

The Southern Indian Ocean Fisheries Agreement (SIOFA) 6th Meeting of the Parties
01-05 July 2019

Pearle Beach Resort & Spa conference centre, Flic en Flac, Mauritius

MoP6-INFO-10

ABNJ Deep Seas Project Workshop on rights-based management for
deep-sea fisheries Summary of Conclusions

Relates to agenda item: 14.3

Proposal ☐ Working Paper ☐ Information Paper ☒ Other Document ☐

FAO ABNJ Deep Seas Project

SUMMARY

From 10 -12 April 2019, a group of international experts met in Rome to identify and evaluate the issues relating to existing and future possible implementation of rights-based management of high seas fisheries. The group reviewed the development of international law as it relates to the high seas fisheries with particular emphasis on the Convention on the Law of the Sea in how it provides for access to high seas fisheries and the obligations this access involves and the implications for those wishing to enter fully prescribed fisheries. This assessment provided a basis for discussing the legal basis that allows Regional Fisheries Management Organizations (RFMOs) to manage harvesting entitlements to fish stocks or to effort, capacity, or habitat impact in their jurisdiction in a manner that ensures that the incentives for effective and efficient management that rights-based management (RBM) that are found in seas under national jurisdiction may also be obtained from high seas fisheries.

The workshop reviewed the constraints to implementing RBM for high seas fisheries with particular emphasis on the issues that are encountered when RFMOs encounter the wish of new entrants to enter or when coastal Contracting Parties to the Convention wish to expand fishing in fisheries that are fully subscribed, and that, in contrast to national systems, international rights are comprised of two rights, the Flag State right and the right to catch, effort, capacity, or habitat impact. The RFMO sets the overall objectives, system for monitoring, control, surveillance, and reporting, and allocates first to CPCs which then allocate to vessels. The workshop benefited from insights provided by experts involved in a number of relevant RFMOs, particularly those with deep-sea fisheries. This provided the basis to reflect on the practical considerations arising from implementation of quotas and especially how the attributes of harvesting entitlements can be structured to ensure that benefits from fisheries management are optimized.



ABNJ Deep Seas Project

Workshop on rights-based management for deep-sea fisheries

Summary of Conclusions¹

Background

From 10 -12 April 2019, a group of international experts met in Rome to identify and evaluate the issues relating to existing and future possible implementation of rights-based management of high seas fisheries. The group reviewed the development of international law as it relates to the high seas fisheries with particular emphasis on the Convention on the Law of the Sea in how it provides for access to high seas fisheries and the obligations this access involves and the implications for those wishing to enter fully prescribed fisheries. This assessment provided a basis for discussing the legal basis that allows *Regional Fisheries Management Organizations* (RFMOs) to manage harvesting entitlements to fish stocks or to effort, capacity, or habitat impact in their jurisdiction in a manner that ensures that the incentives for effective and efficient management that *rights-based management* (RBM) that are found in seas under national jurisdiction may also be obtained from high seas fisheries. The workshop reviewed the constraints to implementing RBM for high seas fisheries with particular emphasis on the issues that are encountered when RFMOs encounter the wish of *new entrants* to enter or when coastal Contracting Parties to the Convention wish to expand fishing in fisheries that are fully subscribed, and that, in contrast to national systems, international rights are comprised of two rights, the Flag State right and the right to catch, effort, capacity, or habitat impact. The RFMO sets the overall objectives, system for monitoring, control, surveillance, and reporting, and allocates first to CPCs which then allocate to vessels. The workshop benefited from insights provided by experts involved in a number of relevant RFMOs, particularly those with deep-sea fisheries. This provided the basis to reflect on the practical considerations arising from implementation of quotas and especially how the attributes of harvesting entitlements can be structured to ensure that benefits from fisheries management are optimized.

Major Conclusions of the Workshop

Rights Based Fisheries Management

A first question addressed by this meeting was why are property rights in fisheries management important? Property rights as a means of fisheries management that provide for economic incentives for effective fisheries management. Such economic incentives are major determinants of the behaviour and decision-making by fisheries operators, both within the fishing industry and by contracting parties as perceived through their own national interests.

¹ A report of the Workshop will be available shortly.

Property rights have a range of “ownership”. Fishing rights can range from a revocable privilege to the status of property, where they provide for secure harvesting entitlements that the owner may sell or lease (if they wish) and usually entitle the holder to catch a certain fraction of the total allowable catch (TAC) or to deploy a specified amount of fishing effort, e.g. days at sea, trap days, etc. TAEs). Rights in many forms already exist in almost all fisheries, e.g. the right to fish in a specified area, to use a vessel or gear of specified characteristics and/or to harvest a specified annual catch. These ‘rights’ are usually specified in some form of an annual fishing permit/licence.

Such rights inevitably involve various responsibilities, such as funding of the fisheries management. The regulatory compliance regime continues as before, but because the rights are exclusive (i.e. increases in the total allowable catch, effort or however capacity is measured, management and compliance with conservation regulations is improved and it is the rights holders who benefit. The fishing industry, and the fishermen themselves, have an incentive to comply with regulations. Experience has shown that in the absence of (well defined) access rights, there is an incentive to overcapitalize the fishery by investing in excess fishing capacity in an effort to secure or maintain a share of the catch. If there is a TAC/TAE/TACAPACITY, the management authority often must shorten the fishing season exacerbating economic inefficiencies as the vessels ‘race’ to land product of a minimum quality irrespective of the current market demand. If vessels are to maintain their share of the catch, they may need to operate in bad and hazardous weather: safety records improve when harvesting entitlements are secure and operators can fish when it is safe to do so without fear of loss of catch share.

Within countries, states maintain sovereign rights over their fisheries resources, and so have authority to control fishing entitlements. But in high seas fisheries, no single state has sovereign rights; rather the mandate of setting TACs/TAEs/etc. and assigning quotas is usually within the power of the corresponding regional fisheries organization where they exist – now for most of the world’s high seas.

Establishing rights-based fisheries management regimes can be contentious, but world-wide experience now shows that where there is a will and good faith, negotiations on how to share the TAC among participants can be successfully achieved and should not be a reason to avoid this type of management. Experience shows that incentivizing fishers to align their self-interests with the collective interest of the fishery and RFMO and eliminating the need to compete for a share of available resource results in obtaining increased profitability and social welfare from the fishery and profitability of fishing operations. At the same time, this method of management creates incentives to conserve fishery resources – they become a financial asset, e.g. and when appropriately secure can even be used as collateral for financing.

Other classes of property rights exist for a variety of reasons. Usufruct rights usually have a limited duration and their transferability may be stinted. Other forms of entitlement may also be used such as entitlement to use so much fishing effort, e.g. days at sea or numbers of traps/hooks. Even impacts on benthic habitat may be traded among ‘quota’ holders with the total possible benthic impacts determined to ensure conservation of benthos vulnerable to damage from contact with fishing gear. Such a method is successfully used in the British Columbia deepwater trawl and impact limits are under development in the Mediterranean fishery.

Creation of property rights or credits can proceed through incremental and gradual steps. Experience shows that the transition to well-developed property rights can require considerable time. Gradual transition allows experimentation and reduces the uncertainty about overall level and distribution benefits and costs, advantages and disadvantages. What global experience does show is that the characteristics of such methods of management are dynamic with learning by doing, and rights holders identify improved methods of defining their rights and administering them so as to increase the value provided by this asset.

International rights are comprised of two rights, the Flag State right and the right to catch, effort, capacity, or habitat impact. Management works at two levels. The RFMO sets the overall management objectives, including

monitoring, control, surveillance, and reporting requirements. RFMOs allocate first to CPCs which then allocate to vessels. CPCs implement the RFMO management requirements.

What do Legal Advisors have to say about this issue?

The session on the role of the United Nations Convention on the Law of the Sea addressed what the convention says about rights-based management in the context of the areas beyond national jurisdiction (ABNJ). The ABNJ is defined to comprise the high seas – the area beyond the exclusive economic zone (EEZ) of any State, whose outer limit can be no more than 200 nautical miles from the territorial sea baselines (UNCLOS Articles 57 & 86) and the deep seabed beyond the continental shelf of any State (sometimes referred to as “the Area”), whose outer limit either coincides with the EEZ or can be more seaward where a wider continental margin is present (UNCLOS Article 76).

In the innermost part of ABNJ the seabed may be under coastal State jurisdiction with regulations to protect the seabed marine environment. As with the 1958 High Seas Convention before it, UNCLOS Article 87 codifies that freedom of fishing be exercised with due/ reasonable regard to other States’ interests. The deep seabed and its minerals are under the “common heritage of mankind” regime of UNCLOS Part XI, with a single owner, the International Seabed Authority, managing them for the benefit of the whole international community. This is sometimes seen as a model for fisheries in the ABNJ, but at present the living resources remain under the high seas regime.

UNCLOS Article 87(1) reproduces the 1958 high seas freedom of fishing language, but subjects it to section 2, i.e. Articles 116-119. Article 116 notes that all States have the right for their nationals to engage in fishing on the high seas, **subject to** (a) their treaty obligations (i.e. RFMO treaties and the decisions made under them); (b) the rights, duties & interests of coastal States provided *inter alia* in Article 63(2) ... (i.e. straddling stocks), and (c) Articles 117-119.

Article 117 notes the duty of States to take, or to **co-operate** with other States in taking such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. Article 118 notes States must **co-operate** with each other in the conservation and management of high seas living resources. States, whose nationals exploit the same living resources, or different living resources in the same area, must negotiate with a view to taking the measures necessary for the conservation of those resources and cooperate to establish RFMOs to this end.

Article 119 notes that the: allowable catch and other conservation measures for the high seas must be designed to maintain or restore populations of harvested species to the level that produces maximum sustainable yield as qualified by relevant environmental and economic factors, while maintaining or restoring populations of associated or dependent species above levels at which their reproduction may become seriously threatened.

These requirements present no impediment to rights-based management (RBM) if it helps achieve the above, but paragraph specifies that **States concerned must ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.** But nothing in any provision deals expressly with RBM. It is neither prohibited nor compulsory. So it can be pursued, but subject to the duties of cooperation and non-discrimination already outlined. So, the question is: can RBM avoid discriminating against those without rights? The answer is yes, if it is done carefully.

Part V on the EEZ, Article 72(1) on an *a contrario* reading offers a strong clue that a particular form of RBM is lawful. Article 72, which refers to *Restrictions on transfer of rights* notes that Rights provided under articles 69 and 70 [to landlocked and geographically disadvantaged States] to exploit living resources [in nearby States’ EEZs] *shall not be directly or indirectly transferred to third States or their nationals* by lease or licence, by establishing joint ventures or in any other manner which has the effect of such transfer unless otherwise agreed by

the States concerned. This implies *that such rights are ordinarily transferable; otherwise no such prohibition would be necessary.*

RFMOs: What are they doing and what can they do?

This partly depends on how the term rights-based management is understood. If TACs are divided into national allocations, then several RFMOs with deep-sea fisheries are already engaging in RBM for at least some of their stocks: NAFO, NEAFC, SPRFMO (as are the tuna RFMOs CCSBT, ICCAT and indirectly also IATTC), but not CCAMLR, GFCM, NPFC, SEAFO nor SIOFA. Others are discussing allocation criteria before making any allocation: IOTC is furthest advanced in this but this is not a prerequisite, e.g. ICCAT's 2001 allocation criteria came long after it had started making allocations.

By contrast, RBM based on property rights revolves around transferability of allocations at national or international levels. At national levels with ITQs (individual transferable quotas, also going by different names) each RFMO Member State is free to decide under its domestic law whether to adopt these or similar management tools. At the international level the transfer of part or even all of a national allocation from one member to another has happened in NAFO and to a more limited extent in NEAFC and also in ICCAT (despite default prohibition in allocation criteria). It is also tolerated among Parties to the Nauru Agreement Vessel Day Scheme by the WCPFC. So, RFMOs vary in how freely they allow such transfers, e.g., notification only in NAFO, permission always required in ICCAT. Hybrid models are possible, authorizing some transfers in advance but not others.

Because there is no international property law as such there is a need to design each RBM system from scratch, but this also allows for flexibility. Permission of RFMOs is needed in principle to prevent objection by non-parties to the transaction, which have a right, thereby waived, to hold the gaining member to its original contractual allocation. The regional vessel register of the IATTC allows trading in capacity (hold volume) quota among owners of vessels under different flags. However, reflagging led to loss of control by flag States, some of whom have protested believing (or claiming) capacity quota as a sovereign property right. The GFCM is planning something similar, but only after initial allocations, not yet made, while the IBSCF (now defunct) was very liberal on trading, even to non-members, though all of its Convention Area was under national jurisdiction, which was probably not coincidental.

Proposals have been made to let company quota holders deal directly with each other but report transactions to the RFMO Secretariat (as well as their own flag States. There are no barriers to this in theory, but States may be unwilling to yield the control necessary to make this possible. RFMO decisions seem to deny transfers have any effect on long-term allocation despite the quota being leased year after year rather than sold. Thus, while several RFMO members see the advantages of property rights in principle, in practice they have been reluctant to 'grasp the nettle' (though some WCPFC members have commended the Bellagio Framework).

What is the cause of this problem? Treaties bind only their parties unless they codify practice or it has acquired the status of customary international law – which cannot be said of RBM. Article 34 (and 38) of the Vienna Convention on the Law of Treaties mean that catch or effort limits are binding only on those States "inside the tent" of the RFMO (including cooperating non-members) and not on outsiders. This reduces the incentive to cooperate, as the benefit of freedom to fish may be lost to new entrants. Tensions may occur between (i) purely forward-looking economic arguments for closure to new entrants, and (ii) the legal constraints, notably UNCLOS Art 119(3) – that there be no discrimination in form or in fact against the fishermen of any State.

The result is that both legitimate and illegitimate forms of pressure are exerted on non-members not to fish. Legitimate means include denial of access to ports for their vessels and markets for fish caught by them, in particular, Article (4) through which RFMOs are competent to prescribe conservation and management measures

for stocks. States with a real interest in a specific fishery must give effect to their duty to cooperate by becoming members of such bodies or applying their measures, or refrain from fishing for that stock.

Article 17 notes that parties that are non-members or non-participants in RFMOs or similar arrangements, and do not agree to apply their conservation and management measures, must still cooperate in the conservation of relevant fish stocks. In particular, they must not authorise their vessels to engage in fishing for straddling and highly migratory stocks subject to any RFMO conservation and management measures.

Will/can the UNFSA Article 8(3), (4) rule, requiring RFMOs to be open to those with a “real interest” (which remains undefined), who must either join or cooperate, or refrain from fishing for the stocks in question, become custom? Some RFMOs are closed to new entrants, subject to a vote of existing members. Arguably they cannot invoke Art 8(4).

The list of six criteria in UNFSA Article 11 influence allocations to new entrants (but there is neither hierarchy nor weighting)? This suggests that RFMOs must make some allowance for new entrants and cannot tell them that the only way to cooperate is not to fish (though this in effect is what NAFO and NEAFC do). But the 21st century emphasis on IUU (illegal, unreported and unregulated) fishing essentially conflates unregulated with illegal, which risks making the right to join meaningless because new entrants get no guaranteed share of the benefits.