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Policy brief

Fisheries in Africa: Exclusive Economic Zones for which purpose?

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The objective of this article is to analyse the paradox between, on the one hand, the sovereign rights that African coastal States have over the fishing resources in their EEZs in accordance with the United Nations Convention on the Law of the Sea and, on the other hand, the low benefit that they derive from them for their populations, particularly for food security and employment. After having described the general framework for the exploitation of these resources as defined by this convention as well as the modalities according to which foreign distant water fishing vessels come to fish in the waters of these coastal States, this article shows that there is a structural weakness of these States in the market of fishing rights which is explained in particular by the phenomena of corruption and lack of transparency and it concludes by the need for a change of governance in the management of African fisheries.

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Introduction

The international law of the sea underwent a profound upheaval in the last quarter of the 20th century. The possibility of establishing Exclusive Economic Zones (EEZs) has enabled coastal States to exercise sovereign rights for the exploitation of fisheries resources occurring in a wide area of their coastal waters. The EEZ can be up to 200MM from the baselines from which the width of the territorial sea is measured, i.e., since the territorial sea is usually 12MM wide, which is the maximum allowable width, the EEZ then has a width of 188MM. For African States, the wealth of their coastal waters should theoretically have enabled them to bring significant benefits to their populations. Small-scale fishing is an essential source of employment in coastal areas, both for the fishermen themselves and for those employed in the processing and marketing of catches, especially women. Consequently, African countries should have been able to improve food security for the people of the continent.[2]

This is not the case. With the exception of small-scale coastal fishing, which primarily exploits the territorial sea, the resources of the EEZ are often exploited by vessels flying the flags of third countries, mostly from other continents (Europe, East Asia, Russia), and catches are often exported directly to these countries. As for industrial or semi-industrial fishing vessels registered in an African coastal State and operating in the EEZ, these are often owned by "joint enterprises" which are companies registered in the concerned coastal State but are in fact controlled by foreign shipowners.[3] There is no indication in the recent literature on African fisheries that there is a movement towards an Africanisation of these foreign or foreign-controlled fleets.

Thus, despite the existence of large EEZs all around the continent, African countries and their populations do not really seem to benefit from the resources there. Fishing in these waters seems to benefit first and foremost the shipowners of distant fishing countries and the consumers of these countries for high value species such as tuna, shrimps or cephalopods. As for lower-value species, such as small pelagic species which are of great importance in feeding the continent's populations (the case of the sardinella in North-West Africa), they have been increasingly fished over the last ten years with a view to being processed into fishmeal and exported for aquaculture, particularly to China. This competition between local small-scale fisheries and the

[2] Fish consumption is lowest on the African continent. See UNITED NATIONS GENERAL ASSEMBLY, "*Interim Report of the Special Rapporteur on the Right to Food*", A/67/268, 8 August 2012; in this report devoted specifically to fisheries, the author indicates that, while world per capita fish consumption is about 18.4 kg/year, it averages about 29 kg/year per capita in industrialized countries and 10 kg/year in low-income food-deficit countries, not including China, but only 9.1 kg/year in Africa. See also FAO, "Economic analysis of supply and demand for food up to 2030 - Special focus on fish and fisheries products", *Fisheries and Aquaculture Circular*, No 1089, 2014. According to this report, in some West African countries, half or more of the daily protein ration comes from fish (63% for Sierra Leone and Ghana, 62% for the Gambia and 47% for Senegal), data to be compared with a forecast increase in the African population of 50% in 2030 compared to 2010.

[3] This phenomenon of "joint ventures" concerns several hundred vessels. Many of them are controlled by European interests (especially Spanish, as well as Italian, French, etc.); others are controlled by Chinese, Korean, Russian, etc. interests... See LAMINE NIASSE, Mamadou and SECK, Madieng, « *L'accaparement des ressources marines ouest-africaines : sociétés mixtes de façade et licences de complaisance - Les expériences du Sénégal et de la Mauritanie* », 2011, available at https://www.oceandocs.org/bitstream/handle/1834/4574/LicencesdecomplaisanceSen-Maur.pdf?sequence=1&isAllowed=y. See also EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, "*Opinion of the European Economic and Social Committee Joint enterprises in the Community fisheries sector - current and future situation*", OJ C 65, 17 March 2006, p. 46. This opinion describes how the EU encouraged the creation of these joint enterprises until the early 2000s, which thus exported vessels from the over-capacitated EU fleet to the host countries, while at the same time these vessels committed to supply European markets as a priority.

industrial fleet is also reflected in conflict situations, whether in the territorial sea or in nearby EEZs, with the industrial fishing fleet often fishing very close to the coast (including in the territorial sea), even when it is prohibited, since it will rarely be prosecuted given the very weak means of surveillance of coastal States.

How is such a situation possible? Why no African State has a fishing sector sufficiently developed to prevent their Government from allowing foreign vessels to come and fish in its EEZ? Why African States have not used to better advantage the existence of these EEZs where they exercise sovereign rights?

These issues can be approached from a political, economic and financial, socio-political, etc. perspective. For our part, we will take a legal approach. To this end, first of all, we will recall the rights that the establishment of EEZs gives to coastal States (**§ I**). We shall then describe how the establishment of these EEZs actually benefits shipowners from third States who are authorised to come and fish there, either under bilateral agreements between the African coastal State concerned and their flag State, or by authorisations obtained directly from the administrations of the African States (**§ II**). In a third part, we shall analyse the effects of this practice, trying to distinguish between "good practices" and "bad practices" (**§ III**). Finally, by way of conclusion, we shall come back to the objectives that should be those of fisheries in Africa, in accordance with the Sustainable Development Goals adopted in 2015 by the United Nations, i.e. participation in the food security of the continent and the creation of jobs, to note that the way in which fisheries are managed by the African States is far from meeting these objectives (**§ IV**).

I. A considerable extension of the rights of coastal States

The concept of EEZ was defined at the Third Conference on the Law of the Sea held from 1973 to 1982, which concluded with the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) in Montego Bay, Jamaica. Although this Convention did not enter into force until 1994, the possibility for coastal States to establish an EEZ beyond their territorial sea had been achieved by this third conference as early as the 1975 negotiating session.

At that time, however, important details remained to be defined on the exact content of the rights attached to this EEZ. In particular, for fisheries, there was consensus that the coastal State would have the power to set the overall allowable catch, but it was not yet clear who would have access to the resources. States that usually fish in coastal areas (including distant-water fishing States) as well as land-locked and geographically disadvantaged States wanted to retain the possibility of fishing in future EEZs. However, a consensus emerged during the next negotiating session held from March to May 1976. Thus, without waiting for the end of the conference in 1982, as early as the end of 1976 and in 1977, a good number of States established EEZs (or, for some, only "fishing zones") without giving rise to any dispute at the international level.

I.1 THE CONTENT OF THE PROVISIONS APPLICABLE TO FISHERIES IN UNCLOS

The EEZ is the subject of Part V of UNCLOS (Articles 55-75). Article 56 sets out the general principle that "*the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, living or non-living, of the waters superjacent to the seabed and of the seabed and subsoil, [...]*" of that zone. However, these sovereign rights do not correspond to total sovereignty, as it is added that, in the exercise of these rights, "*the coastal State shall take due regard to the rights and duties of other States*."

Articles 61 to 73 deal with the conservation and management of living resources, i.e. fisheries. According to article 61, the coastal State fixes the allowable catch in its EEZ. To this end, taking into account the best scientific evidence available to it, it shall take appropriate conservation and management measures to avoid overexploitation. These measures shall aim at maintaining or restoring stocks to levels that can produce the maximum sustainable yield, taking into account in particular the economic needs of coastal fishing communities and the special requirements of developing States.

Legally, the coastal State does not have complete freedom to set the allowable catch. After taking into account scientific data and the obligation to avoid overexploitation, the coastal State must, according to Article 62, set the objective of promoting the "*optimum utilization*" of resources. It must first determine its own capacity to exploit and then, if that capacity is less than the entire allowable catch in accordance with the objective of optimum exploitation, "*it shall, through agreements or other arrangements [...] give other States access to the surplus of allowable catch.*" It is added that the coastal State will have "*particular regard to the provisions of articles 69 and 70, especially in relation to developing States mentioned therein*", articles 69 and 70 concerning land-locked and geographically disadvantaged States respectively. Finally, it is specified that the coastal State must also take into account "*the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks*."

I.2 THE SPECIAL CASE OF LAND-LOCKED AND GEOGRAPHICALLY DISADVANTAGED STATES

As indicated above, Article 62 UNCLOS states that the coastal State will have "*particular regard to the provisions of articles 69 and 70, especially in relation to developing States mentioned therein*." Both Articles 69 and 70 state, with identical wording, that land-locked and geographically disadvantaged States "*shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned.*" These two articles are particularly relevant for the African continent since many States are land-locked and others have very narrow coastlines and are thus "geographically disadvantaged."

As stated in article 62, the conditions and modalities for the participation of third States in the exploitation of the resources of the coastal State are to be determined by means of agreements or other arrangements. For the special cases of land-locked or geographically disadvantaged States, it is added, in articles 69 and 70, that where the fishing capacity of a coastal State allows it to fish almost the entire allowable catch on its own, i.e. where the "*surplus*" is in practice almost non-existent, "*equitable arrangements on a bilateral, sub-regional or regional basis*" must be concluded by that coastal State with land-locked or geographically disadvantaged States in the same region or sub-region so that they may nevertheless participate in the exploitation of the living resources of its EEZ. It should also be noted that, according to Article 72, "*the rights of exploitation provided for in Articles 69 and 70 shall not be directly or indirectly transferred to third States or their nationals [...] unless otherwise agreed by the States concerned.*"

Thus, it can be seen that the sovereign rights of coastal States for the exploitation of their EEZs are highly regulated. Although they set the admissible volume of catches, coastal States must nevertheless encourage optimal exploitation of the resources concerned and take into account the recognised rights of other States, particularly land-locked or geographically disadvantaged States.

These provisions are reminiscent of the spirit in which the United Nations General Assembly decided in 1970, following the address by Arvid Pardo, Ambassador of Malta to the United Nations, to convene the Third Conference on the Law of the Sea in 1973. In this speech, made in 1967, he expressed his deep concern about the appropriation of vast marine areas by States, particularly those of the seabed and subsoil, and the need to rebuild the law of the sea on new foundations, taking into account that the riches of the sea, as the "common heritage of mankind," should benefit all mankind.[4]

However, far from Arvid Pardo's wishes, the 3rd Conference finally concluded with a strong expansion of the rights of coastal States. The provisions in favour of land-locked or geographically disadvantaged States have never been translated into practice. Articles 69 and 70 are in fact misleadingly worded. This is the result of the significant evolution of the position of the major maritime States during the negotiations at the Third Conference. Initially, the latter were rather opposed to the expansion of the rights of coastal States because they wished to retain the areas beyond the territorial sea as areas of the high seas; they thus behaved objectively as allies of land-locked or geographically disadvantaged States. However, they changed their minds when they saw that a consensus within the conference could be reached on the recognition of the sovereign rights of coastal States in their EEZs for the exploitation of the resources there in return, on the one hand, for the absence of any impact on the regime of navigation in the EEZ, which would still be that of the high seas, and, on the other hand, for the adoption of the specific regime of the right of transit through straits. Since these maritime States were mostly States with a significant coastal zone, they gained on both counts; they would acquire new rights with EEZs while the regime of freedom of navigation was preserved.

[4] On this speech, see our article MORIN, Michel, "*Fifty years on from Arvid Pardo's speech at the United Nations*", Ocean Yearbook, vol. 32, 2018, pp. 3-26.

As a result, land-locked and geographically disadvantaged states have had to bow to provisions which at first glance appear very favourable to them[5] but which have no real operational value. Indeed, if these States wished to intervene with coastal States, their means of pressure would be derisory. Article 297 of the Convention provides, in paragraph 3(a), that, with regard to fisheries, the coastal State is not obliged to accept the submission to a compulsory settlement procedure before an international court or tribunal of "*a dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.*" Thus, with the impossibility to refer the matter to an international court or tribunal (International Tribunal for the Law of the Sea, International Court of Justice or Arbitral Tribunal) which would have to make a binding decision, the only legal means available to land-locked or geographically disadvantaged States would be to introduce, in accordance with Part XV, section 1, a conciliation procedure. However, the coastal State concerned would have to agree to the initiation of such a procedure and then accept the recommendations of the conciliation commission.[6]

The reality is that the rights enshrined in Articles 69 and 70 of UNCLOS in favour of land-locked or geographically disadvantaged States have not been translated into practice. However, in the early 1980s, some African coastal States had shown a certain openness towards neighbouring land-locked or geographically disadvantaged States, but the cooperation envisaged for a while was not followed through.[7]

As a result, African coastal States behaved in a way that is far from what was envisaged by UNCLOS (the same is true for other continents). The coastal State negotiates with a third State or with shipowning companies according to its interests (or what it considers to be its interests), without regard to the obligations contained in Articles 69 and 70 UNCLOS.

II. Coastal State practices

As stated in our introduction, no State has a national fisheries sector with sufficient capacity to exploit all the resources in its waters. Moreover, agreements concluded by African coastal States with other neighbouring African States appear to be infrequent, if not rare. Admittedly, in various places, small-scale fishers have been accustomed to go fishing in the waters of a neighbouring State on the basis of an

[5] The peremptory value of these obligations in favour of land-locked or geographically disadvantaged States is made very clear by the wording of articles 69 and 70 with the use of the verb "shall": "*Land-locked States/Geographically disadvantaged States shall have the right to participate […].*"

[6] Article 284 UNCLOS: "*1. A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation […] 2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied […].*"

[7] See CARROZ, Jean and SAVINI, Michel, « *Les accords de pêche conclus par les Etats africains riverains de l'Atlantique* », Annuaire français de droit international, Paris, vol. 29, 1983, pp. 674-709. See in particular p. 682, note 25, where the authors, senior officials at FAO, cite two examples: The first, that of the member countries of the Economic Community of West Africa, where a convention providing for the establishment of a company dedicated to fishing and marketing of fishery products was under negotiation, the capital of which would have been subscribed by three land-locked States (Mali, Niger and Upper Volta) and three coastal States (Ivory Coast, Mauritania and Senegal). The second, that of the Gulf of Guinea States (Benin, Ivory Coast, Ghana, Nigeria and Togo), where negotiations were also under way between these States, two of which are geographically disadvantaged because of their very narrow coastlines (Benin and Togo). But these projects do not seem to have led to anything concrete, even temporarily.

existing practice in an informal framework of good neighbourliness, and it is only when problems have arisen that a formal agreement has been negotiated and concluded. This was the case, for example, following the increase in fishing by Senegalese nationals in Mauritanian waters, which recently gave rise to a conflict situation, despite a bilateral agreement dating from 2001; new conditions for access to Mauritanian waters by Senegalese fishermen were negotiated at the end of 2018 and concluded with the granting of 400 licences to Senegalese fishermen.[8] However, African industrial or semi-industrial fishing is of little significance and, when it is carried out by vessels under the flag of an African State in the waters of a neighbouring State, it is likely that, in most cases, this does not give rise to an agreement between the two States but only to authorizations issued directly by the coastal State to the vessels concerned.

On the other hand, the presence of fishing vessels from other continents is very significant in Africa. These vessels fish either under bilateral agreements, which corresponds to what is provided for in Article 62 UNCLOS, or after having directly obtained a fishing authorisation from the coastal State, which by contrast is not provided for in this Article 62 and does not correspond to its spirit. We will first deal with the bilateral agreements concluded by African countries with the EU (§ 1), then with the fishing authorisations issued directly by these countries to vessels flying the flag of an EU Member State (§ 2) and then with the authorisations issued to vessels of the Chinese fleet, which has become a major player in African fisheries (§ 3).

II.1 BILATERAL AGREEMENTS WITH THE EU

First, it should be noted that bilateral agreements also exist between certain African countries and Russia, but information on these agreements is difficult to access.[9] It is also possible that agreements exist with other countries but they are not known. We shall limit ourselves to presenting the case of bilateral agreements with the EU. These are the most important and most detailed, which makes it possible to know how they operate in general. The number of EU vessels fishing in the coastal waters of African countries is estimated at around 700 vessels, half of which would do so under these bilateral agreements, the other half fishing after obtaining authorisations directly from the coastal State.[10] It should be remembered in this regard that the EU has exclusive competence in maritime fisheries, which means that Member States are no longer competent to negotiate bilateral agreements with third countries, either to

[8] This agreement does not appear to have been published. However, it has been widely reported in the press. See for example RADIO FRANCE INTERNATIONALE, "*L'accord de pêche entre la Mauritanie et le Sénégal est finalisé*", 20 December 2018, site of rfi.fr, available at http://www.rfi.fr/afrique/20181220-accord-peche-mauritanie-senegal-finalise-usines-poisson-nouakchott.

[9] Some information is available on the FAO Faolex site. See for example the 2013 agreement with Morocco, available at http://www.fao.org/faolex/results/details/en/c/LEX-FAOC130466. On the other hand, on 26 July 2019, the website www.seafoodsource.com reported on an agreement with Guinea, the terms of implementation of which were to be discussed in October 2019.

[10] Figures quoted in the ACP-EU Joint Parliamentary Declaration. EUROPEAN PARLIAMENT, "*The reform of the European fisheries policy and its impact on ACP countries*", OJ EU C 309, 12 October 2012, p. 41. The ACP or "African, Caribbean and Pacific Group of States" is an organisation whose charter was defined by the 1975 Georgetown Agreement and whose objective is to coordinate its members' cooperation with the EU. This cooperation took place from 1975 under the Lomé conventions (Lomé I to Lomé IV) and then from 2000 under the Cotonou Agreement. Its secretariat is in Brussels. The Cotonou Agreement, which expired at the end of February 2020, is extended until the end of 2020 pending the adoption of a new partnership agreement.

negotiate access for Member States' vessels to the waters of third countries or, conversely, to negotiate access for vessels registered in third countries to EU waters.[11]

These bilateral agreements consist, firstly, of a framework agreement containing the general clauses and, secondly, successive implementation protocols whose validity varies and generally ranges from two to five years. There are about ten such agreements between the EU and African countries. This number varies over time because an implementation protocol may not be renewed immediately after its expiry or may not be renewed at all (this is the case of a so-called "dormant" agreement).[12]

The framework agreement, known from 2004 as the "*Fisheries Partnership Agreement*" and now the "*Sustainable Fisheries Partnership Agreement*,"[13] sets out the principles and objectives governing this partnership agreement, such as responsible fishing, the sustainable exploitation of fisheries resources, good economic and social governance, the employment of seamen from the coastal State concerned in accordance with the fundamental principles and rights at work set out in the 1998 ILO Declaration, etc. This "framework agreement" provides a financial contribution for the coastal State consisting of two elements: the first is a financial compensation for vessel access to the fishing zone of the coastal State concerned, plus a fee payable by vessels for obtaining a fishing licence, and the second is granted under what is commonly known as "sectoral support," i.e. aid granted to the coastal State for the implementation of its national fisheries policy with a view to the sustainable exploitation of fisheries resources.

All these agreements provide for the establishment of a Joint Committee composed of representatives of both parties. Its function is to monitor the implementation of the agreement concerned, to serve as a forum for the amicable settlement of disputes on the interpretation or application of the agreement and, if necessary, to amend the protocol in force. Most of these agreements provide that no fishing authorisation may be issued by the coastal State to an EU vessel outside the framework it has defined.

The protocol gives details of the fishing rights granted to EU Member States' vessels (number and types of vessels, species fished, authorised fishing zones) and the amounts of the financial contribution elements paid by the EU. It also lays down the arrangements for monitoring fishing activity applicable to vessels (recording of catches, satellite monitoring of vessels, monitoring of transhipments). It describes the arrangements for scientific cooperation between the EU and the coastal State concerned. The most recent protocols detail how the funds paid as sectoral support are to be used. These clarifications have been added following criticism of the use of these funds, sometimes used in a way that is not in line with their normal objectives. In some cases, for example, they were used to make investments that have in practice mainly benefited European or Asian companies.

[11] With the reservation that some territories are not included in the scope of the EU. This is the case, for example, for France of the French Southern and Antarctic Territories (TAAF), which include the Iles Éparses (Glorieuses Archipelago, Juan de Nova, Europa and Bassas da India in the Mozambique Channel, and Tromelin in eastern Madagascar). On the other hand, Réunion and Mayotte, which have the status of departments, are part of the EU.
[12] A list of these agreements is available at https://ec.europa.eu/fisheries/cfp/international/agreements_en. These agreements and their protocols are published in the Official Journal of the European Union.
[13] This, since the adoption of the new basic Regulation of the EU Common Fisheries Policy. EUROPEAN UNION, "*Regulation of the EU Common Fisheries Policy*", Regulation No 1380/2013 of 11 December 2013; see Article 31 of that Regulation.

The perception of the EU bilateral agreements with African countries is without ambiguity. In a resolution of the ACP-EU Joint Parliamentary Assembly, it is noted in the preamble that fisheries agreements are "*fundamentally commercial in nature*,"[14] indicating that the purpose of these bilateral agreements is clearly for the EU to buy fishing rights for the fishing fleets of its Member States and for the ACP States, particularly the African states since the vast majority of these bilateral agreements are concluded with them, to obtain foreign currency in return.

Admittedly, this resolution is old (1997) but the situation has not fundamentally changed. The fact that the fisheries agreements are now called "*sustainable fisheries partnership agreements*" and that the financial contribution is made up of two theoretically distinct elements does not really change the situation. Moreover, even if there were no such distribution, it can be assumed that the beneficiary coastal State would in any case redirect part of it towards expenditure corresponding to what is now called "*sectoral support*"; as for the EU, it is still a question of buying fishing rights from the coastal State. This distribution of the financial contribution appears in reality more like a dressing up to justify the purchase of these fishing rights.

But it is true that with a clearly identified "*sectoral support*" component, the financial contribution is now probably better directed than before towards financing the development of local fisheries or equipping national authorities with management or control means (vessels, satellite monitoring systems). In fact, if one wanted to separate the two elements of this contribution completely, the link between the two would in any case be underlying at the time of the negotiations and it would be the overall sum that would count when the negotiations were concluded. Also, the important thing is that the money is used appropriately and does not enter into a corruption circuit, whether direct or indirect.[15] In practice, the joint committees set up under these bilateral agreements have an important role to play in relation to the use of this financial contribution.[16]

On the other hand, a fundamental question which arises with these agreements in relation to article 62, paragraph 2, is whether the quantities which are fished correspond to the "*surplus of the allowable catch*" as required by that article, this "*allowable catch*" being what remains after the coastal State has deducted from the entire allowable catch the amount which it can fish itself according to its capacity to exploit. Here, in our opinion, we are in pure theory; the great uncertainties in the knowledge of fisheries resources state make it difficult to determine the overall allowable catch, and therefore the surplus can be determined only in a very imperfect manner. It is not possible to really dispute the level of a surplus. This ultimately gives the coastal State freedom to determine the amount of fishing rights it can allocate to third States.

[14] EUROPEAN PARLIAMENT, "*Resolution on fisheries in the ACP States and the EDF*", OJ C 328, 9 October 1997, p. 26.
[15] On the phenomenon of corruption, see below § III.3.
[16] On these questions, see PANOSSIAN, Anaïd, "*Are the EU's fisheries agreements helping to develop African fisheries?*", Coalition for Fair Fisheries Arrangements (CFFA-CAPE), November 2016, available at https://www.cffacape.org/publications-blog/2016/10/27/2016-10-27-are-the-eus-fisheries-agreements-helping-to-develop-african-fisheries?rq=Panossian. See also EUROPEAN COURT OF AUDITORS, "*Does the Commission manage Fisheries Partnership Agreements properly?*," Special Report No 11/2015, 2015.

II.2 FISHING AUTHORISATIONS ISSUED BY COASTAL STATES DIRECTLY TO EU VESSELS

By its Regulation No 2017/2403 of the European Parliament and of the Council of 12 December 2017 on the management of the external fishing fleets, the EU has amended the rules on the issuance of authorisations to vessels flying the flag of its Member States to fish outside EU waters, whether on the high seas or in waters under the sovereignty or jurisdiction of third States. This amendment has particularly affected fishing in the waters of coastal third countries outside the bilateral agreements. Previously, unless there was a bilateral agreement with the coastal State expressly excluding an EU vessel from obtaining a fishing authorisation from a coastal State, an EU vessel could obtain an authorisation from that coastal State without the EU or the Member State concerned being obliged to be informed of this authorisation. Now, a vessel wishing to obtain such an authorisation must at the same time, in accordance with a highly regulated procedure, obtain an authorisation which is issued by the EU Member State whose flag it is flying.

This procedure is described in Articles 17 and 18 of this Regulation. It states in particular that the EU Member State concerned may issue such an authorisation only if a scientific assessment proving the sustainability of the fishing operations envisaged has been carried out and if consistency with Article 62 UNCLOS is respected. It states that this scientific assessment must be provided by a regional fisheries management organisation (RFMO)[17] or a regional fisheries body with scientific competence[18] or by the coastal State itself where the fishery will be carried out; in the latter case, it is specified that the scientific assessment will be reviewed by a scientific body of the EU or the flag Member State. It is also added that such an authorisation will not be issued if the fishery concerns a species managed by an RFMO and if the coastal State where the fishing activity will be carried out is not a member of that RFMO.

Thus, even if there is no bilateral agreement between the African country and the EU, obtaining an authorisation for an EU vessel to fish in the coastal waters of that country is subject to a very rigorous procedure. Although there is no direct communication between the coastal State and the EU (or its Member State) that is expressly provided for, the state of the concerned resource in the coastal State and the effect of the intended fishing operation are both taken into account. In spite of this, we find it difficult to consider that the conditions under which authorisations are issued by the coastal State would amount to an "*arrangement*" within the meaning of Article 62 UNCLOS.

Indeed, an "*arrangement*" presupposes direct contacts between the coastal State and the EU.[19] This means there must be an agreement between the two parties on the

[17] An RFMO is an intergovernmental organization that is competent to adopt measures for the conservation and management of fishery resources, which are then incorporated into the domestic laws of the parties to the organization. For example, for tuna species in the Atlantic, the International Commission for the Conservation of Atlantic Tunas (ICCAT) based in Madrid or, for non-tuna species in the South-East Atlantic, the South-East Atlantic Fisheries Commission (SEAFO) based in Swakopmund, Namibia. On RFMOs, see MORIN, Michel, « *Les procédures d'objection dans les ORGP : de la simple objection à une obligation interne de conciliation* », Annuaire du droit de la mer, Institut du droit économique de la mer, Monaco, tome XIX, 2014, pp. 155-176; and, MORIN, Michel et LEROY, Antonia, "*Innovation in the decision-making process of the RFMOs*" in Marine Policy, Elsevier, Vol. 97, 2018, pp. 156-162.

[18] These could include for example committees set up within the framework of FAO, such as the Committee for Eastern Central Atlantic Fisheries (CECAF) and the Southwest Indian Ocean Fisheries Commission (SWIOFC).

[19] The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks defines an arrangement as "*a cooperative mechanism established in accordance with the Convention and this Agreement by two or more States for the*

terms for issuing fishing authorisations, which is not the case for direct authorisations since it is in fact the EU which imposes those it has defined. Of course, the fact that the EU imposes strict conditions in order to ensure that the fishing activity in question is sustainable is certainly positive, but this is not enough to make it an "*arrangement*." At most, it could be called a quasi-arrangement.

In addition to this assessment of these very special procedures for issuing fishing authorisations directly to the owners of EU vessels, the question also arises as to whether or not the beneficiary vessel actually fishes on the surplus. In our opinion, in the same way as for fishing under bilateral agreements, this is purely theoretical. In view of the uncertainties linked to the information about the state of fisheries resources, how can it be established that fishing envisaged with these direct authorisations will have no negative effect on the sustainability of the resource in question when, even if these authorisations only concern one or more vessels, some EU distant water fishing vessels are sometimes among the largest and most productive in the world fleet and can certainly have a non-negligible impact on the resource? In the end, if a coastal State wishes to issue a fishing authorisation to an EU vessel, it will be difficult for the EU Member State whose flag the vessel is flying to refuse to issue its own authorisation to the shipowner who requests it.

II.3 FISHING AUTHORISATIONS ISSUED BY COASTAL STATES TO CHINESE VESSELS

These authorisations are issued directly by African coastal States to Chinese companies without there being any real "*arrangement*" with China, even though the Chinese authorities are more or less involved in the negotiations to obtain them. Why focus on these Chinese vessels, and not also mention in detail Russian, Korean or flag-of-convenience vessels which, in addition to the EU vessels mentioned above, fish in the coastal waters of African countries?

In fact, the case of Chinese vessels is interesting because it is in this region of the world that the Chinese distant water fishing fleet is most active. It has developed in particular since the 1990s and has become a major player in African fisheries.[20] Its impact is greater than the other fleets mentioned (Russian or Korean, for example).

The Chinese fleet has grown with the consent of the authorities, often with the help of aid. It is well known that the Chinese authorities always follow with attention what their companies do abroad, especially since the launch of the "New Silk Roads" initiative. Besides, these private companies are sometimes more or less controlled by these authorities. Despite this, there is no bilateral agreement between any of the African countries and China to regulate the fishing activity of Chinese vessels. At most, there is a Memorandum of Understanding (MoU) whose sole purpose is to refer in a very general way to the deepening of fisheries cooperation between the two countries, nothing else. Fishing activity is regulated by the African coastal State, which issues authorisations directly to the vessels of the company concerned. The

purpose, inter alia, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks." (Art. 1 (1) (d)).

[20] PAULY, Daniel et *al.*, "*China's distant-water fisheries in the 21st century*", Fish and Fisheries, Wiley, 2014, 15, pp. 474-488.

presence of several hundred Chinese vessels in Africa must be seen in this global picture.

Let us show some examples, based on information gleaned here and there.

Sierra Leone

Industrial fishing activity in Sierra Leonean waters concerns mainly China, as three quarters of the industrial fishing fleet is believed to be made up of Chinese vessels.[21] In 2018, the number of Chinese vessels operating in Sierra Leonean waters was 66.[22] China and Sierra Leone signed a fisheries MoU on 30 October 2017, the main objective of which appears to be to combat illegal fishing.[23] An additional MoU, the aim of which is to "boost investment in Sierra Leone fishing sector" was signed on 19 June 2018.[24]

In 2019, in order to preserve the resources, in particular following underreporting of catches, Sierra Leone decided to ban all industrial fishing activities in its waters for one month from 1 April 2019. However, this measure is considered insufficient by a scientific official of the country who speaks of "invasion" by trawlers. Fishing by these vessels resumed at the end of the month of closure.

Ghana

Chinese fishing vessels are also very present in Ghanaian waters. Although the law provides that fishing licences can only be issued to Ghanaians, around 90% of these vessels are in fact owned by Chinese interests. Various studies have shown that this fleet has disrupted the Ghanaian fisheries sector and is endangering fish stocks.

This has occurred through a system known as *saiko*, which has its origin in the recovery by artisanal fishing vessels of unwanted by-catches from industrial trawlers. This system has evolved in the sense that industrial fishing vessels now target species of local interest (the small pelagics used in traditional African cuisine) for sale to artisanal fishermen who in turn sell them on local markets. Artisanal fishers who participate in this system thus compete with local artisanal fishers who do not participate in the *saiko* system. This system has de-structured small-scale fisheries by concentrating profits for the benefit of the few fishermen participating in the *saiko* and at the same time endangered the targeted resources to the detriment of the majority of artisanal fishermen.[25]

[21] See OGUNDEJI, Olusegun, "*Sierra Leone takes steps to tackle overfishing*", China Dialogue Ocean website, 20 May 2019, available at https://chinadialogueocean.net/8182-sierra-leone-takes-steps-to-tackle-overfishing/.
[22] See GODEFREY, Mark, "*Seven trawlers leave Yantai, headed for Sierra Leone*", Seafood Source website, 19 June 2019, available at https://www.seafoodsource.com/news/environment-sustainability/seven-trawlers-leave-yantai-headed-for-sierra-leone.
[23] The existence of this memorandum of understanding is known from the press release of the Government of Sierra Leone. See BAIMBA SESAY, John, "*Sierra Leone, China sign fisheries cooperation MoU*", Sierra Express Media website, Beijing, 30 October 2017, available at http://sierraexpressmedia.com/?p=82783. The exact contents of the memorandum do not appear to have been made public.
[24] See the press release "*President Bio Signs MoU with Chinese Government to Increase Investment in the Country's Fishing Sector*", State House Media and Communications Unit, 21 June 2018, available at https://statehouse.gov.sl/president-bio-signs-mou-with-chinese-government-to-increase-investment-in-the-countrys-fishing-sector/. The content of this MoU does not seem to have been made public as well.
[25] See PENNEY, Ryan et al., "*Managing sino-ghanaian fishery relations: A political ecology approach*", Marine Policy, Elsevier, Vol. 79, 2017, pp. 46-53. See also the two studies carried out by the NGO ENVIRONMENTAL JUSTICE FOUNDATION, "*China hidden fleet in West Africa*", 11 October 2018; and EJF, "*Stolen at sea: How illegal saiko fishing is fuelling the collapse of Ghana's fisheries*", 17 June 2019, available at https://ejfoundation.org/reports.

It should be noted that an MoU is being planned between China and Ghana on fisheries issues.[26]

Senegal - Guinea-Bissau - Guinea

In May 2015, the NGO Greenpeace published a report entitled "*Scam on the African coasts - The hidden face of Chinese fishing and joint ventures in Senegal, Guinea Bissau and Guinea*", which highlighted fraudulent practices by Chinese fishing companies in West Africa, including under-reporting the gross tonnage of vessels used as a basis for calculating taxes. This report, which is well documented, concerns 66 vessels fishing in the waters of these three States.

A Senegalese NGO, the "Association for the Promotion and Empowerment of Artisanal Maritime Fisheries Actors (APRAPAM),"[27] took a rather critical stance towards this report as, according to APRAPAM, it gives too much importance to this fraud. This association prefers to focus on the problem posed by joint ventures[28] (in this case, more than China, it is the EU states that are concerned. This dates back to the time when the transfer of EU vessels was encouraged by the granting of specific aid).

In any case, the Greenpeace report, with the facts it mentions, even if it contains certain errors or approximations, shows the opacity surrounding the activity of these Chinese vessels fishing in the waters of African countries.

Morocco

Morocco is certainly one of the few African states to have succeeded in building up a national fishing fleet. Despite this, Chinese fishing vessels are present in Moroccan waters. Thus, we learned from the online information site www.seafoodsource.com that in December 2019, eight large new trawlers left China to fish octopus in Morocco, while noting that two other Chinese fishing companies are already present in this country.[29]

Mozambique

In a press release dated 3 December 2018, the website of the Chinese Special Administrative Region of Macao reveals that Yu Yi Industry Co. signed a five-year fisheries agreement with Mozambique. At that time, six trawlers were returning from Mozambique with shellfish and fish on board, and it was expected that by 2019, the fishing fleet would amount to 18 trawlers.[30]

Somalia

[26] Ministerial Press Release of the Government of China of 18 November 2018, available at http://english.agri.gov.cn/news/dqnf/201811/t20181118_296089.html.
[27] SOGUI, Diouf, « *Fraudes présumées sur la jauge des navires de pêche* », APRAPAM website, 2016, available at https://aprapam.org/categorie/contributions.
[28] Cf. *supra* note 3.
[29] See GODFREY, Mark, "*Eight new Chinese trawlers head to Moroccan octopus fishery*", Seafood Source website, 17 December 2019, available at https://www.seafoodsource.com/news/supply-trade/eight-new-chinese-trawlers-head-to-moroccan-octopus-fishery.
[30] See MACAUHUB, « *Les chalutiers de la compagnie chinoise de Shenzen en activité dans les eaux Mozambicaines* », Macauhub French website, 3 December 2018, available at https://macauhubfrench.com/les-chalutiers-de-la-compagnie-chinoise-de-shenzhen-en-activite-dans-les-eaux-mozambicaines/.

The World Bank reported, in a press release of 7 March 2019,[31] on the agreement reached between the Somali authorities and a Chinese shipowners' association, the Chinese Offshore Fisheries Association, for the issuance of 31 licences to fish for tuna and associated species by longline for an amount of US$ 1 million for the first year. This licensing system was set up with the assistance of the World Bank, FAO and Italy. These vessels are subject to a satellite monitoring system and a logbook, but there were to be no scientific observers on board (possibly in the future, according to the press release). Catches would not be landed in Somalia.

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These few examples, which do not provide an exhaustive overview of the activity of Chinese fishing vessels in African coastal waters,[32] nevertheless show the diversity of contexts in which these vessels operate. However, a constant is that the flag State (China) never appears to be formally involved in obtaining fishing authorisations, contrary to the requirements of Article 62 UNCLOS. It merely signs a Memorandum of Understanding, which has a political but not a legal value.

III. The exercise of sovereign rights by African coastal States between "good practices" and "bad practices"

As we have just seen, the way in which coastal States exercise their sovereign rights in relation to fishing in EEZs deviates from what is provided by UNCLOS. On the one hand, articles 69 and 70, which give rights to land-locked or geographically disadvantaged States, are ignored and, on the other hand, authorizations to vessels flying the flags of third States are often not made by means of agreements or other arrangements as required by article 62.

Beyond this observation, the question that arises is whether the practices implemented by African coastal States nevertheless serve their interests and could thus be qualified as "good practices" or not. To do so, it is necessary to try to define what is meant by "good practices." In our view, in the present case, it should be understood as practices that meet the needs of the countries of the African continent. As we have already noted in the introduction, the supply of fish to ensure food security for the populations of the continent is essential, as well as the support to small-scale fisheries to maintain jobs for a population that is increasing.

However, it should also be noted that the fishing fees collected by coastal States often constitute a significant contribution to the State budget. Thus, African States face a dilemma. Either they allow foreign vessels to come and fish in their waters, either through bilateral agreements with flag States or by issuing direct authorizations to shipowners, which brings them valuable foreign currency for their budget, or they restrict the overall number of foreign vessels allowed to come and fish in their waters in order to give priority to their professional sector and coastal communities, but this

[31] THE WORLD BANK, "*Somalia Issues Fishing Licenses: Fees will help develop fisheries sector*", The World Bank website, 7 March 2019, available at https://www.worldbank.org/en/news/factsheet/2019/03/07/somalia-issues-fishing-licenses-fees-will-help-develop-fisheries-sector.
[32] See below, on paragraph III.3, the cases of Mauritania and Madagascar.

may have a negative impact on their budget in the short term. It is a very political choice.

An analysis of the practices of African coastal States shows that improvements are certainly possible because income from the sale of fishing rights yields poor profits overall (§ 1). This is due in particular to the weakness of coastal States which, until now, have not been able to come together to make a better profit from the sale of these fishing rights (§ 2). Additionally, we must also take into account the problem of corruption and lack of transparency in the issue of fishing authorisations outside the framework of bilateral agreements (§ 3). From this analysis, we deduce that the "least bad practices" correspond, in our opinion, to the bilateral agreements as they are concluded with the EU (§ 4).

III.1 POOR PROFITS

A recent study by economists on bottom trawling by foreign distant water fleets in four countries, Guinea-Bissau, Sierra Leone, Liberia and Guinea, has shown that the benefits to these coastal States are poor.[33]

This study, conducted from 2005 to 2016, is interesting because it covers different scenarios. For two countries, Sierra Leone and Liberia, agreements were concluded directly between foreign owners and the national authorities after being negotiated through national brokers; there were also instances in these countries where foreign vessels were chartered by local operators with fishing rights. In the case of Guinea, 80% of the vessels came from China and fished in accordance with the general conditions laid down by the national authorities. As for Guinea-Bissau, it has bilateral agreements with the EU and Senegal as well as an agreement with the Chinese company China National Fishing Corporation. Overall, for the four African coastal States concerned by this study, 79% of the vessels came from four countries: China (47%), Spain (13%), South Korea (12%) and Senegal (7%).

The authors are careful to point out that their study suffered from imprecise data, for example on quantities fished or vessel operating costs, and they are very cautious in their conclusions. Nevertheless, the study suggests that only one of the four countries, Guinea-Bissau, would have fared well. While the income benefiting the coastal State would represent for this country about 17% of the value of the products fished, it would be much lower for the three others: 8% in the case of Sierra Leone, 5% for Liberia and 2% for Guinea.

This prompts the authors to suggest that coastal States should review their licensing systems by developing a different strategy, for example by developing their own fleet or their capacity to land and process the products caught. From their perspective as economists, they stress the need to collect more accurate data so that African coastal States, as economic actors in the market for fishing rights, are no longer in a position of information asymmetry vis-à-vis shipowners. This should enable them to negotiate agreements that provide greater benefits for them, whatever the nature of these agreements.

[33] VIRDIN, John et al., "*West Africa's coastal bottom trawl fishery: Examination of trade in fishing services*", Marine Policy, Elsevier, vol. 100, 2019, pp. 288-297. One of the authors (M. Kobayashi) is an economist from the World Bank, which suggests that the authors have benefited from the best available sources to conduct this study.

These authors also draw attention to the impact of this bottom trawl fisheries on small-scale coastal fisheries. This is in line with the finding of another study, carried out under the auspices of the World Bank,[34] which reports on the interactions between small-scale coastal fisheries and industrial fishing vessels, whether or not the latter operate under bilateral agreements. This study notes that there may be competition to fish for the same species, including in the same fishing grounds, since these large vessels may come to fish close to the coast, illegally or even legally if the coastal State has not taken appropriate prohibition measures. Moreover, even if there is no direct competition on the same species because industrial fishing vessels target other ones, it is quite possible that their by-catches correspond to the species targeted by local small-scale fisheries.

This study demonstrates that coastal States, while they formally have sovereign rights over their EEZ, do not fully exercise these rights for their benefit and that of their population. There is, as indicated above, this asymmetry of information between, on the one hand, coastal States and, on the other hand, shipowners or third States negotiating the acquisition of fishing rights on behalf of the latter in the framework of bilateral agreements, resulting in very low revenues for the coastal State.

A study carried out on behalf of FAO comes to an even clearer conclusion. According to it: "...the total value added of marine fisheries by African countries in 2011 was US$9.9 billion. However, it only comes from 75% of the total catches around the African continent. It has been calculated that if the remaining 25% of the total were fished by African countries rather than by DWFMPs [deep-sea fishers, i.e. distant-water fishing countries], in theory, these additional catches could generate a value of US$3.3 billion, which is 8 times more than the current US$0.4 billion that African countries derive from fisheries agreements. However, in order to establish or develop their fisheries sector many African countries would need investment, skills and a viable environment, the additional catches would also increase food supplies and provide employment as well as stimulate the processing sector."[35] This conclusion is clear; the manner in which African states exercise their sovereign rights over their fisheries resources could certainly be improved.

III.2 THE STRUCTURAL WEAKNESS OF COASTAL STATES IN THE FISHING RIGHTS MARKET

As noted above, the economic analysis of the functioning of the fishing rights market shows an asymmetry of information between its actors. One of the ways in which this asymmetry could certainly be reduced would be for coastal States to collect more precise information on the different parameters of the fishing rights markets in order to be able to better organize themselves and strengthen their negotiating power.

[34] ARTHUR, Robert et al., "*Trade in fishing services – Emerging perspectives on foreign fishing arrangements*", Environment and natural resources global practice discussion paper, Report n° 92622-GLB, The World Bank, Washington, 2014, available at http://documents.worldbank.org/curated/en/504571468164949623/Trade-in-fishing-services-emerging-perspectives-on-foreign-fishing-arrangements. See appendix E of the same report: ARTHUR, Robert, "*Appendix E: Interaction between foreign fishing arrangements and small-scale fishers*", pp. 91-98.
[35] FAO, "*The Value of African Fisheries*", Fisheries and Aquaculture Circular, n° 1093, 2014, p. 49, available at http://www.fao.org/3/a-i3917e.pdf

African coastal States have so far not established any real coordination among themselves for the management of their fisheries resources, even though many stocks are shared among several States. A few intergovernmental organisations exist but the resulting cooperation is rather embryonic. There is certainly the exception of tuna and associated species which are managed, on the Atlantic coast, by ICCAT, the International Commission for the Conservation of Atlantic Tunas, and, for the Indian Ocean, by IOTC, the Indian Ocean Tuna Commission, but the role of African coastal States in these two RFMOs is weak compared to that of the EU and the East Asian states whose vessels are the main exploiters of tuna, whether in the EEZ or on the high seas.

On the Atlantic coast, four intergovernmental organizations are present. One, the Ministerial Conference on Fisheries Cooperation among the African States Bordering the Atlantic Ocean (ATLAFCO), covers almost the entire Atlantic coast from Morocco to Namibia. The other three have a regional dimension: the Sub-Regional Fisheries Commission (SRFC) brings together seven States from Mauritania to Sierra Leone, the Fisheries Committee for the West Central Gulf of Guinea (FCWC) brings together six States from Liberia to Nigeria and the Regional Commission of Fisheries of Gulf of Guinea (COREP) brings together seven States from Cameroon to Angola (two of them as observers). In practice, these organizations are more forums for exchange than real cooperation bodies and significant progress remains to be made. It is also worth noting the existence of the Committee for Eastern Central Atlantic Fisheries (CECAF), which is a consultative structure set up within the framework of FAO. The coastal States concerned are aware of the need to establish genuine cooperation between them in the management of fisheries resources. ATLAFCO therefore adopted a recommendation in August 2018 in which it plans to examine the possibilities of raising ATLAFCO to the status of an RFMO. A study carried out on the subject in 2019 concluded that, for legal and other reasons, the transformation of ATLAFCO itself into an RFMO would be very difficult and that it would be more appropriate to create a new organisation that would be structured in the same way as RFMOs are generally structured, with ATLAFCO continuing to have its own function.[36]

As for the Indian Ocean coast, there is no such specialized intergovernmental organization. It should just be noted that there is the Committee for South-West Indian Ocean Fisheries (SWIOFC) which, like CECAF, was set up within the framework of FAO.

It is reasonable to assume that African coastal States would have a better knowledge of the state of fisheries resources and the level of fishing activities if they were to cooperate more with each other in the regulation and monitoring of activities in their waters. They would then be in a position to better coordinate with each other to obtain better remuneration for the fishing rights they grant.

[36] CAILLART, Benoît, MORIN, Michel et THOM, Mireille, « Etude pour examiner la pertinence et les modalités pratiques pour faire évoluer la COMHAFAT vers une Organisation Régionale de Gestion de Pêche », F&S Fisheries Maritime Affairs pour la COMHAFAT, November 2019. A summary of the final report is available in French on the ATLAFCO website at https://www.comhafat.org/fr/files/publications/doc_publication_0120.pdf.

III.3 CORRUPTION AND LACK OF TRANSPARENCY

Another important factor to consider regarding the market for fishing rights is corruption. An Interpol study[37] on West Africa deals with this problem and the findings can undoubtedly be extended to the whole continent.

The study identifies several forms of corruption:

- corruption of law enforcement officials in the field who solicit bribes to not carry out an inspection or to fail to detect an offence during an inspection;
- corruption in procedures for the prosecution of offences, which also involves bribes;
- the great opacity that often surrounds the issuance of fishing authorisations outside bilateral agreements: information on licences issued is often considered confidential to the extent that even other government departments of the same coastal State find it difficult to obtain them. This can go as far as the issuance of licences in excess through the bribing of officials. Moreover, there is often an obligation to go through intermediaries to obtain them, which encourages corruption.

The role of these intermediaries is particularly well described in an article published in 2017.[38] The role of these intermediaries, whom the author calls 'fishing agents', has grown considerably over the past three decades. In fact, their role goes beyond that of a fishing agent, i.e. an agent responsible for organizing the ships' calls to port. It corresponds more to that of a commercial agent or broker who is responsible for ensuring the issuance of fishing authorizations for a fee. These intermediaries take advantage of the weakness of States; they make themselves indispensable to foreign shipowners in order to obtain these authorisations and they take advantage by asking them to pay a remuneration which is not legal but which they are obliged to pay if they wish to obtain the authorisation.

Furthermore, there is a term that is frequently used in the above-mentioned Interpol study, as well as in the World Bank study,[39] namely "transparency." It is indeed the lack of transparency in the issuing of fishing authorisations, in the public access of data relating to these authorisations, in the keeping of registers of vessels authorised to fish, in the exchange of information between neighbouring States or between the various services of the same State, etc., which encourages corruption.

To illustrate our point, let us cite two cases, which are major ones. These two cases concern Chinese companies:

The agreement signed by Mauritania with the Poly-Hondone company

Mauritania signed an agreement in 2010 with the Chinese company Poly-Hondone Pelagic Fishery Co, in which this company undertook to invest US$100 million in

[37] INTERPOL, "*Study on fisheries crime in the West African coastal region*", Environmental Security Sub-directorate, September 2014, available at https://www.interpol.int/en/Crimes/Environmental-crime/Fisheries-crime.
[38] STANDING, André, "*One of the greatest barriers to sustainable fisheries? The role of fishing agents in Africa*", Coalition for Fair Fisheries Arrangements, 25 October 2017, available at https://www.cffacape.org/publications-blog/2017/09/14/2017-9-14-one-of-the-greatest-barriers-to-sustainable-fisheries-the-role-of-fishing-agents-in-africa
[39] Cf *supra* note 34.

an industrial complex in Nouadhibou including a processing plant, a fishmeal factory and a pirogue manufacture workshop. This agreement, complemented by a protocol signed in 2011, was originally confidential but was opportunely made public by a Mauritanian parliamentarian who was strongly opposed to it.[40] Under this agreement and its protocol, Mauritania has granted fishing licences to several Chinese vessels flying the Mauritanian flag.

The terms of this agreement are actually surprising. There is no limit on catches, the industrial complex is under the free port regime, the company is allowed to export its production through whatever channels it chooses, and it benefits from various tax breaks and exemptions. This agreement, concluded for 25 years, is regularly strongly criticised[41] because of the numerous facilities it grants to this company (it is not the only Chinese company operating in Mauritania in the fisheries sector since, according to a press release from the Chinese Ministry of Fisheries,[42] five companies are present there with a total of 200 vessels).

The agreement concluded by Madagascar with a group of seven Chinese companies

The second case is just as surprising and concerns Madagascar. This agreement was signed on 5 September 2018 by the AMDP (Malagasy Economic Development and Business Promotion Agency) with a group of seven Chinese companies, on the side-lines of the Sino-African cooperation forum in Beijing. It was announced that this 10-year agreement would result in an investment of 2.7 billion US dollars and the creation of 10,000 jobs. It provided for 330 vessels to be sent to Madagascar, comprising 300 new 14-meters fishing vessels and 30 28-meters vessels to be used for sea rescue, surveillance and catch collection.[43] It was expected that the catches would first be offered to the population of Madagascar and only the surplus would be sent to China. However, following the change of government in that country at the beginning of 2019, its implementation was suspended.

The announcement of this agreement had led to very strong protests among Malagasy civil society, especially since the Minister of Fisheries Resources and Fisheries had not been involved in its adoption. The AMDP is apparently a little-known and opaque structure that was launched in 2016 at a forum of the International Organisation of the Francophonie in Paris. Although claiming to act

[40] This agreement and its protocol are available (in French) on the information site http://www.rmibiladi.com/fr/, see articles from 9 and 16 June 2011.
[41] For example, see CHERIF, Mahmoud, "*Impact analysis of the Poly Hondone Pelagic Fishery-Mauritania Convention*", Pêchecops NGO, 2011, available at https://www.cffacape.org/publications-blog/2011/07/08/2011-7-8-impact-analysis-of-the-poly-hondone-pelagic-fishery-mauritania-convention. See also the following press articles (in French): DEIDA, Jedna, « *Mauritanie-Chine Polyhondone fisheries: Bateaux épinglés et protocole contesté*! », REJOPRAO blog, 2012, available at https://rejoprao.blog4ever.com/mauritanie-chine-polyhondone-fisheries-bateaux-epingles-et-protocole-conteste and DEIDA, Jedna, « *Programme d'investissement de Polyhondone: Le gouvernement fait profil bas!* », Mauriweb info website, 24 March 2018, available at http://www.mauriweb.info/node/4479. Finally, see the report from the French NGO Sherpa: « *La corruption en Mauritanie, un gigantesque système d'évaportation* », July 2017, available at https://www.asso-sherpa.org/wp-content/uploads/2017/09/Sherpa-La-Corruption-en-Mauritanie_Un-gigantesque-système-dévaporation-2017.pdf.
[42] See MINISTRY OF AGRICULTURE OF THE PEOPLE'S REPUBLIC OF CHINA, "*China-Mauritania mixed committee on fisheries holds meeting in Beijing*", Information office PRC, 3 November 2011, available at http://english.agri.gov.cn//news/dqnf/201711/t20171103_295609.htm
[43] See CARVER, Edward, "*Local fishers oppose $2.7 billion deal opening Madagascar to Chinese fishing*", Mongabay news website, 5 November 2018, available at https://news.mongabay.com/2018/11/local-fishers-oppose-2-7-billion-deal-opening-madagascar-to-chinese-fishing/ and CARVER, Edward, "*Madagascar: Opaque foreign fisheries leave empty nets at home*", Mongabay news website, 9 October 2019, available at https://news.mongabay.com/2019/10/madagascar-opaque-foreign-fisheries-deals-leave-empty-nets-at-home/.

on behalf of the Government, the agency refused to provide a copy of the agreement. The fishermen expressed strong opposition because of the competition that the vessels would cause to their activity.

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These two examples make it incomprehensible how such interesting advantages can be granted to foreign shipowners without there being in return some kind of benefit granted in one way or another exclusively to the political or administrative staff involved in negotiating these agreements. The forms that the phenomenon of corruption that is rife in many African States certainly characterizes what can be described as "bad practices."

This lack of transparency argues that fishing rights should rather be granted in the framework of bilateral agreements between states that would be published in accordance with the norms of international law. This would make the conditions under which fishing authorisations are issued clearer, thus preventing persons in strategic positions or acting in connection with them from deriving illegal income too easily. The benefits for coastal States would certainly be higher.

We will not go so far as to say that bilateral agreements between coastal States and third states, such as those concluded with the EU, necessarily represent "good practice." Although the transparency of the provisions and functioning of these agreements has improved, they sometimes retain their share of grey areas, for example with regard to compliance with technical conditions for fishing, the accuracy of catch declarations, or the use of funds paid out in support of the fisheries sector in the host country. However, despite this reservation, the transparency of bilateral agreements is certainly better than with authorisations granted directly to private companies.

III.4 BILATERAL AGREEMENTS AS "LESS BAD PRACTICES"

In the presence of bilateral agreements such as those between the EU and African states, civil society and fisheries management experts have concrete elements from which they can analyse the flaws of these agreements, the risks they entail and their possible negative effects. On the other hand, in the case of authorisations granted directly by coastal States to foreign shipowners, researchers or observers can only work on the basis of more or less reliable hypotheses. Moreover, as we have just seen, the conditions for granting these authorisations open the door to corruption.

This view is not shared by everyone. A very significant example of this is the bilateral agreement between the EU and Mauritania, in respect of which a well-known research consultant is very critical.[44] In an article with an suggestive title ("*EU-Mauritania fisheries partnership in need of more transparency*"), he denounces the lack of transparency of this agreement. Most recently, in February 2020 on the CFFA website,[45] he sounded the alarm on the state of small pelagic stocks in Mauritania

[44] CORTEN, Ad, "*EU-Mauritania fisheries partnership in need of more transparency*", Marine Policy, Elsevier, vol. 49, 2014, pp. 1-11.
[45] CORTEN, Ad, "*How the Mauritania fisheries agreement can be used to improve fisheries management*", Coalition for Fair Fisheries Arrangements (CFFA-CAPE), February 2020, available at: https://www.cffacape.org/publications-blog/how-the-eu-mauritania-fisheries-agreement-can-be-used-to-improve-fisheries-management.

and strongly criticized the EU's shortcomings in the management of this agreement, particularly with regard to data collection, and considers that the EU should use this bilateral agreement as a lever to promote more sustainable management of these stocks.

It is not entirely wrong to say that the implementation of this bilateral agreement should become more transparent; there are still grey areas. And he is quite right to point out the shortcomings of this agreement. This shows precisely that it is possible to point out the shortcomings in the implementation of these bilateral agreements and also to indicate the aspects that should be improved or approached differently.

One would like to read such a thorough analysis of the risks and possible negative effects of fishing carried out by EU vessels on the basis of authorisations issued directly by the coastal State, for example fishing carried out by Dutch vessels in Mauritania before the bilateral agreement was put in place or fishing carried out by the same vessels in Namibia, examples that are quoted in a quick comparison in the 2014 article. Obviously, it is hardly possible to make such an analysis since the terms of these authorisations are confidential! There is thus a paradoxical aspect in the 2014 article. Indeed, criticisms are made on this bilateral agreement with the EU, criticisms that are certainly not totally unfounded, but this agreement is not placed in a more general context that should encourage it to put these criticisms into perspective to take into account the total opacity that reigns for the other modes of granting fishing authorizations (except for unforeseen leakage as in the case of the agreement with Poly-Hondone).

On the other hand, it is illusory to think that, since the bilateral agreements that the EU concludes to acquire fishing rights are of a purely commercial nature, sectoral aid should be taken out of the bilateral agreement and brought within the framework of development aid. Indeed, should the EU ever decide to move in this direction, this would certainly have two consequences. Firstly, the same aid would certainly be reduced since it would be budgeted within the general framework of development aid and not within the specific framework of the fisheries policy. The bilateral agreement framework very probably justifies a higher amount of aid than would be the case with development aid since, psychologically, whether we like it or not, it represents a quid pro quo for obtaining fishing rights. Secondly, the bilateral agreement for obtaining fishing rights would probably gradually lose its raison d'être, the EU would progressively abandon the renewal of the protocols which set out the conditions of access for EU vessels for limited periods of time and would finally leave the private companies to take responsibility themselves for acquiring the fishing rights necessary for their activity. However, as we have seen, the opacity surrounding the delivery of authorisations by the coastal State directly to third country shipowners would open the door to the resumption or resurgence of the phenomenon of corruption.[46]

[46] See specifically the case of Namibia, cited in the second line of this paragraph, where Dutch vessels have obtained fishing authorizations directly from the authorities. Namibia changed its system for allocating fishing licences in 2018 precisely because of corruption problems; in this context, see the following press articles: HARTMAN, Adam, "*New rights to curb fisheries corruption*", The Namibian website, 30 May 2018, available at https://www.namibian.com.na/177910/archive-read/New-rights-to-curb-fisheries-corruption, and CABRA, Mar, "*Fishing industry rep calls ICIJ investigation an 'explosive cocktail that damages the Spaniards'*", International Consortium of Investigative Journalists, 15 March 2012, available at https://www.icij.org/investigations/looting-the-seas-ii/impact-fishing-industry-rep-calls-icij-investigation-explosive-cocktail/.

In the aforementioned article, after having highlighted the critical aspects of the EU-Mauritania bilateral agreement, the author mentions the position of the Dutch shipowners who would prefer to negotiate themselves with third countries without entering into bilateral agreements concluded between these third countries and the EU.[47] In our view, it is dangerous that private companies, whose primary aim is to make their assets grow and which are in no way philanthropic, should have such economic weight[48] that they are in a position of strength to negotiate advantageous conditions for access to fishing rights or to the internal markets of States in order to sell their products there. It is not just a question of asymmetry of information, as noted above,[49] but of too much negotiating power when faced with countries that have difficulty ensuring food security for their populations.

Therefore, thanks to the information which is made public and which makes it possible to launch debates, either in the coastal States concerned or in the distant fishing States from which the fishing vessels originate, bilateral agreements are certainly preferable to the agreements which are concluded by coastal States with private companies where opacity reigns. Of course, these bilateral agreements and their implementation certainly need to be improved. But, at least with knowledge of the shortcomings that result from the implementation of the current agreements, it is easier to determine what needs to be changed or improved. That is why, without going so far as to describe them as "good practices," we can consider them to be the "least bad practices."

IV. Conclusion: The purpose of the sovereign rights of coastal States over their fisheries resources

As we said in the introduction, given the African context, the purpose of fishing activities must be to contribute to the food security of the continent and to provide employment for the populations of coastal States. Therefore, fishing by fleets foreign to the continent should in principle be considered as transitory until African countries are able to fish their resources with their own vessels. However, the way in which coastal States exercise their sovereign rights in EEZs is far from being conducive to this (§ 1), which leads us to believe that African States must necessarily change their fisheries governance (§ 2).

IV.1 THE EXPLOITATION OF EEZs IS TOO DEPENDENT ON FOREIGN FLEETS

When one considers, on the one hand, the large number of bilateral agreements, particularly with the EU, and on the other hand, the strong presence of vessels

[47] See p. 9 of article cited in note 44: "*It is not surprising that some pelagic ship owners in the Netherlands would prefer to negotiate their own agreement with the Mauritanian government, even if this means that they would lose the EU subsidy.*"
[48] See welcome page of Parlevliet & Van der Plas group (which is a different group from the one mentioned by Ad Corten in his footnote 10, page 9): "*Africa, our main market - Our main market is Africa. Our fish is considered both affordable and healthy. Fish trading is handled and managed by women. Together with the so-called Mama's we are good for supplying 3 million fish meals per day.*" Available at https://www.pp-group.nl/the-world-of-pp and last consulted on 12 April 2020.
[49] Cf. *supra* § III.1.

belonging to distant water fishing vessel owners to whom fishing authorisations are issued directly by coastal States, as well as the existence of joint ventures registered in an African country but in fact controlled by foreign interests, one does not detect a trend towards a decrease in foreign presence. It is as though it was made to last and that African States were prisoners of this situation.

There are certainly economic constraints, but these ones cannot justify that, after having become independent for the most part in the 1960s and having acquired sovereign rights in their EEZs in the 1980s and 1990s, African countries do not seem to want to reverse the curve of foreign presence in their waters at the dawn of the 2020s (let us recall that, although UNCLOS did not enter into force until 1994 after being adopted by the 3rd Conference in 1982, the principle of the establishment of EEZs was established as early as 1975 and many states, for example the European states, established their EEZs as early as 1976-1977). It is as if the EEZs of African countries had somehow become economic colonies of distant water fishing states. It is hardly acceptable that the trade-offs over the use of the income from the sale of fishing rights seem to benefit mainly the state apparatus and the people around it, and have not so far made it possible to build, or even begin to build, a viable fisheries economic sector that would improve the continent's food security.

Some of the orientations currently being taken by African fisheries are even the opposite of what is desirable. The increase in the capture of small pelagics in West Africa, which are the basis of the traditional food of the populations, to process them into fishmeal which is then exported for aquaculture, particularly in China but also to European countries, is a worrying phenomenon.[50] In addition, this increase in catches is putting a dangerous pressure on the resource with some stocks which are now in a state of overexploitation. Moreover, this activity creates very few jobs, unlike small-scale processing when the catches are intended for consumption by the population. But it is not only the distant water fishing fleet that is involved in this phenomenon. For example, the fishmeal factories in Mauritania (Nouadhibou) and The Gambia are supplied by Senegalese small-scale fisheries (some large pirogues can measure up to 25 m).

Another example is the announcement made in January 2019 by the large Dutch industrial fishing company Vrolijk that it had opened a fish processing plant and cold storage facility in Nouadhibou. Vrolijk presented this investment as a welcome alternative to Chinese investment in fishmeal factories located there, because the products leaving the factory will be destined for human consumption on the African market.[51] It is true that the fish will not be used for the production of fishmeal and the processed products not exported, as is usually the case, but will be destined for the African market (if this company really complies with this announcement since there is no legal obligation to do so). From this point of view, we can say that there is a positive aspect to this investment. However, this factory will employ only 100 people for a production of 500,000 frozen portions per day and, according to the announcement mentioned above, there will be only one ship that will supply this factory, with a crew of Mauritanians trained by Dutch people

[50] See CAILLART, Benoît and BEYENS, Yolaine, « *Etude sur l'évolution des pêcheries de petits pélagiques en Afrique du Nord-Ouest et impacts possibles sur la nutrition et la sécurité alimentaire en Afrique de l'Ouest* », DAI Europe, 2014. This study was funded by the EU.
[51] See press release from 2 January 2019, available at http://www.industriaspesqueras.com/.

(it can be assumed that the Dutch will be the ship's officers and the Mauritanians the sailors). Many jobs could undoubtedly have been created with a differently organised sector, on the one hand, jobs at sea with smaller vessels and African crews (Mauritanians and possibly from neighbouring countries, Senegalese for example), and on land using processing technologies that might have been less efficient but which would have created a significant number of jobs.

These two examples concern the same fishing port (Nouadhibou) but other similar examples could be cited. Our aim is not to make an exhaustive study on the subject, which would go far beyond the scope of this primarily legal article, but to show that there is a general problem of fisheries governance in Africa and that different orientations on certain aspects of this governance must be envisaged for the future of this continent.

IV.2 THE NEED FOR CHANGE IN GOVERNANCE

The governance of fisheries in Africa must evolve to be at the service of the population as a whole and not only for the benefit of the state apparatus and those who feed on it. This is the responsibility of policy makers and it is important that they take concrete measures to ensure that the exploitation of the resources in their EEZs benefits national vessels.

From this point of view, an FAO legal instrument seems to us essential to consider. It is the "*Voluntary Guidelines for Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*" which were adopted by its Committee on Fisheries in June 2014.[52] As indicated in its foreword, these guidelines complement the Code of Conduct for Responsible Fisheries adopted in 1995, also by FAO. These guidelines are highly relevant to the fisheries situation in Africa. They recognize the contribution of small-scale fisheries to food security and emphasize their importance in terms of employment, acknowledging the role of small-scale fishing communities and the need to build their capacity to participate in decision-making processes. They call for preferential access to fisheries resources for artisanal fishers through the establishment of specific measures and the protection of exclusive fishing zones.

These guidelines are a guide for States. FAO has conducted a series of regional workshops for their implementation.[53] African States should use these guidelines as a basis for taking action to strengthen their small-scale fisheries sector so that it can contribute effectively to the food security of the continent. Thus, although African coastal States have completely ignored their obligations under Articles 69 and 70 UNCLOS towards land-locked or geographically disadvantaged States in the same region, these actions would at least have the advantage of bringing them closer to the common fate they have with these countries.

In addition, African coastal States need to better coordinate their resource management policies, including through the establishment of RFMOs to manage stocks shared between several countries.

[52] The text of the Guidelines is available at http://www.fao.org/voluntary-guidelines-small-scale-fisheries/en/
[53] See document COFI/2018/Inf.17 presented to the 33rd session of the FAO Committee on Fisheries in July 2018, available at http://www.fao.org/about/meetings/cofi/documents-cofi33/en/.

All of these actions would be a significant change from the current "every man for himself" approach. This would be more in keeping with the spirit of UNCLOS. It would also better respond to Goal 14 ("*Conserve and sustainably use the oceans, seas and marine resources for sustainable development*") of the Sustainable Development Goals (SDGs) adopted by the United Nations in 2015.

Nantes, May 2020