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Regional Allocation Issues or Zen and the Art of Pie Cutting

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Abstract

Regional Fisheries Management Organisations (RFMOs) have increasingly become the mechanism of choice through which high seas fisheries are to be managed. How these organisations allocate fishing opportunities for the dwindling resources under their jurisdiction is, however, a difficult and often controversial issue. Achieving equitable, scientifically reliable and sustainable allocations as between members and as between members and non-members has serious implications for the operational efficacy and legitimacy of an RFMO and its management regime. This paper examines the allocation practices adopted in RFMOs in the context of the tension between state sovereignty and the development of rules of international law restricting the freedom to fish. It provides suggestions for possible new approaches that may better support both the legal obligation to sustainably manage high seas fisheries and the institutional legitimacy of RFMOs.

Regional Allocation Issues or Zen and the Art of Pie Cutting

Rosemary Rayfuse*

1.0 Introduction

The discipline of Zen consists in attaining enlightenment. According to the Zen school of thought, freedom is not enlightenment. Rather, freedom is the outcome of enlightenment which is attained through the rigorous application of two approaches. The first approach, that of verbalism, requires one to “examine the living words and not the dead ones”.¹ Dead words are “those that no longer pass directly and correctly and intimately on to the experience. They are conceptualised, they are cut off from the living roots”.² The second, or ‘actional’ approach, consists in taking action which has as its deeper purpose the “awakening in a disciple’s mind [of] a certain consciousness that is attuned to the pulsation of Reality”.³ From an international lawyer’s perspective, the intriguing thing about Zen philosophy is that these two approaches appear to mirror those taken in the development of international law, in particular customary international law, which requires evidence of *opinio juris* and state practice.

If we apply Zen philosophy to the high seas fisheries context, the alleged freedom to fish is not enlightenment. Enlightenment is, instead, to be attained through the implementation of a fisheries regime which ensures, in light of changing experiences and realities, the long-term sustainability of fish stocks. Only when that goal is achieved will enlightenment, and hence true freedom, be achieved. In the context of the topic of allocation, attainment of enlightenment requires devising allocation strategies to divide ever decreasing resources amongst ever increasing numbers of exploiters in a manner that both ensures the long term sustainability of the resource and is acceptable to all.

This paper examines the search by Regional Fisheries Management Organisations (RFMOs) for enlightenment in the context of the allocation of high seas fish stocks. Although allocation is essentially a political, or negotiated, process, in devising their allocation strategies RFMOs and their member states act within the context of a wide-ranging body of legal principles. This body of law is, however, still developing.

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¹ Daisetz T Suzuki, *Zen and Japanese Culture* (Princeton University Press, Princeton, NJ, 1959) at 7

² *Ibid*

³ *Ibid* at 9

Moreover, as states seek new ways to deal with constantly emerging realities, these principles may come into conflict with each other or their legal status may be controversial. In other words, RFMOs are operating in a changing international legal environment that reflects the on-going tension between the state sovereignty and international communitarian models. Accordingly, rather than focus on political or economic aspects, or on the practice in one or more RFMOs as will be done in other papers, this paper presents a broad overview of the legal principles that apply to the who, what, why, when, where, and how of allocation decisions by RFMOs. It concludes with some suggestions for a reconceptualisation of the legal regime which might bring us closer to the elusive goal of enlightenment in the context of regional allocation issues.

2.0 Legal Principles Applicable to Allocations within RFMOs

2.1 Who allocates?

The first set of principles relate to the question of who has the right to allocate high seas fisheries. It seems beyond doubt that RFMOs are now the accepted *modus operandi* through which international cooperation in the conservation and management of high seas fisheries is to be carried out.⁴ Articles 116-118 of the Law of the Sea Convention (LOSC)⁵ provide that the duty to cooperate in respect of the conservation and management of high seas fish stocks is to be carried out through the establishment, where applicable, of RFMOs. This is further reinforced by Article 8 of the Fish Stocks Agreement (FSA)⁶ which institutionalises the duty to cooperate through the medium of RFMOs by providing that only members of RFMOs or non-members which agree to abide by the conservation and management measures adopted by RFMOs can access the fishery concerned.

However, the efficacy of allocations made by RFMOs is affected by the operation of a number of legal principles. First, the freedom to fish on the high seas, while often overstated, nevertheless means that, subject to certain restrictions, the vessels of any state, including states that are not members of an RFMO, may fish on the high seas within the regulatory area of that RFMO. These restrictions include the general limitations of 'due regard'⁷ and 'peaceful purposes'⁸ as well as the specific limitations arising from states' treaty obligations, the rights, duties and interests of coastal states in straddling and anadromous fish stocks, highly migratory and catadromous species and marine mammals, and the duties of conservation, cooperation and non-discrimination in

⁴ In truth, this is something of an overstatement. Cooperation can be through mechanisms other than formally established RFMOs. The terminology of RFMO is used here as shorthand to encompass all cooperative participatory agreements and arrangements for the management of high seas fisheries resources

⁵ United Nations Convention on the Law of the Sea, 10 December 1982, 21 ILM 1245 (hereinafter LOSC)

⁶ 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, 8 September 1995 34 ILM 1542 (hereinafter, FSA)

⁷ LOSC Art 87(2)

⁸ LOSC Art 88

respect of the conservation and management of the living resources of the high seas.⁹ Arguably this circumscribed ‘freedom’ is also now exercisable either only by members of RFMOs or by non-member states parties that agree to abide by the conservation and management measures adopted by an RFMO. This restriction, found in the FSA,¹⁰ is however, not yet universally accepted as binding on all states as a matter of customary international law. Thus, its application appears to be limited to parties to the FSA.

Next, the *pacta tertiis* rule, which provides that treaties do not bind third, or non-party, states,¹¹ operates to exempt non-members and non-parties to the FSA from the application of an RFMO regime. The effect is that allocation decisions can only be made in respect of members. Even assuming RFMO allocations are adhered to by member states, which is often not the case, their efficacy is compromised by the inability of an RFMO to require submission of catch and effort data from non-members. In other words, allocations will be based on incomplete scientific information and will therefore be unreliable and possibly unachievable or unsustainable.

The principle of exclusivity of flag state jurisdiction further limits the effectiveness of RFMO allocations. As noted above, RFMOs have no legal standing to enforce their allocation regimes, or any other part of their mandate, against non-members. Thus, the phenomenon commonly referred to as Illegal, Unreported and Unregulated (IUU) fishing appears to continue almost unabated. However, IUU fishing is not confined to non-members of RFMOs but is also carried out by nationals of member states. Nevertheless, while progress is being made, RFMOs still lack comprehensive and effective compliance and enforcement regimes in respect of their members¹² who, it is acknowledged, may see little advantage, commercial or otherwise, in compliance with limitations on their fishing effort when non-members are not so bound. Thus IUU fishing is often said to be at the root of the allocation issue.

The question of ‘who can allocate’ also relates to the issue of participation in RFMOs. Not addressed in the LOSC, the FSA provides that “states having a real interest in the fisheries concerned may become a member” of RFMOs.¹³ What, precisely, a ‘real interest’ is, however, is still not clear.¹⁴ Argument persists as to whether the category encompasses only states with a pre-existing fishing history and relevant coastal states, or is also open to new entrants or other states with no such attachment but only a general interest in, for example, the conservation of living marine resources or global biodiversity. Molenaar suggests that no rational argument exists to interpret or apply the concept of real interest to bar states in these latter categories from membership in

⁹ LOSC Arts 116 – 120. See Rosemary Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, 2004) at 30-34

¹⁰ FSA Art 8

¹¹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 Arts 34-38

¹² See Rosemary Rayfuse, “To Our Children’s Children’s Children: From Promoting to Achieving Compliance in High Seas Fisheries” (2005) 20 (3-4) *International Journal of Marine and Coastal Law* 509-532

¹³ FSA Art 8(3)

¹⁴ Erik-Jaap Molenaar, “The Concept of ‘Real Interest’ and Other Aspects of Cooperation through Regional Fisheries Management Mechanisms” (2000) 15 *International Journal of Marine and Coastal Law* 475-531

RFMOs.¹⁵ Nevertheless, some RFMOs do make membership contingent on fishing interest. Others, while not limiting membership in this way, make membership contingent on allocation, while still others are prepared to offer membership but no allocation.¹⁶

While any state may accede to the Convention on the Conservation of Antarctic Marine Living Resources, membership in the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR) is only open to states which are actively engaged in research or harvesting activities within the Convention area.¹⁷ Similarly, any state may accede to the Convention on Future Multilateral Cooperation in the North-West Atlantic Fisheries, however, membership of the Fisheries Commission of the Northwest Atlantic Fisheries Organisation (NAFO) is limited to states already engaged in fishing in the NAFO Regulatory area or those that provide satisfactory evidence that they intend to do so during the relevant year.¹⁸ However, membership applications will not succeed if the prospective member has no allocation. The apparent circularity of this is overcome by the practice of offering new entrants allocations of fishing opportunities for stocks not currently allocated.¹⁹ While Korea and Taiwan successfully negotiated allocations before joining the Commission on the Conservation of Southern Bluefin Tuna (CCSBT) the Commission initially refused to grant an allocation to South Africa should it join the Commission. After several years of debate, the Commission has recently agreed to make a 'final' offer of a 45 tonne catch limit to South Africa in return for it becoming a cooperating non-member. This is less than the 60 tonne allocation requested by South Africa.²⁰

None of these approaches encourages new entrants, and each merely encourages unregulated fishing. Moreover, each of these approaches arguably discriminates in fact, if not in form, against new entrants and developing states which have not previously had the capacity, be it legal or practical, to engage in high seas fisheries. As Molenaar points out, the concept of cooperating non-member has been adopted by a number of RFMOs in an attempt to woo compliance from non-members. These states may receive allocations and they may also be exempt from measures designed to deter IUU fishing.²¹ The status of cooperating non-member is, however, not a permanent one but is subject to annual renewal by the RFMO concerned. While clearly designed to encourage eventual membership, this may, instead, merely result in further discrimination against developing state non-members which may be held to higher levels of compliance with the RFMO regime than the members themselves.

¹⁵ Ibid at 496-498

¹⁶ Erik-Jaap Molenaar, "Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organisations" (2003) 18(4) *International Journal of Marine and Coastal Law* 457-480 at 462-466

¹⁷ Convention on the Conservation of Antarctic Marine Living Resources, Art VII

¹⁸ NAFO Convention Arts IV(1), XII(4) and XIII(1)

¹⁹ See NAFO Resolution to Guide the Expectations of Future New Members with Regard to Fishing Opportunities within the NAFO Regulatory Area, adopted at the 21st Annual Meeting of NAFO, September 1999

²⁰ CCSBT: Report of the Extended Commission for the Twelfth Annual Meeting of the Commission, Report of the Twelfth Annual Meeting of the Commission, 15 October 2005, paras 72-74

²¹ Ibid at 466

2.2 What is being allocated?

The next set of principles relates to the question of what is being allocated. International law does not currently recognise any property rights in high seas fisheries. In other words, no one owns the fish.²² RFMOs can therefore not allocate fish. They can, however, allocate fishing opportunities as between their members. This is recognised in Article 10 of the FSA which refers to participatory rights such as allocations of allowable catch or levels of fishing effort. Nevertheless, as all states have the freedom to fish on the high seas, any participatory rights allocated by an RFMO will only ever be relative at best, and hence, imperfect.

RFMO members may distribute these imperfect rights among their nationals as, for example, in the provision of individual quotas, the sum total of which do not exceed the internationally agreed national allocation. Member states operating in this manner are responsible for their nationals and, to that end, must ensure, through adequate compliance and enforcement mechanisms, that the overall national allocation is not exceeded. If it is, the member state will be internationally responsible to other RFMO members for its breach of its allocation. The consequences of such a breach are, however, unclear. Acts of retorsion²³ or countermeasures²⁴ may be adopted by other individual members of the RFMO. Alternately, the RFMO may take steps against recalcitrant members. Traditionally, these steps have involved the development of reporting procedures aimed at 'naming and shaming' in compliance committees or similar RFMO bodies. A more interesting concept has been adopted in the International Commission on the Conservation of Atlantic Tunas (ICCAT) by which overages in one year must be deducted from allocated amounts in future years. More recently, ICCAT has gone further and drastically reduced the Taiwanese allocation in response to Taiwan's continued involvement in IUU fishing.

RFMO members may wish to transfer all or part of their national allocation to other members. Although an imperfect right, this right can be transferred to other members by agreement if the RFMO regime allows or does not otherwise prohibit it. Where allocation is transferred the receiving member state will become responsible internationally for adherence to it. However, where effort – as opposed to allocation – is transferred, as through the chartering out of vessels flagged in one member state to another member state the attribution of responsibility becomes less clear. While the flag state will *prima facie* be responsible under the principle of exclusive flag state jurisdiction, the chartering state may also be responsible as a member of the RFMO and questions of joint and several responsibility will arise. Moreover, questions may arise as to whose allocation the vessel is fishing against. ICCAT regulates chartering arrangements for its members

²² This is subject to the exception of coastal state interests in anadromous stocks, catadromous species and sedentary species on the extended continental shelf as per LOSC Arts 66 - 68

²³ These are acts that although perfectly lawful are regarded as 'unfriendly'

²⁴ Countermeasures are unlawful acts the unlawfulness of which is excused because they are taking in response to a prior unlawful act and meet certain criteria relating to proportionality, necessity and temporal limitations. See Rosemary Rayfuse, "Countermeasures in High Seas Fisheries" (2004) 51(1) *Netherlands International Law Review* 41-76

pursuant to Recommendation 02-21 on Vessel Chartering. Vessels may only be chartered from other ICCAT members or cooperating non-members and both states are responsible to ensure compliance by the vessel with ICCAT measures. Both states are obliged to record the catch and to do so separately from catches taken by other vessels. However, catches taken count against the allocation of the member who charters the vessel. Similarly, Article 15 of the NAFO²⁵ Conservation and Enforcement Measures dealing with chartering arrangements, allows charters as between NAFO members with the flag state being responsible to ensure compliance with NAFO measures and the chartering member, which is the member state to whom the allocation was originally made, being responsible for compliance with its own allocation limits.

RFMO members may also wish to transfer all or part of their allocation to non-members. Such transfers may serve three purposes: (1) they may act as an incentive for procuring non-member membership in the RFMO; (2) they may be used to allow new entrants to establish a fishing history to allow them to meet membership criteria; and (3) they may provide a revenue source for the transferring state. Referred to as 'quota trading' in the CCSBT, in 2003 Korea proposed to sell its national quota to non-member South Africa which had been refused an allocation by the Commission in return for membership. However, the suggestion that a state should have to purchase an imperfect right to fish for a species on the high seas flies in the face of the traditional rules of freedom of fishing, and even more so where that state is a coastal state through whose waters the species passes and which has the right to fish for that species within its exclusive economic zone in any event. Nevertheless, it is always open to states to agree to fetters on their sovereign rights, including the freedom of fishing on the high seas. In doing so, however, the issue becomes one of enforcement and responsibility for breaches by the non-member state of the purchased allocation. By virtue of the *pacta tertiis* rule the RFMO cannot enforce against the non-member (unless that non-member is a party to the FSA). Thus, by effecting transfers of this sort the member state may be open to the charge that it is undermining the RFMO regime contrary to the basic principles of good faith.

2.3 When to allocate?

The third set of principles relates to the question of when RFMOs should engage in an allocation exercise. Traditionally RFMOs have only sought to regulate allocation of stocks or species once decline in biomass has been noted, in other words, once overfishing has already occurred. Allocation exercises then become a race to the bottom with member states reluctant to accept any lower than their historically highest catch as their allocation, even despite sound scientific advice that such allocations will drive the stock or species concerned into commercial or biological extinction. Perceived or genuine lack of scientific knowledge, ponderous decision-making processes, and objection procedures²⁶ often render nugatory regulatory efforts to reach scientifically meaningful allocation decisions. Moreover, many stocks and species currently subject to exploitation

²⁵ Northwest Atlantic Fisheries Organisation

²⁶ Ted McDorman, "Decision Making Processes in RFMOs" (2005) 20 (3-4) *International Journal of Marine and Coastal Law*

are not regulated in any way and these are the fisheries into which new entrants are often pushed.

Arguably allocations should be set on any fishery from its inception. This strategy is followed in the Commission on Conservation of Antarctic Marine Living Resources (CCAMLR) which sets precautionary catch limits on all new and exploratory fisheries in the Convention area. This is not to suggest that the limits set are necessarily biologically astute. However, catch limits can be amended over time as more data on stock status becomes available. In this respect it is worth noting that initial limits should be, but often are not, set at both a precautionary and conservative level, as once a fishery is established reducing allocations is notoriously difficult. To give but one example, despite accepted scientific advice of the need to reduce allocations in the CCSBT members have consistently deferred taking and actioning the hard decision which, in 2005 was put off yet again until 2007. In short, as the human propensity is to over-exploit and protect their right to do so, allocations should be set, and be set carefully, from the start of, and in respect of all fisheries.

2.4 Why allocate?

The purpose of allocating high seas fishing opportunities is simple; to avoid overfishing and the inevitable tragedy of the commons that comes from over-exploitation of an open access resource. As Molenaar notes, this is one of the core objectives and principle functions of an RFMO.²⁷ As a matter of basic treaty law, RFMOs play this role in respect of their members only. Increasingly, however, RFMOs have been institutionalised as custodians of the resources under their mandate for the entire international community with all states being required either to comply with the measures adopted by RFMOs or refrain from fishing.²⁸ The role of RFMOs should therefore now be to ensure that as an open access resource, the resource continues in a long-term and sustainable manner to be available to all states on an equitable and non-discriminatory basis.

2.5 Where to allocate?

An important, and controversial, set of principles relate to the area over which RFMOs may exercise their allocational jurisdiction, or the issue of where allocations are to be made. The difficulty here arises from the conflict of interests between coastal states and high seas fishing states over straddling and highly migratory fish stocks, most famously highlighted by the Canadian arrest of the Spanish vessel the *Estai* in 1995 when Canada alleged that the high seas fishing activities of the *Estai* were undermining its own fisheries within its EEZ. While coastal states may, and do, arrest vessels for illegally fishing within their EEZ, as in Australian and French arrests of foreign flagged vessels fishing for Patagonian toothfish within their waters, the international community has been less than enthusiastic about following Canada's example.

²⁷ Molenaar, supra note 17 at 466

²⁸ FSA Art 8

The crux of the matter lies in the possible differences between the management regimes. A coastal state may strictly regulate access to a stock. However, its conservatory actions may be nullified by un-, or insufficiently, regulated fishing for the same stock in the high seas part of its range. This seems to have been at the heart of the dispute between Chile and the EU over swordfish fishing in the Eastern Pacific Ocean.²⁹ Alternately, an RFMO may strictly regulate access to a stock but a coastal state in whose waters the stock is also found may not. In a strange turn of events at NAFO, it will be recalled that while the NAFO moratorium on high seas fishing for cod was in place Canada reopened its domestic cod fishery, thereby raising the ire of its NAFO partners.³⁰ Admittedly the opening was short-lived. After four years it was obvious that there were simply no cod to be had and the fishery was closed permanently. Coastal states seeking membership in RFMOs who have been denied allocations may similarly engage in heavy exploitation of a stock while it is within their EEZ thereby undermining the RFMO regime and possibly creating a situation of over-exploitation. South Africa has repeatedly expressed its desire to join the CCSBT but to do so in return for an allocation of the overall SBT catch. The Commission has repeatedly refused to give South Africa an allocation. South Africa can, of course, fish for SBT within its own EEZ without any allocation from the Commission; a situation of no benefit to the stock (or the Commission).

One view, traditionally held by high seas fishing nations has been that RFMOs should have the power to regulate, and allocate, in respect of a stock throughout its range. The contrary view, held by coastal states is that coastal states should have that power. Chile's claim to a Presential Sea³¹ and the Canadian concept of 'custodial management' of the straddling stocks on the high seas portion of the Grand Banks³² are two manifestations of this view. However, article 7 of the FSA establishes the principle of compatibility whereby neither group of states takes precedence. Rather, measures established by RFMOs for the high seas and by coastal states for within their EEZs are to be compatible. Unfortunately, although article 7 does list a number of factors that are to be taken into account in determining compatibility, no guidance exists on precisely whose measures are to be compatible with whose.³³ Resolution of the issue of compatibility is left to be dealt with by the dispute settlement provisions of the FSA an approach which has not yet been tested. In any event, it is clear that while RFMOs may consider coastal state catches when reaching decision on allocation, they cannot, without the agreement of the relevant state, fetter coastal states' sovereign rights to exploit the living resources within their EEZs.

²⁹ See Marcos A Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO" (2002) 71 *Nordic Journal of International Law* 55-81

³⁰ Rosemary Rayfuse, "Canada and Regional Fisheries Organisation: Implementing the UN Fish Stocks Agreement" (2003) 34 *Ocean Development and International Law* 209-228 at 216.

³¹ Francisco Orrego Vicuña, "'The Presential Sea': Defining Coastal States' Special Interests in High Seas Fisheries and Other Activities" (1992) 35 *German Yearbook of International Law* 264-331

³² Canada, Department of Fisheries and Oceans Canada, Report of the Roundtable on Improving the Management of Straddling Fish Stocks, 11 April 2003, available at http://www.dfo-mpo.gc.ca/media/backgrou/2003/hq-ac18a_e.htm

³³ Alex Oude Elferink, "The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks" (2001) 5 *Max Plank Yearbook of United Nations Law* 551-607

2.6 How to allocate?

A final set of principles relate to the question of how, or in what manner, RFMOs should allocate fishing opportunities. Neither the LOSC nor the FSA provide any specific principle to guide allocation processes. Rather, the FSA merely calls upon members of RFMOs “to agree, as appropriate, on participatory rights such as allocations of allowable catch or level of fishing effort”.³⁴ The FSA does set out a number of criteria that are relevant to the allocation issue although no indication is given of the relative weight of these criteria. Nevertheless, these criteria reflect a number of underlying legal principles including the precautionary principle, the ecosystem approach, the principles of non-discrimination and fairness, and the principle of recognition of the special requirements of developing states.

While argument persists over whether the precautionary principle is a principle or an approach, the precautionary approach is one of the ‘general principles’ enunciated in article 5 of the FSA. The details of the application of the precautionary approach is set out in article 6 which, at the risk of oversimplification, requires RFMOs to be more careful or cautious in their allocation decisions where information is uncertain, unreliable or inadequate. A number of RFMOs have been working to introduce the concept of precaution into their management decisions. However, particularly where considerable IUU fishing activity is occurring, this may require RFMOs to revisit and revise downward existing allocations. As experience in the CCSBT and other RFMOs has demonstrated, however, members are extremely loathe to reduce their allocations, even in the face of conclusive scientific evidence of the need to do so.

Article 5 of the FSA also requires the adoption of an ecosystem approach which protects not only the targeted stocks, but non-target associated and dependent species as well as the biodiversity of the marine environment as a whole. However, as experience in CCAMLR has shown, implementing an ecosystem approach is a difficult and complex matter. Moreover, in implementing an ecosystem approach RFMOs may again need either to revise downward allocations of targeted stocks or otherwise restrict the manner in which fishing activities are carried out.

The fundamental principles of non-discrimination and fairness also apply in the allocation context, although their successful implementation may be far from assured. In the quest for compatibility or high seas and EEZ measures, Article 7(2)(d) of the FSA requires states to consider the biological unity and other biological characteristics of stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned including the extent to which the stocks occur and are fished in areas under national jurisdiction. Sub paragraph (e) requires states to take into account the dependence of coastal states and high seas fishing states on the stocks concerned. Allocations which fail to consider any of these aspects will result in unfairness either to the coastal or the fishing states which in turn will be evidence of discrimination against one or the other.

³⁴ FSA Art 10 (b)

The FSA is particularly concerned with how RFMOs should allocate participatory rights to new members. Article 11 sets out a non-exhaustive list of criteria to be considered including: the status of stocks and level of current fishing effort; the respective interests, fishing patterns and fishing practices of new and existing members; the respective contribution of new and existing members to the collection and provision of data and conduct of scientific research on the stocks; the needs of coastal communities which are dependant mainly on fishing for the stocks; the needs of coastal states whose economies are overwhelmingly dependent on the exploitation of living marine resources; and the interests of developing states in the region in whose areas of national jurisdiction the stocks also occur. Nevertheless, even a cursory glance at these criteria seems to indicate that they are weighted in favour of existing fishing effort and existing compliance with RFMO regimes to which states may not even be party. Moreover, as Molenaar notes, these criteria relate not only to situations where fishing opportunities are to be allocated but may also encompass situations where no allocations are made at all.³⁵ In this case there will be little incentive for new entrants to join RFMOs. Thus, these criteria neither necessarily discourage unregulated fishing, nor compel fairness and non-discrimination in the allocation of fishing opportunities.

This may be somewhat ameliorated in the case of developing states by the operation of articles 24 and 25 of the FSA which call for recognition of the special requirements of developing states and set out the forms of cooperation by which assistance to meet those special requirements is to be provided. However, while FSA parties are to assist developing states to develop their own fisheries for straddling and highly migratory fish stocks, to enable them to participate in high seas fisheries, and to facilitate their participation in RFMOs, cooperation for these purposes is to take the form of financial assistance, human resources development, technical assistance, transfer of technology through joint venture arrangements, and advisory and consultative services. Nothing in the FSA gives developing states a *prima facie* right to an allocation of high seas fishing opportunities. Yet it will be recalled that all states have the right for their vessels to fish on the high seas.

In an undersubscribed or unregulated fishery new entrant developing states will likely have little difficulty obtaining an allocation. However, in many RFMOs the most lucrative fisheries are already fully or over-subscribed. Thus, the only way developing states or other new entrants might receive an allocation is if existing members of an RFMO either willingly reduce their own allocations, a level of altruism not yet evidenced by members of RFMOs, or agree to possibly unsustainable capacity increases. One alternative, which has been adopted in NAFO, is to provide new entrants with allocations in respect of new and unallocated fisheries only.³⁶ Other RFMOs provide allocations to new entrants from 'others quotas' or that portion of the allocation that is set aside to account for fishing by cooperating non-members. Another approach is found in the Fleet

³⁵ Molenaar, *supra* note 17 at 468

³⁶ NAFO Resolution to Guide the Expectations of Future New Members with Regard to Fishing Opportunities within the NAFO Regulatory Area, *supra* note 20.

Capacity Resolution³⁷ adopted by the Inter-American Tropical Tuna Commission (IATTC) which only allows for allocation of fishing opportunities to new entrants where they make arrangements to replace a vessel already listed on the IATTC Vessel Register. The overall effect of all this is, however, that neither articles 24 and 25, nor these allocation approaches, necessarily discourage unregulated fishing or encourage developing countries to join RFMOs. Instead, they lead to the perception that the ‘haves’ will continue to have (albeit it often in continually decreasing amounts) and the ‘have nots’ will continue to be left to settle for the left-overs.³⁸

Of course the issues of allocation criteria and new entrants are not co-extensive. Allocating fishing opportunities as between members is an important – and almost always contentious – aspect of RFMO activity. Despite continuing scientific advice of the need to limit catches of bigeye tuna, the IOTC has not yet been able to adopt any system of allocation of fishing effort. Rather it has merely called on members to limit their catches to “recent level of catch reported by the Scientific Committee” and has determined that at its next meeting in 2006 it will establish interim catch levels for cooperating non-members.³⁹ The IATTC has taken a different approach by attempting to limit fleet capacity.⁴⁰

Some RFMOs are now moving to adopt detailed allocation criteria. The ICCAT Criteria for the Allocation of Fishing Possibilities,⁴¹ adopted in 2001, are the most comprehensive example to date and apply to all stocks when allocated by ICCAT. Included are criteria relating to: past/present fishing activity; the status of the stocks; the status of the qualifying participant states; and the record of compliance or cooperation by participant states. Also included is a list of nine conditions for applying the criteria including the requirement that they be applied in a fair and equitable manner with the goal of ensuring opportunities for all qualifying participants and that they should be applied in a manner that encourages cooperating non-members to become members where they are eligible to do so. Interestingly, however, no qualifying participant shall trade or sell its quota allocation or any part thereof. The approach proposed by Korea in the CCSBT would not work in ICCAT. After a rather rocky start to its implementation, which resulted in the Commission failing to reach agreement on any allocations in 2001, the allocation process appears to have improved to the point that in 2005 Taiwan’s allocation was significantly reduced due to its continuing failure to comply with Commission measures and its involvement in IUU fishing, both conditions to be considered in applying the allocation criteria.

³⁷ Resolution on Capacity of the Tuna Fleet Operating in the Eastern Pacific Ocean, June 2002

³⁸ Rosemary Rayfuse, “The Challenge of Sustainable Fisheries” in Nico Schrijver and Friedl Weiss (eds) *International Law and Sustainable Development, Principles and Practice* (Brill, 2004) 467-499 at 487

³⁹ IOTC Resolution 05/01 on Conservation and Management Measures for Bigeye Tuna

⁴⁰ IATTC Resolution on Fleet Capacity of the Tuna Fleet Operating in the Eastern Pacific Ocean, June 2002

⁴¹ ICCAT Recommendation 01-25

In contrast, the NAFO Draft Guidelines for the future allocation of fishing opportunities for the stocks not currently allocated⁴² set out four criteria only: historical fishing in accordance with NAFO rules during a representative reference period; contribution to research and data collection on the stock concerned; needs of coastal communities which are dependent on fishing for the stocks concerned; and/or contribution to the NAFO Conservation and Enforcement Measures. Disputes over allocation in NAFO are legend and it is not clear how these criteria will assist in resolving them, or the problem of unregulated fishing in general. Similarly, while the CCAMLR approach of ‘olympic’ style fisheries overcomes the problem of disputes over allocations between members it does not entirely, at least in the absence of an effective enforcement regime, resolve the problem of IUU fishing.

3.0 Reconceptualising the Legal Principles relevant to Regional Allocation Issues

The challenge of allocation has elsewhere been stated to be to ensure that “each and every participant anticipates receiving long-term benefits from the cooperatively managed fishery that are at least equal to the long-term benefits it would expect to receive in the absence of collaboration”.⁴³ The question is what legal principles might better assist RFMOs to meet this goal?

First, the principle of freedom of fishing could be retired from the pantheon of fundamental principles. Indeed, the continued articulation of the principle is both inaccurate and misleading, if not downright disingenuous. As noted above, the ‘freedom’ has long been subject to a developing range of limitations and exceptions including the obligation to cooperate in respect of the conservation and management of high seas fish stocks, through the establishment, where appropriate, of RFMOs. The corollary of this is that where a state fails in its duty to cooperate it forfeits the right for its nationals to participate in the ‘freedom’ of fishing. While the content of the obligation to cooperate is still developing it arguably now involves, at a minimum, the obligation to either agree to abide by the measures adopted by RFMOs or refrain from fishing. States who authorise or otherwise permit their vessels to fish in contravention of RFMO measures, or who fail to restrain their vessels from engaging in IUU fishing, or to take effective action against any of their vessels that have engaged in IUU fishing are in breach of their duty and forfeit the right for their nationals to fish. Other states may then take countermeasures against the breaching state which might even include the arrest of the vessels concerned.

Next, the principle of exclusivity of flag state jurisdiction could also be retired. Like the freedom of fishing, flag state jurisdiction is not, in fact, exclusive. Rather, it is only primary, and is conditioned by reference to a number of exceptions. Where a flag state fails to meet its responsibilities a secondary jurisdiction over its vessels may be vested in

⁴² NAFO: Meeting Proceedings of the General Council and the Fisheries Commission for 2002/2003, Annex 11 at 172-173

⁴³ Report of the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks, *FAO Fisheries Report* No 695 (Rome, FAO 2002) at 8

non-flag states⁴⁴ which might then take enforcement action against recalcitrant vessels. Moreover, the principle of flag state jurisdiction itself could be rejected or modified with the power to flag residing in the RFMO. A less drastic approach would be to require ‘dual-flagging’ on high seas fishing vessels. In either case, only vessels authorised by the RFMO and flying its flag would be entitled to engage in a high seas fishery. All other vessels would be *prima facie* IUU vessels and subject to arrest or other measures either by the enforcement services of the RFMO or by any other state.

Next, the institutionalisation of RFMOs could be further strengthened by acceptance that RFMOs act as the custodians of all high seas fisheries on behalf of the international community as a whole. To that end RFMOs could be given the power not only of binding regulation and allocation in consultation with coastal states in whose waters the relevant stocks are also found, but could also possess the machinery necessary to enforce that regulation. A fair, equitable, and non-discriminatory allocation strategy along these lines might then involve an RFMO setting overall catch limits for species and auctioning off quotas to commercial operators – as opposed to states. The proceeds of the auction would then go to fund the operation of the RFMO, its scientific research and its enforcement services which could also be utilised by coastal states seeking to ensure that high seas operators are not operating illegally in their waters. In other words, the solution to both the allocation and IUU fishing issues might lie in the development of individual property rights in high seas fisheries which are allocated, overseen and enforced by RFMOs.

4.0 Conclusion

It is acknowledged that the above suggestions are controversial and not fully developed. However, it is often said that the question of allocation cannot be dealt with until the issue of IUU fishing is resolved. Yet, perhaps what is needed is a reconceptualisation of the problem. In other words, perhaps the solution to IUU fishing lies in finding a new legal paradigm in which ‘allocation’ takes place. Radical, lateral and controversial thinking may be what is needed to awake in our minds a “consciousness that is attuned to the pulsation of Reality”. A metaphorical Zen-like ‘slap in the face’ may be what is needed to hasten the attainment of enlightenment in the context of regional allocation issues.

⁴⁴ For a comprehensive analysis of this issue see Rayfuse, *supra* note 9