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Sustainable Fisheries Partnership Agreements:

A necessary harmonization of the scope and interpretation of the exclusivity clause

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Introduction

The EU Sustainable Fisheries Partnership Agreements (SFPA) consist of a framework agreement and application protocols that are renegotiated every 3 to 5 years on average, according to the agreements. The framework agreement specifies that the EU vessels can operate exclusively under the agreement. This exclusivity clause means that no EU vessel can operate outside the framework of the agreement, even when there is no protocol in force, the framework agreement remaining in effect.

The new Basic Regulation of the EU Common Fisheries Policy (CFP), entered into force on 1St January 2014, integrates for the first time specific provisions for the external dimension, including the exclusivity clause as a central element of the SFPAs.

On October 9, 2014, the Court of Justice of the European Union (CJEU), issued a ruling on the application of the exclusivity clause in the case of European fishing activities in Moroccan waters. In its judgment, the CJEU extends the application of this clause to chartered fishing vessels, - a strict interpretation of the exclusivity clause.

This ruling is certainly a step towards better control of EU fleets by their flag States, admittedly the contours and the implementation of the exclusivity clause remain irregular, differing from mixed to tuna agreements. This calls for reflecting on the need to harmonize its content and its implementation, and on the scope that the EU wishes to give to this exclusivity with the reformed CFP.

Background of the exclusivity clause

The SFPAs between the EU and third countries establish a bilateral framework allowing the fleets of the EU Member States to operate in EEZ of coastal States in Africa, the Indian Ocean, the Pacific and Greenland.

EU fleets must carry out fishing activities in accordance with the provisions of the agreement, protocol and annexes and are also subject to EU's and the third country laws and regulations. For its part, the EU is committed to ensuring that its fleet complies with the provisions of the agreement, the law of the partner State and the United Nations Convention on the Law of the Sea and other instruments international law and relevant RFMOs. The flag State has the primary responsibility to control its fleets and ensure that they meet these commitments.

SFPAs contain an exclusivity clause which states that only EU vessels holding a fishing authorization issued under the fisheries agreement are authorized to fish in the waters of the third country, when there is an SFPA signed by both parties, with an implementing protocol in force or not.

These exclusivity clauses should ensure that all European vessels fishing in the waters of the partner States obey the responsible approach and the governance principles promoted in the SFPA[1].

This provision is also clearly expressed in article 3 of Regulation (EC) no 1006/2008 on fishing authorisations (Fishing Authorisation Regulation - FAR):

> *"Only Community fishing vessels for which a fishing authorization has been issued under this Regulation are allowed to engage in fishing activities outside Community waters".*

However, based on existing agreements, there are different degrees of exclusivity, between mixed and tuna agreements.

In tuna agreements, the exclusivity clause is strict and does not allow any EU fishing activities outside the scope of the agreement, *ie* for species which are not covered by the Agreement/Protocol:

> *1. Union vessels may fish in [Country's name] waters only if they are in possession of a fishing authorisation on board, or a copy thereof, issued under this Agreement and the Protocol hereto. 2. The procedure for obtaining a fishing authorisation for a vessel, the fees applicable and the method of payment to be used by shipowners shall be as set out in the Annex to the Protocol."*
> (Article 6 "Fishing authorisations" of FPAs)

In mixed agreements though (Morocco, Guinea Bissau and Mauritania), the exclusivity clause allows access for species which are not covered by the agreement:

> *1. Community vessels may fish in the [Country's name] fishing zones only if they are in possession of a fishing licence issued under this Agreement. The exercise of fishing activities by Community vessels shall be subject to the holding of a licence issued by the competent Mauritanian authorities at the request of*

[1] *The justification for the exclusivity clause is the fact that the agreements establish a secure framework to control the fishing activities of the fleets of EU's Member States and to ensure that they are carried out in a responsible and legal manner*

the competent Community authorities. The procedures for the issue of licences and for the payment of fees and contributions to scientific observers' expenses, and any other conditions to which fishing activities by Community vessels in [Country's name] fishing zones may be subject, are set out in the Annexes hereto. 2. For fishing categories not covered by the Protocol in force, and for exploratory fishing, licences may be granted to Community vessels by the Ministry. However, the granting of these licences remains dependent on a favourable opinion from the two Parties." (Article 6 "Conditions governing fishing activities" of FPAs)

This article has to be read in the light of the article in the implementing protocol stating that new fishing opportunities can been foreseen, following the advice of the joint scientific committee and the agreement of the Joint Committee (followed by an amendment under the EU and partner country procedures):

"Should EU fishing vessels be interested in fishing activities which are not indicated in Article 1 of this Protocol, the parties shall consult the Joint Scientific Committee. The parties shall agree on the conditions applicable to these new fishing opportunities and, if necessary, make amendments to this Protocol and to the Annex hereto."
(example of article 9 "New fishing opportunities" of the 2014 protocol to the EU-Guinea Bissau FPA)

It should be noted that the only SFPA concluded in 2014 after the entry into force of the new CFP, contains a very strict exclusivity clause, forbidding all activities outside the scope of the agreement and especially private licenses, while it can be considered as a mixed agreement since it allows the access for deep-sea demersal species, although limited to two trawlers, along with tuna species[2].

In any case, the fact that this exclusivity clause is included in the framework agreement (and not in the Protocol) means that, when there is a partnership agreement but no protocol in force (referred to as a 'dormant agreement'), neither an EU Member State nor the shipowners can negotiate private licenses directly with the third country.

The European Council of Ministers sometimes allowed, exceptionally, shipowners to negotiate private licenses, for example when the protocol between the EU and Mauritius was not renewed in 2007. The framework agreement remained however in force, - so the exclusivity clause applied - but the European Commission authorised its Member States to negotiate private licenses directly with the Mauritian authorities. An SFPA and a Protocol have since been initialled[3].
Another situation arises when an agreement exists, a protocol has expired and a new protocol has been negotiated but has not yet entered into force. In this case, in application of the exclusivity clause, EU vessels should leave the area.

However, the article 9 of the FAR, on the ' *continuity of fishing activities* ', provides that there must be no stoppage in fishing activities in the period between the expiration of a protocol and the new protocol initialled:

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[2] *Article 4 "Access to Senegalese waters": 1. "Union fishing vessels may only carry out their activities in Senegalese waters if they are in possession of a fishing authorisation issued under this Agreement; all other fishing activities are forbidden. 2. The Senegalese authorities may only issue fishing authorisations to Union fishing vessels under this Agreement; the issuing to these vessels of other authorisations, in particular private licences, is forbidden."*

[3] *Initialing of the FPA and its Protocol on February 23, 2012 in Port Louis, Mauritius. Entered into force only in spring 2014.*

"1. Where:
-the protocol to a bilateral fisheries agreement with a third country which sets out the fishing opportunities provided for in that agreement has expired, and; - a new protocol has been initialled by the Commission but a decision has not yet been adopted on its conclusion or on its provisional application; The Commission may, during a period of six months from the expiration date of the previous protocol and without prejudice to the competence of the Council to decide on the conclusion or provisional application of the new protocol, transmit applications for fishing authorisations to the third country concerned in accordance with this Regulation"

This provision has, for example, applied, in July 2012, after the 2008-2012 protocol of the EU-Mauritania agreement expired, before the entry into provisional application of the Protocol 2012-2014 in December 2012.

The exclusivity clause in the new CFP

The new CFP, which entered into force on January 1, 2014, has opted for a strengthening of the exclusivity clause in the SFPA:

« *Union fishing vessels shall not operate in the waters of the third country with which a Sustainable fisheries partnership agreement is in force unless they are in possession of a fishing authorisation which has been issued in accordance with that agreement* » (art. 31.5)

and

«*Those agreements shall also, to the extent possible, include (…) an exclusivity clause relating to the rule provided for in paragraph 5* » (art. 31.6.b).

It provides also for stricter conditions to prevent abusive reflagging:

«A fishing authorisation, as referred to in paragraph 5, shall be granted to a vessel which has left the Union fishing fleet register and which has subsequently returned to it within 24 months, only if the owner of that vessel has provided to the competent authorities of the flag Member State all data required to establish that, during that period, the vessel was operating in a manner fully consistent with the standards applicable to a vessel flagged in the Union». (section 31.9)

The new basic regulation doesn't determine the outlines and the scope of this clause, *i.e.* if we tend to a more rigid or flexible approach, to be applied to all agreements, without making any difference of their format (mixed or tuna).

Implementation of the exclusivity clause: applying double standards?

- **The case of the Swedish vessels fishing outside the EU-Morocco agreement**

In 2014, a dispute arose between the Swedish administration and Swedish shipowners who had chartered two vessels for fishing off the coast of Western Sahara while there was an agreement, but not protocol in force. The case was brought to the EUCJ which gave, for the first time, an explicit interpretation as to the application of the exclusivity clause in le case of EU chartered vessels, flying the flag of an EU Member State, while a framework fisheries agreement existed between the EU and Morocco, including an exclusivity clause (article 6, paragraph 1), but without a protocol in force.

The two vessels, flagged in Sweden, had been chartered ("*bareboat chartering*") by Moroccan companies to fish Moroccan quotas, embarking Moroccan and Swedish sailors. Licenses had been issued for them by Morocco.

According to the Swedish vessel owners, no permission of the Swedish administration or any other European authority was required for their activity; the exclusivity clause was not applicable to the leasing activity by the Moroccan companies. They felt they had therefore committed no offence against the European Union law.

For the Swedish administration, article 6.1 of the 2006 EU-Morocco framework fisheries agreement, setting the conditions for the fishing activities, is clear: fishing vessels must have a fishing license issued by the Moroccan authorities, based on a request made by the EU in the context of the fishing agreement.

Questions asked to the EUCJ were mainly to know whether the agreement excluded the possibility of leasing vessels flying the flag of an EU Member State (in this case Sweden) to Moroccan companies, with a bareboat charter contract, so that the vessels were fishing with licenses issued only by the Moroccan authorities, not based on a request made by the EU.

The Court ruled that the chartering of vessels flying the flags of EU Member States engaged in fishing activities in the waters of a State who has an FPA with the EU, although there is no protocol in force, was contrary to the exclusivity clause:

> "*The Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, approved on behalf of the Community by Council Regulation (EC) No 764/2006 of 22 May 2006, in particular Article 6 of that agreement, must be interpreted as excluding any possibility for Community vessels to carry out fishing activities in Moroccan fishing zones on the basis of a license issued by the Moroccan authorities without the intervention of the competent European Union authorities".*

Thus, the Court gives a strict interpretation of the exclusivity clause, not allowing vessels flying EU flag, even chartered, to operate when there is a framework FPA in force, even with no protocol in force. This decision reaffirms the law of the flag (since the flag does not change for a chartering operation): the fact that the vessels were chartered in no way precludes that such vessels be subject to the rules of the Member State in which they are flagged (and in this case the rule of exclusivity under the FPA). Thus, chartering cannot be used to fish out of the scope of the agreement and, above all, without the intervention of the competent authorities of the Union.

- **The case of the chartered Portuguese vessels fishing outside the EU-Mozambique agreement**

It would seem that there has been a similar chartering operation by Portuguese shipowners fishing in Mozambique in 2012, while an agreement and protocol were in force, for accessing species not covered by the agreement, as highlighted by the *ex-post ex-ante* evaluation of the agreement, published in April 2014:

> *"Foreign vessels active on the industrial shrimp fisheries operate under charter arrangements with National fishing companies owning the fishing rights. At least until 2012, four of these trawlers were flagged to Portugal. The activities of these four vessels appear to be outside the scope of the FPA and therefore, may be in contravention of the exclusivity clause of the agreement"*[4]

Unlike the EU-Morocco agreement, the exclusivity clause in the EU-Mozambique agreement is very strict like for all the other tuna agreements. No fishing is allowed by EU vessels outside the agreement, including when the species caught are not part of those governed by the protocol to the agreement. It follows that in the case of these two chartered shrimp trawlers, - i.e. in a situation where a protocol is in force but does not provide for fishing opportunities for EU vessels for the species targeted by the latter-, these operations are contrary to the exclusivity clause.

The EU has, for the time being, not taken any action in this respect.

The necessary harmonization of the content of the exclusivity clause and its interpretation

We can deduce from this variety of situations that the EU doesn't have a very clear position on the exclusivity clause, whether its scope or mainly its interpretation.

In addition, the implementation of article 9 of the FAR, on the continuity of fishing activities, may be also regarded as a legal obstacle to the implementation of the exclusivity clause. Does it intend to do so on the basis of the model of the EU-Senegal SFPA concluded in 2014 (post-reform)?

In the light of the new basic regulation, it is up to the European Commission to clarify the scope of this exclusivity clause, and to harmonize it in all agreements.

The question that needs to be debated, - having regard to the example of Sweden, where sanctions have been taken against EU shipowners, and of Portugal where, for the moment, no sanction has been taken-:

> *'In the context of the implementation of the CFP, what can the Commission do to ensure that a firm and harmonized attitude is adopted by all its Member States to enforce the exclusivity clause, now included in the CFP basic regulation?'*

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[4] *Ex-post and ex-ante evaluation of the protocol to the fisheries partnership agreement between the EU and the Republic of Mozambique: http://transparentsea.co/images/e/e8/EC-Evaluation_Mozambique_2014.pdf*

In any case, the EUCJ ruling is a step forward towards clarifying the scope of this clause to ensure better control of the EU fleets by their flag State.

A priority is to secure this legal framework by clarifying the content of the exclusivity clause in the SFPA, and harmonizing conditions and interpretations.

What to do to discourage abusive re-flagging?

The judgment of the EUCJ does not address other forms of fishing access which can lead to abuses, like European vessels which, to keep operating in third country waters where no agreement protocol is in force, choose to change their flag or create joint ventures.

Regarding joint ventures, they legally have the nationality of the host country, which generally must hold at least 51% of the capital. In the past, despite some conditions relating to the conservation and management of resources that were contained in EU legislation on joint ventures (dating from 1993), a large number of stakeholders, in particular third countries artisanal fishing communities, believe that many fishing joint ventures, which involved the transfer of vessels(s), and many re-flagging operations resulted in the degradation of their countries fish resources, as well as a local direct competition with the artisanal fishing sector.

Today, part of the European fishing industry requests more flexibility in the implementation of the exclusivity clause, in particular in cases when an agreement containing an exclusivity clause, does not see its protocol renewed, resulting in a total impossibility for the European fishing vessels to operate and allegedly pushing some to consider re-flagging or the establishment of joint ventures as an alternative.

In the spirit of the reformed CFP, the main principle that must be respected, is that **all** the fleets of European origin, whether they fish under an SFPA, a private agreement, chartering arrangements, or EU controlled joint ventures, should be subject to the same CFP rules and standards.

Therefore, introducing flexibility regarding the implementation of the exclusivity clause could only be discussed insofar as more stringent rules are decided, applicable to all EU vessels. This could be achieved, in particular, through the revision of the Fishing Authorisation Regulation (FAR).

These stricter rules should include conditionalities for the issuance of fishing authorization, including for the respect of environmental and social sustainability criteria and transparency requirements (on the basis of article 17 of the new CFP basic regulation).

Thus, the scope of the new regulation FAR should encompass all fishing activities conducted outside the EU water by vessels flying an EU flag or in the EU waters by vessels of third countries (chartering arrangements, joint ventures operations, etc.).

It will also be up to the European Commission to establish an appropriate legal framework underlying the conditions for the establishment of fishing joint ventures and their follow-up, by providing conditions for the constitution, operation and monitoring of the fishing activities of these joint ventures, whose creation is encouraged by the SFPA.

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