

## No Surplus, No fishing?

### The integration of the concept of surplus in EU fishing agreements

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#### Introduction

*The new EU Common Fisheries Policy (CFP) regulation that entered into force in 2014 makes the concept of surplus a corner stone of EU access to third country waters through its bilateral fisheries agreements.*

*The EU has presented this approach as a progress achieved through the CFP reform. It is nevertheless a basic legal principle of access agreements as set up by UNCLOS since 1982, and not new to the CFP external dimension.*

*It has to be understood in the framework of the creation of Exclusive Economic Zones (EEZ), where a Coastal States has sovereign rights for the purpose of exploring and exploiting, conserving and managing living resources of the seabed, subsoil and superjacent waters in its EEZ<sup>1</sup>.*

*In parallel to these sovereign rights, Coastal States have the duty to assess the status of resources in their waters for management and conservation purposes, in order to allocate fishing opportunities to their own national fleets. The Coastal State has the right to allocate to foreign States the "surplus" that it cannot exploit itself.*

*The availability of a surplus following the determination of its harvesting capacity by the coastal State is the "raison d'être" of the conclusion of agreements granting access. Indeed, most of these agreements do refer to the existence of a surplus, either with respect to the fish resources of the EEZ in general or to particular stocks.*

*Bilateral agreements between the EU and third countries, mostly African and Indian Ocean developing countries, have always been based on these rules, but not always applied by the book; in the past, we can find numerous examples where EU fleets access to third countries fisheries through bilateral access agreements were not based on the existence of a proven surplus.*

*Have things changed today, with the entry into force of the new Common Fisheries Policy?*

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<sup>1</sup> Which zone "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." If a coastal State has established the maximum territorial sea permitted by the treaty (12 nautical miles), it may therefore exercise these sovereign rights in a further zone of 188 nautical miles.

## 1. The legal basis of the concept of surplus

**Article 62** of UNCLOS addresses the utilization of living resources and provides:

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. **Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements** and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, **give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States** mentioned therein.

*Firstly*, under the provisions of the UNCLOS, coastal States are required to promote the objective of optimum utilization of the living resources in Exclusive Economic Zones. To this end, they have to fulfil a number of obligations, the most important of which can be summarized as follows:

- a) It will be assumed that there is a maximum sustainable yield (MSY) which can be taken from any stock, and this yield as well as the population level which will produce it can, with appropriate research, be estimated<sup>2</sup>;
- b) This MSY may be modified by economic considerations, as well as by environmental factors;
- c) Coastal States have to determine the allowable catch (TAC/VAC) of the living resources in their exclusive economic zones. In deciding upon the allowable catch, the coastal State also determines what restrictions on harvesting are required by the effects of fishing on target stocks upon other stocks;
- d) They must then determine their own capacity to harvest these resources;
- e) Where coastal States do not have the capacity to harvest the entire allowable catch, they give other States access to the surplus.

Each of these decisions can be regarded as a condition of access. In respect of some species the initial decision of an allowable catch and the decision about access must be preceded by advance consultations or negotiation with other States either directly or through an international organization<sup>3</sup>.

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<sup>2</sup> Article 61(3) UNCLOS, which is where MSY is mentioned, is concerned with keeping the population at a level which can produce the MSY.

<sup>3</sup> The determination of the surplus is in fact the culmination of very complex operations, as is apparent from the provisions of the Convention itself regarding the factors to be taken into account by coastal States when determining the allowable catch (See in particular Article 61 § 2 and 4).

The **granting of access to the surplus is not automatic**, but depends on the negotiation and conclusion of agreements or other arrangements. Both language of article 61 and 62 make it clear that the treaty does not have any obligation of "full" or "maximum" utilization of fisheries in the EEZ, but "optimum utilization"<sup>4</sup>.

The coastal State's obligation to give access is dependent on the vital pre-condition that it determines that its harvesting capacity is exceeded by the allowable catch. Since these determinations are wholly within the coastal State's discretionary powers, it is apparent that **giving access is not an obligation of the coastal State**.

**If the coastal State decides that declaring a surplus meets its interests, only then is it required to give access under terms and conditions it prescribes. A coastal State may have sound reasons for affirmatively deciding that its interests are best served by determining that the allowable catch is equal to or less than its harvesting capacity, thus also deciding not to allow any foreign fishing.**

Eventually, UNCLOS contains virtually no restriction on coastal State authority to forbid access to foreign fishing<sup>5</sup>. If, for whatever reason, the coastal State establishes a surplus, to do so brings with it the obligation to give access to it. This in turn entails the need to determine the terms and conditions of access and to make allocation amongst foreign fishermen. It is nevertheless clear that **the surplus may only be exploited by foreign fleets provided they comply with the conservation and management measures and other terms determined by the coastal State**.

Hence, in practice, the Coastal States can decide that for conservation and management reasons, - for example when the targeted species is an important nutrition source for another resource-, applying a precautionary and eco-system approach would require not to allocate any surplus to foreign fleets.

**Secondly**, as mentioned in article 62, articles 69 and 70 should be taken into account. These articles address the questions of the rights of land-locked countries (69) and rights of geographically disadvantaged States (70)<sup>6</sup>.

Articles 69 and 70 do not provide for an effective right of access to an adjoining State's EEZ fishery, but if that State declares a surplus, Articles 69 and 70 give land-locked countries and geographically disadvantaged States rights to claim to secure access to it. Implementing the opportunity presented by such a claim faces the pitfalls and difficulties of negotiations to reach bilateral, sub-regional, and regional agreement on terms satisfactory to the coastal State and to others.

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<sup>4</sup> *The first reading of this article may first be understood as putting an obligation on Coastal state to sell to others their surplus (use of « shall » whereas in French it is softer "il autorise d'autres Etats").*

<sup>5</sup> *For practical legal purposes the treaty provides no remedy even for some arbitrary actions to deny foreign access.*

<sup>6</sup> *Article 62 contains two specific provisions relating to the coastal decision about which States will be given access to coastal fisheries. Paragraph 2 provides for the basic obligation, such as it is, to give access and especially singles out the landlocked and geographically disadvantaged States by referring to them with the phrase "having particular regard". The following paragraph (3) enjoins the coastal State to "take into account all relevant factors" and then emphasizes four different States or categories of States: (1) the coastal State itself; (2) landlocked (Article 69) and geographically disadvantaged States (Article 70); (3) developing States in the region or sub-region and (4) States who have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.*

Since article 70 refers to Coastal States that have not enough resources or no quality resources in their EEZ, it can be linked to the need to fulfil food security requirements in these countries who depend on specific species for their nutrition (directly or indirectly).

That would be the case of small pelagics resources in West Africa, particularly sardinella. Applied to Mauritania for example, the EU has made it clear that its understanding of article 70 regarding surplus and "local catches", means that these catches include catches of coastal States whose geographical situation makes them dependent upon the exploitation of the Mauritanian resources, such as Senegal<sup>7</sup>.

*Thirdly*, the wording of article 62 refers expressly to "other States", which would exclude the access to surplus for private companies through private agreements. Practice has shown however that private agreements have been concluded over time and haven't been condemned by international law.

## 2. Legal prescription of access to surplus in the Reformed CFP

The reference to surplus when negotiating access agreements is not new to the CFP, since the EU has to comply with its international obligations. Under the previous CFP, regulation (EC) No 2371/2002, the 2004 Council's conclusions on fisheries agreements already stated, *inter alia*, that the "Community must: (1) contribute towards the rational and sustainable exploitation of the surplus of coastal States marine resources, in particular by preventing overfishing of stocks which are of interest to local people"<sup>8</sup>.

The new basic regulation tends to focus on surplus, or even present it as something new, in order to reiterate the importance of prior stock assessments and the solely access of EU vessels to resources that cannot be exploited by the Coastal State's national fleets.

It is indeed clear from the Regulation that the overall objective of the CFP cannot be met in the absence of high quality scientific data and it follows that the Union cannot disregard the lack of scientific data when it acts externally. The Commission, in its Communication of 2011 on the external dimension (COM 424(2011)) made it clear that fishing agreements "should be always based on the best available scientific advice, using the concept of maximum sustainable yield (MSY) as a reference" (point 3.2). The Commission also confirms that SFPAs shall comply with UNCLOS by only providing access of EU vessels to surplus resources (point 3.1).

In its 2012 Resolution, the European Parliament welcomed the intention of the Commission to include several provisions in future bilateral agreements, including: respect for the principle of limiting access to resources that are scientifically demonstrated to be surplus for the coastal State in line with the provisions of UNCLOS. This approach is now reflected in Article 31(4) of the Regulation 1380/2013<sup>9</sup>.

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<sup>7</sup> Letter from DG MARE in response of a letter from LDRAC, 03/02/2012: <http://138.100.136.144:9090/Docs/GetImageById/9377/1>

<sup>8</sup> (2) improve scientific and technical knowledge of the fisheries in question and (3) combat illegal unreported and unregulated (IUU) fishing.

<sup>9</sup> See below.

Article 31(2) of the new CFP Basic Regulation therefore requires that:

“For the purpose of ensuring the sustainable exploitation of surpluses of marine biological resources, the Union shall endeavour to ensure that the Sustainable fisheries partnership agreements with third countries are of mutual benefit to the Union and to the third country concerned, including its local population and fishing industry and that they contribute to continuing the activity of Union fleets and seek to obtain an appropriate share of the available surplus, commensurate with the Union fleets' interest.”

In addition to this article which promotes sustainability by supporting the coastal State in the fulfilment of its own obligations under UNCLOS, there is a 'bottom line' provision in Article 31(4) which provides that:

"Union fishing vessels **shall only catch surplus of the allowable catch** as referred to in Article 62(2) and (3) of the UNCLOS, and identified, in a clear and transparent manner, on the basis of the best available scientific advice and of the relevant information exchanged between the Union and the third country about the total fishing effort on the affected stocks by all fleets. Concerning straddling or highly migratory fish stocks, the determination of the resources available for access should take due account of scientific assessments conducted at the regional level as well as conservation and management measures adopted by relevant RFMOs."

Thus, when negotiating an SFPA, the EU shall only aim at targeting the available surplus, evaluated according to accurate and updated scientific assessments, when dealing with species other than tuna. For straddling stocks and highly migratory species (tuna and tuna like species), the EU shall respect relevant RFMOs recommendations and TACs determined, the tonnage allocated to the EU being part of its overall quota for the specific specie under the RFMO's jurisdiction.

Where no surplus has been established in accordance with UNCLOS, the requirements of Article 31(4) (including the need for the best available scientific advice and transparency) are not met, the Union cannot enter into negotiation of an SFPA with the country concerned and its vessels should not fish in its waters.

### 3. Specific case of tuna fisheries

According to UNCLOS, the creation of EEZs placed fisheries within a coastal State's jurisdiction, and hence, subject to a single management system. Unfortunately, the opportunity is less than complete because many exploited fish stocks "possibly even the majority of the stocks supporting large-scale industrial fisheries"<sup>10</sup> are shared migratory stocks, i.e., those that are at some stage subject to the jurisdiction of more than one State because of a regular pattern of movement across boundaries, and beyond national jurisdictions. This means that the States concerned cannot achieve either conservation or allocation goals by acting independently of the others.

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<sup>10</sup> According to John Gulland, 1980.

This situation is dealt with both by article 63 and article 64 of UNCLOS, which relate to **stocks occurring within two or more EEZs and/or areas beyond**. This can apply also to small pelagic resources. It requires the relevant coastal States to seek to agree measures either bilaterally or through relevant sub-regional or regional organisations, "where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States"<sup>11</sup>.

In addition these States are enjoined to seek agreement regarding "associated stocks", which can be stocks that neither State is interested in exploiting<sup>12</sup>. It is clear that in West Africa for example, fishing for small pelagics in one EEZ (Mauritania, for ex.) has an impact on that fishery in the neighbouring countries (Senegal and Morocco, in that example). Therefore, management measures must be taken at a sub-regional level, either between those States directly or through a relevant sub-regional organisation.

Article 64 of UNCLOS deals with **highly migratory species**, which are species listed in annex 1 of the Convention, i.e. tuna and tuna like species. Regional Fisheries Management organizations (RFMOs) have been created in order to manage these highly migratory stocks as international organizations foster cooperation among States for an optimal and sustainable management of these resources. RFMOs can be competent for the management of resources in a specific region and/or for a specific resource. This is expressly the case for tuna and tuna like species which are managed solely by dedicated RFMOs (ICCAT, IOTC...).

In terms of functioning and allocation of fishing rights, these RFMOs proceed to stock assessments (on the basis of data provided by Coastal States) and fix fishing quotas for each of the contracting parties.

Regarding SFPAs, the RFMO allocates an overall quota to the EU for the entire area and for species under its jurisdiction.

**The catches made by EU vessels in the EEZ of a country under an SFPA, will be deducted from this general maximum quota set up by the RFMO. Therefore, for ‘Tuna SFPAs’, the notion of ‘access to surplus’ is not pertinent.**

#### 4. Determining the surplus: from theory to practice

According to UNCLOS, it is the **duty of the Coastal State to assess the resources in its EEZ and determine its TAC**. The EU, when negotiating an SFPA shall rely on the data provided by the Coastal State, it cannot proceed to any evaluation itself<sup>13</sup>. In practice, determining the surplus requires that scientific evaluations of the resources and the total fishing effort are assessed and known<sup>14</sup>.

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<sup>11</sup> *In order for either coastal State to promulgate improved management measures in many situations, it must seek to agree with the other coastal State or States upon one or more of a variety of actions regarding the target stocks.*

<sup>12</sup> *William T. Burke, "1982 convention on the law of the sea provisions on conditions of access to fisheries subject to national jurisdiction", Annex 1, FAO, 1983. Report of the Expert Consultation on the conditions of access to the fish resources of the exclusive economic zones. Rome, 11-15 April 1983. A preparatory meeting for the FAO World Conference on fisheries management and development. FAO Fish. Rep. (293), 209 p.*

<sup>13</sup> *In West Africa, the national scientific institutes are for example in Mauritania IMROP, in Morocco INRH, in Guinea Bissau CIPA.*

<sup>14</sup> *It must also be taken into account that any fishing by foreign vessels, carried out in addition to fishing on the same stock by the coastal state, will reduce the abundance of the stock. There are exceptions. The commonest is when species taken by the foreign fleet is not harvested at all by the local fishermen<sup>14</sup>. It should be noted at that stage that Coastal States withdraw other benefits from fisheries agreements that can compensate the lowering of abundance of stocks (fees, support to local fisheries sector...), if and only if it remains at*

In the case of resources moving between EEZs of neighbouring countries, such as small pelagics in West Africa, this exercise should be done at the appropriate regional/sub-regional level, in cooperation with neighbouring States, bilaterally or through existing bodies.

Under SFPAs targeting also species other than tuna ('mixed agreements'), SFPA Joint Scientific Committees are established with the duty to proceed every year to a stock assessment of the stocks targeted by the EU. COM (2001)424 (point 3.2) had suggested to systematically launch **scientific audits** to assess the stocks before negotiating new protocols to mixed agreements.

Regarding tuna fisheries, scientific assessments are made by the RFMOs and rely on the scientific data provided by Coastal States.

However, the 2011 Commission communication on the external dimension (COM 424) confirms that the scientific knowledge on certain stocks in foreign waters is insufficient to establish the overall size of the surplus.

There is indeed a lack of capacity in many developing countries which hinders data collection and thus leads to incomplete stock assessments, both at national and RFMO levels.

Therefore, the EU uses not only data provided by the partner countries, but also assessments made by sub-regional and regional studies, and other relevant assessment by scientific bodies.

It should be noted that RFMOs are working on capacity building of developing members States. ICCAT, for example, where the vast majority of members are developing countries, decided in 2005 that assistance to developing coastal States would be a standing item on the agenda of its annual meetings. It adopted a number of recommendations in this regard<sup>15</sup>. The role of the EU is to support data collection and independent scientific research, both through RFMOs and SFPAs.

## 5. Limitations in the determination of a surplus

As the Commission pointed out in 2011: “[i]n spite of several improvements, substantial shortcomings continue to affect the functioning of FPAs”, notably:

- The scientific knowledge on certain stocks in foreign waters is insufficient to establish the overall size of the surplus;
- The terms and conditions of fishing agreements concluded by partner countries with other (non-EU) countries are usually not known; Consequently it is often impossible to assess the overall fishing effort on stocks, and to determine the share of the surplus that can be sustainably caught by the EU fleet;

The new CFP Regulation therefore reinforces the need for better scientific assessments based on best scientific advice, for supporting partner countries in achieving this goal.

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*sustainable yields, if there is no competition with local fishermen and in particular small scale fishermen activities and if benefits are shared among all fishing communities.*

<sup>15</sup> ICCAT Recommendation on the establishment of a participation investment fund aimed at developing Contracting Parties of ICCAT [Rec. 11- 26] ; ICCAT Recommendation on the establishment of a fund for scientific capacity building for developing States which are Contracting Parties to ICCAT [Rec. 13-19], which establishes a special fund for scientists capacity building (SCBF) to support scientists of ICCAT Contracting Parties that are developing States to meet their need to acquire knowledge and develop skills on issues related to ICCAT.

However, the following elements continue to hamper an adequate implementation of the surplus principle to the benefit of developing countries:

➤ **Under-estimation of catches and lack of data**

- ❖ In **small-scale fisheries** catch data are under-reported. There are different systems in place, for example in the West Africa Sub Regional Fisheries Commission (SRFC) countries area, to address that issue. They can be administrative: registration of canoes and control of landings (which is often unreliable, due to lack of staff and the importance of the geographical to cover). The second relies on a data reconstruction, based on a combination of surveys and inventories on the canoe fleet, monitoring of activities and monitoring of landings per units<sup>16</sup>. The technique of data reconstruction has been developed recently by the Sea Around Us project (University of British Columbia), showing that actual catch data from the artisanal sector are vastly under-estimated.
- ❖ Catch data of vessels operating under **joint ventures** and all other relevant information related to their activities, are also very complicated to obtain and manage. As pointed out by the FAO in 2014, foreign vessels operating in joint ventures with local companies make correct attribution of catch nationality more complex and avoiding catch recording easier<sup>17</sup>.
- ❖ Catches made by vessels involved in **IUU** fishing operations are obviously not recorded and jeopardize a correct evaluation of the overall catches made in an EEZ.

➤ **Applying the surplus principle defends the status quo, doesn't allow the development of local small scale fisheries capacity**

If a coastal country gives access to foreign vessels for resources it cannot catch at a certain time, there will never be any 'space' for local small scale fisheries to develop their own capacity to catch these resources. The surplus concept doesn't integrate the idea that development also means that local small scale fisheries can increase their capacity and their catches - it's a system that maintains the 'status quo'.

➤ **The surplus principle does not integrate the eco-system approach**

A coastal state may decide that, even if there would be a surplus of one resource, allocating access to this resource to foreign fleets using unselective gears (bottom trawlers) may lead to other resources, of interest to local fleets, being caught as by-catch, and ecosystems destroyed. This is the case with deep water hake in Senegal: there may be 'surplus' of that resource (still to be confirmed) for the EU trawlers to catch, but by-catches of other species (like octopus, etc) caught by small scale fisheries, are high.

Similarly, when the targeted species is an important source of food for another species of interest to local fishers, applying an eco-system approach would require not to allocate any surplus to foreign fleets for this resource.

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<sup>16</sup> Pierre CHAVANCE, "Towards Reconstructing Half a Century of Change in West African Fisheries", IRD, 2002.

<sup>17</sup> FAO, SOFIA 2014, p. 13.



➤ **Lack of transparency**

Finally, applying the concept of surplus correctly presupposes that there is full transparency about who get access to what. In many cases, fleets of foreign origin come in through opaque agreements or through equally opaque joint ventures/chartering arrangements.

It should be noted that some studies, such as the latest World Bank report on foreign fisheries arrangements<sup>18</sup>, promote the 'import of fisheries services' through private investments (joint venture for example) instead of taking into account Coastal States' interests, particularly in terms of development of their local small scale fishery sector. This approach is not in line with the principles of UNCLOS<sup>19</sup>, particularly article 62 that refers expressly to "other States" when granting access to the surplus, which would exclude the access to surplus for private companies through private agreements.

## 6. Recommendations

In light of the above, CFFA has the following recommendations:

- Create transparency, through regular updated publication of reliable information on licences allocated to all vessels, regarding all types of access, including by fleets of foreign origin (joint ventures, chartering, fishing agreements, private licences, etc), catches and by catches made by all fleets.
- Improve the quality of data about the small-scale fisheries level of catches. This is also highly important for creating a 'small-scale fisheries track record', in cases where quotas systems are to be introduced in some fisheries – in the absence of such 'track record' and historical data, small scale fisheries are likely only to get a raw deal.
- Take into account the eco-system approach, including by taking measures to protect some fragile ecosystems (trawl ban in coastal zones, co-managed Marine Protected Areas, etc.)
- Elaborate development plans for small-scale fisheries (using the FAO guidelines on Sustainable Small Scale Fisheries), so that their current activities are protected/promoted and that 'space' is created to enable their development (including by decreasing the number of licences allocated to foreign vessels)

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<sup>18</sup> World Bank, "Emerging Perspectives on Foreign Fishing Arrangements", December 2014, report: [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/12/09/000333037\\_20141209023547/Rendered/PDF/926220NWP0Box30in0Fishing0Services0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/12/09/000333037_20141209023547/Rendered/PDF/926220NWP0Box30in0Fishing0Services0.pdf).

<sup>19</sup> You may find a detailed analysis of this report by CFFA: "Trade In Fishing Services: Emerging Perspectives On Foreign Fishing Arrangements" By The World Bank. A Review By CFFA": <https://cape-cffa.squarespace.com/new-blog/trade-in-fishing-services-emerging-perspectives-on-foreign-fishing-arrangements>.

- The EU should not negotiate an SFPAs or specific access to a stock when the status of the stock is not clearly scientifically established. It should apply the precautionary approach and wait until the status of the stock is assessed.
- The EU has to actively support and contribute to the development of independent scientific knowledge in developing countries who do not always have the technical and financial means to invest in scientific research
- The EU should systematically launch **scientific audits** to assess the stocks before negotiating new protocols to multi species agreements, as requested by Communication 424, whether in addition to the ex ante ex post evaluation study, or as part of these evaluations.

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