

## Assessing the role of equity in fisheries allocation decisions

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In June of this year, a Review Panel, established under article 17 and annex II of the [Convention for the Conservation and Management of High Seas Fishery Resources of the South Pacific Ocean](#) (the Convention), released its [Findings and Recommendations](#) with respect to an objection presented by the Republic of Ecuador.

Ecuador objected to Conservation and Management Measure [CMM 01-2018](#), adopted by the Commission of the South Pacific Regional Fisheries Management Organization (SPRFMO) on 3 February 2018. CMM 01-2018 allocates the quota of the total allowable catch (TAC) for Jack mackerel for 2018 among the states parties to the Convention participating in the fishery.

The Convention provides the Commission with extensive decision-making powers, including for the adoption of conservation and management measures and the establishment of participatory fishing rights for fishery resources (Convention, Article 8(a)(b)). Article 17(1) of the Convention states that decisions on questions of substance adopted by the Commission shall become binding on the members. Article 17(2) allows any member of the Commission to object a binding decision within 60 days of the date of notification. The objection is only admissible if the objected decision unjustifiably discriminates in form or in fact against the member of the Commission or is inconsistent with the provisions of the Convention or other relevant international law as reflected by the [1982 United Nations Convention on the Law of the Sea](#) (UNCLOS) and the [1995 United Nations Fish Stocks Agreement](#) (UNFSA) (Article 17(2)(c)). In accordance with article 17(5)(a), when a member presents an objection a Review Panel must consider the objection and provide for independent findings and recommendations.

The objection procedure requires that the objecting member clarifies the grounds for its objection, adopts alternative measures that are equivalent in effect to the decision to which it has objected and have the same date of application, and advises the Executive Secretary of the terms of such alternative measures (Article 17(2)(b)).

Ecuador argued that the quota percentage allocated to it by CMM 01-2018 was too small to enable the development of a high seas fishery for Jack mackerel. Based on its status as a developing country with an aspiration to develop a fishery for the stock in question Ecuador argued that the decision was inconsistent with the provisions on developing states contained in the Convention, UNCLOS and UNFSA. Furthermore, Ecuador argued that the allocation decision was based on the criterion of historic catch thereby resulting in unjustifiable discrimination against Ecuador, since Ecuador has no historic catch record for Jack mackerel on the high seas.

Essentially, Ecuador perceived the allocation outcome of CMM 01-2018 as inequitable in relation to itself and its interest in and right to development. This triggers the delicate discussion of what can be legally perceived as an equitable allocation.

Although neither UNCLOS nor UNFSA incorporate equity or references to it in the provisions governing the conservation and management of fisheries, the jurisprudence of the International Court of Justice suggests that allocation decisions should target an equitable outcome/result ([1974 Fisheries Jurisdiction Case](#) para. 69-77). In international law, an equitable outcome is achieved through

cooperation guided by equitable principles, which includes the balancing of the relevant factors and interests of the parties ([\*Tunisia-Libya Continental Shelf Case\*](#) para. 71).

There is no clear international rule that explains how fishing quotas must be allocated among states. Nevertheless, articles 7(2) and 11 of UNFSA seemingly attempt to incorporate the relevant factors and interests of states which should be balanced in making allocation decisions. Article 7(2) is directed at ensuring that conservation and management measures for areas under national jurisdiction and for the high seas are compatible. It lists considerations that should be taken into account when establishing compatible measures, including; the biological unity of the stocks, the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region (this includes the extent to which the stocks occur and are fished in areas under national jurisdiction), and the dependence of both coastal states and high seas fishing states on the stocks concerned.

The criteria provided by article 11 should be taken into account in determining participatory rights for new members of a regional fisheries management organization (RFMO). Article 11 references: (a) the status of the stocks and existing fishing efforts; (b) the interests, fishing patterns and fishing practices of new and existing members or participants; (c) the contributions of new and existing members or participants to conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks; (d) the needs of coastal fishing communities which are dependent mainly on fishing for the stocks; (e) the needs of coastal states whose economies are overwhelmingly dependent on the exploitation of living marine resources; (f) and the interests of developing states from the subregion or region in whose areas of national jurisdiction the stocks also occur.

It is difficult to determine how equity has influenced the application of allocation criteria in practice, particularly because decision-making on allocation commonly occurs through closed negotiations. This blog post reflects on the procedure initiated by Ecuador, as well as the arguments presented by the parties and the findings and recommendations of the Review Panel. In doing so, it seeks to establish the Review Panel's contribution to determining what can be considered to be equitable allocation decisions.

The post first discusses the legal framework and criteria for decision-making on allocation within the SPRFMO, including the provisions on the interests and aspirations of developing states. Following that it makes some observations on the necessary elements of an equitable allocation decision and discusses as well what might amount to an allocation decision that was inconsistent with the applicable rules. It briefly comments on the implications of objection procedures and finally it provides some concluding remarks.

### **Interests and aspirations of developing states**

The Convention was adopted on 14 November 2009 and the SPRFMO officially established in August of 2012. There are fifteen state parties: Australia, the People's Republic of China, Cuba, the European Union, the Republic of Korea, Peru, Chinese Taipei, Vanuatu, Chile, the Cook Islands, Ecuador, New Zealand, the Russian Federation, the United States and Denmark in respect of the Faroe Islands. The four Cooperating non-Contracting Parties (CNCs) are Colombia, Curacao, Liberia and Panama.

The Convention area covers the area of the high seas of the South Pacific. Jack mackerel is one of the most economically important stocks covered by SPRFMO, together with Jumbo flying squid. The states currently participating in the Jack mackerel fishery are Cuba, the Republic of Korea, the

Russian Federation, Ecuador, Chile, Peru, the Cook Islands, the European Union, the Faroe Islands, the People's Republic of China and Vanuatu.

Besides Ecuador and the Commission, Peru, Chile, Australia and New Zealand all submitted memoranda with regard to the objection presented by Ecuador. Peru, Chile and New Zealand were present as participants at the oral hearings, whereas Australia and Chinese Taipei were present without participating. The critical engagement of these different parties illustrates the importance attached to allocation issues by the members of the SPRFMO.

As the main foundation for its claim that CMM 01.2018 is inconsistent with the Convention, UNCLOS and UNFSA, Ecuador invoked the provisions relating to the interests and aspirations of developing states incorporated by these instruments.

In line with articles 7 and 11 of UNFSA, article 21(1) of the Convention provides for a list of criteria that must be taken into account, *to the degree relevant*, when taking decisions regarding the allocation of a TAC. The fisheries development aspirations and interests of developing states, and the interests of (developing) coastal states in fisheries that straddle their exclusive economic zones (EEZs) and the high seas area covered by the Convention, are laid down in article 21(1)(e) and (f). As pointed out by the Commission, as well as by Peru, Chile, Australia and New Zealand, the interests of developing states are one criterion out of the multiple criteria that must be considered in the negotiation process under the Convention.

Other criteria included are; historic catch and past and present fishing patterns (21(1)(a), compliance with conservation and management measures under the Convention (21(1)(b), capacity and willingness to exercise effective flag state control over fishing vessels (21(1)(c), contribution to the conservation and management of fishery resources including the provision of accurate data and effective monitoring, control, surveillance and enforcement (21(1)(d), the needs of coastal states and territories whose economies are dependent mainly on the exploitation of a fishery that straddles their areas of national jurisdiction and the Convention area (21(1)(g), contributions to the development of new or exploratory fisheries, and contributions to the conduct of scientific research (21(1)(i) and (j).

The language of article 21(1) suggests that the relevance of each criterion is not pre-established and will vary, according to the different circumstances of the particular case under negotiation. As pointed out by the Commission at the oral proceedings, article 21(1) does not oblige the parties to give explicit weight to each single criterion. The Commission opined that such an obligation would lead to unworkable negotiations in practice. It is therefore left to the discretion of the parties to decide how the criteria of article 21(1) are applied in reaching allocation decisions, in light of the specifics of the case (Findings, para. 92, 93).

Moreover, Ecuador referred to article 3 of the Convention, which recognizes the interests of developing states and the needs of developing state coastal communities as part of the principles that must be applied in giving effect to the objective of the Convention and in carrying out decision-making under the Convention. Furthermore, Ecuador invoked article 19 of the Convention, which recognizes the special requirement of developing states, and therefore complements article 24 of UNFSA.

The Panel recognized the importance of the provisions relating to the interests, aspirations and needs of developing states, especially within the SPRFMO which has many developing states among its members (Findings, para. 94). Whereas the interests of developing states are undeniably recognized by the law governing fisheries, that law fails to indicate what weight they should be

accorded in the decision-making on allocations. Therefore, while these provisions must be treated seriously, they provide no legal guarantee as to the outcome of allocation decisions.

### **Equitable allocation**

At the hearing the participants noted that the outcome of any allocation decision is subordinate to the objective of the Convention; to ensure the long-term conservation and sustainable use of fishery resources and, in so doing, to safeguard the marine ecosystems in which these resources occur (Convention, article 2). This objective reflects the principal aim of the duty to cooperate, incorporated by UNCLOS part VII section II – to ensure conservation and management of the living resources of the high seas. Allocation decisions form an important aspect of the duty to cooperate as these decisions can directly affect the conservation of stocks.

As mentioned before, the objection procedure requires that the objecting member adopts alternative measures that are equivalent in effect to the decision to which it has objected (Convention, article 17(2)(b)(ii)).

The alternative measure advanced by Ecuador proposed an increased capture capacity for Jack mackerel in the Convention area, from 517,582 tons to 522,705 tons. Ecuador referred to the TAC that was recommended by the Scientific Committee in 2017, which was set at 576.000 tons. On this basis Ecuador claimed that the increase of 5123 tons could be taken from the ‘reserve’ of 58.218 tons (i.e. the difference between the TAC recommended by the Scientific Committee and the TAC established by CMM 01-2018). The increase of 5123 tons would afford Ecuador a higher quota, of 1.13 percent.

In its findings the Panel clarified that the recommendation by the Scientific Committee applies to the entire range of the stock, comprising the areas of the high seas, as well as areas under the national jurisdiction of Chile, Ecuador and Peru. Since Chile expressly consented to the inclusion of its EEZ within the area of application of CMM 01-2018, the measure allocates the TAC for Jack mackerel only for the areas of the high seas and for the EEZ of Chile (Findings, para. 113-114). The ‘reserve’ is therefore set aside for the remaining Jack mackerel fishery in the EEZs of Ecuador and Peru (Findings, para. 117,118).

At the oral proceedings the Commission contended that Ecuador’s proposed increase of the TAC would be inappropriate for securing conservation of the stock in question. The Panel agreed that the alternative measure was not reconcilable with the purpose of CMM 01-2018 to ensure conservation of the stock (Findings, para. 118). Moreover, the proposed increase of the TAC for the high seas would affect the catches of Peru and Ecuador in their EEZs. On this basis, the Panel concluded that the alternative measures proposed by Ecuador is not equivalent in effect to the decision to which the objection has been presented. (Findings, para. 118 and page 34)

During the hearings several participants, including the Commission, expressed their willingness to accommodate Ecuador’s interests eventually. The Commission indicated that it is first necessary for Ecuador to step up its cooperation efforts; that it presents objective proof of its real aspiration to develop a high seas fishery for Jack mackerel, and that it actively engages within other areas of the RFMO, such as scientific research, enforcement and the drafting of conservation and management measures. (Findings, para. 125)

On this basis, subject to long-term, consistent, inclusive and transparent cooperation in good faith, the Panel anticipated that it would be possible in the future to adopt a solution that would accommodate Ecuador’s aspirations (Findings, para. 123).

Since the Panel found no legal basis to establish that the Commission acted outside its margin of discretion in applying the criteria listed in article 21(1), it did not find that CMM 01-2018 was inconsistent with the Convention, UNCLOS and UNFSA (Findings, para. 97). The Panel clarified that an inconsistency can be identified in cases where it is evident that an allocation was exclusively based on only one of the criteria listed in article 21(1) (Findings, para. 96). Since Ecuador and other states without any historic catch were still accorded a quota of the TAC by CMM 01-2018, the Panel found no evidence to establish that the decision was exclusively based on the criterion of historic catch (Findings, para. 108).

## **Objection procedures**

Objection procedures are incorporated in the decision-making procedures of multiple RFMO Conventions (e.g. North-East Atlantic Fisheries Commission (NEAFC), [article 12\(2\)](#); Northwest Atlantic Fisheries Organization (NAFO) 2007, [article XIV\(2\)](#); South East Atlantic Fisheries Organization (SEAFO), [article 23](#); South Pacific Regional Fisheries Management Organization (SPRFMO), [article 17\(2\)](#); Western and Central Pacific Fisheries Commission (WCPFC), [article 20\(6\)](#); and North Pacific Fisheries Commission (NPFCC), [article 9\(1\)\(c\) and \(e\)](#)). Prior to the objection presented by Ecuador, the procedure laid down in article 17 of the Convention was applied with a similar purpose in 2013 [when the Russian Federation objected to Conservation and Management measure CMM 1.01 adopted by the Commission](#). This is therefore the second Review Panel established under the Convention to consider an objected allocation decision. Although the findings and recommendations by independent panels are strictly linked to the specifics of the decision to which the objection is made, they may be useful in clarifying what are equitable applications of allocation criteria within the negotiation process.

Pursuant to annex II paragraph 10(i) of the Convention when the Review Panel finds that an objected decision is inadmissible, the objecting member or members of the Commission shall, subject to subparagraph (j), within 45 days implement the decision or institute dispute settlement proceedings under the Convention. Since 45 days have passed since the Panel released its findings and recommendations, it can be assumed that Ecuador has agreed to implement the decision.

## **Concluding remarks**

Based on the findings and recommendations of the Review Panel discussed by this post, some assumptions can be made as to what can be considered to be an equitable allocation. An equitable allocation is arrived at on the basis of good faith cooperation. It must be evident that multiple criteria, which are reflective of the different interests of states, have been accounted for, thereby evidencing the intent of reaching an equitable outcome. If such an outcome does not correspond to the solution advocated by one or more of the states involved, this does not itself imply that the decision is inequitable. Equity is about the process, in which compromises have been made, but at the same time no one has been excluded. In practice, this translates into the balancing of multiple allocation criteria. An allocation arrived at on the basis of only one criterion, when multiple criteria are recognized to be of interest to the different participants, will arguably, be inequitable. Moreover, when it is clear that the Commission has acted outside of its margin of discretion on allocation, the outcome of its decision will probably qualify as inconsistent with international law, and as inequitable. Since the margin of discretion is wide, proving that it has been abused will in most cases be a challenging task (Findings, para. 92, 93).

RFMO membership and the aspiration to participate in a fishery are not automatically sufficient to secure the immediate accommodation of a quota as requested. At least within the SPRFMO it appears that the benefits deriving from cooperative efforts are affected by the prior input and involvement in the RFMO.

Finally, the outcome of any allocation decisions must be reconcilable with the conservation duty. This conforms to the duty to cooperate for the conservation and management of straddling and highly migratory fish stocks laid down in UNCLOS and further advanced by UNFSA.

Although allocation decisions remain the outcome of subjective processes of negotiation, procedures like this one present interesting opportunities to examine the reasoning behind what can or cannot be viewed as equitable decisions.

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