 1982). Since there are no specific obligations or limitations in the LOSC (or even the UNFSA) regarding the conservation and management of fisheries in zones under sovereignty, coastal States have almost absolute discretion in exercising their sovereignty over living resources, subject only to the general duty to protect and preserve the marine environment (Article 292) (United Nations, 1982), and the customary international law duty not to cause transboundary harm. In the context of allocations, this can give rise to some complex questions about how to effectively conserve and manage highly migratory stocks in a way that appropriately recognizes the coastal State’s sovereignty and fairly distributes the burden of conservation (Tsamenyi & Hanich, 2012). And importantly, no State can validly assert any form of sovereignty in the EEZ or on the high seas (Article 58(2), 89) (United Nations, 1982).

Sovereign rights

The term ‘sovereign rights’ is also invoked commonly—and not always accurately—during RFMO allocation discussions, particularly in support of arguments concerning coastal State rights (and duties) with respect to living marine resources and maritime zones. Sovereign rights are a ‘functionally limited variation’ of the broad concept of sovereignty—they provide exclusive competence to exercise the functions of a State for a particular purpose within a particular area (Brown, 1977; Proelss, 2012). This is reflected in the LOSC, which provides that the coastal State has sovereign rights for the purpose of

exploring and exploiting, conserving and managing the natural resources of the EEZ (Article 56(1)(a)). Within these functional and geographic limits, sovereign rights provide the coastal State with exclusive competence to regulate all activities with a ‘direct connection’ to fishing (ITLOS, 2014), subject to the fulfilment of relevant duties under the LOSC—including the duty to have due regard for the rights of other States, duties of conservation and utilization, the duty to cooperate with other coastal States and States fishing on the high seas to ensure the effective conservation and management of shared stocks, and the general duty to protect and preserve the marine environment (Articles 56(2), 61, 292) (United Nations, 1982).¹ Accordingly, while the coastal State’s sovereign rights afford it the sole discretion to set the total allowable catch (TAC) and establish conservation and management measures for the living resources in the EEZ—including for straddling or highly migratory stocks within that zone—the exercise of this discretion is more qualified than in zones under sovereignty.

The LOSC does not indicate that the coastal State’s sovereign rights in the EEZ entail any form of preferential rights with respect to straddling or highly migratory stocks on the adjacent high seas, although there has been disagreement on this point (Henriksen & Hoel, 2011). The UNFSA specifies that coastal States and States fishing on the high seas must ensure that their measures are ‘compatible’ in order to ensure the conservation and management of straddling and highly migratory fish stocks in their entirety (Article 7) (United Nations, 1995). However, this requirement is specifically stated to be without prejudice to the sovereign rights of coastal States over the living resources of the EEZ, which means that a coastal State may choose to set catch limits for its EEZ independently of an RFMO allocation process (although in doing so, it is still required to ‘cooperate’). Accordingly, it is clear that the establishment of a total allowable catch (TAC) or other conservation and management measures for such stocks—whether by the coastal State in the EEZ or by an RFMO on the high seas—implicitly involves some level of allocation of fishing opportunities between the coastal State and States fishing on the high seas (Henriksen & Hoel, 2011). In this respect, innovative and adaptable approaches may be required in order to ensure that the conservation and management of shared stocks are undertaken in a way that appropriately reflects their effect on the rights—in particular, the sovereign rights—and burdens of the States involved (Tsamenyi & Hanich, 2012).

Access agreements

In the exercise of its sovereign rights, a coastal State may allow the vessels or nationals of other States to exploit the living resources of its EEZ (Article 62) (United Nations, 1982). This is commonly done through an ‘access agreement’ between the coastal State and a flag State, establishing a right for fishing vessels of the flag State to exploit living resources in the EEZ of the coastal State subject to agreed terms and conditions, which usually include the payment of access fees and requirements regarding the conduct of fishing activities.² The coastal State may also choose to grant foreign access to fishing opportunities in the EEZ through other means, such as through an agreement with a corporation or private sector association, by directly granting a fishing license to a foreign fishing vessel, or through the establishment of joint ventures or partnerships.

¹ On the meaning and extent of coastal State sovereign rights over living resources, see further C Goodman, *Coastal State Jurisdiction Over Living Resources in the Exclusive Economic Zone* (OUP, 2021).

² Access to fishing opportunities in the EEZ may also be granted by other means, including agreements between the coastal state and a corporation or private sector association, or through the direct grant of a fishing license to a foreign fishing vessel. On the regulation of foreign fishing in the EEZ see further C Goodman (2021).

These sorts of access agreements and arrangements give rise to important questions about the attribution of catch. Catches have historically been reported and attributed by reference to the flag of the vessel by which they were caught, rather than by reference to the coastal State in whose waters—or pursuant to whose sovereign rights—they were harvested. As Davis et al. (2022) have observed, this can have significant implications for negotiations about the allocation of fishing opportunities, where historical catches are often a key consideration in the determination of future fishing rights. Accordingly, even though access agreements are a common practice in international fisheries, in the context of allocation discussions, their role and effect are often a matter of contention between coastal States and flag States. For example, in the IOTC allocation negotiations, flag States have argued not only that catches taken in a coastal State’s EEZ pursuant to an access agreement should be attributed to the flag State of the vessel, but that the benefits to developing coastal States that are associated with access agreements—such as investments, contribution to local employment and capacity building—should be recognized and encouraged in the context of allocation (IOTC, 2017a).

Freedom of fishing

The ‘freedom of fishing’ is another term that features ubiquitously in RFMO allocation discussions. The freedom of fishing ensures that all flag States have the right for vessels of their nationality to engage in fishing on the high seas (Articles 87(1)(e), 116) (United Nations, 1982). This right applies regardless of whether the flag State is also a coastal State, whether it is located within or outside the region, has historically fished for the stock, is a new entrant to the fishery, or is a landlocked State.³ Like other rights in the law of the sea, the freedom of fishing is a ‘conditional’ right, subject to the fulfilment of a range of general and specific duties, including the State’s treaty obligations under the LOSC and any other relevant agreements to which it is a Party, a general duty of due regard for the rights of other States, and specific duties of conservation and cooperation (Articles 87(1), 116-119) (United Nations, 1982). For States which are party to the UNFSA, the freedom of fishing may also be limited by the requirement to join or apply the measures of a relevant RFMO and the need to have a ‘real interest’ in the fishery concerned (Article 8) (United Nations, 1995).

In the context of RFMO allocation discussions, a distinction is often drawn between ‘coastal States’ (whose land territory is within or adjacent to the geographic area under the competence of the relevant RFMO) and ‘distant water fishing nations’ (DWFNs) (whose land territory is situated outside and at a distance from the area of the RFMO in question). In most instances, both coastal States and DWFNs are ‘flag States’ in the context of an RFMO (meaning that they have flagged vessels fishing in the RFMO)—the implication of this distinction is that different considerations might apply in allocating fishing opportunities under that RFMO to coastal States, which have sovereign rights over living resources in adjacent areas of EEZs, and to DWFNs, which do not. While this distinction may be relevant to establishing or exercising allocation criteria or taking decisions about fishing opportunities within an RFMO, no such distinction exists in the freedom of fishing established in the LOSC, which applies equally to all flag States, regardless of their geographic location and therefore including coastal States members of the RFMO. In the IOTC allocation negotiations, this is reflected in the proposal by coastal States that all member States receive a baseline high seas fishing opportunity of 5%, to

³ Since the regulatory scheme for maintaining public order at sea is framed by the rights and responsibilities of flag States with respect to vessels of their nationality, the freedom of fishing is generally discussed by reference to flag states. However, states also have a right for *persons* of their nationality to engage in fishing on the high seas, and a corresponding duty as the state of nationality to take measures with respect to the activities of those persons.

recognize that the freedom of fishing on the high seas is a right that should, *prima facie*, be enjoyed equally by all States (IOTC, 2017b).

Flag State responsibility

Although all States have the right to grant their nationality to ships, and the freedom for those ships to fish on the high seas, these rights are subject to duties falling within the broad concept of ‘flag State responsibility’. The right of all States to grant their nationality to ships is accompanied by a responsibility to exercise effective jurisdiction and control in administrative, technical and social matters over ships flying their flag (Articles 91, 94) (United Nations, 1982). In the context of fishing vessels, the International Tribunal for the Law of the Sea (ITLOS) has confirmed that this extends to fisheries-related flag State responsibilities: the flag State must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities that will undermine the conservation and management of living resources; and if such violations occur and are reported by other States, the flag State must investigate and, if appropriate, take any action necessary to remedy the situation (ITLOS, 2015). For States which are Party to the UNFSA, these obligations also arise pursuant to Article 19 (United Nations, 1995). Depending on the criteria employed by the relevant RFMO, the question of whether, or how effectively, a flag State has complied with these responsibilities can become a relevant factor in the context of allocation discussions.

Record of compliance

As already discussed, the rights afforded to coastal and flag States with respect to living resources are subject to a range of corresponding duties under the LOSC and other international agreements—including the duty to cooperate in the conservation and management of shared stocks through RFMOs (Article, 63-68, 118-119) and the duty to take measures for nationals in order to conserve the living resources of the high seas (Article 117) (United Nations, 1982). Accordingly, a State’s ‘record of compliance’ with the conservation and management measures of a relevant RFMO—whether as a coastal State or flag State or even as the State of the nationality of persons or companies involved in fishing—is in some cases taken into account in RFMO decision-making processes, including concerning the allocation of fishing opportunities (e.g. WCPFC, 2000, 2019). In most RFMOs, compliance with conservation and management measures is a criterion in the allocation process, particularly for those measures that have a direct impact on the status of the stocks (see e.g., ICCAT, 2015; IOTC, 2021). Since flag State responsibility includes a duty to take the necessary measures to ensure that vessels engaged in fishing in the EEZ of a coastal State comply with the laws and regulations of the coastal State (ITLOS, 2015), a flag State’s record of compliance with coastal State laws may also be relevant in this context, particularly where the EEZ of the coastal State falls within the area of application of an RFMO’s conservation and management measures (e.g. WCPFC, 2019).

Developing States and Small Island Developing States

Some of the most critical and challenging aspects of negotiations on allocation revolve around an agreement on a methodology to allocate quotas to ‘developing States’ to meet their development aspirations (Lodge et al, 2007). The importance of taking into account the special needs and interests of developing States is recognized in the LOSC (Articles 61(3), 62(3), 119(1)(a)) (United Nations, 1982) and the UNFSA (Articles 5(b), 24, 25) (United Nations, 1995). And it is addressed in the constituent instruments of most RFMOs, some of which also contain provisions highlighting the unique needs of ‘Small Island Developing States’ (SIDS) and Territories, of developing coastal States in the region, or

setting out specific ways in which these needs and interests will be addressed (e.g. IOTC, 1993; WCPFC, 2000). However, since these agreements do not contain a definition of ‘developing States’ or ‘SIDS’, it is necessary to look outside the LOSC and its implementing agreements in order to understand which States are the intended beneficiaries of these provisions.

There is no global consensus on the definition of a ‘developing State’, or which States fit into this category. A developing State can generally be understood to be a country with a low Human Development Index relative to that of other States. In contrast, SIDS are a distinct group that have been recognized as facing a range of challenges that produce special requirements both for their environment and development. In particular, SIDS have EEZs that are, on average, 28 times their landmass, and are thus highly dependent on the ocean (United Nations, 2021), but they are faced with a number of constraints, threats and vulnerabilities due to their small land area, insularity, remoteness and proneness to natural disasters (Briguglio, 1995).

Special requirements and special circumstances

In recognition of developmental imbalances between countries, the UNFSA establishes criteria that must be taken into account in order to ensure that the ‘special requirements’ of developing States are properly reflected in the development of RFMO conservation and management measures (Article 24). The UNFSA also recognizes the right of developing States to develop their own fisheries and explicitly encourages forms of cooperation that will enhance their ability and facilitate their participation (Article 25) (United Nations, 1995; Rosales, 2008). In addition to the special requirements of developing States, Articles 24(2b) and 25(1) of the UNFSA specifically recognize the ‘special circumstances’ of SIDS and emphasize the need to avoid adverse impacts on, and cooperate with, this unique category of developing States (United Nations, 1995).

This recognition builds on the right to develop, which is enshrined in the 1986 Declaration on the Right of Development (United Nations, 1986). In particular, the UNFSA specifies that in order to take into account the special circumstances of developing States, it is necessary to ensure that conservation and management measures do not transfer a ‘disproportionate burden’ of conservation action onto developing States (Article 24.2.c) (United Nations, 1995; Azmi et al., 2016). In the context of allocation negotiations, this means that in the allocation of fishing opportunities between RFMO members, developing States must not be asked to bear a disproportionately higher burden than other States in order to ensure the overall conservation of a fish stock.

Unfortunately, the UNFSA did not provide any guidance on when a burden is disproportionate, or set out any criteria against which the balance of burdens should be assessed. However, drawing inspiration from the principle of ‘proportionality’ as it is applied in other areas of international law, Azmi et al. (2016) suggest five rules that should be applied in the development of RFMO conservation and management measures in order to avoid disproportionate burdens being placed on developing States: (i) the measure must be ‘necessary’ to achieve its stated objective; (ii) the measure must be commensurate to the scale and timing of its objective; (iii) during its design, the measure should be tested against agreed criteria to ensure it does not distribute a disproportionate conservation burden; (iv) all relevant factors should be considered, in a way that ensures they are fairly weighed and balanced against each other and do not in fact exacerbate or perpetuate disproportionality; and (v) there must be a high degree of ‘procedural equity’ to ensure that all interested parties are properly engaged. Some of these considerations—in particular (iii) to (v)—could be usefully applied to give substance to the concept of ‘disproportionate burden’ in the context of allocations.

Historical catch/use

In making allocation decisions, most RFMOs place significant weight on ‘historical catch’, which can generally be understood to mean how much a country has fished for a stock in the Convention Area in the past. But in the context of allocation discussions, even something as seemingly straightforward as historical catch can raise complex questions and involve intense negotiations about its meaning and particularly its calculation. For example, what period of time should be considered in calculating historical catch? Different States are likely to have had different levels of catch at different times, so the time period on which catch history is based can make a significant difference to a State’s allocation. In situations where fishing has been conducted by vessels of a flag State in the waters of a coastal State under an access agreement, how should the catch history be recorded? Should it be considered to form part of the historical catch of the flag State by whose vessels it was harvested, or should it be attributed to the coastal State in whose EEZ (and pursuant to whose sovereign rights) it was taken?

Of course, using historical catch as a basis for future allocation can also perpetuate past problems. For example, historical catch can benefit States that have historically subsidized fisheries by using public funds to increase fishing capacity (Sinan et al, in review), thus rewarding past fisheries subsidies with future fishing opportunities. And perhaps most significantly, basing allocation decisions on historical catch can also disadvantage developing States that do not have a fishing history, but aspire to develop fisheries in waters under their national jurisdiction. This has led to inequitable outcomes which have contributed to the instability of RFMOs (Lodge et al 2007). However, by providing for catch caught in coastal State waters to be attributed to coastal States, RFMO allocation mechanisms can lead to a more equitable outcome (Davis et al, 2022; Sinan, 2021a) that will better support the realization of the development aspirations of developing States, and the achievement of Sustainable Development Goal (SDG) 14 (Davis et al, 2022).

Historic fishing rights

In addition to historical catch, the term ‘historic fishing rights’ (or ‘historic rights’) is also used in allocation discussions. The concept of historic fishing rights is quite distinct from that of historical catch. A historic fishing right is a right established via a long history of fishing. Although there is no jurisprudence on what constitutes a ‘long history’, it is generally acknowledged that the fishing activity needs to have taken place continuously over at least 100 years and that the right has been recognized by other States (Bernard, 2012). In most cases, such rights relate to the fishing activities of local communities in the territorial sea or EEZ of neighbouring States and do not involve distant water fishing States (Bernard, 2012; Kopela, 2019). Historic fishing rights are created by custom and not contract, and effectively constitute a ‘burden’ over the maritime area of one State in favour of the nationals of the other State (Kopela, 2019). Furthermore, as the Tribunal confirmed in the South China Sea Arbitration, historic fishing rights cannot be established on the high seas, because the dominant legal regime is one of ‘freedom’, and fishing by all States is permitted under international law (Symmons, 2019). Accordingly, once the term is properly understood, it can be seen that there are very limited circumstances in which historic fishing rights will be relevant in the context of RFMO allocation discussions.

Real interest

Another term giving rise to complex questions in the context of RFMO allocation schemes is ‘real interest’, a concept that was introduced to the international fisheries framework by the UNFSA. As

noted above, all States have the freedom to fish on the high seas, subject to fulfilling the duty to cooperate in the conservation and management of living resources (Article 118) (United Nations, 1982). Pursuant to Article 8 of the UNFSA, States must give effect to this duty by becoming members of or participants in relevant RFMOs, or by agreeing to apply their conservation and management measures (United Nations 1995). Importantly, Article 8 provides that all States with a ‘real interest’ in the fisheries concerned may become members of or participants in such RFMOs (United Nations, 1995). However, the UNFSA does not make clear how this concept interacts with the freedom of fishing, or how it operates in practice. For example, on what basis is a State considered to have a ‘real interest’ that would justify a right to participate in—and receive a catch allocation from—any particular RFMO? Or, starting from the premise that all States have the freedom to fish on the high seas, on what basis could a State wishing to participate in a fishery be found *not* to have a real interest, and who is competent to make that finding?

The UNFSA does not define what constitutes a ‘real interest’, and Nomura’s (2019) commentary on the UNFSA indicates that this wording reflected a compromise between a range of views on how open RFMO memberships should be. According to Molenaar (2000 and 2019), the decision to include the ‘real interest’ test in Article 8 logically indicates an intention that access to high seas fishing should be more limited than under the LOSC but also indicates that it should extend beyond just the coastal States and States fishing for the stocks on the high seas already referred to in Article 8. On this basis, Molenaar concludes that States with a ‘real interest’ are likely to include: coastal States in the area; flag States that are fishing in the relevant area and want to continue fishing; flag States that have previously fished in the area and want to resume fishing; flag States without a catch history that want to fish in the future; and States with no intention to fish that nevertheless want to participate in the RFMO (such as key port or market States, for example). Moreover, as Serdy (2016) points out, preventing participation by States due to a perceived lack of ‘real interest’ might have negative consequences, since such States might start fishing in the area in an unregulated way in order to develop or demonstrate a real interest. In practice, most RFMO allocation schemes do not specifically refer to the concept of ‘real interest’ as a criterion for allocation. Accordingly, in the context of RFMO allocation schemes, the key question is whether the criteria for allocation are being applied in a way that prevents participation in the fishery by any State (or group of States) having a real interest in the fishery concerned. However, noting that decisions to allow new entrants are made by consensus, providing existing members with an opportunity to hinder other countries to enter this fishery.

4. Conclusion

The basic international legal framework for all activities in the ocean space is provided by the LOSC, and in the case of fisheries, it is developed and elaborated through the UNFSA. These two agreements outline the key rights and duties of flag and coastal States with respect to the conservation and management of living marine resources. While the meaning of some of the key terms in this framework is reasonably clear—such as sovereignty, sovereign rights, the freedom of fishing and flag State responsibility—there is less clarity on the content of other important concepts—such as historical catch, historic fishing rights, real interest, the special requirements of developing States and disproportionate burden. And in the context of allocations, these concepts interact and overlap in complex and largely unclear ways. Most RFMOs have adopted—or are in the process of adopting—an allocation framework, which draws together these concepts in the form of criteria or guidelines that can be applied to allocate fishing opportunities between member States. In order to ensure that these

frameworks result in the equitable allocation of fishing opportunities, it is important that all participating member States have a common understanding of the terminology used in the relevant RFMO allocation framework.

Allocating fisheries resources equitably is one of the most difficult—and most critical—tasks in fisheries management (Lodge et al., 2007). At its heart, allocation involves the distribution of rights among participating parties. In the context of RFMOs, allocation processes give effect to the participatory rights of member States and acknowledge a State's rights to engage in the relevant fishery (Hanich & Ota, 2013). But these processes have significant challenges: in particular, they involve a negotiation based on a pre-established framework of allocation criteria, from amongst which member States seek to apply the criteria most favourable to them, interpreted in the way that best suits their national interest or interprets their rights, rather than by a shared and objective understanding of their meaning (Seto et al., 2021). In particular, while developed States predominantly seek to apply allocation criteria in a way that will allow them to preserve existing access to fishery resources, developing States are often seeking access to a fishery in which they have not previously had the capacity to participate. This distinction underpins some significant differences in approach between RFMO member States in allocation discussions, as revealed throughout the discussion above.

For example, an emphasis on 'historical catch' as a predominant criterion in allocation preserves the rights of developed States with a significant fishing history but does not reflect the freedom of all States to fish on the high seas or the sovereign rights of coastal States over the living resources of the EEZ or enable practical recognition of the special requirements of developing States. This is illustrated in the ongoing discussions of the Technical Committee on Allocation Criteria for the IOTC, in which coastal State members have suggested that (regardless of the flag of the vessel) catch taken in a coastal State's EEZ should be attributed to that coastal State pursuant to its sovereign rights over the resources of the EEZ, and thus contribute toward the calculation of the coastal State's future allocation. In contrast, other members have argued that this catch history belongs to the relevant flag State, and should be used to calculate the flag State's future allocation (IOTC, 2021).

Another question with potentially significant consequences is how the development status of a State is to be recognised and given practical effect in allocation negotiations—particularly in the case of developing coastal States and SIDS, for whom fishing is often a critical means to increase food security and development for coastal communities (Sinan et al. 2021b). As discussed above, even though the duty to cooperate in the conservation and management of living resources applies to all States, the UNFSA recognises that the special requirements of developing States and the special circumstances of SIDS necessitate differentiated responsibilities for these States and that they must not be asked to shoulder a disproportionate burden (Azmi et al 2016; Sinan et al, 2021c). However, it is clear that the emphasis that is often placed on historical catch in allocation negotiations has the potential to undermine developing States' development aspirations and lead to disproportionate burdens. In this context, the concept of 'common but differentiated responsibilities' could help to attenuate the emphasis on historical catch and give practical effect to the special requirements of developing States, and the special circumstances of SIDS. Based on this concept it would be inequitable to attribute the same responsibilities to developing and developed States. Although this principle has been mainly used in climate change negotiations (Campbell et al. 2022), it would provide a useful counter-weight to the dominant criterion of historical catch.

Reaching a shared understanding between all RFMO members about these issues is important so that developing States and SIDS can effectively leverage to negotiate an equitable share of fisheries resources in an allocation framework. In this article, we have sought to address this by providing an objective interpretation of some of the key terms and concepts which are commonly used during allocation negotiations, based on the relevant sources of international law. However, this is a dynamic and constantly evolving area of international law and policy, and the consequences of these terms will continue to change, particularly as climate change leads to changes in the distribution and abundance of fish stocks. In these circumstances, ensuring a shared understanding that informs an equitable approach to allocating global fisheries resources will only become more, not less, important.

References

- Azmi, K., Davis, R., Hanich, Q., & Vrahnos, A. (2016). Defining a disproportionate burden in transboundary fisheries: Lessons from international law. *Marine Policy*, 70, 164-173. <http://dx.doi.org/10.1016/j.marpol.2016.05.007>
- Bernard, L. (2012). The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation Maritime Boundaries Delimitation. *LOSI Conference Papers*, May, 20.
- Brown, E. D. (1977). The exclusive economic zone: criteria and machinery for the resolution of international conflicts between different users of the EEZ. *Maritime Policy & Management*, 4(6), 325–350. <https://doi.org/10.1080/03088837700000019>
- Campbell, L.M., Fail, R., Horan, R., Acton, L., Blackwatters, J.E., Garcia Lozano, A., Gill, D., Gray, N., Gruby, R., Melvin, E., Murray, G., & Wiehe, E. (2022). Architecture and agency for equity in areas beyond national jurisdiction. *Earth System Governance*, 13, 100144. <https://doi.org/10.1016/j.esg.2022.100144>
- Davis, R. A., Hanich, Q., Haas, B., Cisneros-montemayor, A. M., Azmi, K., Seto, K. L., Swartz, W., González-espinoza, P. C., Colléter, M., Adams, T. J. H., Craig, R. K., & Davis, R. A. (2022). *Who Gets the Catch? How Conventional Catch Attribution Frameworks Undermine Equity in Transboundary Fisheries*. 9(March), 1–13. <https://doi.org/10.3389/fmars.2022.831868>
- Elferink, A. (2001). The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks. In J. Frowein & R. Wolfrum (Eds.), *Max Planck Yearbook of United Nations Law* (vol 5, p. p.345). Kluwer Law International.
- Hanich, Q., & Ota, Y. (2013). Moving beyond rights-based management: a transparent approach to distributing the conservation burden and benefit in tuna fisheries. *The International Journal of Marine and Coastal Law*, 28(1), 135-170. <https://doi.org/10.1163/15718085-12341268>
- Havice, E. (2021). The environmental geopolitics of allocation: State power and institutional stability in Eastern Atlantic bluefin tuna management. *Political Geography*, 88(May), 102395. <https://doi.org/10.1016/j.polgeo.2021.102395>
- Henriksen, T., & Hoel, A. H. (2011). Determining Allocation: From Paper to Practice in the Distribution of Fishing Rights Between Countries. *Ocean Development & International Law*, 42(1–2), 66–93. <https://doi.org/10.1080/00908320.2011.542106>
- Holmes, G., & Miller, S. (2022). Harvest strategies and allocation – A chicken and egg scenario?

- Marine Policy*, 135, 104871. <https://doi.org/https://doi.org/10.1016/j.marpol.2021.104871>
- ICCAT. (2015). *Resolution by ICCAT on criteria for the allocation of fishing possibilities*. <https://www.iccat.int/Documents/Recs/compendiopdf-e/2015-13-e.pdf>
- IOTC. (1993). *Agreement for the establishment of the Indian Ocean Tuna Commission*. <https://www.iotc.org/about-iotc/basic-texts>
- IOTC. (2017a). Feedback on IOTC-2017-S21-Propn-rev1 on the allocation of fishing opportunities for IOTC species. <https://www.iotc.org/documents/feedback-iotc-2017-s21-propn-rev1-allocation-fishing-opportunities-iotc-species>
- IOTC. (2017b). On the allocation of fishing opportunities for IOTC species – IOTC-2017-S21-PropN. <https://www.iotc.org/documents/allocation-fishing-opportunities-iotc-species>
- IOTC. (2021). *REPORT OF THE 9TH TECHNICAL COMMITTEE ON ALLOCATION CRITERIA*. <https://www.iotc.org/documents/report-9th-technical-committee-allocation-criteria>
- ITLOS. (2014). *Reports of judgments, advisory opinions and orders – The M/V “Virginia G” Case (Panama vs Guinea-Bissau)*. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment_published/C19_judgment_140414.pdf
- ITLOS. (2015). *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*. <https://www.itlos.org/en/main/cases/list-of-cases/case-no-21/>
- Kopela, S. (2019). Historic fishing rights in the law of the sea and Brexit. *Leiden Journal of International Law*, 32(4), 695–713. <https://doi.org/10.1017/S0922156519000438>
- Lodge, M. W., Anderson, D., Lobach, T., Munro, G., Sainsbury, K., & Willock, A. (2007). *Recommended Best Practices for Regional Fisheries Management Organizations*. <https://repository.oceanbestpractices.org/bitstream/handle/11329/1456/39374297.pdf?sequence=1&isAllowed=y>
- McDorman, T.L. (2005). Implementing existing tools: turning words into actions decision-making process of regional fisheries management organizations (RFMOs). *International Journal of Marine and Coastal Law*, 20:423-458.
- Molenaar, E. J. (2000). The Concept of “Real Interest” and Other Fisheries Management Mechanisms. *International Journal of Marine and Coastal Law*, 15, 475–531.
- Molenaar, E. J. (2019) ‘Participation in Regional Fisheries Management Organizations’ in *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart) 103-130
- Nandan, S., & Lodge, M. (2005). Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995. *The International Journal of Marine and Coastal Law*, 20(3), 345–379. <https://doi.org/https://doi.org/10.1163/157180805775098540>
- Normura, I. (2019). *Background, Negotiation History and Article-by-Article Analysis of the United Nations Agreement of Fish Stocks and the FAO Compliance Agreement*. NextPublishing Authors Press
- Proelss, A. (2012). The Law on the Exclusive Economic Zone in Perspective: Legal Status and

- Resolution of User Conflicts Revisited. *Ocean Yearbook Online*, 26(1), 87–112.
<https://doi.org/https://doi.org/10.1163/22116001-92600096>
- Rosales, J. (2008). Economic growth, climate change, biodiversity loss: Distributive justice for the global north and south. *Conservation Biology*, 22(6), 1409–1417.
<https://doi.org/10.1111/j.1523-1739.2008.01091.x>
- Serdy, A. (2016). *The new entrants problem in international fisheries law*. (1st ed). Cambridge University Press.
- Seto, K., Galland, G. R., McDonald, A., Abolhassani, A., Azmi, K., Sinan, H., Timmiss, T., Bailey, M., & Hanich, Q. (2021). Resource allocation in transboundary tuna fisheries: A global analysis. *Ambio*, 50(1), 242–259. <https://doi.org/10.1007/s13280-020-01371-3>
- Sinan, H., & Bailey, M. (2020). Understanding barriers in Indian Ocean Tuna Commission allocation negotiations on fishing opportunities. *Sustainability (Switzerland)*, 12(16).
<https://doi.org/10.3390/su12166665>
- Sinan, H. (2021a). Equitable tuna governance in the Indian Ocean. PhD Thesis
- Sinan, H., Bailey, M., & Swartz, W. (2021b). Disentangling politics in the Indian Ocean Tuna Commission. *Marine Policy*, 133, 104781. <https://doi.org/10.1016/j.marpol.2021.104781>
- Sinan, H., Bailey, M., Hanich, Q., & Azmi, K. (2021c). Common but differentiated rights and responsibilities in tuna fisheries management. *Fish and Fisheries*, 00, 1-11.
<https://doi.org/10.1111/faf.12610>
- Symmons, C. R. (2019). *Historic Waters and Historic Rights in the Law of the Sea* (2nd ed). Brill | Nijhoff.
- Tsamenyi, M., & Hanich, Q. (2012). Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States. *The International Journal of Marine and Coastal Law*, 27(4), 783–793.
<https://doi.org/10.1163/15718085-12341259>
- United Nations. (1982). *United Nations Convention on the Law of the Sea*.
https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
- United Nations. (1986). *Declaration on the Right to Development*.
<https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-development>.
- United Nations. (1995). *Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks*. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement>
- United Nations. (2006). *Reports of international arbitral awards – Island of Palmas case (Netherlands vs the USA)*, 1928. https://legal.un.org/riaa/cases/vol_II/829-871.pdf
- United Nations. (2021). *About Small Island Developing States*.
<https://www.un.org/ohrlls/content/about-small-island-developing-states>
- van Dyke, J.M. (2010) *Allocating Fish across Jurisdiction*, in Conservation and Management of Transnational Tuna Fisheries, ed Allen, R; Joseph, J; and Squires,

D. <https://doi.org/10.1002/9780813820262.ch10>

WCPFC. (2000). *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*. <https://www.wcpfc.int/doc/convention-conservation-and-management-highly-migratory-fish-stocks-western-and-central-pacific>

WCPFC. (2019). *Cooperating Non-Members*. <https://www.wcpfc.int/doc/cmm2019-01>