

Fishing access arrangements, catch attribution and allocation

Information Paper

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Executive summary

Negotiations on catch allocations have taken place for 11 years at the IOTC. This information paper aims to provide a full picture to IOTC members on the rights and obligations associated with FAAs and present the management and allocation implications of FAAs. The paper is based on a detailed analysis of LOSC provisions and a review of the EU's sustainable fisheries partnership agreements (SFPAs) tuna arrangements and other publicly available FAAs.

In terms of **rights, obligations and implications of FAAs**, the LOSC prescribes coastal States with sovereign rights over their EEZs, while promoting optimum utilisation for surplus catch, as determined solely and exclusively by the coastal State. The analysis of the nine EU SFPAs shows that SFPAs recognize and acknowledge the sovereign rights of the respective coastal states. Under the SFPAs a temporary right of access has been transferred to the foreign flagged vessels, limited to a maximum tonnage of fish, a certain number of vessels, and certain species, that can be harvested subject to specific terms and conditions. Similar concepts are reflected in other examples of FAAs that allow temporary access to the EEZ of coastal states.

The LOSC does not provide any guidance on the **temporal extent of FAAs**, although coastal States may enter into FFAs as long as the stock is in good health and a surplus exists. In practice, however, Indian Ocean coastal states and DWFNs continue to sign FAAs despite declining stocks and the need to reduce fishing impacts below existing levels. The FAAs analysed apply to a certain timeframe ranging from 3 to 10 years that can be renewable.

The paper also analyses the financial arrangements in FAAs to determine if there is any **compensation for future catch history and rights transfer**. The LOSC (Art. 62(4)) prescribes exclusive authority to the coastal State to determine any access fees and conditions for access. The study of all publicly available FAAs does not provide any suggestion or mention that fees might compensate for any future catch history or right transfers. The analysis of the EU SFPAs and other examples does not reveal any reference to future catch history, nor mention any transfer of enduring rights from the coastal State to the flag State.

Finally, we discuss the **implications of allocation discussions on FAAs**. Proposals that grant the majority of historical catch to foreign flag states would radically change the operation of tuna fisheries. Similarly, the implementation of FAAs would change if historical catch became the dominant factor for determining allocations. This model would result in developing coastal States potentially being forced to purchase quota from DWFNs, in order to access their own EEZs. This would effectively destroy the sovereign rights granted by the LOSC to coastal States, while empowering historically dominant developed fishing States. Alternatively, if the IOTC recognises the sovereign rights of coastal States and attributes EEZ catch to the coastal State, and high seas catch to the flag State, then it would minimise any impact on the future operation of the region's tuna fisheries, or on future FAAs. In this scenario, DWFNs would continue to negotiate FAAs for access to an EEZ, fishing against the quota allocated to the coastal State when inside an EEZ, and against their own flag's quota when on the high seas.

This paper confirms that FAAs only grant a limited term of access. They do not provide an ongoing right of access beyond the period of the arrangement, nor establish a historical catch or remove any sovereign rights from coastal states.

Résumé

Ce document vise à informer les membres de la CTOI sur les droits et obligations associés aux accords de pêche (AP) et à présenter les implications des AP sur le régime d'allocation. Le document se base sur une analyse détaillée des dispositions de la convention des Nations Unies sur le droit de la mer (CNUDM) et sur un examen des accords de partenariat de pêche durable (APPD) conclu par l'Union Européenne (UE) relatifs au thon et d'autres AP publics.

En termes de droits, d'obligations et d'implications des AP, la CNUDM prescrit aux États côtiers des droits souverains dans leurs ZEE, tout en encourageant une utilisation optimale des captures excédentaires dont l'évaluation est déterminée exclusivement par l'État côtier. L'analyse des neuf APPD de l'UE montre que les APPD reconnaissent les droits souverains des États côtiers respectifs. Dans le cadre de ces accords, un droit d'accès temporaire est transféré aux navires battant pavillon étranger, selon des conditions spécifiques tel le tonnage maximum, le nombre de navires et les espèces. Des concepts similaires se retrouvent dans d'autres AP, permettant uniquement un accès temporaire à la ZEE des États côtiers.

La Convention sur le droit de la mer n'a pas de prescription particulière sur la durée des AP, les États côtiers peuvent conclure des AP tant que le stock est en bonne santé et qu'il existe un excédent. Dans la pratique, cependant, les États côtiers de l'océan Indien et les États pratiquant la pêche hauturière (DWFN) continuent de signer des AP malgré le déclin établi des stocks. Les AP analysés s'appliquent sur une période allant de 3 à 10 ans, renouvelables.

Le document analyse également les dispositions financières des AP afin de déterminer si la compensation financière est liée à l'historique des captures futures et le transfert des droits. La CNUDM (article 62, paragraphe 4) confère à l'État côtier le pouvoir exclusif de déterminer les droits d'accès et les conditions d'accès. L'étude des AP montre qu'il n'y a aucune mention que les droits d'accès pourraient couvrir l'historique des prises futures, ni la possibilité d'un transfert de droits à l'État du pavillon.

Enfin, nous présentons des implications des discussions du régime d'allocation sur les AP. Les propositions qui accordent la majorité des prises historiques aux États du pavillon étrangers modifieraient radicalement le fonctionnement des pêcheries de thon. Ce modèle aurait pour conséquence que les États côtiers en développement seraient potentiellement contraints d'acheter des quotas aux DWFN, afin d'accéder à leurs propres ZEE. Cela détruirait effectivement les droits souverains accordés par la Convention sur le droit de la mer aux États côtiers, tout en renforçant la dominance historique des DWFN. En revanche, si la CTOI reconnaît les droits souverains des États côtiers et attribue les captures dans la ZEE à l'État côtier et les captures en haute mer à l'État du pavillon, elle minimisera tout impact sur le fonctionnement futur des pêcheries de thon de la région ou sur les futurs AP. Dans ce scénario, les DWFN continueraient à négocier des AP pour l'accès à une ZEE, en pêchant à travers le quota alloué à l'État côtier lorsqu'il se trouve à l'intérieur d'une ZEE, et sur le quota de leur propre pavillon lorsqu'il se trouve en haute mer.

Le présent document confirme que les AP n'accordent qu'une durée d'accès limitée à la ZEE. Ils ne fournissent pas un droit d'accès permanent au-delà de la période de l'accord, ni n'établissent un historique des captures. Les AP ne peuvent retirer aucun droit souverain aux États côtiers.

Introduction

The United Nations Convention on the Law of the Sea (LOSC) set up a system of access rights to marine resources.¹ It also established geographical boundaries for national waters, including countries' territorial waters and an economic exclusive zone (EEZ). Coastal states were given an array of rights over natural resources within the EEZ: the rights to access, use and manage the resources within those limits, determine who can have access and use rights and determine who can have rights to access those resources, and under what conditions.² LOSC also prescribes in article 62 that coastal States shall promote the objective of optimum utilisation, and provide access to any surplus allowable catch to other states. However, coastal States are given exclusive discretion in determining the level of surplus, if any, and the conditions and fees for access. These provisions created the possibility for fishing access arrangements (FAAs) between coastal States and distant water fishing nations (DWFNs), or directly with the distant water fishing fleets. These FAAs provide access to marine resources in exchange for a fee and other modalities determined within the arrangement.

FAAs have often been criticised for their lack of consideration of sustainability, their limited fairness and a persistent lack of transparency in both their negotiations and implementation [1]–[3]. Coastal States often face a range of dilemmas and political-economic struggles regarding the setting of the appropriate access fee due to: influential DWFNs who use a range of economic and diplomatic tools on behalf of their national fleets; domestically-based processors who may want to secure raw material supply to maintain employment; regional competition with other states (including around catch histories); local small scale fishers who see FAAs as privileging foreign industrial fishing; and/ or wider national pressures to distribute the benefits of the fishery [4], [5] [6]. The attribution of catches taken under FAAs has been raised during meetings of the Indian Ocean Tuna Commission (IOTC) (authors' observation), as the IOTC negotiates the attribution of catches for the purposes of catch history.

The aim of this information paper is to provide a full picture to IOTC members on the rights and obligations associated with FAAs and present the management and allocation implications of FAAs at the national and regional levels.

The paper starts with a brief presentation of the nature of FAAs, and briefly discusses the challenges associated with FAAs. It then analyses the rights and obligations associated with FAAs, as expressed within the LOSC and within publicly available FAAs themselves, and their implication for catch attribution and subsequent allocation decisions. It concludes with some key recommendations for different actors involved in FAAs and the management of marine resources and tuna fisheries in particular.

¹ United Nations Convention on the Law of the Sea, Montego Bay; 10 December 1982. In force 16 November 1994, 1833 UNTS 3 [UNCLOS]

² Art 56 of UNCLOS: "In the exclusive economic zone, the coastal state has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds [...]"

Methods

The paper is based on a detailed analysis of LOSC provisions focusing on articles linked to access, sovereign rights and management. The paper then studies the EU's sustainable fisheries partnership agreements (SFPAs) tuna arrangements and the Pacific Islands Multilateral Tuna Treaty with the United States (FFA-US MLTT) – as these are publicly available. Currently, the EU has nine SFPAs in place³, mainly with African countries and one State in the Pacific – the Cook Islands. Two of these SFPAs also include hake as a target species (i.e., Senegal and Gambia). The FFA-US MLTT negotiations are facilitated by the Pacific Islands Forum Fisheries Agency (FFA) and the treaty allows multilateral access to FFA EEZs. Results from these two methods were complimented with a literature review of existing papers and reports on FAAs but also on FAAs and their link to resources management. Finally, the authors also provided their personal observations from their own personal involvement in the negotiation and evaluations of access agreements. These observations are flagged as such within the paper.

What are fishing access arrangements?

The establishment of the LOSC underpinned FAAs through its Part V which granted coastal States sovereign rights over the living marine resources within their EEZs. It requires coastal States to promote the objective of optimum utilisation while allowing the sale of access to any "surplus" catch. The exclusive discretion granted to coastal States is sufficiently flexible that coastal States may decide - for many reasons - that there is no surplus available for access by other countries [7]. Coastal States, especially developing States, were not opposed to incoming foreign vessels [8], [9] and historically viewed this activity as a distributary mechanism for coastal States to generate income from what were considered, at the time, to be locally underexploited stocks.

FAAs set the fees for foreign fishing vessels to fish in an EEZ, and determine the modalities and conditions of access to the fishing grounds. They may include, for example, the number of vessels that can fish under the FAA, the area that is accessible or restricted, the species that can be fished, and the gear that can be used, and any other fishing conditions such as obligations to report on fishing, carry observers, utilise satellite monitoring, and other management measures. Access fees have various structures [10]⁴ and can include reference tonnages, effort levels or number of authorised fishing days. For the EU SFPAs, the tonnage does not represent a quota but is rather an approximation of the potential annual catch by the fleets. The number of vessels authorised to fish is also a maximum, and does not always reflect the actual number of vessels that ultimately proceed to fish inside the EEZ.

Types of FAAs globally

A recent mapping of FAAs for the FAO identified a number of axes for differentiating among FAAs and categorising them (FAO 2022). One axis is between reciprocal and non-reciprocal, which are typically, but not always, between developed countries for reciprocal or 'Northern'

³ A tenth EU SFPAs was concluded with Madagascar in November 2022, the SFPAs was not part of this analysis as it is not publicly available yet.

⁴ See Le Manach 2014 [11] for a detailed analysis of EU access fees.

arrangements, and between developed and developing countries for non-reciprocal or 'Southern' arrangements. FAAs can be single species and multi-species. In the Indian Ocean, non-reciprocal 'Southern' Arrangements are more common, although countries like the Seychelles and Mauritius have reciprocal FAAs⁵. There are two overarching types: first- and second-generation FAAs.

'First generation' FAAs involve the granting of fishing access in return for a financial payment. Various methods are used to calculate the financial component and arrangements are normally regulated by a complex set of requirements relating to fisheries management, monitoring, control and surveillance (MCS), and enforcement. There are three main types of first-generation access arrangements (FAO 2022):

1. government-to-government, which can be bilateral (the approach used by the EU) or multilateral (used by the USA with the Pacific Islands).
2. industry association-to-government, which are often used by fleets flagged by Japan, South Korea and Taiwan, among others; and that may involve different associations representing different gear types combining to enhance their leverage with a coastal state.
3. company-to-government through direct licensing, which are the less well understood and often most opaque.

'Second-generation' FAAs involve one mechanism, or a combination of two broad mechanisms (FAO 2022). The first mechanism is the granting of access and/or reduced access fees in return for the vessels registering locally and agreeing to use local goods and services through transshipment and/or landing of the fish domestically. This is the case for some vessels flagged to the Seychelles, Mauritius and recently Madagascar, often operated by European and Asian companies. The second mechanism is onshore investment in processing facilities in return for fishing access. In this case, the operator is expected to commit to onshore investment in the form of joint-venture enterprises and involve anticipated direct and indirect employment generation, spin-offs in terms of ancillary industries, exports, technology transfer, etc. Distant water fishing operators often use second-generation access in one EEZ to benefit from South-South cooperation arrangements in another EEZ, such as Seychelles flagged, Spanish owned purse seiners under the Mauritius-Seychelles arrangement. Such arrangements can also be used to avoid catch, effort or capacity limits adopted by RFMOs, thereby undermining sustainability objectives as vessels maintain or increase their catch or effort through re-flagging. An example of this practice can be seen in the response to the IOTC yellowfin rebuilding plan where fishing companies from DWFNs have continued to exploit resources through their allocated DWFN catch limit, but also then additionally through vessels that have re-flagged to other IOTC states and utilised their limits [12].

⁵ Such FAAs between Mauritius and Seychelles have been in place since 2005 and allow reciprocal access to the EEZ of both countries in exchange of fees paid per vessel flagged to both countries.

National and regional challenges linked to FAAs

FAAs have long been criticised for a lack of transparency and fairness [3], [13]. While the literature reveals some improvements [14], [15], there are substantial structural challenges that remain regarding the management of FAAs and their implementation. Monitoring, control and surveillance is one such challenge. It has been reported that despite the requirements set in fishing arrangements and their protocols, partner States in Africa often do not possess the financial and logistical capacity to use electronic monitoring (e.g. in Côte d'Ivoire [16]) or to send observers (e.g. in Cape Verde [17]) or inspectors (e.g. in Gambia [18]) onboard. Data related to European fishing activities also appears not to be communicated in certain cases (e.g. in Cape Verde [17]; in Madagascar [14]). Coastal states often rely on good faith of foreign fishing fleet to submit data regarding the monitoring of catch. Furthermore, surveillance of fishing activities within the entire EEZ cannot always be ensured and risk of illegal fishing activities remains high [14]. Distant water fishing vessels continue to engage in illegal fishing activities (i.e. fishing in an area, or targeting a species/using a gear they are not legally permitted) in both West and East Africa [17], [19]–[21], and still actively participate in overfishing [22], [23]. Another challenge relates to local fishers, who often feel excluded from the processes of FAAs, and do not receiving significant benefits from these arrangements, while they have to share the resources within the EEZ [24].

FAAs also create geopolitical entanglements that have impacts at the national and RFMO levels. Nationally, FAAs play a key role in foreign aid flows [25], [26]. The ‘sectoral support’ part of EU access fees for example has over the years contributed to the construction of different infrastructures such as fisheries buildings, ports and processing facilities in the islands of the Western Indian Ocean [14]. It has also funded different projects within the departments of fisheries [9]. Furthermore, Official Development Assistance (ODA) that is not directly tied to FAAs has long been understood to influence interactions between resource holding states and resource seeking states and the firms that they represent [27]–[29]. In the Indian Ocean region in the 2010s, the EU, Japan and China were all major donors of development and fisheries aid [6]. Such contributions, which have started since the beginning of industrial tuna fisheries in the region in the 1980s, have created a strong relation between the coastal States involved in FAAs with DWFNs [6], [26]. Added to this are even stronger geopolitical links between DWFNs like France and its former colonies in the region. At the RFMO level, national interests of some coastal States can lean more towards collaboration with DWFNs than other States of the region [30]. DWFNs often use their strategic and historical positions as long-term foreign aid ‘partners’ of coastal states to seek alignment of coastal states involved in FAAs. This can hinder efforts of regional cooperation amongst coastal states when negotiating management measures, with some coastal states not sponsoring proposals that might impact fishing activities of vessels under FAAs [30].

Rights, obligations, and implications of FAAs

In this section, we analyse the rights and obligations linked to FAAs and their implications for fisheries management, especially in terms of catch attribution and allocation discussions at the RFMO level. We start with an analysis of LOSC provisions followed by a presentation of what FAAs prescribe.

The LOSC applies jurisdiction (parts 2, 4, 5, 6 and 7) over three broad maritime zones: zones under sovereignty (encompassing internal waters, archipelagic waters and territorial seas); zones under sovereign rights (EEZ and the continental shelf); and high seas (all parts of the sea that are not included in zones under sovereignty or sovereign rights [31]). In the context of FAAs, the LOSC prescribes coastal States with sovereign rights over their EEZs, while promoting optimum utilisation for surplus catch, as determined solely and exclusively by the coastal State.⁶

The analysis of the nine EU SPFAs⁷ shows that SPFAs recognize and acknowledge the sovereign rights of the respective coastal states. SPFAs grant a temporary right of access to EU distant water fishing vessels, however it is limited to a maximum tonnage of fish, a certain number of vessels, certain species to be harvested, and subject to specific terms and conditions. All fishing activity governed by the respective SPFAs falls under the jurisdiction of the coastal state and has to comply with the coastal state's laws and regulations. Fishing vessels are required to report data to the coastal state, supporting the coastal state's sovereign rights.

Similar concepts are reflected in the FFA-US MLTT⁸. The FFA-US MLTT allows temporary access to the EEZ of coastal states. All licenced vessels have to comply with the national law of each Pacific Island state. Generally, it has been emphasised that nothing in this treaty shall "prejudice the rights, jurisdiction and duties of parties under international law" (Para 4.12).

The concept of "surplus" is central to LOSC's Art. 62. A "surplus" corresponds to the fraction of the "total allowable catch" that the coastal State does not have the capacity to harvest itself, and would thus remain in the water if not harvested by vessels of another State [9]. In practice, very few States have established this surplus, or determined their total allowable catch, or their own capacity to harvest. While stock assessments take place in the Indian Ocean region, for example, only a handful of stocks are assessed and related management measures do not include the establishment of TAC [32]. Furthermore, in the case of migratory species such as tuna, coastal States depend on regional assessments and management measures adopted *multilaterally* at the RFMO level. However, DWFNs continue to use the concept of a "surplus" to justify *bilateral* FAAs.

⁶ Art. 62(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. Art. 62(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 [Landlocked and geographically disadvantaged states], especially in relation to the developing States mentioned therein.

⁷ The nine EU SPFAs are with Cape Verde, Gabon, Ivory Coast, Sao Tome and Principe, the Cook Islands, Seychelles, Mauritius, Senegal, and the Gambia. Source : https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_en

⁸ in Amendments to the Treaty on Fisheries Between the Governments of Certain Pacific Island States and The Government of The United States of America. Source: <https://www.congress.gov/115/cdoc/tdoc3/CDOC-115tdoc3.pdf>

While LOSC envisages that other States may be given access to the surplus, this is firmly within the framework of the coastal State's sovereign rights over living resources in the EEZ. Pursuant to this framework, the sovereign rights of coastal States to explore, exploit, conserve and manage living resources in the EEZ are subject to concomitant responsibilities⁹; not only to establish a total allowable catch, but to adopt conservation and management measures to prevent over-exploitation, taking into account the effects on associated and dependent species, and to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield (as qualified by relevant economic and environmental factors). All of this must consider the best scientific evidence available. In the context of these responsibilities, the coastal State must then determine its own capacity to harvest the total allowable catch, and then allow other States access to any surplus, taking into account a wide (and non-exclusive) range of factors — including the coastal State's own economy and national interests, and the interests of land-locked, geographically disadvantaged and developing States, and States which have habitually fished in the region.¹⁰ These factors are, in large part, issues which are likely to change over time and may require the coastal State to make different decisions at different times.

It is thus clear that the LOSC framework establishes a system within which the rights (and concomitant obligations) to conserve and manage fishery resources in the EEZ, and to make decisions about how and by whom they are harvested, remain perpetually with the coastal State. This is evident in the fact that consideration must be given to the conservation and management of the whole population of a species, as well as associated and dependent species, all of which must be managed dynamically in a way that avoids over-exploitation. This could not be achieved if rights over a particular portion of a stock were transferred to foreign flag states as a result of granting access to the surplus under FAAs. Furthermore, even if the surplus is established by a coastal state, such surplus would vary in different years. The continuing rights of the coastal State are also confirmed by the variety of issues to be taken into account in considering to whom access will be granted. This suggests that the recipient of the access is likely to vary over time (depending on how or whether particular issues apply), and does not suggest that, if access is once granted, rights are transferred permanently to a flag State.

⁹ Article 56 (1)(a). In the exclusive economic zone, the coastal State has: **sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources**, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil [...].

Art. 61(1). The coastal State shall **determine the allowable catch** of the living resources in its exclusive economic zone. (2). The coastal State, taking into account the best scientific evidence available to it, shall ensure through **proper conservation and management measures** that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.

¹⁰ Article 62(3). In giving access to other States to its exclusive economic zone under this article, the coastal State **shall take into account all relevant factors, including, inter alia**, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and 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.

Temporal extent of access – For how long is access allowed under FAAs?

LOSC does not provide any guidance on how long FAAs may exist, though arguably, coastal States may enter into FFAs as long as the stock is in good health and a surplus exists. In practice, however, Indian Ocean coastal states and DWFNs continue to sign FAAs (Mauritius in 2019, Seychelles in 2020, Madagascar in 2022) despite declining stocks and the need to reduce fishing impacts below existing levels (such as the case of yellowfin tuna, which has been assessed as overfished since 2015).

The nine EU SFPAs apply to a certain timeframe ranging from 3 years (e.g., Cook Islands) to 6 years (e.g., Gabon, Seychelles). Although, these arrangements are limited to a set number of years, they are routinely tacitly renewed. For example, the SFPA with Cabo Verde has been tacitly renewed since 2007.

The FFA-US MLTT first entered into force in 1988 and was initially limited to five years, and then subsequently was renewed twice for ten years each [10]. Since 2013, the negotiations for the SPTT have experienced turbulence, due to a variety of reasons, but have continued to renew, with the most recent renewal signed on the 27th of November 2022.

Determination of fees – Do FAAs provide compensation for future catch history, or prescribe any transfer of rights?

The LOSC prescribes exclusive authority to the coastal State to determine any access fees and conditions for access.¹¹ In practice, this is usually a negotiation and depends on commercial and other factors. But careful study of all publicly available FAAs does not find any suggestion or mention that fees might compensate for any future catch history or right transfers. The question of adequate compensation has been widely addressed by the literature as a challenge for coastal states [2], [5], [28], [29], [33]. Despite existing guidelines, such as the guidelines for minimum terms and conditions for foreign fisheries access of the Southwest Indian Ocean Fisheries Commission¹², coastal states in the Indian Ocean have historically struggled to establish access fees that offer comparatively high rates of return [33]. This is especially true in comparison to the Pacific Islands purse seine fishery where collective bargaining has empowered coastal States to increase their share of the benefits [10], [34]. Sovereign rights in EEZs mean that coastal states act somewhat like landlords, leveraging state property to capture rent, and engaging in other struggles around ‘national interest’, geopolitics, resource management and industry regulation [5]. The PNA States’ purse-seine Vessel Day Scheme (VDS) offers a good example for Indian Ocean. The VDS was a key element in establishing PNA countries’ control of the purse-seine fishery within their own waters [35].

¹¹ Art. 62(4). [Part 1] Nationals of other **States fishing** in the exclusive economic zone **shall comply with** the conservation measures and with the other terms and conditions **established in the laws and regulations** of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following: (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of **adequate compensation** in the field of financing, equipment and technology relating to the fishing industry;

¹² Available on the FAO website: <https://www.fao.org/fishery/en/publication/269817>

The purse-seine VDS was built around an agreed annual Total Allowable Effort (TAE) for all PNA EEZs, which is then annually subdivided between Parties into Party Allowable Effort (PAE) shares according to an agreed PAE formula. Although the TAE was based on the effort that existed at the time¹³, the development of the Harvest Strategy Approach should allow the TAE in future to be linked with maintaining purse-seine key target stocks (skipjack and yellowfin tuna) around Target Reference Points (TRPs). In capping effort in the fishery, financial and biological sustainability interests coincided and the VDS had much broader effect. Under the VDS, the PNA coastal States can denominate, limit, allocate and trade purse-seine fishing opportunities within their EEZs. States can conclude bilateral access agreements – usually between individual PNA national fisheries Authorities and vessel owners’ Associations – or be part of several VDS “Pools”, allowing different subgroups of the PNA membership to put days into a subregional system that allows vessels more freedom of movement. Multilateral pool days are usually more expensive than the “bilateral” days that allow access to only one EEZ, but are an alternative mechanism to trading days between EEZs while offering a more flexible option for vessels. The VDS, and its integrated multilateral Fisheries Information Management System (iFIMS) provide the foundation for more effectively valorising access to PNA EEZs, but in ways that are up to individual national Parties to decide.

Historical catch has traditionally been one of the key indicators to inform fisheries allocation [36] so it is critically important to attribute catch correctly. Our analysis of the EU SPFAs and the FFA-US MLTT does not reveal any reference to future catch history, nor does any EU SPFA or the FFA-US MLTT mention any transfer of enduring rights from the coastal State to the flag State. As noted in the previous section, access to fish is limited to a specified time period, and only grants access. The concept of providing future rights or catch history is not supported by the analysed FAAs, nor is it supported in the framework established in LOSC, or in international fisheries law. Indeed, the sovereign rights of coastal states is recognized in all SFPAs, acknowledging that the right to regulate the utilization of these resources lies exclusively with the coastal state.

FAAs and allocation discussions

In the context of current discussions of allocations within the IOTC, it is critically important to understand the impacts of catch attribution on future access arrangements, particularly given the EU proposal to attribute catches from a coastal State’s EEZ to a foreign flag State.

The EU is proposing a model that produces a ‘double inequity’ of outcomes: first, the surplus catch has been historically under-priced through comparatively low access fees; second, this same catch from inside a coastal State’s EEZ is then proposed as historical evidence for future quota for the foreign flag State. In short, it entrenches and perpetuates historical inequalities. In the current IOTC’s Technical Committee on Allocation Criteria, coastal states are

¹³ The VDS TAE has changed over the years, but only by bringing existing effort from other areas or other arrangements into the VDS – including the addition of new members such as Tokelau and the inclusion of the effort of vessels fishing under regional access arrangements such as the US MLTT and the FSM Arrangement. Or of recent fishing on the high seas in areas later prohibited to fishing. The Palau Arrangement however does provide for the TAE to be linked to a Harvest Control Rule

demanding that their sovereign rights are recognised, and that any catch from within their EEZ is attributed to them, while high seas catches are attributed to the respective flag State [37]. Allocating catch to the respective coastal state for catches within their EEZ is consistent with the LOSC and acknowledges the sovereign rights of coastal states [38].

Other DWFNs are less strident in their positions, while China actively supports the coastal States in their defence of their sovereign rights. It should be noted that the EU and all other IOTC DWFNs attribute catch to the coastal State in the Western and Central Pacific Ocean, where they have agreed to develop an allocation model for the high purse seine fisheries in the Western and Central Pacific Ocean. This agreement was renewed in December 2022 when the EU and all other DWFNs agreed to a process to negotiate high seas purse seine allocations in 2023, recognising the limits implemented by coastal States for their EEZs [39].

The attribution of catch has important implications. If adopted, the EU proposal to attribute catch from a coastal State's EEZ to a foreign flag would radically alter the operation of tuna fisheries, and the implementation of FAAs. It would dramatically increase the power of historically dominant DWFNs States such as the EU, and effectively enshrine them with ownership of the region's tuna fisheries. For example, if a coastal developing State with no significant domestic fleet aspired to license vessels to fish inside its EEZ, it would be limited to only licensing foreign vessels from historically dominant DWFNs that had sufficient quota. This would further empower the historically dominant DWFN in fee negotiations as the coastal State would have little choice but to accept the fee structure proposed by the DWFN. The only alternative would be for the coastal State to purchase quota from a historically dominant DWFN that it could then provide to domestic vessels or seek a DWFN partner that was able to subsidise its fishing fleet to purchase quota from historically dominant DWFNs.

In effect, this model would result in developing coastal States being forced to purchase quota from historically dominant DWFNs, in order to access their own EEZs. It would effectively destroy the sovereign rights granted by the LOSC to coastal States.

In contrast, if the IOTC attribute EEZ catch to the coastal State consistent with the LOSC, and high seas catch to the flag State, then it would minimise any impact on the future operation of the region's tuna fisheries, or on future FAAs. In this scenario, DWFNs would continue to negotiate FAAs for access to an EEZ, fishing against the quota allocated to the coastal State when inside an EEZ. When fishing on the high seas, then all IOTC members would be limited to their flag State quota.

Furthermore, the LOSC prescribes that national laws can establish quotas of catch and fishing states need to abide to these¹⁴. In this sense, an agreement on quotas and allocations at the

¹⁴ Art. 62(4). [Part 2] Nationals of other **States fishing** in the exclusive economic zone **shall comply with** the conservation measures and with the other terms and conditions **established in the laws and regulations** of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following: [...] (b) determining the species which may be caught, and **fixing quotas of catch**, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period.

regional level would help coastal States establish such quotas at the national level. This, in turn, might affect future FAAs in terms of catch limits, which is not mentioned in any FAA at the moment and would need to be considered when concluding FAAs.

Conclusion

The LOSC prescribes sovereign rights over the resources to coastal States, which then have exclusive rights to determine management, limits, and access. While optimum utilisation prescribes that coastal States shall provide access to any surplus, it is the exclusive right of the coastal State to determine if there is any surplus, and what the fees and conditions will be for access to that surplus, in line with national legislations. We have established that FAAs only grant a limited term of access. They do not provide an ongoing right of access beyond the period of the arrangement, nor establish a historical catch or remove any sovereign rights from coastal states.

The past and current critics of FAAs briefly presented in this paper also demonstrate that FAA parties need to rethink the value of these arrangements. Ultimately the domestic fisheries sectors of coastal states have not really benefited from these arrangements, as illustrated by their lack of development in developing coastal States, despite provisions in some FAAs that access fees should contribute to such development. The geopolitical ties that come with FAAs have shaped the decision-making of some coastal states at RFMOs. This has often hindered attempts of alignment between coastal states, especially at the IOTC.

DWFNs need to change their approach to access and allocation, particularly the EU given its claims of leadership in sustainability, both in its public discourse and in its SFPAs. DWFNs need to move beyond their focus on historical entitlements, which perpetuate colonial legacies of resources dispossession and domination. Such approaches prioritise narrowly defined vested-interests over strategic whole-of-government concerns. Decolonising interactions between coastal States and DWFNs is urgently needed, especially at the IOTC, so that DWFNs discount their historical privileges gained in the past which was characterised by developmental and power imbalances. 'Win-win' and 'sustainable partnerships' rhetoric carried by DWFNs when concluding FAAs should also be applied during negotiations at the IOTC, especially in their proposal for catch allocation. The EU in particular has long claimed to have supported the capacity and development of coastal States. In catch allocation discussion, this support needs to translate into a full endorsement of the sovereign rights of coastal states over fisheries resources.

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