Chapter 17

Allocation of Fishing Opportunities in Regional Fisheries Management Organizations: From Power to Law?

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Introduction

In 1963, Shigeru Oda “attempted to call the attention to the existence of a difficult question, a question which requires more comprehensive study by both international lawyers and national statesmen.”1 That question was the one of allocation of limited fisheries resources among states.2

A half-century later, international law of the sea has changed substantially; international environmental law has evolved; sustainable development has made its entrance in international law and policy; but the question remains, largely, unexplored. In 2000, the same author proposed that three issues of ocean governance remain open and in need of resolution. Among them, he cites the sharing of the benefits of the positive use of the ocean and the sharing of the burden of restrictions on the use on the ocean imposed for the purpose of preserving the marine environment.3 What is said with respect to the uses of the ocean in general, is also true for one particular activity: high seas fisheries. This is notably paradoxical if one considers that, during the same period, the establishment of total allowable catches (TACs) and its allocation among states participating in the fisheries has become ‘best practice’ in international fisheries management.

The lack of attention to the question on how the benefits and burdens of the exploitation of living marine resources should be shared among nations is not exceptional. It has been acknowledged that, generally, “environmental policy decision-making usually fails to consider distributional effects of proposed actions.”4 However, the vacuum is becoming evident and pressing in

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2 Ibid.
environmental policy generally, and is one of the most cumbersome problems in international fisheries management.

This chapter analyzes the mechanisms and principles developed in international fisheries law to address the question of allocation of fishing opportunities. It first examines some general aspects of allocation of living marine resources. Then, it describes the history behind the establishment of total allowable catches and national allocation as a fisheries management tool in international fisheries, as well as the continuing search for guiding principles ruling allocation decisions. Finally, the current legal framework and the current practices of regional fisheries management organizations/arrangements (RFMO/As) are critically analyzed from the perspective of equity. In particular, ‘equitable access and allocation’ and the principle of common but differentiated responsibility are explored as means to introduce (or reinforce) equity in the normative framework for the adoption of allocation decisions.

**Allocation of Fishing Opportunities: Some General Aspects**

In unregulated high seas, the wealth of living marine resources is, in theory, available to fishers of every state. However, living marine resources have proven to be exhaustible in the face of the outstanding fishing capacity developed by modern technology—they are scarce resources. In a situation of ‘moderate scarcity’ and a community of interests, a distribution or ‘allocation’ of those scarce resources becomes necessary and possible. It is in such a scenario that equity considerations become relevant.

The question of sharing the benefits of the ocean requires addressing the question of the nature of those benefits. Traditionally, the benefits have been principally understood to be of economic character. Furthermore, the economic benefits

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7 Ibid.