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The rhetoric of “responsible fishing”: Notions of human rights and sustainability in the European Union’s bilateral fishing agreements with developing states

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Abstract: Over the past two decades, European Union rhetoric has communicated a desire to take on a normative power role in advancing human rights and sustainable development approaches in the context of global fisheries policy. Officials have propagated an image of a “new Europe,” committed to promoting good maritime governance and ensuring responsible fishing worldwide as part of its global responsibility to human rights and sustainable development. These normative principles have at times been framed as an integral part of the European Union’s legal and political identity. In practice, however, the European Union’s bilateral fishing agreements with developing states have come short of European Union aspirations, facing criticism for hindering rather than aiding local development. This paper explores the bilateral agreements from an international law perspective, engaging in grounded theory, discourse analysis, and a detailed case study on European Union-Senegal fishing relations. For the European Union, the article raises questions about conflicts between national and supranational fishing goals and about the challenges these conflicts present to its goal of normative leadership. More generally, the study suggests implications for enacting international law principles on the ground, as well as for the inherent power dynamics of post-colonial relations.

Keywords: Fisheries; European Union; Common Fisheries Policy; Normative power; Sustainable development; Human rights;

1. Introduction

Over the past two decades, rhetoric from the European Commission (EC) and the Directorate-General for Maritime Affairs and Fisheries (DG MARE) has framed the European Union’s (EU’s) role in global fisheries policy through a series of abstract values: responsibility, leadership, human rights, and sustainability. These notions have been advertised as part of the EU’s image as a “normative” global civil power, especially with regard to human rights and environmental policy.¹ Rhetoric of this “new Europe,” and its perceived role “at the service of sustainable global development,”² has propagated into recent discussions on the external dimensions of the Common Fisheries Policy (CFP). DG MARE’s Green Paper on Reform (GPR), published in preparation for the 2012 reform cycle of the policy, stated that the main objective of the CFP’s external dimension must be “to extend the principles of sustainable and responsible fisheries internationally” and outlined a vision for the near future in which “the EU continues its work to promote good maritime governance and responsible fishing worldwide [...] as part of the EU’s overall responsibility and effort to achieve better global governance of the seas.”³ A significant part of the policy’s external dimension, the EU’s bilateral fishing agreements with developing countries (now known as Sustainable Fishing Partnership Agreements, or SFAs), have been restructured for the second time to better accommodate the EU.

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¹ For more in-depth discussions of the EU’s normative power, see I. Manners, “Normative power Europe: A contradiction in terms?” *Journal of Common Market Studies* 40 (2002), 235-258; or J. Vogler and H. R. Stephan, “The European Union in global environmental governance: Leadership in the making?” *International Environmental Agreements* 7 (2007): 389-413.

² R. Prodi, “2000-2005: Shaping the New Europe” (speech, Strasbourg, 15 February 2000), available online: http://europa.eu/rapid/press-release_SPEECH-00-41_en.htm.

³ European Commission, 2009. Green Paper on Reform of the Common Fisheries Policy, 22. COM (2009) 163.

Yet the EU's "worldwide effort" in promoting responsible fisheries and sustainable development through its bilateral agreements has faced severe criticism for decades. Despite a previous restructuring during the 2002 CFP reform cycle, the agreements have been lambasted as unsustainable, exploitative, at best "detached from the broader scope of [...] development cooperation"⁴ and coming short of the EC's stated aspirations. This article investigates this discrepancy from an international law perspective. Using critical discourse analysis and policy analysis, the article evaluates the international law framework in which the bilateral agreements exist, then tests the alignment of the EU's fishing goals and policy actions with the norms actually propagated by this framework.

Section II briefly explores the international law framework and examines the discourse in those international treaties and agreements shaping human rights and sustainable development as guiding principles of global fisheries management. Through this analysis, it debates what "normative influence" actually entails in the context of international law. In assessing the actual role of the EU in this framework Section III examines the external fishing objectives promoted in the CFP and probes their alignment with normative notions from international law. Section IV discusses a case study on bilateral fishing relations between the EU and Senegal. Senegal's longevity of fishing relations with the EU makes it well-placed to illustrate some of the issues with implementing international law principles into the bilateral agreements. The section examines what environmental and human rights or developmental notions exist in each iteration of the agreements. Findings and perspectives are reviewed in Section V.

2. Background: Human rights and sustainability in international fisheries law

The idea of extending human rights and sustainable development through fisheries governance originates from a definition of the environment first coined in 1972 at the United Nations Conference on the Human Environment in Stockholm. The Stockholm Conference became incredibly influential in later international environmental law because it framed the natural environment as comprising of socioeconomic and cultural, rather than merely physical and biological, factors.⁵ Notably, however, this definition was advanced largely through the sway of developing countries, whose perspective on global environmental concerns proved very different from that of industrialized states.⁶ Never before had it been imaginable to center international environmental management around the idea, voiced by Indian Prime Minister Indira Gandhi, that "poverty is the worst form of pollution."⁷

Following the Stockholm Conference, human rights and sustainable development propagated into international fisheries law. It was partly reflected in the 1982 United Nations Convention on the Law of the Sea (UNCLOS III). When the exclusive economic zone (EEZ) regime established in UNCLOS III defined fisheries predominantly as a matter of national coastal state policy, it did so not only for purposes of conservation, but also because of the importance of fishing resources to these states' developmental and human rights' needs.⁸ Later on, this connection between fishing and human rights was furthered through the United Nations Conferences on Environment and Development (UNCED) and agreements sponsored by the Food and Agricultural Organization of the United Nations (FAO) such as the Code of Conduct for

⁴ E. Witbooi, "The infusion of sustainability into bilateral fisheries agreements with developing countries: The European Union example," *Marine Policy* 32 (2008): 669-679.

⁵ L. Juda, "International environmental concern: Perspectives of and implications for developing states," in *The Global Predicament: Ecological Perspectives on World Order*, David Orr and Marvin Soroos, eds. (Chapel Hill: University of North Carolina Press, 1979).

⁶ M. Strong, "One year after Stockholm," *Foreign Affairs* 51 (1973): 690-707; C. Joyner and N. Joyner, "Global eco-management and international organizations: the Stockholm Conference and problems of cooperation," *Natural Resources Journal* 14 (1974): 535-555; L. Juda, 1979, see n. 5 above.

⁷ Cited in: UN Department of Economic and Social Affairs, "Rio+20: from environment to sustainable development" (2012), available online: <<http://www.un.org/en/development/desa/newsletter/desanews/feature/2012/06/>>.

⁸ E.g., see in particular Part V, Article 62.3, outlining concern for "the requirements of developing States in the subregion or region [...] and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone..."

Responsible Fisheries (1995) and the 2014 Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines). The latter two, in particular, offer insight into international best practices for advancing human rights and sustainability through fisheries governance.

First, the Code of Conduct defines “responsible fishing” as a function of ecological, social and economic factors. Moreover, the Code aims to present these factors as indivisible. For instance, the utilization of fisheries considers stock levels but also “food security,” while conservation decisions are to be based “on the best scientific evidence available, also taking into account traditional knowledge of the resources.”⁹ The Code also established specific goals central to modern fisheries governance, such as maintaining the interests of small-scale fishing, aiding local capacity-building, and ensuring fair trade that avoids negative consequences for “social, including nutritional, impacts.”¹⁰ In the Code, “responsibility” and “sustainability” in fishing apply not only to the act of fishing itself but also to orbital activities like negotiations, trade, or processing. Food security must be advanced not only through sustainable stock levels but also through equitable market decisions; poverty alleviation depends on building up local capacity for governance while preserving small-scale fishermen’s interests.¹¹ The legal rhetoric suggested that this wholeness of human rights considerations in fisheries must be interpreted as the guiding aspiration behind subsequent global policy efforts.

The 2014 SSF Guidelines built upon these ideas. They highlighted the key role small-scale fisheries must play in pursuing the Code of Conduct’s aspirations regarding food security, poverty eradication, equitable and sustainable development through resource utilization.¹² The Guidelines speak of the vitality of artisanal fishing activities – pre-harvest through processing – to local communities, serving as “an engine, generating multiplier effects in other sectors.”¹³ To this role, the SSF Guidelines juxtapose the considerable challenges faced by small-scaled fisheries, stressing in particular the constraints placed on them by industrial overfishing and, notably, by “unequal power relations” – that is, conflicts with larger-scale fishing and other sectors.¹⁴

It is important to recognize that, even as widely-propagated as these aspirations have become, in the context of international law and the EEZ regime they have always been advanced through soft law mechanisms. Under the auspices of formal international law, most implementation principles for sustainable development and human rights in fisheries could be considered either as merely declaratory, or as entirely non-binding. The complexity of defining humanity’s relationship with the environment had meant that neither the Stockholm Conference in 1972 nor the UNCED mega-conferences in 1992, 2002, and 2012, resulted in conclusive codifications for a global regime as UNCLOS III had.¹⁵ The non-binding nature of the UNCED conferences and FAO documents was a function of their broad aim to build institutional capacity across borders and disciplines through a continuous multilateral approach.¹⁶ This approach has persisted in the application of sustainability and human rights principles in international law.

Hence, it is challenging to define normative influence consistent with these tenets of international law. Because the regime and its values originated through the viewpoint and advocacy of developing countries, language of EU “leadership” raises problematic questions about power relations and cooperation. Equally, the “leadership” rhetoric clashes with trends of propagating sustainable development and human rights principles through multilateralism on equal terms. A normative influence role may therefore consist of support for the soft law instruments advancing human rights in fisheries. Should the EU wish to take on

⁹ FAO, Code of Conduct (1995), 6.2, 6.4, available online: <<http://www.fao.org/fishery/code/en>>.

¹⁰ *Id.*, 6.2, 6.3, 6.12-6.16, 6.18.

¹¹ *Id.*

¹² FAO, Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (2014), available online: <<http://www.fao.org/fishery/ssf/guidelines/en>>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ P. Sand, “International environmental law after Rio,” *European Journal of International Law* 4 (1993): 377-389.

¹⁶ L. Andonova and M. Hoffman, “From Rio to Rio and beyond: Innovation in global environmental governance,” *Journal of Environment and Development* 21 (2012): 57-61.

this role, it must address small-scale fisheries (avoiding unfair competition), food security (through sustainable stock levels and appropriate trade decisions), capacity-building (aiding local ability to govern through cooperation, not prescription), and poverty alleviation (through small-scale fisheries and capacity-building). If the EU's aspirations are genuine, and not merely rhetorical, its external fishing goals would reflect these concerns. The following section explores the extent to which that is true.

3. The EU's external fishing goals

Examination of the EU's external fishing policy reveals contradictory aspirations. The EU's 1980s-1990s legal centralization spurred a vision of "an ever closer union" as a forum for championing international values and soft power. This vision gave rise to the EC's modern rhetoric on fishing relations. However, the legal centralization also created an ongoing dynamic of national protectionism among member states and corresponding appeasement policies from the EC. Thus, interinstitutional conflict has likewise impacted the CFP's external dimension.

3.1 The normative aspect

The first CFP was established in 1983, at a time when a new sense of integration was emerging.¹⁷ The EU began pursuing enlargements based less on economic merits¹⁸ and more as a means of encouraging democratic development and stability on the continent.¹⁹ This politicization of the EEC/EU occurred through a series of institutional and legal reforms: the Single European Act (SEA) of 1986 (a first amendment to the Treaty of Rome), the 1992 Maastricht Treaty on the European Union and ultimately all other reforms (the 1997 Amsterdam Treaty, the 2001 Nice Treaty, and the 2007 Lisbon Treaty) that led to the EU we have today.

Although fishing was only a sub-theme in these events, it was affected by them in a large way. New states' accession prompted the firm establishment of the EEC/EU's legal competence in fisheries. The Maastricht Treaty reinforced the EU's control over the resource, whereas the EU's collective ratification of UNCLOS III in 1998 explicitly claimed an exclusive right "to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organizations."²⁰ The international norms that the EU came to promote – human rights, democratic freedoms, the rule of law, multilateralism – were all adopted in this way; many coincided with the EU's founding legal principles as per the Maastricht Treaty: "liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law [...]"²¹

¹⁷ That is, from a Haas notion of economic integration to a more normative basis of multilateralism. See E. Haas, "The study of regional integration: Reflections on the joy and anguish of pretheorizing," *International Organization* 24 (1970), 607-646; and A. Burley and W. Mattli, "Europe before the court: A political theory of legal integration," *International Organization* 47 (1993), 41-76.

¹⁸ Both the 1981 Greece enlargement and the 1986 Spain/Portugal enlargement were heralded by overwhelming concerns with potentially devastating economic impacts on the EEC/EU. See, for instance: H. Stadlmann, "Will Europe be the victim of its own expansion?" *Frankfurter Allgemeine Zeitung* (14 April 1977); J. Gouzy, "Greater Europe," *L'Europe en formation* (February 1979); "The perils of enlargement," *L'Humanité* (28 May 1979); H. Hartzinger, "Griechenland bewirbt sich um den Beitritt zur EG," *Politische Karikaturen von Horst Hartzinger 1970/1980*, (München: Bruckmann 1979); all available online through CVCE <<http://www.cvce.eu/>>.

¹⁹ For example, Margaret Thatcher wrote that "Greece had been accepted into the Community precisely to entrench its restored democracy [...]. I had earlier stressed [...] just how vital it was to get Spain and Portugal in [to the EEC] quickly and not let short-term considerations stand in the way of what must be done to strengthen democracy in Europe." *The Downing Street Years* (London: Harper Collins Publishers, 1993), p. 545-546.

²⁰ Maastricht Treaty on European Union. 1992. Title II, Article G (B)(3)(e); UNCLOS, Declaration of the European Community upon signature (7 December 1998). Declaration made pursuant to article 5(1) of Annex IX to the Convention and to article 4(4) of the Agreement. See also A. Antonova, "Reforming EU participation in fisheries management and conservation on the high seas," *The Ocean Yearbook* 29 (2015): 125-143.

²¹ *Id.*

It has been argued, therefore, that the EU's normative approach in international law was directly necessitated by the EU's legal origins.²² Because the EU was established on the merit of certain principles and aspirations, its promotion of these principles internationally was not only genuine, but also the chief source of its internal and global legitimacy.²³ In this sense, acts of further legal centralization, such as strengthening the European Parliament's (EP) role in EU-wide decision making, further support the EU's legitimacy in principled international governance. It is precisely this approach to legitimacy that permeated EC rhetoric pertaining to the 2013 CFP reform. The new CFP's external objectives, strongly influenced by the EP, reflect this perception of the EU as a normative power entity, especially with regard to environmental policy.²⁴

Despite this vision, the CFP's external fishing goals actually retain multiple contradictions with the EU's suggested normative role, reflecting protectionism, internal conflicts, and appeasement politics. The following sub-sections explore these contradictions in greater detail.

3.2 Protectionism

The CFP was established after pressure from new member states with strong economic fishing interests (Denmark, the UK, and Ireland in 1972; Greece in 1981; Spain and Portugal in 1986).²⁵ The accession negotiations with Spain and Portugal, both countries with large fleets, and older member states' concern with granting these fleets access to the already overfished North Sea, were a main driver behind the original agreement to establish the CFP.²⁶ The compromise that eventually led to Spain and Portugal's successful accession three years later, in 1986, involved financial aid packages for fleet capacity reduction, (exasperated) calls for "political goodwill" from North Sea fishing member states, and the underpinned importance of negotiating bilateral fishing agreements with third state countries so as to "offer Spanish fishermen good prospects for the future" – good prospects, that is, safely away from the North Sea.²⁷

Thus began the EEC/EU's quest of ensuring fleet access outside European waters. The first bilateral fishing agreements were therefore concluded out of distinctly internal interests. Their early objectives were to ensure EEC-caught fish supply to the European markets and to secure foreign access for EEC vessels, providing continued employment for the fleets while preventing the further exploitation of Europe's overfished waters.²⁸ These goals, with their focus on EEC competitiveness, market value, and local economic and environmental protectionism, sharply contrasted with the high aspirations expressed by EC officials later on, as well as with international law concerns such as equitable cooperation, advancing development, building local governance capacity, or maintaining food security.

Moreover, these original goals remain pertinent today. The bilateral agreements still hold a considerable importance for the EU's fishing imports, market, and fleet—something openly communicated by various documents not related to the CFP reform. At the time preparations for the latest CFP reform began in 2009, roughly 40 per cent of total EU catch was taken in third party states' waters.²⁹ As of 2011,

²² I. Manners, 2002, see n. 1 above.

²³ *Id.*

²⁴ E.g., see European Commission. 2011. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on External Dimension of the Common Fisheries Policy. COM (2011) 424.

²⁵ Council of the European Communities. 1983. Council Regulation (EEC) No. 170/83 establishing a Community system for the conservation and management of fishery resources; J. Raakjær, "An introduction to Danish and EU fisheries systems," Chapter 3 in *A Fisheries Management System in Crisis – The EU Common Fisheries Policy* (Aalborg: Aalborg University Press, 2009), 33-56.

²⁶ *Id.*; J. Raakjær Nielsen, "Participation in fishery management policy making: National and EC regulation of Danish fishermen," *Marine Policy* 18 (1994): 29-40.

²⁷ *Id.*

²⁸ M. Holden, "The policies for structures, markets and external fisheries, or How the policy started," in *The Common Fisheries Policy* (Oxford: Fishing News Books, 1994), 16-38.

²⁹ European Commission. 2009. "Fishing in wider waters," Chapter 10 in *Brochure on the Common Fisheries Policy*,

although the long distance fleet constituted less than 1 per cent of the EU fleet by number of vessels, it accounted for 86 per cent of EU landings in weight per day at sea, 19 per cent of total gross tonnage, and 15 per cent of total income for the year.³⁰ An interim report on the 2007-2013 period prepared for the EC stated explicitly that these agreements “have made a significant contribution to securing the continued existence and competitiveness of the EU's fisheries sector.”³¹

The bilateral agreements' importance for EU fishing competitiveness has played into speculations that the EC's aspirations in international environmental law are dictated at least in part by regulatory competition politics.³² Without preferential trade agreements in place, the EU's relatively stringent environmental standards could curb its ability to compete with less conscientious producers worldwide. These concerns have been raised in particular with regard to the tariff regime incorporated in the bilateral agreements. The system of tariff exemptions between the EU and the group of African-Caribbean-Pacific (ACP) countries has been controversial since its conception under the first Lomé Convention (1975) – framed as a tool for equitable post-colonial cooperation by the EEC/EU but often censured by others for promoting market dependency.³³ The current export tariffs regime in the bilateral fishing agreements draws on the successor of the Lomé Convention, the 2000 Cotonou Agreement, which has faced similar criticism. It sets out tariffs-free exports from ACP countries to the EU market as long as fish are caught by either the local fleet or EU vessels.³⁴ Given the limited size of large-scale ACP country fleets, this policy promotes the host countries' dependency on both the EU export market and on the EU long distance fleets as the main means of accessing it.³⁵ In this way, the agreements' tariff regime supports both the competitiveness of the EU's distant water fishing fleet against other global fleets and the EU's position as the world's largest market and purchasing power for seafood products.³⁶

Finally, the competitiveness of the EU's long range fleet has been supported through subsidies. These have included tax benefits, subsidized loans and grants for vessel owners transferring their vessels to ACP countries' waters.³⁷ However, the EU's financial contribution to ACP partners itself represents a form of subsidy – predominantly financed by the EC, it essentially mitigates vessel owners' access costs.³⁸ Far from representing any kind of normative leadership, the EC subsidizes its overseas fleet in direct discord with modern international law trade aspirations. Critics, officials of the World Trade Organization and other countries (including the US, Norway, Australia, and New Zealand) have long advocated for limiting subsidies that contribute to overcapacity.³⁹ By contrast, EC and European Council representatives have a

available online: <http://ec.europa.eu/fisheries/documentation/publications/cfp_brochure/partnerships_en.pdf>.

³⁰ Scientific, Technical and Economic Committee for Fisheries (STECF). 2013. The 2013 Annual Economic Report on the EU Fishing Fleet (STECF 13-15). Luxembourg, Publications Office of the European Union (EUR 26158 EN).

³¹ TEP, Poseidon, MRAG, "Interim evaluation on EU financial measures for the implementation of the Common Fisheries Policy and in the area of the Law of the Sea 2007-2013" (2010), p. 11, available online: <ec.europa.eu/fisheries/documentation/studies/cfp_evaluation/financial_measures_implementation_cfp_en.pdf>.

³² R. Kelemen and D. Vogel, "Trading places: The role of the United States and the European Union in international environmental politics," *Comparative Political Studies* 43 (2010): 427-457.

³³ UNEP. 2002. *Integrated Assessment of Trade Liberalization and Trade-Related Policies: A Country Study on the Fisheries Sector in Senegal*.

³⁴ E. Naumann, "Rules of Origin in the Cotonou Agreement: Selected issues and proposals in the context of Economic Partnership Agreements (EPAs)." Report prepared for the Commonwealth Secretariat. (Stellenbosch, South Africa: Trade Law Centre for Southern Africa, 2004).

³⁵ S. Ponte, J. Raakjær and L. Campling, "Swimming upstream: Market access for African fish exports in the context of WTO and EU negotiations and regulation," *Development Policy Review* 25 (2007): 113-138.

³⁶ For a quantification of the EU's fish market, see Directorate-General for Maritime Affairs and Fisheries, "Fishing outside the EU," available online: <http://ec.europa.eu/fisheries/cfp/international/index_en.htm>; or EUMOFA. 2014. "The EU fish market," available online: <<http://ec.europa.eu/fisheries/market-observatory/>>.

³⁷ B. Gorez, "Policy study: EU-ACP fisheries agreements." Report prepared for the UK Department of International Development (2005).

³⁸ *Id.*

³⁹ U.R. Sumalia, A. Khan, R. Watson, G. Munro, D. Zeller, N. Baron, and D. Pauly, "The World Trade Organization

long history of rejecting such proposals and arguing that their policies should not be considered as subsidies – once again displaying striking protectionism.⁴⁰

Estimations of the exact amounts granted to the EU fishing industry vary depending on different definitions of what constitutes a subsidy, but the sums are always substantial. In 1997, for example, the EC disbursed 23 per cent of all fishing subsidies among countries in the OECD;⁴¹ a later report put the total amount of fishing subsidies for 2009 at EUR 3.3 billion.⁴² The subsidies raise concerns with unfair competition as they make it economically viable for EU distant water vessels to continue fishing when stock levels have decreased too much to justify the activity for others.⁴³

In short, the competitiveness of the EU's seafood market and of its distant water fleets remains an important goal for the CFP. This goal directly contradicts the framework of international law to which EU rhetoric purportedly aspires. The subsidized operational flexibility of EU vessels places pressure on small-scale fishermen who do not have similar support. The resulting "unequal power relations" feature as a main concern in the FAO's SSF Guidelines.⁴⁴ Meanwhile, the tariffs regime increases ACP governments' dependency on the EU export market and the bilateral agreements as a way to access it, undermining developmental goals and coming into sharp contrast with the FAO Code of Conduct's provisions on equitable trade of fish and seafood products that does not "result in obstacles to trade, environmental degradation or negative social, including nutritional, impacts."⁴⁵

3.3 Internal conflicts and exporting overcapacity

Equally, the role of the CFP as a means of assuaging problems and internal conflicts within the EU remains active. The concern with relocating excess capacity has not receded. The 2009 GPR attributed the CFP's overall (internal) poor performance, the continuously declining fish stocks (in European waters) and the low profitability of European fisheries to "chronic overcapacity."⁴⁶ In addressing the issue, the EC has employed a range of subsidies that encouraged vessel owners to relocate to ACP countries' waters.⁴⁷ It has done so predominantly through offering grants for joint ventures with ACP partners and increased access through the bilateral agreements. In 2000, for instance, 16 out of 31 Spanish vessels relocated to the Senegalese register received structural fund subsidies from the EC.⁴⁸ Spain has been a consistent recipient of subsidiary benefits, accounting for 26 per cent of EFF funding in the 2007-2013 period (followed by Portugal at 17 per cent and Italy at just under 10).⁴⁹

Spain's influence on the EU's external fisheries policy is substantiated by the country's overwhelming share in total capacity (22 per cent of gross tonnage as of 2014) and in total employment (a

and global fisheries sustainability," *Fisheries Research* 88 (2007): 1-4; S. Harper, D. Bevacqua, R. Chudnow, S. Giorgi, V. Guillonneau, F. Le Manach, T. Sutor, and U.R. Sumalia, "Fuelling the fisheries subsidy debate: Agreements, loopholes and implications," *Fisheries Research* 113 (2012): 143-146.

⁴⁰ S. Ponte, J. Raakjær and L. Campling, 2007, see n. 36 above; S. Harper, D. Bevacqua, R. Chudnow, S. Giorgi, V. Guillonneau, F. Le Manach, T. Sutor, and U.R. Sumalia, "Fuelling the fisheries subsidy debate: Agreements, loopholes and implications," *Fisheries Research* 113 (2012): 143-146.

⁴¹ O. Flaaten and P. Wallis, "Government financial transfers to fishing industries in OECD countries," (2000). Paris: OECD.

⁴² A. Shröer, C. Sakai, V. Vulperhorst, A. Bialas, "The European Union and fishing subsidies." Report prepared for Oceana (2011). Available online: <oceana.org/en/eu/media-reports/publications/the-european-union-and-fishing-subsidies>.

⁴³ B. Gorez, 2005, see n. 37 above.

⁴⁴ FAO, 2014, SSF Guidelines, see n. 12 above.

⁴⁵ FAO, 1995, Code of Conduct, 6.14. See n. 9 above.

⁴⁶ European Commission. 2009. Green Paper on Reform of the Common Fisheries Policy. COM (2009) 163: 22.

⁴⁷ Shröer et al., 2011, see n. 42 above.

⁴⁸ B. Gorez, 2005, see n. 37 above.

⁴⁹ European Commission. 2014. Facts and Figures of the Common Fisheries Policy. Available online: <http://ec.europa.eu/fisheries/documentation/publications/pcp_en.pdf>.

quarter of all EU jobs in the fisheries sector as of 2014).⁵⁰ This influence is also maintained through extensive lobbying efforts by both politicians and individual groups.⁵¹

Hence the bilateral agreements are still an important utility in furthering EU fishing interests and mitigating internal conflicts. Goals such as redistributing excess fleet capacity through ensuring continuing access to third states' waters and retaining market status quo are still discernible in the bilateral agreements today. These goals plainly contrast the GPR's statement that "the logic of the EU external fleet supplying the EU market is being undermined by our large and increasing dependence on imports."⁵² On the contrary, the EU's fishing goals seem dictated above all by the continuing importance of external fishing as a solution to internal interests. The following section examines a case study on the EU's fishing relations with Senegal during the 1979-2014 period so as to offer more concrete evidence on the issue.

4. Case study: Bilateral fishing relations between the EU and Senegal

[--Figure 1 approximate position--]

Senegal (see Figure 1) exemplifies many trends applicable to the issues of long-distance fishing and EU-ACP fishing relations. As a former French colony, the country's relationship with the EU today reflects the post-colonial moral complexities of trade and resource exploitation.⁵³ Further, like other rich-resource coastal states targeted by foreign fleets, Senegal has faced problems with overcapacity and overfishing.⁵⁴ In the three decades between 1970 and 2000, landings from the country's EEZ increased nearly six-fold, from 60,000 to 350,000 tonnes.⁵⁵ This has led to a rapid decline of fish stocks, particularly ones at the high trophic level, including tuna, deep sea demersal fish, and cephalopods (the species predominantly targeted by foreign fleets in Senegal).⁵⁶ Senegal also has a long-standing involvement with the EU and the CFP, becoming in 1979 the first African country to enter into a bilateral fishing agreement with the EEC/EU.⁵⁷ The two parties have explored multiple iterations of the agreements: from the original 1979 document to a number of subsequent amendments, a 2002-2006 protocol incorporating certain notions from the 2002 CFP reform, a 2006-2014 hiatus, and finally an agreement signed in October of 2014 as the EU's first SFA after the latest reform of the CFP.⁵⁸

Senegal also constitutes an important case study for this article because the human rights and sustainable development aspects of the bilateral agreements are quite significant. Fishing is as an important pillar of the Senegalese economy, prompting UN reports to deem it vital for the country's growth.⁵⁹ The fishing industry employs 15 per cent of Senegal's workers, while 75 per cent of Senegal's population relies

⁵⁰ Together, Spain, Portugal, Italy and Greece accounted for 70 per cent of all fishing jobs in the EU as of February 2014. See European Commission. 2014. Facts and Figures of the Common Fisheries Policy.

⁵¹ E. Bienfeld, "The Basque lobby at the EU level: A matter of expertise and networks," *International Journal of Iberian Studies* 28 (2015): 21-41.

⁵² European Commission. 2009. Green Paper on Reform of the Common Fisheries Policy. COM (2009) 163: 22

⁵³ Developmental historians often speak of Europe's post-colonial guilt; see E. R. Gilli, *The European Community and Developing Countries* (Cambridge: Cambridge University Press, 1994); and M. Holland, *The European Union and the Third World* (New York: Palgrave, 2002).

⁵⁴ FAO. 2008. General Overview of the National Fisheries Sector, Republic of Senegal (in French). Available online: <<http://www.fao.org/fishery/countryprofiles/search/en>>.

⁵⁵ M. Laurans, D. Gascuel, E. Chassot, and D. Thiam, "Changes in the trophic structure of fish demersal communities in West Africa in the last three decades." *Aquatic Living Resources* 17 (2004): 163-173.

⁵⁶ Id.

⁵⁷ D. Belhabib, V. Koutob, A. Sall, V. W. Y. Lam, and D. Pauly, "Fisheries catch misreporting and its implications: the case of Senegal." *Fisheries Research* 151 (2014): 1-11.

⁵⁸ Agreement on a Sustainable Fisheries Partnership between the European Union and the Republic of Senegal. 2014. *Official Journal of the European Union* L 304/3.

⁵⁹ UNEP. 2002. Integrated Assessment of Trade Liberalization and Trade-Related Policies: A Country Study on the Fisheries Sector in Senegal.

on fish products as a main source of protein – the second highest fish consumption per capita in Africa.⁶⁰ At the same time, fishing has served as Senegal’s largest export for nearly three decades.⁶¹ Finally, the interests of artisanal or subsistence fishing are particularly important to the country. In 2002, 90 per cent of its 100,000 fishermen were considered to be small-scale fishermen.⁶² This trend makes the FAO’s SSF Guidelines, and the EU’s stated role in enforcing them through its new agreements, particularly important for Senegal.

4.1 Early agreements and protocols

The earliest (1979) bilateral fishing agreement between the EU and Senegal was amended twice and its duration extended numerous times by a series of subsequent protocols and letter exchanges.⁶³ However, the original conditions of the agreement itself were never fully renegotiated in the 1979-2006 period. Accordingly, the outdated agreement faced intensifying criticism as sustainable development, small-scale fishing rights, and ecosystem-based management increasingly came on the international agenda for fishery policy during the 1990s and early 2000s. In the same period, Senegal’s growing small-scale national fleet gradually became capable of exploiting Senegal’s stocks fully; yet access negotiations with the EU/EEC continuously involved an a priori assumption that stock surplus is invariably available.⁶⁴ The resulting conflict between visiting industrial vessels and local small-scale fishermen exacerbated, predominantly to the detriment of the latter.⁶⁵

Additionally, analysis of the EEC-ACP fishing agreements over the duration of the 1990s showed that revenue from the EEC’s financial contribution was only marginally beneficial to the coastal state, with most of the added value from the exchange collected by EEC/EU vessel operators (mostly from Spain).⁶⁶ During the same decade, Senegal’s increasing market dependency on the EEC/EU and its Lomé-driven shift toward export-oriented fishing at the expense of national markets’ needs was exacerbated.⁶⁷ In all, critics expressed concern with local food security, employment, and especially with the interests of the artisanal fleet.⁶⁸

On par with developmental concerns, reports continuously pointed toward issues with sustainability, most notably overarching problems with stocks over-exploitation and depletion of stocks.⁶⁹ Although other fleets (notably Chinese, Korean and Japanese) were also fishing in Senegalese waters, the EEC/EU both held by far the largest share of the export market and maintained the most significant local presence, thereby caused most of the problem.⁷⁰ The bilateral agreement lacked conservation measures such as clear catch quotas for licensed vessels.⁷¹ The agreements’ structure – payment in exchange for access – meant that the

⁶⁰ Id; Belhabib et al., see n. 57 above.

⁶¹ UNEP, 2002, see n. 59 above.

⁶² Id.

⁶³ Agreement between the Government of the Republic of Senegal and the European Economic Community on Fishing off the Coast of Senegal. 1979. Official Journal of the European Communities L 226/7.

⁶⁴ B. Gorez, 2005, see n. 37 above.

⁶⁵ For the local small-scale fishermen perspective, see testaments cited in O. Brown, “Policy Incoherence: EU fisheries policy in Senegal.” UNDP Human Development Report Office (2005); also J. Vidal, “Senegal’s fishing community will act on foreign fleets if government doesn’t.” *The Guardian* (2012), available online: <<http://www.theguardian.com/global-development/2012/apr/02/senegal-fishing-community-act-foreign-fleets>>.

⁶⁶ B. Gorez, 2005, see n. 37 above.

⁶⁷ UNEP, 2002, see n. 59 above; O. Brown, “Policy Incoherence: EU fisheries policy in Senegal.” UNDP Human Development Report Office (2005); V. M. Kaczynski and D. L. Fluharty, “European policies in West Africa: Who benefits from fisheries agreements?” *Marine Policy* 26 (2002): 75-93.

⁶⁸ Id.

⁶⁹ Kaczynski and Fluharty, 2002, see n. 70 above.

⁷⁰ UNEP, 2002, see n. 59 above.

⁷¹ J. Stilwell, A. Samba, P. Failler, and F. Laloë, “Sustainable development consequences of European Union participation in Senegal’s Marine Fishery.” *Marine Policy* 34 (2010): 616-623.

EU could demand additional fishing opportunities in exchange for increased financial contributions, taking advantage of any devaluation of the resource and refusing to account for ecosystem value.

This approach was sustained for decades. In 2002, years after rhetoric of the “new Europe [...] at the service of sustainable global development,”⁷² the bilateral fishing agreements remained structured around a simplistic “fish for cash” model. In 2002, this model led to the suspension of negotiations with Senegal to renew the expired fisheries protocol. The official press release noted, “The European Commission delegation felt that additional fishing possibilities would have been necessary to justify the substantial increase in the compensation requested by the Senegalese representatives.”⁷³ Even when the negotiations were eventually renewed, proactive provisions to support equitable trade, food security, and poverty eradication were largely absent from the EU representatives’ concerns. When the protocol was finally renewed for the 2002-2006 period, it came short of such aspirations. Provisions on small-scale fishermen, for example, held very little prominence in the protocol, being limited to “safety” considerations.⁷⁴ By contrast, the EC-subsidized access fee, retained from the original 1979-2002 agreement, represented the EU’s ongoing concern with maintaining its vessels’ competitiveness abroad. When the 2002 protocol introduced payments for “capacity building,” these payments remained tied to access fees, obliging developing states to provide access – development help at the expense of sustainability considerations.

An entity that advanced such a model for fishing relations years after the first UNCED conference and the FAO’s Code of Conduct could hardly be considered to “play a leading role in ensuring that Johannesburg delivers concrete progress toward sustainability goals.”⁷⁵ Although the protocol was eventually renewed for the 2002-2006 period, it was hardly more successful. Following 2006, it was never renewed, while its cancellation was framed as a triumph for local fishermen and Senegal more generally.⁷⁶

These experiences show that the EU’s changing legal structure in the 1980s and 1990s had little direct impact on the EU-Senegalese fishing relations over the same period. Key advancements of international fisheries governance, such as the FAO’s 1995 Code of Conduct and the UN’s 1995 Fish Stocks Agreement, were not incorporated into the EU-Senegalese agreement between 1979 and 2002. While the protocol eventually negotiated in 2002 did implement specific principles of sustainable development, it did so both belatedly and incompletely. The EU’s inclusion of certain conservation aspects into the protocol contrasted sharply with its negotiating position only months earlier. This discrepancy again suggests that external political pressure, rather than an internal normative purpose, impacted the EU’s decision. A plausible analysis supports the alternative narrative for EU fishing: a combination of Senegal’s own position in insisting on sustainable stock levels and of internal EU interests to maintain Spanish vessels’ access to foreign waters. Thereby, the sudden 2002 inclusion of sustainability and stock considerations – years after the 1992 Rio Conference, 1995 Code of Conduct and 1995 UN Fish Stocks Agreement – reveals the EU as a reluctant participant in the international fishing management framework.

4.2 The 2014 agreement

Given the long (2006-2014) hiatus in fishing relations between the EU and Senegal that followed, the agreement signed in 2014 as the very first representative of the SFAs could be expected to show significant improvements in terms of sustainable development. Indeed, it makes strides compared to its

⁷² R. Prodi, 2000, see n. 2 above.

⁷³ European Commission. 2002. “EU/Senegal fisheries agreement: negotiations suspended.” Available online: <http://europa.eu/rapid/press-release_IP-02-462_en.htm>.

⁷⁴ Proposal for a Council Regulation on the conclusion of the Protocol setting out the fishing opportunities and the financial contribution provided by the Agreement between the European Economic Community and the Government of the Republic of Senegal on fishing off the coast of Senegal for the period from 1 July 2002 to 30 June 2006. COM (2002) 496. Official Journal of the European Communities C 20 E/336.

⁷⁵ M. Wallström, “A wake-up call for global sustainability” (speech, Brussels, 26 February 2002), available online: <http://europa.eu/rapid/press-release_SPEECH-02-84_en.htm>.

⁷⁶ Stilwell et al., 2010, see n. 71 above.

predecessors, with both its language and the provisions reflecting a stronger sense of responsibility to human and developmental rights. It must be noted that the new agreement reflects increased commitment to a more UNCED-coherent style of development support: cooperative, participatory, and focused on soft law.⁷⁷

The SFA outlines much fewer fishing opportunities for EU vessels in Senegalese waters, accounting for the limitations of the fishing resources and allowing for adjustment of either financial contribution or fishing opportunity as necessitated by conservation, and, notably, as determined through joint EU-Senegal deliberation.⁷⁸ The new agreement includes provisions for cooperation and consultation between professional fishing organizations, the private sector and the Senegalese society, thus allowing representation of different interests.⁷⁹ This approach speaks more directly to the international framework's emphasis on cooperation and equitable participation in promoting soft law principles. In short, overall the provisions of the 2014 SFA are better aligned with the role of normative influence suggested by the international law framework than previous agreements.

However, while it is too early to draw comprehensive conclusions about the latest agreement's ultimate success, already many former criticisms seem unaddressed. The agreement does not include special considerations for small-scale fishermen, nor does it address issues of competition between EU-subsidized vessels and local artisanal fleets. Articles concerning the institutional support, albeit strengthened through the creation of a private-public stakeholder forum, still only offer limited help for self-sufficient development. The debate on market dependence and food security in the face of climbing exports is still missing from the SFA discussions.

Finally, fundamental issues for Senegal, such as protein dependence, employment and food security, fall entirely outside the purview of the agreement—whereas their inclusion could both benefit Senegal (especially given the strength of the EU's seafood market) and demonstrate the EU's commitment to advancing human rights goals and showcase its leadership in sustainable fisheries governance. As the SFA is a hard law document – unlike the FAO's SSF Guidelines, for instance – its inclusion of such developmental principles would truly represent a commitment to propagating them internationally. In particular, stronger provisions on limiting subsidies and otherwise maintaining conditions for equitable competition between small-scale and industrial fishermen would demonstrate a real commitment on the part of the EU to global development.

5. Conclusions and perspectives

This study raises questions about the applicability of international law aspirations to concrete policy initiatives. In the context of fisheries, soft law principles advanced by the FAO's Code of Conduct and SSF Guidelines have faced a difficult process of policy incorporation and particularly when the issues concerned are as complex and abstract as the ones related directly to human rights, equitable development, and natural resource use.

The Senegal case study shows that the EU's bilateral agreements still reflect internal political goals rather than promote the high international norms it is also advocating. On an EU-level, some of the CFP's most difficult external dimension challenges arise from the policy's highly contested internal politics. Despite the normative vision contained in EC rhetoric, analysis demonstrates that the real political objectives driving the policy are much more contradictory, driven by inter-institutional and inter-level conflict. Although this work has only superficially engaged with the EU's institutional challenges, it has illustrated their impacts on its international engagement and supranational policy making with regard to fishing relations and FPAs as the instrument. These challenges call to question the EU's very legal identity as an

⁷⁷ Agreement on a sustainable fisheries partnership between the European Union and the Republic of Senegal. 2014. Official Journal of the European Union L 304/3.

⁷⁸ Council Regulation (EU) No 1118/2014 of October 8, 2014 concerning the allocation of fishing opportunities under the Implementation Protocol to the Sustainable Fisheries Partnership Agreement between the European Union and the Republic of Senegal. *Official Journal of the European Union* L 304/41.

⁷⁹ *Id.*, Article 10.

organization founded around a strong set of values and principles. This trend's manifestation in fisheries comes at a time when other aspects of the EU's international engagement (*vis-à-vis* the 2015 refugee crisis or the Greek debt crisis) are testing the strength of European values and concerns about the EU's global role and mode of legal engagement abound.

Nevertheless, the EU is well-placed to address normative aspirations such as food security, poverty eradication, and sustainability through trade measures due to its strength as the world's foremost market for seafood products. In other aspects of fishing policy, most notably combating illegal, unregulated, and underreported (IUU) fishing, the EU has already shown initiative to utilize its market influence.⁸⁰ Introducing trade more prominently as part of the conversation about the bilateral fishing agreements may help support developmental goals such as food security, poverty eradication, stock sustainability, and maintaining small-scale fishing communities. Reforming the EU-ACP tariff regime may prove a good starting point but has several shortcomings, as illustrated above. For Senegal and countries like it, such conflicting incentives could spell significant issues with food security in the future. To fulfill its normative aspirations, the EU must address the multi-level power imbalance in its fishing negotiations with ACP countries. Further, the EU should implement policies in support of small-scale fishing communities, perhaps by integrating trade measures for supporting such communities in its existing capacity building payments. Yet as part of its effort to promote development and human rights, the EU must decouple such payments from its fishing access fees.⁸¹

Because of its significant sway as the world's foremost market for seafood products, the EU would lose relatively little from implementing measures that support decreased dependency and food security in ACP countries. It is likely to retain both its influence and its competitiveness as the world's largest purchasing power for seafood products despite changes in the tariff scheme or dual payments. By contrast, the EU would gain much in the way of respectability as an international actor and a champion of human rights in fisheries, at a time when its values must stand stronger than ever.

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⁸⁰ See Council of the European Union. 2008. Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. Official Journal of the European Union, L286/1.

⁸¹ This argument has been made earlier, and a great deal more elegantly, by Beatrice Gorez, 2005, see n. 38 above.