

# The Sustainable Fisheries Partnership Agreements of the European Union and the Objectives of the Common Fisheries Policy: Fisheries and/or Development?

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**Abstract:** The documents published by the European Commission within the framework of the latest Common Fisheries Policy reform include the “new” Sustainable Fisheries Partnership Agreements. This paper will analyse whether their inclusion reinforces the objectives of the Common Fisheries Policy by facilitating the development of a coherent and comprehensive external fishing policy, respectful with the international fisheries norms. In order to address it, we will examine, firstly, the European Union’s fisheries treaty practice and, secondly, the changes introduced by the new Agreements regarding this practice and their compliance with the objectives of the Common Fisheries Policy.

**Keywords:** European Union; Common Fisheries Policy; fisheries agreements; development; coherence.

## INTRODUCTION

Whenever the Common Fisheries Policy (CFP) of the European Union (EU) comes under review, the relevance of the international fisheries agreements (IFAs) concluded by the EU with third States<sup>1</sup> and the advisability of their continuation are called into question, casting doubt on whether they are properly integrated within the CFP, as well as on their coherence with other EU policies and their conformity with the international law of the sea.<sup>2</sup>

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<sup>1</sup> Regarding these agreements, see M. Hernández García, *La política convencional pesquera de la Comunidad Europea con terceros Estados* (Tirant lo Blanch, Valencia, 2007); Z. Ould Ahmed Salem, *Les écueils du “partenariat”: l’Union européenne et les accords de pêche avec l’Afrique* (Ed. Karthala, Nouakchott, 2009) [DOI: 10.3917/polaf.116.0023]; N. Van der Burgt, *The contribution of International Fisheries Law to Human Development. An Analysis of Multilateral and ACP-EU Fisheries Instruments* (Martinus Nijhoff Publishers, Leiden/Boston, 2013); E. Witbooi, *Fisheries and Sustainability. A Legal Analysis of EU and West African Agreements* (Martinus Nijhoff Publishers, Leiden/Boston, 2012).

<sup>2</sup> It should be reminded that the European Union is a contracting party to UNCLOS and, pursuant to Council Decision 98/414/EC, to the United Nations Agreement on the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks of 4 December and, pursuant to Council Decision 96/428/EC, to the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas of 24 November 1993 of the Food and Agriculture Organization of the United Nations.

In this regard, since the presentation, on 24 April 2009, of the European Commission's Green Paper on the reform of the Common Fisheries Policy,<sup>3</sup> criticism of these agreements has multiplied. Amongst other things, they have come under fire for: their negative effects on responsible and sustainable fishing in non-EU partner countries; the high cost they impose on the EU budget and the limited trade-offs received in return; the persistent overcapacity of the fleets of certain Member States; the permissive attitude adopted towards certain corrupt administrations in non-EU countries; and the limited impact they have on development for the populations of such countries, including the very coastal communities that are most dependent on fishing for their livelihood.<sup>4</sup>

Such criticism has given rise to a variety of alternative ideas. Some have suggested that EU funding for these agreements be withdrawn. Others have gone even further and proposed that the private sector that benefits from such funding should bear the burden of the economic cost of the agreements within the framework of the CFP, or that they should be re-nationalized, in other words, brought back under the competence of those Member States that might be interested in them. Still other voices have emphasized —as has the European Commission itself in its documents regarding the review of the CFP<sup>5</sup>— the need to fully harmonize EU external policy and its international fisheries action with the principles and objectives of the CFP by establishing a series of so-called “Sustainable Fisheries Partnership Agreements” (SFPAs). According to Article 4(35) of Regulation (EU) No. 1380/2013 on the CFP, these international agreements are celebrated by the EU with a third state for the purpose of obtaining access to waters and resources in order to sustainably exploit a share of the surplus of marine biological resources, in exchange for financial compensation from the Union, which may include sectoral support.<sup>6</sup> Thus, the partner countries would receive either compensation in exchange for granting access to the surplus of their fisheries resources or financial assistance for the implementation of their own sustainable fisheries policies to support its development.<sup>7</sup>

However, such purposes and the compulsory coherence between the IFAs and the EU's development cooperation policy (DCP), in the same line with Article 7 TEU, should not require the transformation of the SFPAs into international development agreements. This would go them away from the specific objectives of the CFP (Article 39 TEU) and, undoubtedly, these agreements represent one of the main manifestations of the EU's international dimension.<sup>8</sup>

<sup>3</sup> COM(2009) 163 final: Green Paper – Reform of the Common Fisheries Policy, Brussels, 24.04.2009.

<sup>4</sup> These criticisms and divergent positions are mentioned in different documents and reports presented by more than 350 lobbies, national governments, regional governments, NGOs, etc., with the occasion of the consultation process regarding the CFP reform, which took place from April to December 2009. For a synthesis of the various positions, see SEC (2010) 428 final, Commission Staff Working Document. Synthesis of the Consultation on the Reform of the Common Fisheries Policy, Brussels, 16.4.2010. A complete collection of the contributions received by the European Commission with the occasion of these consultations may be seen at <http://ec.europa.eu>, accessed 1 February 2016.

<sup>5</sup> COM(2011) 425 final, Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, Brussels, 13.07.2011, at 9.

<sup>6</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ 2013 L 354/22.

<sup>7</sup> A recent analysis of the financial costs of the IFAs can be read in the report “Are the Fisheries Partnership Agreements well managed by the Commission?” (European Court of Auditors, No. 11, 2015).

<sup>8</sup> It has to be mentioned that the confusion between IFAs and cooperation for development agreements (CDAs) neither is possible from a legal point of view nor desirable as their respective legal basis as well as their consequences are

Moreover, it should be reminded that the EU's external fisheries dynamic, which is represented by the IFAs, is not solely and exclusively the international dimension of the CFP, and therefore a tool for achieving its objectives. It is also one of the elements that best define the EU's international legal personality as explicitly enshrined in Article 47 TEU, whilst, at the same time, enabling it to fulfil one of its fundamental objectives, as set out in the TEU Preamble itself, namely, reinforcing the European identity and its independence at the international level. Thus, the EU's external fisheries policy has become one of the essential components of its external action that best project its identity in the world, along with its Common Foreign and Security Policy (CFSP), common trade policy, and DCP. This would be to know, now, if the new SFPAs are able to contribute to the achievement of this goal.

The essential objectives of the CFP are, as set out in Article 39 TFEU and developed in Article 2(1) of Regulation (EU) No. 1380/2013 on CFP, to increase fishing productivity, to encourage technical progress, ensuring a rational development of fishing production and guaranteeing that fishing and aquaculture activities will be long-term environmental sustainability and will be managed in a coherent way to generate different benefits (economic, social and of a sustainable employment) as well as to contribute to the availability of food supplies at reasonable prices.<sup>9</sup>

Taking into account this legal framework, one must ask whether the “new” SFPAs do in fact meet these objectives, or whether, on the contrary, they distance themselves from it by prioritizing other objectives, such as partner-country development. In an attempt to answer this question, the First Part of this paper will address the EU's fisheries treaty practice with third States as well as how the SFPAs emerged into it. The Second Part will offer an appraisal of the elements and the features that characterise SFPAs and determine whether they are still agreements that intend, primarily, the objectives of the CFP.

#### INTERNATIONAL FISHERIES AGREEMENTS AS AN ELEMENT OF THE EUROPEAN UNION'S FISHERIES TREATY POLICY BEFORE THE COMMON FISHERIES POLICY REFORM OF 2013

It is well known that the EU's exclusive competence over the conservation of fisheries resources is not restricted to the maritime waters under the sovereignty or jurisdiction of its Member States, but also extends to the activities of EU fishermen and fishing vessels in the waters of third countries or on the high seas.<sup>10</sup> In implementing this competence, the Union has gradually

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different. Indeed, the legal basis of the IFAs is in the sectorial policy of the conservation of marine living resources, which, according to Article 3(1)(d) TFEU, is a field where the EU has exclusive competence. The CDAs belong to the DCP that, by virtue of Article 4(4) TFEU, is a shared policy between the EU and its Member States. So, whilst the DCP allows the EU to undertake actions and a common policy, it does not prevent Member States from doing the same on their own. In principle, this means that any IFA should be concluded exclusively by the EU, whereas DCAs should be signed by both the EU and its Member States, due to the complementarity principle set out in Article 208(1) TFEU, on which the functioning of the DCP is based.

<sup>9</sup> Article 2(1) of Regulation (EU) No. 1380/2013.

<sup>10</sup> Art. 1(1) of Regulation (EU) No. 1380/2013 provides: “1. The Common Fisheries Policy (CFP) shall cover: (a) the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources; (b) in relation to measures on markets and financial measures in support of the implementation of the CFP: fresh water biological resources, aquaculture, and the processing and marketing of fisheries and aquaculture products. 2. The CFP shall cover the activities referred to in paragraph 1 where they are carried out: (a) on the territory of Member States to which the Treaty applies; (b) in Union waters, including by fishing vessels flying the flag of, and registered in, third countries; (c) by Union

forged an external fishing policy that has enabled it to negotiate fisheries agreements with third states, with a view to maintaining the activity of the EU fishing fleet, as well as helping to supply the European fish market.<sup>11</sup>

This competence to conclude international treaties has been held by the EU for the last thirty years. The case law of the Court of Justice of the European Union (CJEU) reflects some of the problems that have arisen throughout its implementation.<sup>12</sup> Moreover, international practice provides some thirty international fisheries agreements that have been concluded in the period. Whilst some of these, logically enough, are no longer in force, their currency is obvious, as can be seen from the documents on the reform of the CFP that the European Commission has presented since the publication of its Green Paper in 2009.<sup>13</sup> In that document, it was apparent that, in spite of the strategic importance of this fisheries treaty activity for the EU, the IFAs were not without difficulties and problems. This is why a “new” model of agreement was proposed: the SFPAs. The place of such agreements within the EU’s extensive and wide-ranging activity in the sphere of fisheries agreements will be examined below.

#### (1) From “pay, fish and go” agreements to the fisheries partnership agreements

The diminishing opportunities for the EU fleet to fish outside its jurisdictional waters as a result of the widespread implementation of Exclusive Economic Zones (EEZs) led the Union, in keeping with the international legal framework,<sup>14</sup> to develop an active fisheries treaty policy aimed at gaining access for its fleet to the surplus allowable catches of other coastal states through the signing of a wide range of international fisheries agreements of varying scope and content.<sup>15</sup> Logically, such agreements were not entered into at zero cost; in return for such access, the EU has had to dedicate financial resources that account for a significant proportion (approximately 40%) of the CFP’s annual budget.

Initially, the intention of these agreements was mainly commercial, as they sought to ensure access for the EU fleet to fishing in third-country grounds in exchange for a financial contribution or the reciprocal concession of fishing opportunities to the other party. However, gradually, new agreements began to appear in which access to the third country’s fisheries

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fishing vessels outside Union waters; or (d) by nationals of Member States, without prejudice to the primary responsibility of the flag State”.

<sup>11</sup> The EU has a deficit in fishery products, requiring it to import significant amounts of such products to meet its market demand. According to Eurostat data, in 2014 about 66% of fishery products and aquaculture products were imported from third countries compared to 33% supplied by the EU. Currently, more than a quarter of the fish caught by European vessels comes from waters outside the EU. Specifically, about 8% are fished under fisheries agreements with third countries and 20% are fished in the high seas, which are mainly located in areas under the jurisdiction of regional fisheries management organizations. According to Eurostat data from 2011, about 700 fishing vessels flying the flags of EU Member States operate outside the Union, accounting for almost 25% of the capacity in tonnage recorded in the EU fleet register.

<sup>12</sup> See, amongst others, the judgment in *Kramer and others*, 3, 4 and 6/76, ECLI:EU:C:1976:114; the judgment in *Commission v. Ireland*, C- 61/77, ECLI:EU:C:1978:29; and the judgment in *Commission v. Spain*, C-258/89, ECLI:EU:C:1991:322. See also: J. M. Sobrino Heredia and A. Rey Aneiros, *La jurisprudencia del Tribunal de Justicia de las Comunidades Europeas sobre la política común de la pesca* (Xunta de Galicia, Santiago de Compostela, 1997).

<sup>13</sup> COM (2009) 163 final, *supra* n. 6.

<sup>14</sup> Arts. 56, 61 and 62 of UNCLOS.

<sup>15</sup> This was, at least, the European Commission’s traditional view, as can be seen in: COM(96) 488 final: Fisheries agreements – Current Situation and Perspectives, Brussels, 30.10.1996. However, it has been questioned in more recent documents. See: COM(2009) 163 final, *supra* n. 6, at 24.



resources was no longer based on the granting of licences to EU vessels, but rather on the creation of joint fishing enterprises or of temporary fishery associations with the fishing sector of the coastal state.

Although this is the recent trend, not all of the agreements concluded by the EU fit only this model. Indeed, historically speaking, it would be wrong to speak of a single “model agreement”, and at present such a model does not exist. Each agreement has followed, and continues to follow, its own rationale, reflecting the objectives and economic interests of the contracting parties, which often vary from one agreement to another. Nevertheless, from a more educational than strictly legal standpoint, and with a view to determining where the SFPAs fall within this wide-ranging treaty practice, these agreements can be divided into two or even three different generations, namely: the so-called “first-generation” agreements (a), the so-called “second-generation” agreements (b), and the so-called “third-generation” agreements (c).

#### (a) *The “first-generation” agreements*

There are four different types of “first-generation” agreements, namely: reciprocal agreements, financial compensation agreements, agreements involving commercial considerations, and agreements involving other types of considerations.<sup>16</sup>

The *reciprocal agreements* involve an exchange of fishing opportunities between the EU fleet and that of the third country. Under this kind of agreement, the parties grant mutual access to resources in their respective fishing zones. Examples would include the agreements concluded with different Scandinavian and Baltic countries, whose fishing zones are adjacent to those of the Union. One of their key objectives is to encourage harmonized and coordinated management of fish stocks in areas where there exists a common interest. Norway,<sup>17</sup> the Faroe Islands,<sup>18</sup> and Iceland<sup>19</sup> have all concluded agreements of this nature with the EU, the most important being the

<sup>16</sup> For an overview of these issues, see: S. Mbithi Mwikya, “Fisheries Access Agreements: Trade and Development Issues” (International Centre for Trade and Sustainable Development, Issue Paper No. 2, 2006), at 3-6; and W. Kalaidjian, “Fishing for Solutions: The European Union’s Fisheries Partnership Agreements with West African Coastal States and the Call for Effective Regional Oversight in an Exploited Ocean”, 24 *Emory International Law Review* (2010) 389-431, at 404-406. See also: “Comparative Study of the Impact of Fisheries Partnership Agreements: Technical Report” (UK Department for Environment, Food and Rural Affairs and Department for International Development, May 2007), at 3-8; and “Les enjeux des accords de pêche Union européenne / Pays Africains”, Avis du Conseil économique, social et environnemental présenté par M. Gérard d’Aboville (2010), at 15-18.

<sup>17</sup> The framework fisheries agreement signed between the EU and Norway was adopted by Council Regulation (EEC) 2214/80 (OJ 1980 L 226/47). It has since been periodically renewed. The current fisheries agreement refers to the 2009-2015 period. This bilateral agreement is the most important agreement signed between the EU and a third country regarding fishing possibilities and the joint management of fisheries resources. For example, under Council Regulation (EC) No. 41/2006 (DO 2007 L 15/1), Norway is allocated a quota of 204,982 tonnes of different species to be caught in EU and Greenland waters, in exchange for 88,809 tonnes for the EU in Norwegian waters. Additionally, on 25 October 2013, the European Commission concluded the negotiations for a new fisheries agreement with Norway regarding mutual access to fishing in the waters of Skagerrak and Kattegat.

<sup>18</sup> The first fisheries agreement between the EU and the Faroe Islands was adopted by Council Regulation (EEC) 2211/80 (OJ 1980 L 226/11) and remained in force for ten years. The agreement was extended for two further six-year periods until 2012, subject to subsequent tacit renewal for additional periods of six years unless a notice of termination is given (see Council Regulation (EC) No. 51/2006, OJ 2006 L 16/1).

<sup>19</sup> The framework fisheries agreement between the EU and Iceland was adopted by Council Regulation (EEC) No. 1737/93 (OJ 1993 L 161/1) and entered into force on 15 December 1993. This agreement covered a period of ten years and was extended for further periods of six years. The current fisheries agreement refers to the 2009-2015 period.

agreement signed with Norway in 1981. The agreements signed with the Baltic Republics also included the payment of financial compensation by the EU.

These agreements are known as *agreements with Northern countries* or *Northern agreements*. They are based on a system of exchange of fishing opportunities, whereby the annual quotas to be exchanged are negotiated with the countries concerned. As a result, the fleets can continue to fish in the waters of both parties. In addition to these bilateral agreements, there are also certain *multilateral agreements*—the so-called “coastal states” agreements—concerning three populations of pelagic species: Atlanto-Scandian herring, mackerel and blue whiting.

The *financial compensation agreements* are those signed by the EU with third-country coastal states that agree to cede part of the exploitation of their fisheries resources, with no reciprocal right of access to EU waters, in exchange for the payment of a sum by the Union, as well as payment of a fee by those private ship owners that enjoy the right of access to the coastal states' waters. This financial compensation is frequently accompanied by other considerations, such as access to the European market at lower tariffs. This category includes the initial agreements signed with African and Indian Ocean countries, such as those concluded with developing countries in Africa, the Caribbean and the Pacific (ACP countries), until they were superseded by Fisheries Partnership Agreements (FPAs).<sup>20</sup>

The *agreements involving commercial considerations* were signed between the EU and industrialized countries. This category included the fisheries agreements concluded with the United States of America and Canada, in which access to their fisheries resources was granted in exchange for a series of trade facilities. These agreements also provided for access to surplus stocks and allowed EU fishermen to operate in the waters of the countries that signed them.

Finally, the EU also signed *agreements involving other kinds of considerations*, which authorize the exploitation of fisheries resources in exchange for financial compensation, market access (e.g. the agreement with Greenland<sup>21</sup>), and other considerations. The agreement signed with Morocco on 13 November 1995 is an example of this type of agreement, as it provided for a combination of financial compensation and trade facilities, the constitution of close ties between the parties allowing for the recruitment of local crews, the obligation to land catches locally, the presence of Moroccan observers on board, etc.<sup>22</sup>

#### (b) The “second-generation” agreements

The *agreement entered into with Argentina on 24 May 1994* is considered a “second-generation” agreement. Its provisions foster the constitution of mixed enterprises and temporary joint ventures able to conduct their activities in Argentina's EEZ, guaranteeing them access to a quota of a given species. The agreement also included facilities for transferring an EU fishing vessel's flag to Argentina and provided for the implementation of technical cooperation projects. The

<sup>20</sup> In those years such agreements were signed with several countries, including, amongst others, Senegal, Madagascar, Mauritania, and São Tomé and Príncipe.

<sup>21</sup> The first fisheries agreement between the EU and Greenland was signed in 1985, for an initial period of ten years. The agreement was extended for additional six-year periods until being replaced by Fisheries Partnership Agreements, implemented through successive protocols. The most recent FPA was adopted by Council Regulation (EU) No. 927/2012 (OJ 2012 L 293) and Corrigenda (OJ 2012 L 294); the new partnership protocol was adopted by Council Decision 2012/653/EU (OJ 2012 L 293) for the period spanning from 1 January 2013 to 31 December 2015.

<sup>22</sup> On EU-Morocco fisheries relations, see J.M. Sobrino Heredia, “Les relations euro-marocaines concernant la pêche”, in A. Del Valle Gálvez (ed.), *Inmigración, seguridad y fronteras* (Dykinson, Madrid, 2012), at 235-261.

agreement, which had a fairly eventful history, was hailed at the time as a change in EU policy in these matters, since, in addition to the above-mentioned content, it provided for commercial opportunities in a country, in this case South American, with a well-developed fisheries sector of its own.

### (c) *The “third-generation” agreements*

Finally, within the context of the 2002 reform of the CFP,<sup>23</sup> the European Commission produced a new “third-generation” type of agreement, namely, the FPAs. Most of the agreements in force for the EU at the time were adapted to this new model, except for those concluded with Northern European countries. As will be shown below, it is precisely within this framework that the “new” SFAs must be placed.

### (2) From fisheries partnership agreements to sustainable fisheries partnership agreements

Until the 2013 CFP reform, the most significant change in the EU’s fisheries treaty activity came about with the FPAs, which aim not to satisfy a mutual interest in fishing in both parties’ waters, but to give, in exchange for access to third countries’ waters, the benefit of financial and technical support to develop the national fisheries sector of the country with which the EU concludes the agreement, providing European capital and technology to this end. The Member States were divided on the suitability of introducing this new type of agreement. Thus, whilst Spain showed little liking for it at the time, other countries, such as Germany, with no tradition of distant-water fishing, but an interest in selling their technology, showed much greater interest.

Regardless of these discrepancies, the fact is that the critical opinions of various NGOs, the lack of enthusiasm for IFAs shown by some Member States, and the views of the European Commission itself led the latter to turn its bilateral financial compensation agreements into FPAs in order to foster responsible and sustainable fishing activity in the mutual interest of both parties. These agreements thus represented a significant shift away from traditional fisheries agreements, mainly based on the “pay, fish and go” principle, towards new forms of fisheries partnerships, based on a more global approach that encouraged cooperation. As already noted, in addition to providing access to EU fishing vessels, these agreements’ sought to strengthen partner countries’ capacity to ensure sustainable fishing in their own waters.<sup>24</sup>

To meet these objectives, the idea behind the FPAs was that the coastal partner country would set aside a significant share of the European financial compensation it received to improve its national fisheries policy and ensure the rational and sustainable exploitation of its fisheries resources. In this regard, it is considered that this kind of agreement makes it possible, to a greater extent than previous models, to establish a wide-ranging political dialogue between the EU and the partner country, covering aspects such as fisheries management, fleet control and surveillance, and the development of the fisheries sector.<sup>25</sup> Underlying the agreements was the

<sup>23</sup> Council Regulation (EC) No. 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358/59).

<sup>24</sup> On the FPAs, see, amongst others; A. Hudson, *Case Study: The Fisheries Partnership Agreements* (The Overseas Development Institute, 2006), at 1-4; N. Sporrang, *Fisheries Agreements with Third Countries – Is the EU Moving Towards Sustainable Development?* (Institute for European Environmental Policy, London, 2002), at 1-19.

<sup>25</sup> See, amongst others, C. Teijo García, “Una aproximación a la práctica convencional de los acuerdos de asociación pesquera suscritos por la Comunidad Europea”, in J. Pueyo Losa and J. Jorge Urbina (coords.), *La cooperación internacional*

concern to ensure the consistency of all the envisaged measures with sustainable fishing and the promotion of good governance. Furthermore, such agreements placed great importance on impact assessments, control and implementation, and the sustainable and effective management of fishing activities.<sup>26</sup> Although it was not an entirely new aspect, they also included obligations for EU vessels to employ local fishermen, and an emphasis on fishing opportunities that encouraged EU vessels to land their catch in the partner country for processing. Finally, these agreements offered greater flexibility in the way EU financing could be used for particular priorities, such as scientific research and monitoring, control, and surveillance activities.

The current SFPAs can be divided into two main groups: the *tuna agreements* and the *mixed agreements* or *multi-species agreements*. The EU has concluded/signed 13 tuna agreements, allowing EU vessels to follow the migratory stocks of tuna as they move through the African and Indian Ocean waters of Cape Verde, Comoros, Côte d'Ivoire, Gabon, Equatorial Guinea, Kiribati, Liberia, Madagascar, Mauritius, Mozambique, São Tomé and Príncipe, Seychelles, and the Solomon Islands.<sup>27</sup> It has likewise signed eight mixed or multi-species agreements granting the EU fishing fleet access to very diverse stocks in the partner country's EEZ. These agreements were signed with Greenland, Guinea, Guinea-Bissau, Morocco, Mauritania, Micronesia and Senegal.<sup>28</sup>

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*en la ordenación de los mares y océanos* (Iustel, Madrid, 2009) 263-291; K. Van den Bossche and N. Van der Burgt, "Fisheries Partnership Agreements under the European Common Fisheries Policy: an External Dimension of Sustainable Development?", LXII (4) *Studia Diplomatica* (2009) 103-125.

<sup>26</sup> On the impact of the IFAs on the development of responsible fishing activities, see: C. Bretherton and J. Vogler, "The European Union as a Sustainable Development Actor: the Case of External Fisheries Policy", 30(3) *Journal of European Integration* (2008) 401-417, at 408-415 [DOI: 10.1080/07036330802142012]; B. Mesnil, "The hesitant emergence of maximum sustainable yield (MSY) in fisheries policies in Europe", 36(2) *Marine Policy* (2012) 473-480 [DOI: 10.1016/j.marpol.2011.08.006]; Witbooi, *supra* n. 4.

<sup>27</sup> For a detailed overview of these fisheries agreements, see *Fishing for Coherence in West Africa: Policy Coherence in the Fisheries Sector in Seven West African Countries* (BECS, Paris, 2008), at 17-28; and F. Manach et al., "Who gets what? Developing a more equitable framework for EU fishing agreements", 38 *Marine Policy* (2013) 257-266 [DOI: 10.1016/j.marpol.2012.06.001]. Liberia and the Cook Islands are the most recent countries to enter into a fishing treaty relationship with the EU. On 5 June 2015, a new SFPA and the associated Protocol were concluded between the EU and Liberia for a (renewable) five-year period. On 23 October 2015, the EU and the Cook Islands reached an agreement on an SFPA and a Fisheries Protocol. According to Article 15 of the SFPA signed with Liberia and Article 12 of the associated Protocol, the provisions of these agreements will be effective from the date of their signature. The Protocol provides for fishing opportunities for 18 tuna seiners and 6 surface long-liners. For more details, see COM(2015) 467 final, Proposal for a Council Decision on the conclusion of a Sustainable Fisheries Partnership Agreement between the European Union and the Republic of Liberia and the Implementation Protocol thereto, Brussels, 30.09.2013.

<sup>28</sup> Euro-Moroccan fisheries relations have drawn the greatest diplomatic effort in recent years. To date, fisheries relations between the EU and Morocco have been based on four successive fishing agreements: the first was signed on 25 May 1988, the second on 1 May 1992, the third on 1 December 1995, and the fourth in 2005 (although it did not come into force until 1 April 2007). The current Protocol of the most recent agreement was published by Decision 2013/720 /EU of 15 November 2013 (OJ L 328, 7.12.2013). For a detailed analysis of the different fishing agreements with Morocco, see V. Chapaux, "La cuestión del Acuerdo de Pesca entre las Comunidades Europeas y Marruecos", in M. Ponce de León, K. Arts and P. Pinto Leite (eds.), *El derecho internacional y la cuestión del Sahara Occidental* (Ed. International Platform of Jurists for East Timor, Leiden, 2012), at 217-237; I. González García, "Las relaciones en materia de pesca entre Marruecos y la Unión Europea : situación actual", in A. Del Valle Gálvez (ed.) and M. Acosta Sánchez (coord.), *Las dimensiones internacionales del Estrecho de Gibraltar / Les dimensions internationales du Détroit de Gibraltar* (Dykinson, Madrid, 2006), at 241-263; J. Juste Ruiz, "El acuerdo pesquero CEE-Reino de Marruecos de 25 de febrero de 1988", 15(3) *Revista de Instituciones Europeas* (1988) 741-766; and Sobrino Heredia, *supra* n. 25, at 235-261.



Under these FPAs, in exchange for access to third-country waters, the EU has had to make a single financial contribution consisting of two separate elements. On the one hand, the financial compensation is used to promote sustainable fishing. The amount of the EU contribution for this purpose is calculated based on the access to fisheries resources granted to fishing vessels flying a Member State flag, the definition of measures to promote sustainable fisheries development, the impact of the partnership agreement, and the participation of EU interests in the coastal partner state's fisheries sector as a whole. Sustainability policy is defined jointly by the EU and the partner country, based on an assessment of the third country's national fisheries policy, a calculation of its needs in the sphere of sustainable fisheries development, and support in the fight against illegal, unreported and unregulated (IUU) fishing.

On the other hand, these agreements seek to encourage the transfer of capital, technology and technical knowledge. This is achieved particularly through the constitution of joint enterprises, but also by improving control and surveillance systems, advising the partner state's government in matters of scientific research, and supporting the modernization of its national fishing fleet. They also contain an important new element in that they are intended to be adaptable to the development needs of the coastal third countries and to their integration in the global fishing economy, as a means of contributing to the partner countries' economic and social development.

This explains why the most part of the financial contribution envisaged under these agreements is intended to help the partner countries reinforce their fisheries policy, including scientific research and the control and monitoring of fishing activities in their waters.<sup>29</sup>

It is precisely within this context that the SFPAs first appeared, referred to indirectly in the Green Paper on the reform of the CFP when the European Commission, after praising the progress represented by the transition from traditional fisheries agreements to FPAs, highlighted the problems encountered in their implementation.<sup>30</sup> These problems are due to the minimum uptake of the financial compensation provided for improving the national fisheries policies of the partner countries, and the lack of accuracy in the assessment of the conservation status of fish stocks in these countries, which is essential to determine sustainable catch levels properly. Following on from this analysis, the European Commission considered that the support for the fisheries sector channelled through FPAs should contribute to the fight against poverty and the achievement of the Millennium Development Goals, which, according to this European institution, it had thus far failed to do. As a result, the Commission proposed that the current architecture of the EU's agreements be revisited and alternative forms of arrangements be explored.

Taking this line of thought further, the European Commission first started to make specific reference to Sustainable Fisheries Agreements (SFAs) in its Communication on the reform of the CFP published on 13 July 2011.<sup>31</sup> These new agreements were renamed "Sustainable Fisheries

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<sup>29</sup> When these agreements affect African and Pacific countries, a large share of the EU financial aid is specifically earmarked to help the national fisheries policy of those countries, according to the sustainability principle. The allocation and management of these funds are decided by mutual agreement between the partner country and the EU.

<sup>30</sup> COM (2009) 163 final, *supra* n. 6, at 25-26. All documents published on this subject by the European Commission during the 2009-2012 period made references to the SFPAs; however, they were called "Sustainable Fisheries Agreements" at the time.

<sup>31</sup> COM (2011) 417 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Reform of the Common Fisheries Policy, Brussels, 13.07.2011.

Partnership Agreements” in Regulation (EU) No. 1380/2013. In this regard, the European Commission considered that these new agreements should be “reoriented towards achieving more sustainable management of fishery resources through a transparency clause that ensures that EU vessels only fish resources that the partner country cannot or does not wish to fish itself”. It also affirmed that these agreements should “focus more on science, monitoring, control and surveillance” and that they should include a human rights clause.<sup>32</sup> The Commission maintained this position in its Communication on the external dimension of the CFP, emphasizing the need to transform the IFAs into SFPAs “to provide a fully-fledged governance framework for the fishing activities of EU vessels in third-country waters”.<sup>33</sup>

These are the ideas contained in the concrete Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, also published on 13 July 2011. This text was modified for the last time on 30 May 2013, and was ultimately reflected in the new framework regulation on the CFP adopted on 11 December 2013 (Regulation (EU) No. 1380/2013). It is a text that, in opinion of the majority part of the fishing sector affected directly by these SFPAs, creates some confusion especially with respect to the legal nature of these agreements and their relationship with the different elements of the CDP.<sup>34</sup>

Thus, on the one hand, the Preamble of the Proposed Regulation on the CFP states that “[r]elations with third countries through Sustainable Fisheries Agreements (SFAs) are another means to promote internationally the CFP principles and objectives”.<sup>35</sup> Therefore, these objectives cannot be other than those set out in Article 39 TFEU. On the other hand, paragraphs 40 and 41 of the Proposal specify the dimension of the development cooperation to be included in the SFPAs, noting that “[r]espect for democratic principles and human rights, [...] and for the principle of the rule of law, should constitute an essential element of Sustainable Fisheries Agreements and be subject to a specific human rights clause” and that the introduction of such a clause “should be fully consistent with the overall Union development policy objectives”. In this regard, the Proposal mentions, as a possible punishment for the violation of the essential and fundamental elements of this clause, *the suspension of the protocol to the SFPA signed by the EU with the relevant third country*.<sup>36</sup>

However, it should be thought that these paragraphs are superfluous, as the specific clause on respect for human rights is already a general obligation that affects all European policies and not just the future SFPAs. The statement also becomes inexplicably reductionist, since, in the Communication on the external dimension of the CFP, it is limited to the necessary consistency with the overall objectives of EU development cooperation policy when it is noted that it “should

<sup>32</sup> *Ibid.*, at 8.

<sup>33</sup> COM (2011) 424 final, Communication and the publication, on 13 July 2011, of the Communication from the Commission on the external dimension of the CFP, Brussels, 13.07.2011, at 11.

<sup>34</sup> In relation to these criticisms, different documents prepared by the Shipowners’ Association of Vigo Harbour (ARVI, in Spanish – Cooperativa de Armadores del Puerto de Vigo) may be read. This Association is formed by numerous shipowners whose vessels are fishing in the framework of these agreements. In this regard, see, amongst others: ARVI, *Más Europa para la pesca. Aportación del sector pesquero desde el sentido común a la reforma de la política pesquera europea / More Europe for Fisheries. Contributions from of fishing industry from common sense viewpoint to the reform of the European Fisheries Policy* (Cooperativa de Armadores del Puerto de Vigo, Vigo, 2011).

<sup>35</sup> COM (2011) 425 final, *supra* n. 8, at 9.

<sup>36</sup> COM (2011) 424 final, *supra* n. 36, at 12.

follow the example of provisions established by the Cotonou Agreement, where applicable, or other relevant international instruments and agreements”.<sup>37</sup>

Moreover, paragraph 39 of the Preamble of the Proposal for a Regulation again stresses the need for the SFPAs to ensure “sustainable exploitation of the marine biological resources”. It further emphasizes that these agreements “should contribute to the establishment of a high quality governance framework to ensure in particular efficient monitoring, control and surveillance measures”. In the authors’ view, this statement seems to ignore the fact that international fisheries agreements involving the waters of third coastal states must be negotiated and concluded with sovereign states that, as such, have their own fishing-related options. This scenario is according with UNCLOS provisions.

The next section will address the features that characterize the SFPAs in order to know if these agreements are adequate tools for the achievement of the objectives of the CFP.

#### THE SUSTAINABLE FISHERIES PARTNERSHIP AGREEMENTS AS A KEY ELEMENT OF THE CURRENT EXTERNAL FISHERIES POLICY

Even though, as shown in the first part of this paper, not all IFAs are the same, in the authors’ view, the EU’s fisheries treaty policy should be comprehensive, coherent and unique. Thus, equal treatment should be offered to European fleets operating under these agreements with regard to both the possibility of using a third country’s surplus quotas and the payment of fees to take advantage of the fishing opportunities in that country. This treaty policy should cover the different types of agreements, adapting them to the different conditions offered by third states. But what about the SFPAs? Do they have a place within a global EU fisheries treaty policy? In the authors’ view, they do, as long as they suitably reflect the principles and objectives of the CFP.

##### (1) The legal regulation of the sustainable fisheries partnership agreements in the last reform of the Common Fisheries Policy

Article 4(37) of Regulation (EU) No. 1380/2013 on the CFP defines SFPAs, as mentioned above, as those international agreements “concluded with a third state for the purpose of obtaining access to waters and resources in order to sustainably exploit a share of the surplus marine biological resources, in exchange for financial compensation from the Union, which may include sectoral support”<sup>38</sup>. As can be seen, this is a very broad definition, covering almost all the IFAs in force at the time of the regulation’s entry into force, except the Northern agreements.

<sup>37</sup> *Ibid.*, at 12. On democratic conditionality clauses in the agreements concluded by the EU, see, amongst others, L. Bartels, *Human Rights Conditionality in the EU’s International Agreements* (Oxford University, Oxford, 2005); S. Hammamoun, “Droits de l’homme et conditionnalité des accords de coopération de l’Union Européenne: quelle logique juridique? », 1 *Revue Générale de Droit* (2010) 145-178.

<sup>38</sup> As is well known, a FPA signed between the EU and its partner countries (Côte d’Ivoire, Liberia, Mauritania, Morocco, Senegal...) is formed by an agreement and its implementing protocols, whose provisions are negotiated by both parts. The fishing agreement will provide a framework for long-term cooperation in fisheries, including the general principles and standards governing access for EU vessels to fish in waters under the jurisdiction of the partner countries. While the fishing protocols set out detailed terms and conditions regarding, amongst others, fishing opportunities and species, the financial contribution (for both access and sectoral support), the level of fees to be paid by ship-owners, the number and size of vessels authorized for fishing, etc.

The elements of the SFPAs identified in this provision are reiterated in Articles 31 and 32 of the Regulation, regarding the principles and objectives of the SFPAs and the financial assistance to be provided by the Union in this field, respectively. In relation to their content, it may seem that most of the terms of these provisions are redundant and repetitive as they coincide with international obligations already assumed by the EU in relation to the fisheries sector (for instance, conservation and management of fisheries resources, fishing of the fisheries surplus of a third state, etc.). However, perhaps this is due to the desire of EU legislators to emphasize these prior international commitments, as well as to make a statement of intent to further advance the goal of conservation and sustainable management of living marine resources, and not only in waters under the sovereignty or jurisdiction of the Member States. On the one hand, this purpose is in keeping with what the EU has stated in different international forums in recent years, such as the United Nations Conference on Sustainable Development held in Rio de Janeiro on 20-22 June 2012 (the “Rio+20” Conference).<sup>39</sup> And, on the other hand, it is properly framed within the objectives of the CFP as it has been shown in the previous pages.

Article 2(1) of Regulation (EU) No. 1380/2013 provides that this policy will aim to ensure that fishing and aquaculture are environmentally sustainable in the long term and are managed in a manner that is consistent with the goals of achieving economic, social and employment benefits, and of “contributing to the availability of food supplies”.

At the same time, according to these provisions, the SFPAs also have commercial purposes as they pursue, in line with the objectives of the CFP, to provide the European market with fish products for consumption and processing that Europe needs.<sup>40</sup> In the line with the CFP provisions, these agreements also try to affirm its role as tools for the defence of the EU’s activity and employment in this sector. In relation to this, it should be noted that the new fisheries agreements and protocols – such as the ones signed with Morocco (2013),<sup>41</sup> Senegal (2014),<sup>42</sup>

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<sup>39</sup> On these issues, see “Contribution by the European Union and its Member States to the UN Department of Economic and Social Affairs. United Nations Conference on Sustainable Development (Rio+20), Rio de Janeiro, 4-6 June 2012”, European Union, 1.11.2011. On what the EU would like to see happen within the framework of this international conference, see P. C. Sandei, “Rio+20: ‘The Future We Want’ (o quello che avrebbe voluto l’Unione Europea)”, 6 *Rivista Giuridica dell’Ambiente* (2012) 851-858. See also: R. Froese and M. Quaas, “Rio+20 and the reform of the Common Fisheries Policy in Europe”, 39(1) *Marine Policy* (2013) 53-55 [DOI: 10.1016/j.marpol.2012.10.007]; and G. A. Oanta, “Protection and Preservation of the Marine Environment as a Goal for Achieving Sustainable Development on the Rio+20 Agenda”, 16(2) *International Community Law Review* (2014) 214-235 [DOI: 10.1163/18719732-12341277].

<sup>40</sup> The European Parliament qualified them when it asked the EU to continue to develop an active policy geared towards signing international fisheries agreements of a commercial nature with developing countries based on mutual interest and benefit in order to contribute to the supply of fish and to employment in the EU, as well as to the social and economic development of the fisheries sector and ancillary industries in third countries. The European Parliament expressed its position in this regard in its “Report on the Commission communication on an integrated framework for fisheries partnership agreements with third countries” of 11 September 2003 (EP 325.178, at 3), and again, more recently, in the “Resolution of 22 November 2012 on the external dimension of the Common Fisheries Policy” (A7-0290/2012, paragraph 21).

<sup>41</sup> Council Regulation 1270/2013 of 15 November 2013 on the allocation of fishing opportunities under the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, OJ 2013 L 328/40.

<sup>42</sup> Agreement on a sustainable fisheries partnership between the European Union and the Republic of Senegal, OJ L 2014 304/3. See also Council Decision 2015/384 of 2 March 2015 on the conclusion, on behalf of the European Union, of a Sustainable Fisheries Partnership Agreement between the European Union and the Republic of Senegal and the Implementation Protocol thereto, OJ 2015 L 65/1.



Liberia (2015),<sup>43</sup> etc. – allow preserving jobs into the European fishing sector and especially in regions highly dependent on fishing.

The contribution to the good global governance of fishing resources represents another purpose of such agreements. In relation to this, and in the same line with the objectives of the CFP, Article 31(1) of Regulation (EU) No. 1380/2013 stipulates that treaty fishing relations should developed into “a legal, environmental, economic and social governance framework”. This framework could include, firstly, “development and support for the necessary scientific and research institutions”, secondly, “monitoring, control and surveillance capabilities”, and, thirdly, “other capacity building elements concerning the development of a sustainable fisheries policy of the third country”.

Indeed, a good fisheries agreement should not appear to be enabling the obvious plunder of the fisheries resources of other countries, let alone those of developing countries whose populations suffer from hunger and poverty; nor should it erode sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources in these third countries’ EEZs, as provided for under Article 56 of UNCLOS. It is clear, in line with international fishing regulations, that the access to surplus fisheries resources should have as essential objective the optimum utilization of the resources from a biological and nutritional point of view. This is not desirable and would run contrary to the objective enshrined in international fishing regulations, not to mention international ethics, as has been stressed by different authors, that fishery resources in the waters of developing countries not be exploited beyond a sustainable maximum. For a variety of reasons, these countries might not be in a position to exploit these resources themselves, and this action, by reducing the productivity of the living resources, is counterproductive not only for the third countries directly affected, but also for the international community as a whole.<sup>44</sup> This is in line with the objectives of the CFP since Article 2(2) of Regulation (EU) No. 1380/2013 on the CFP states that the achievement of the maximum sustainable yield is one of the goals of this policy.

From this perspective and with the aim of achieving responsible and sustainable exploitation of fisheries resources in third countries by EU vessels, Regulation (EU) No. 1380/2013 provides a set of specific objectives for the SFPAs. Hence, the EU must endeavour to ensure that the SFPAs benefit both parties, “including [the] local population and fishing industry” of the third country concerned and that they contribute to the continued activity of the EU’s fleets in this field.<sup>45</sup> To this end, the objective should be to “obtain an appropriate share of the available surplus, commensurate with the Union fleets’ interests”.<sup>46</sup>

But, it should be recalled that, under Article 62 of UNCLOS, fishing in the EEZ of a partner state should only target the surplus resources that the partner state cannot or does not wish to catch for itself. If the EU does otherwise, it would violate these provisions of UNCLOS, which are binding. Moreover, this surplus must be identified “in a clear and transparent manner, on the

<sup>43</sup> Sustainable Fisheries Partnership Agreement between the European Union and the Republic of Liberia, OJ L 2015 L 328/3.

<sup>44</sup> On the ecosystem management of fisheries and the maximum sustainable yield, see J. M. Sobrino Heredia, E. López Veiga and A. Rey Aneiros, *La integración del enfoque ecosistémico en la política pesquera común de la Unión Europea* (Tirant lo Blanch, Valencia, 2010).

<sup>45</sup> Art. 31(2) of Regulation (EU) No. 1380/2013.

<sup>46</sup> *Ibid.*

basis of the best available scientific advice and of the relevant information exchanged between the Union and the third country about the total fishing effort on the affected stocks by all fleets”.<sup>47</sup> As regards straddling and highly migratory species, the fisheries resources that the EU fleet may access under the SFPAs must be determined taking into account scientific assessments made at a regional level, as well as the conservation and management measures adopted in relation to these resources by regional fisheries management organizations (RFMOs).<sup>48</sup>

However, taking into account the international norms regarding fisheries in the EEZs together with the provisions of Regulation (EU) No. 1380/2013, it is considered that this express reference to the part of the surplus to which EU fishing vessels may have access in third-country waters is not only redundant but also seems to suggest that EU lawmakers are unaware of the fact that the SFPAs are international agreements – not unilateral acts – and, therefore, are concluded with third countries, i.e. sovereign legal subjects that are free to define their national fisheries policies as they wish, with the sole condition that they comply with international law.<sup>49</sup> Hence, the EU cannot impose its own management objectives on fisheries resources under the jurisdiction of a third state. Obviously, the management rights and objectives to be pursued by the fisheries policies of these third countries are a manifestation of their own sovereignty. Article 61(3) of UNCLOS clearly imposes the duty to exploit the resources so as to produce the maximum sustainable yield; however, it states that this must be done in accordance with “relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States”. It should therefore be understood that the fulfilment of what is already an international obligation for the EU cannot constitute a specific objective of the fisheries agreements to be concluded in the implementation of its CFP, but only a reminder of the international legality.

In light of the international fisheries law, it is observed how this context allows for broad discretion, which corresponds to the third coastal state rather than the EU. The said third state will have primacy and exclusivity with regard to the fisheries resources of waters under its jurisdiction. However, sometimes, this primacy is more formal than real, because of the coastal state’s economic dependence, development status, or need to obtain financial resources quickly to facilitate access to fishing in its waters.<sup>50</sup> In this regard, the sums received by some African states under the IFAs signed with the EU have historically accounted for a significant portion of their government revenue. For example, it is estimated that the financial contribution made under the IFA first signed between the EU and Mauritania in 1987 provides 25% of the Mauritanian government’s budgetary receipts.<sup>51</sup>

<sup>47</sup> Art. 31(4) of Regulation (EU) No. 1380/2013.

<sup>48</sup> *Ibid.*

<sup>49</sup> The ECJ recently had to rule on the nature of these acts (treaty or unilateral). Contrary to the Advocate General’s opinion, the court held that the relations between the EU and Venezuela in this area (in this case, with regard to fishing off the coast of French Guyana) are based on an international agreement. See the judgment in *Parliament and Commission v. Council*, C-103/12 and C-165/12, ECLI:EU:C:2014:2400.

<sup>50</sup> In this regard, see J.M. Sobrino Heredia, “La tensión entre la gobernanza zonal y la gobernanza global en la conservación y gestión de los recursos pesqueros”, in J.M. Sobrino Heredia (ed.), *La contribution de la Convention des Nations Unies sur le droit de la mer à la bonne gouvernance des mers et des océans. La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos. The Contribution of the United Nations Convention on the Law of the Sea to Good Governance of the Oceans and Seas* (Scientifica, Napoli, 2014), at 455-483.

<sup>51</sup> The sum amounts to about 86 million euros annually. See “Fisheries and Access Agreements” (Policy Brief No. 6, Marine Resources Assessment Group Ltd. (MRAG). The first fisheries agreement between the EU and Mauritania was

Furthermore, the bilateral nature of the SFPAs as a manifestation of the EU's external action regarding fisheries is assured, under Article 31(5) of Regulation (EU) No. 1380/2013, by the fishing authorization that EU fishing vessels must obtain in accordance with the relevant provisions of each SFP. In contrast, other global fishing powers – such as the United States or Japan – have opted for a multilateral policy. For example, the United States has signed the only multilateral tuna agreement with all the Pacific island countries, whose EEZs, in which US fishing vessels were fishing even before the adoption of UNCLOS, are rich in fisheries resources.<sup>52</sup> In this regard, it should be noted that today the possible adoption of a general multilateral tuna agreement is being discussed in certain international forums. It should likewise be mentioned that, in August 2014, three East African coastal states —Kenya, Mozambique and Tanzania— agreed on a series of regional minimum terms and conditions for granting fishing access for foreign fishing vessels to fish highly migratory shared stocks in the waters under their sovereignty or jurisdiction.<sup>53</sup>

Moreover, under Article 31(6) of Regulation (EU) No. 1380/2013, the SFPAs should also include a clause on respect for democratic principles and human rights, and, wherever possible, two additional clauses: one prohibiting the granting of more favourable conditions in the field of fisheries to non-EU fleets and another on exclusivity.<sup>54</sup>

Regarding the clause on respect for democratic principles and human rights, it contains an exigence that was also mentioned by the previous FPAs, as it has already been mentioned in this paper. Thus, it is to introduce, in the field of fisheries, those values that inspire the EU (Article 2 TEU) and, therefore, the CFP domestically and internationally. And this is why the inclusion of this clause and, above all, its application must be coherent with the criteria of application of these clauses to other commercial and of cooperation European policies.

The prohibiting the granting of more favourable conditions in the field of fisheries is an interdiction on the granting by the EU's partner state of more favourable conditions to other, non-EU fleets operating in its waters. Thus, under Article 31(6)(a) of Regulation (EU) No.

signed in 1987 (OJ 1987 L 388/1); the current fisheries agreement refers to the period spanning from 1 August 2012 to 31 July 2018 (Decision 2012/827/UE, OJ 2012 L 361/43). For a detailed overview of this agreement, see A. M. Cherif, "The Bilateral Agreements between the European Union and Mauritania on Fisheries", LXII(4) *Studia Diplomatica* (2009) 127-149; and Kalaidjian, *supra* n. 19, at 407-416.

<sup>52</sup> Mbithi Mwikya, *supra* n. 19, at 7. See also T. Agorau, "Reshaping International Fisheries Development: Assimilating the Treaty on Fisheries between the Governments of Certain Pacific Island States and the United Nations under the PNA Vessel Day Scheme (VDS)", 29(1) *The International Journal of Marine and Coastal Law* (2014) 52-76 [DOI: 10.1163/15718085-12341301]; and W. Hanich, F. Teo and M. Tsamenyi, "A collective approach to Pacific islands fisheries management: Moving beyond regional agreements", 34(1) *Marine Policy* (2010) 85-91 [DOI: 10.1016/j.marpol.2009.04.018].

<sup>53</sup> See "Maputo Declaration on Regional Minimum Terms & Conditions for Granting Fishing Access for Highly Migratory and Shared Stocks in the Coastal East Africa", 28-29 August 2014. The three states agreed that, e.g., the compensation from fisheries access agreements must be based on the market price of the fish and the cost of management; the formula to calculate the private licence fee must be based on the market price; sectoral support under fisheries partnership agreements should include monitoring, control and surveillance (MCS), policy, industry and infrastructure development; no transshipments may take place at sea within the respective EEZs of the partner states; pre-fishing briefings and inspection must be mandatory in the partner states' ports; performance bonds must be introduced and implemented for individual foreign fishing vessels; etc.

<sup>54</sup> For example, Article 3(3) of the SFP between the EU and Senegal (2014, *supra* n. 45) set out that "The Parties undertake to ensure that this Agreement is implemented in accordance with Article 9 of the Cotonou Agreement on essential elements regarding human rights, democratic principles and the rule of law, and the fundamental element regarding good governance, following the procedure set out in Articles 8 and 96 thereof".

1380/2013, to the extent possible, the EU must seek to include in the SFPAs provisions whereby the third state shall undertake not to grant better conditions to other foreign fleets than those granted to the EU's own, "including conditions concerning the conservation, development and management of resources, financial arrangements, and fees and rights relating to the issuing of fishing authorisations".<sup>55</sup> The Union, in line with the objectives of the CFP, tries to create conditions for the fisheries capture sector to be economically viable and competitive (Article 2(5) of Regulation (EU) No. 1380/2013). Undoubtedly, the prohibition of this clause helps to this.

Furthermore, it is considered that it is a legitimate aspiration for the EU since, in practice, the vessels of other countries have been seen fishing in the same waters of the EU's various partner states in better conditions than the EU's vessels, whose activities have been limited to those specifically provided for in the fisheries agreement signed by the relevant partner state with the EU. Again, however, the EU must take into account as well that the SFPAs have to be signed with independent sovereign states that also have to define their own fisheries policies. This requirement could therefore make the negotiations in this area more cumbersome, increasing the time required for the signature of an agreement.

The exclusivity clause provided for in Article 31(6)(b) of Regulation (EU) No. 1380/2013 is a relatively recent practice of the EU in the field of fisheries —although it was also included in the last IFAs— that seeks to ensure minimum requirements for the activity of the EU's fishing fleet as a whole, as well as to prevent its vessels from fishing outside the scope of an SFPa. As the European Commission expressed in its second written statement, submitted on 13 March 2014, on behalf of the EU to the International Tribunal for the Law of the Sea (ITLOS) in Case No. 21, on the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC),<sup>56</sup> this clause is an additional safeguard, aimed at ensuring responsible governance of the fishing activities carried out by the EU under its bilateral international fisheries agreements.<sup>57</sup> Should such a clause not be included in the SFPAs, a fishing vessel that is benefiting from European public aid might, for instance, once the fishing quotas agreed with a third country had been reached, sign a private fishing agreement that would allow it to continue fishing in that country's waters.<sup>58</sup> To prevent such things from happening, any fishing vessel that changes its flag

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<sup>55</sup> For example, Article 3(2) of the SFPa between the EU and Liberia (2015, *supra* n. 46) provides that "The Liberian authorities undertake not to give more favourable conditions than those accorded under this Agreement to other foreign fleets operating in the Liberian fishing zone which have the same characteristics and target the same species as those covered by this Agreement and the Implementing Protocol thereto (hereinafter referred to as 'the Protocol'). Those conditions relate to the conservation, development and management of resources, financial arrangements, fees and rights relating to the issuing of fishing authorisations".

<sup>56</sup> The Request for an Advisory Opinion was presented by the SRFC to ITLOS on 28 March 2013. On 1 April 2015, the ITLOS issued its opinion in this case. The SRFC itself is a regional fisheries management organization, founded on 29 March 1985. It has seven Member States (Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone) and is headquartered in Dakar (Senegal). For more information, see the SRFC's official website: <<http://www.spcsrp.org/>>, accessed 15 September 2015.

<sup>57</sup> *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC). Second Written Statement by the European Commission on Behalf of the European Union*, 13 March 2014, ITLOS, paragraph 27.

<sup>58</sup> M. Ortega Cerdà, "Análisis y propuestas de actuación ante la reforma de la Política Pesquera Común. La sostenibilidad como eje de futuro de la pesca española", *Estudios de Progreso*, Fundación Alternativas (70/2012), at 54.



to circumvent the obligations arising from the provisions of such an agreement or obtain additional fishing opportunities will no longer be allowed to fish in the partner country's EEZ.<sup>59</sup>

The Court of Justice of the European Union (CJEU) has significantly contributed to the interpretation and application of the exclusivity clause in the SFPAs. In its judgment of 9 October 2014 in the *Ahlström and Others* case (C-565/13), regarding a preliminary ruling on the interpretation of the last fisheries partnership agreement signed between the EU and Morocco in relation to fishing activities carried out by two fishing vessels flying the Swedish flag in Moroccan fishing zones between April 2007 and May 2008, the court held that “it cannot be accepted that Community vessels should be able to access Moroccan fishing zones in order to carry out fishing activities there through the conclusion [...] of a ‘bareboat’ charter arrangement with a Moroccan company holding a licence issued by the Moroccan authorities to Moroccan owners of fishing quotas or by using any other legal instrument in order to access those fishing zones for the purpose of carrying out such activities there outside the scope of the Fisheries Agreement and, consequently, without the intervention of the competent European Union authorities”.<sup>60</sup> This judgment should thus be interpreted as excluding any possibility for EU vessels to carry out fishing activities in the fishing areas of a third country with which the Union has signed an SFPA under a licence issued by the authorities of that country without the intervention of the competent EU authorities. They are therefore some duties that are part of the objectives pursued by the CFP and good fishing governance that must guide this policy, as set out in Articles 2 and 3 of Regulation (EU) No. 1380/2013.

These various requirements for the SFPAs are rounded out by paragraphs 7, 8 and 9 of Article 31 of Regulation (EU) No. 1380/2013, which, as it will be addressed in the following paragraphs, derive from the novel and complex policy that the EU has adopted in recent years in relation to fisheries control and the fight against IUU fishing.

Thus, Article 31(7) of Regulation (EU) No. 1380/2013 states that the EU must monitor the activities of its fishing vessels both in EU waters and in non-EU waters that fall beyond the scope of the SFPAs.

Furthermore, according to Article 31(8) of the Regulation (EU) No. 1380/2013, EU Member States must ensure that EU fishing vessels flying their flag and operating in non-EU waters do not engage in undeclared fishing. To this end, the EU Member States must ensure that these ships provide “detailed and accurate” documentation of all their fishing and processing activities.

The provisions of Article 31(9) of the Regulation on CFP are in line with Regulation (EC) No. 1005/2008 adopted by the Council<sup>61</sup>—that is, the framework regulation to combat IUU fishing—the provisions of which are supplemented by the other three regulations adopted by the EU in recent years regarding IUU fishing, namely: Council Regulation (EC) No. 1006/2008 on fishing

<sup>59</sup> See “A new basis for EU agreements with ACP countries. An interview with Stefaan Depypere, Director of International Affairs and Markets, DG Mare”, *Agritrade*, 7 September 2011; available at <<http://agritrade.cta.int>>, accessed 1 September 2015.

<sup>60</sup> C-565/13, ECLI:EU:C:2014:2273, paragraphs 33–35.

<sup>61</sup> OJ 2008 L 286/1. For an analysis of this Regulation, see G. A. Oanta, “The European Union’s System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing”, in J. M. Sobrino Heredia (coord.), *Sûreté maritime et violence en mer / Maritime Security and Violence at Sea* (Bruylant, Paris/Bruxelles, 2011) 103–114; and M. Tsamenyi et al., *Fairer Fishing? The Impact on Developing Countries of the European Community Regulation on Illegal, Unreported and Unregulated Fishing* (Economic Paper No. 86, Commonwealth Secretariat, London, 2009).

activities in non-Community waters<sup>62</sup>; Commission Regulation (EC) No. 1010/2009, laying down rules for the implementation of Council Regulation (EC) No. 1005/2008<sup>63</sup>; and Council Regulation (EC) No. 1224/2009 establishing a new system of control, inspection and enforcement in the field of fisheries.<sup>64</sup> In addition, this paragraph complements and strengthens the sanctions that the EU and its Member States may impose under the provisions of the four regulations on IUU fishing. It stipulates, for example, that fishing authorizations shall not be granted to fishing vessels that have left the EU fishing fleet register and subsequently reregistered within a period of 24 months unless the vessel can provide all the necessary information to prove to the competent authorities of the flag Member State that it actively complied with the EU provisions for fishing vessels throughout the period during which it was not registered in the Union.

Here it should be noted that EU provisions to combat IUU fishing include the periodic publication of black lists. These lists refer both to fishing vessels that engage in IUU fishing and to states deemed to be non-cooperating with regard to its eradication. Likewise, since 2010, different regulations for implementation have been published containing these black lists of the fishing vessels involved in IUU fishing activities and identifying the third countries that do not cooperate in the efforts to combat it, as set out in Regulation (EC) No. 1005/2008. The most recent documents in this area have been: first, Commission Implementing Regulation (EU) No. 2015/1296, adopted on 28 July 2015, which includes a list of 112 EU vessels engaged in IUU fishing;<sup>65</sup> and, second, Council Implementing Decision 2014/170/EU, of 24 March 2014, as amended by Implementing Decisions 2014/914/EU and 2015/200/EU, which compiled a list of non-cooperating third countries in the EU's efforts to fight against IUU fishing.<sup>66</sup> Moreover, EU legislation adopted in this field empowers the European Commission to notify third countries of the possibility of being deemed non-cooperating third countries in the fight against this global scourge.<sup>67</sup>

With a view to strengthening this framework, Article 31(9) of Regulation (EU) No. 1380/2010<sup>3</sup> also stipulates that “[w]here the state granting the flag during the period that the vessel was off the Union fishing fleet register became recognised under Union law as a non-cooperating state with regard to combating, deterring and eliminating IUU fishing, or as a state allowing for non-sustainable exploitation of living marine resources, such fishing authorisation shall only be granted if it is established that the vessel's fishing operations ceased and the owner took

<sup>62</sup> OJ 2008 L 286/33.

<sup>63</sup> OJ 2009 L 280/5.

<sup>64</sup> OJ 2009 L 343/1. For an overview of the provisions of the framework Regulation on fisheries control, see: R. Churchill and D. Owen, *The EC Common Fisheries Policy* (Oxford University Press, Oxford, 2010), at 230-232; and A. Rey Aneiros, “Compleja reforma integral del sistema de control de la Política Pesquera Común”, 23 *Revista General de Derecho Europeo* (2011) 1, at 1-19. For a study of recent legal developments in the EU in relation to the fight against IUU fishing, see: G. A. Oanta, “New Steps in the Control of Illegal, Unreported and Unregulated Fishing”, in H.-J. Koch et al. (eds.), *Legal Regimes for Environmental Protection: Governance for Climate Change and Ocean Resources* (Brill/Nijhoff, Leiden/Boston, 2015) 229-357 [DOI: 10.1163/9789004302839\_014].

<sup>65</sup> OJ 2015 L 199/12.

<sup>66</sup> OJ 2014 L 91/43. Belize, Cambodia and Guinea were found to be non-cooperating third countries in the fight against IUU fishing. Belize was delisted as a non-cooperating third country by Council Implementing Decision 2014/914 (OJ 2014 L 360/53). More recently, Sri Lanka was added to the list by Council Implementing Decision 2015/200 (OJ 2015 L 33/15).

<sup>67</sup> Thailand, Comoros and Taiwan are the most recent countries to receive such notice. See Commission Decision 2015/C 142/06 (OJ 2015 C 142/7); Council Decision 2015/C 324/07 (OJ 2015 C 324/6); and Commission Decision 2015/C 324/10 (OJ 2015 C 324/7).

immediate action to remove the vessel from the register of that state". It is about some crucial aspects regarding SFPAs as these agreements apply to different fishing areas that are frequently and seriously affected by this illegal practice.<sup>68</sup>

Finally, under Article 31(10) of Regulation (EU) No. 1380/2013, the implementation of the SFPAs will receive special attention from the European Commission, as it is responsible for carrying out independent evaluations before and after each protocol to an SFPA. These evaluations must be submitted to the European Parliament and the Council reasonably in advance of such time as the Council will be asked to open negotiations, and a summary of the evaluations must be made publicly available. Through this arrangement, the EU seeks to lend the agreements, in line with the objectives set out in Articles 2 and 3 of Regulation (EU) No. 1380/2013, greater transparency, as called for by European civil society, and, thus, as required for their future viability. The requirement of transparency in fisheries treaty policy clashes with other countries with large fishing fleets, such as Russia, China, Japan, and other Asian countries, which also pay sums of money in exchange for fishing opportunities in the waters of African, Caribbean and Pacific countries,<sup>69</sup> but do not provide data on these fisheries agreements or, if they do, publish only some of the agreed conditions and, even then, only sometime after the agreements are concluded.<sup>70</sup>

In conclusion, the SFPAs are fisheries partnership agreements in which the dimension of development cooperation with the partner country is reinforced. In this regard and in order to avoid unwanted confusion with the DCAs that also contain provisions on fisheries that can be concluded by the EU or its Member States in the framework of the EU's DCP. However, the reinforcement of this cooperation should not be understood that these agreements will not primarily pursue anymore the objectives of the CFP, namely: to increase the productivity of existing fisheries surpluses in the EEZs of coastal third states (i.e., to achieve the maximum sustainable yield); to ensure a fair livelihood for those who depend on fishing activities; to stabilize European markets; to ensure security of supply in the EU; and to ensure reasonable prices for consumers. However, the EU must also ensure that the activities covered by these agreements are carried out in economically, environmentally and socially sustainable conditions. If this occurs, these new fisheries agreements could ensure the fulfilment of the objectives of the CFP, without forgetting the dimension of cooperation and sustainable development, on the basis of the principle of coherence with other EU policies as mentioned by Article 3(h) of Regulation (EU) No. 1380/2013. The recent practice seems to confirm this impression.<sup>71</sup>

<sup>68</sup> For an overview of this situation, see J.M. Sobrino Heredia, *supra* n. 53, at 462; T.M. Ndyae, "Illegal, Unreported and Unregulated Fishing: Responses in General and West Africa", 10 (2) *Chinese Journal of International Law* (2011) 373-405, at 374-378 [DOI: 10.1093/chinesejil/jmr012]; A. Eyiunmi Falaye, *Illegal Unreported Unregulated (IUU) Fishing in West Africa* (Ed. MRAG, London, 2008).

<sup>69</sup> Dyhia Belhabib et al., "Euros vs. Yuan: Comparing European and Chinese Fishing Access in West Africa", *Plos One* (2015) 1-22 [DOI: 10.1371/journal.pone.0118351].

<sup>70</sup> Manach et al., *supra* n. 30, at 258. For an overview of the fisheries agreements signed by these countries with large distance-water fleets, see R. Nichols et al., "Fishing access agreements and harvesting decisions of host and distant water fishing nations", 54 *Marine Policy* (2015) 77-85 [DOI: 10.1016/j.marpol.2014.12.019]; and S. Pyo Kim, "The UN convention on the law of the sea and new fisheries agreements in north East Asia", 27(2) *Marine Policy* (2003) 97-109 [DOI: 10.1016/S0308-597X(02)00082-9].

<sup>71</sup> In this regard, see the protocols and the SFPAs signed by the EU with Senegal (2014), Mauritania (2015) and Liberia (2015).

(2) *Should the European Union still support these sustainable fisheries partnerships agreements or should it renationalize or privatize them?*

As noted above, the access to the fishing surpluses of coastal countries that these SFPAs facilitate is subject to compensation from the EU. In other words, this fisheries treaty policy costs the EU money. This has led some Member States, first, to argue that the current policy should be abandoned, and future agreements should not be negotiated by the Commission, but rather directly by the Member States concerned, which would thus also be responsible for paying the agreed financial compensation; and, second, to advocate differential treatment with regard to the agreements signed with northern and southern countries, with the SFPAs being concluded solely with the latter.<sup>72</sup>

The current reform of the CFP provides that each SFPAs and protocol thereof stipulate the portion of the EU financial assistance to be paid for access to another state's fisheries resources. The Union vessels' owners are responsible for paying part of this assistance, which, according to Article 32(1)(a) of Regulation (EU) No. 1380/2013, "shall be fair, non-discriminatory and commensurate with the benefits provided through the access conditions" to the partner country's fisheries resources.<sup>73</sup> Thus, the EU seeks to facilitate the removal of the market distortions that generated so much criticism in the framework of the World Trade Organization.

Moreover, as laid down in Article 32(1)(b) of Regulation (EU) No. 1380/2013, EU financial assistance is to be conditional on the establishment of a "governance framework, including the development and maintenance of the necessary scientific and research institutions, [and the promotion of] consultation processes with interest groups, and monitoring, control and surveillance capability and other capacity building items relating to the development of a sustainable fisheries policy driven by the third country". Obviously, this could result in interference in the internal affairs of the partner state. As already noted, the EU's partners in the field of fisheries are independent states, which are entitled to freely establish their own national fisheries policies, provided they comply with the requirements of international law. This potential interference in the internal affairs of the third country is compounded by the difficulty that least developed countries, the EU's partners in the field of fisheries, face to build and develop a fishing industry that would allow them to take more efficient advantage of their own fisheries resources.<sup>74</sup>

EU financial assistance under the SFPAs is moreover subject to "the achievement of specific results" and must be "complementary to and consistent with the development projects and programmes implemented in the third country in question".<sup>75</sup>

In relation to this, although Article 32(1)(b) of Regulation (EU) No. 1380/2013 could generate some confusion regarding the nature and objectives of the future SFPAs, Article 32(2) of this act, which was introduced just after the political agreement on the CFP reform was reached on 30

<sup>72</sup> Indeed, within the EU, the fisheries agreements policy does not enjoy unanimous approval, especially when budgetary issues are addressed. The United Kingdom, Sweden and Denmark in particular, and, to a lesser extent, Germany, consistently criticize it, arguing that the agreements are too expensive.

<sup>73</sup> As a concrete example from the practice, see Article 2 (Financial Contribution – Methods of Payment) and Chapter 3 of Annex I (Licence condition – fees and advance payments) of the Protocol setting on the fishing opportunities and financial contribution provided for in the Agreement between the EU and the Republic of Côte d'Ivoire (2013-2018), OJ 2013 L 170/2.

<sup>74</sup> Manach et al., *supra* n. 30, at 261.

<sup>75</sup> Art. 32(1)(b) of Regulation (EU) No. 1380/2013.



May 2013, helps to clarify matters. Thus, by providing that “the financial assistance for sectoral support shall be decoupled from payments for access to fishery resources”, European lawmakers clearly distinguish between development aid that might be offered in relation to a given sectoral activity and payments to be made for access to the recipient country’s fisheries resources. Furthermore, “[t]he Union shall require the achievement of specific results as a condition for payments under the financial assistance, and shall closely monitor progress” in this area.

Finally, it should be reminded that either Article 7 TFEU or Article 3(h) of Regulation (EU) No. 1380/2013 state the coherence between the EU’s policies and actions as a principle of good governance. If this is applied to the SFPAs, it means that these agreements must allow the coherence between fishing actions and development actions. But, as set out in Article 7 TFEU, this should take into account all of their objectives and keep with the principle of conferral. As mentioned before, this principle produces different effects regarding conservation of fisheries resources (exclusive competences) and in the field of cooperation for development (shared competences). Thus, the SFPAs shall maintain their own objectives, focusing on the European fishing industry and, therefore, making it the main beneficiary. In this regard, contrary to other, rather different opinions opposed to the renationalization of fisheries agreements or their conversion into private fisheries agreements, in keeping with the principles of conferral, adequacy of resources, and linkage between European policies, the SFPAs should remain international agreements negotiated and concluded by the Union, integrated into a global fisheries treaty policy based on the EU’s exclusive competence, environmentally friendly and responsible fishing practices, and the fishing needs of both developing countries and, of course, the European fisheries sector. From this perspective, furthermore, such agreements would be a suitable instrument to strengthen the EU’s presence and way of seeing and understanding fishing activities in the not always peaceful international maritime scenario. In this framework, the issue of financial support for the partner countries could be raised. However, that would lead to another field, namely, development cooperation, in which, as mentioned, there are already specific legal instruments (the Cotonou Agreement) and European funds (European Development Fund) to provide and fund this assistance.

If a denaturation of the SFPAs does occur, on the one hand, a proliferation of private agreements could appear, ensuring that the EU fleet would not withdraw from the partner countries’ waters, but would rather simply act on its own, thereby making it almost impossible for the Union to control the fleet’s activities or guarantee that its presence would contribute to local development priorities. On the other hand, nothing would prevent some Member States with large distant-water fleets from including fisheries cooperation clauses in their national development cooperation policies that would facilitate the cooperative presence of their fleets in the these third-country waters through bilateral development cooperation agreements signed with them. In such a case, the EU authorities would hardly be able to control these fleets’ activity, which, in turn, would introduce elements of compartmentalization that would immediately be reflected in the operation of the EU’s internal market.

Either of these scenarios would entail an infringement of the body of law applicable to fisheries agreements, as well as a clear misuse of power,<sup>76</sup> as the development goals would be pursued at the expense of the purposes for which the fisheries agreements were conceived.

In this regard, it is worth noting that these concerns are closely related to some of the issues brought before the ITLOS in the aforementioned case No. 21 regarding the request for an advisory opinion submitted by the SRFC. This was the second case brought before this court through the consultative process.<sup>77</sup> In this case, four questions were raised in direct reference to IUU fishing. Of these, the third referred specifically to international agreements to access third-country fisheries resources.<sup>78</sup> In particular, the ITLOS was asked to rule on whether a flag state or an international agency, such as the EU, would be responsible for the breach of a coastal state's fisheries legislation by a fishing vessel with a fishing licence granted under an international fisheries agreement signed with that coastal state.

The EU presented two written statements, on 29 November 2013 and 13 March 2014, in the framework of the procedure opened by the ITLOS under Articles 138(3) and 133(3) of the Rules of the ITLOS.<sup>79</sup>

Regarding the third question, the EU argued that the liability of the flag state or the international agency, as would be its case, for the violation of the coastal state's national fisheries legislation would depend on the content of the international agreement applicable to it. Where no such specific provisions existed, the general rules of international law on state responsibility would apply and, in particular, the general rules on the responsibility of a flag state for the breach, by its fishing vessels, of the national legislation of a third country's national legislation in that country's EEZ.<sup>80</sup>

However, the ITLOS unanimously replied quite the opposite, that is, that in those cases in which an international organization enjoyed exclusive competence in fisheries matters and signed

<sup>76</sup> According to ECJ case law, misuse of powers refers to the adoption by an EU institution of an act for the purpose of achieving an end that is other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of a case (see, amongst others: the judgment in *United Kingdom v Council*, C-84/94, CLI:EU:C:1996:431; and the judgment in *Crispoltoni and others*, C-133/93, 300/93 and 362/93, ECLI:EU:C:1994:364).

<sup>77</sup> On the ITLOS advisory opinions, see C. Espósito, "Advisory Opinion and Jurisdiction of the International Tribunal for the Law of the Sea", in H. N. Scheiber and J-H. Paik, *Regions, Institutions and Law of the Sea: Studies in Ocean Governance* (Brill, Leiden, 2013) 57-71; and Tafsir Malick Ndiaye, "Les avis consultatifs du Tribunal International du Droit de la Mer", in L. del Castillo (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea. Liber Amicorum Judge Hugo Caminos* (Brill/Nijhoff, Leiden/Boston, 2015) 622-653.

<sup>78</sup> The other three questions concerned: the obligations of the flag state in cases in which IUU fishing activities are conducted within a third state's EEZ; the obligations of the flag state with regard to vessels sailing under its flag; and the rights and obligations of the coastal state in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna. For more details, see <<http://www.itlos.org/index.php?id=252&L=0%20and%207%253D2>>, accessed 1 October 2015.

<sup>79</sup> Another 21 states party to the UNCLOS, 7 international organizations, the United States and WWF International did the same. See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Order of 24 May 2013, ITLOS. See also *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Order of 20 December 2013, ITLOS. For an overview of these issues, see: M. A. Becker, "Sustainable Fisheries and the Obligations of Flag and Coastal States: The Request by the Sub-Regional Fisheries Commission for an ITLOS Advisory Opinion", 17 *ASIL Insights* (2013); and G. A. Oanta, "The International Tribunal for the Law of the Sea and the Polar Regions", 13(3) *The Law and Practice of International Courts and Tribunals* (2014) 286-305, at 301-304 [DOI: 10.1163/15718034-12341278].

<sup>80</sup> *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Written Statement by the European Commission on Behalf of the European Union, 29 November 2013, ITLOS, at 83 and 92.

a fisheries access agreement with a third state, allowing its vessels to fish within the EEZ of that third state, the obligations of the flag state would become obligations of the international organization. Therefore, only the EU would be responsible in such cases. Moreover, the EU should ensure that vessels flying the flag of any of its Member States complied with the national fisheries law of the third state and did not conduct IUU fishing activities within the EEZ of that state. Likewise, the EU, rather than its Member States, would be liable from an international point of view for any breach of its obligations arising under a fisheries access agreement. Therefore, if the EU failed to meet its obligations with due diligence, the SRFC Member States could invoke the international responsibility of the EU for violations of their national fisheries legislation by a fishing vessel flying the flag of an EU Member State and fishing in the EEZ of the SRFC Member States within the framework of a bilateral fisheries access agreement between the EU and an SRFC Member State.<sup>81</sup>

In addition, the ITLOS considered that the SRFC Member States could request an international organization or those of its Member States that are parties to UNCLOS to provide information regarding who is responsible for each specific matter. The international organization and the concerned Member States must provide this information or incur in joint and several liability.<sup>82</sup>

This all seems to counsel the adoption of fisheries agreements where the EU would have an essential role, not only during their negotiations and celebration, but also regarding the surveillance and control of their application, as its international legal responsibility is at stake. So, these agreements represent some efficient tools not only for the achievement of the objectives of the CFP, but also for the reinforcement of the EU's international role for the good fishing governance internationally.

#### CONCLUDING REMARKS

The purpose of the SFPAs, as stipulated by Regulation (EU) No. 1380/2013 and that has been reflected into different fishing agreements signed recently (Morocco, Mauritania, Senegal, Liberia...), cannot be solely or primarily to promote the principle of sustainable and responsible fishing internationally, which is a demand otherwise derived from its legal order of the sea. However, these agreements are necessary to maintain the essential presence of the EU fleet in distant waters, which is needed to ensure the supply —if only partial, albeit a significant part thereof— of the European market and improve the living standards of European fishermen and,

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<sup>81</sup> *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion*, 2 April 2015, ITLOS, at 62-63.

<sup>82</sup> *Ibid.*, at 63. For an overview of the international responsibility of international organizations and their Member States as well as on the sharing of such responsibility for an international wrongful act, see J. M. Cortés Martín, "European Exceptionalism in International Law? The European Union and the System of International Responsibility", in Maurizio Ragazzi, *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Brill, Leiden, 2013) 189-199; G. Gaja, "The Relations Between the European Union and Its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations", SHARES Research Paper 25 (2013), text available at <www.sharesproject.nl>, accessed 30 September 2015; I. Palkoefalos, "Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention", 4(2) *Journal of International Dispute Settlement* (2013) 385-405 [DOI: 10.1093/jnlids/ido009]; and E. Papastavridis, "Allocation Responsibility between EU and Member States: The Case of Piracy off Somalia", in G. Andreone et al., *Insecurity at Sea: Piracy and Other Risks to Navigation* (Giannini Editore, Napoli, 2013) 91, at 91-100.

in general, other populations that depend on this type of fishing, in Europe, too. In other words, it is necessary to be able to contribute for the achievement of the objectives of the CFP.

If the objective of the CFP is to guarantee that the fishing activities are environmentally, socially and economically sustainable in the long-term, the question, thus, becomes how to assure it and how to internationalize the EU's fishing presence if its fleet is reduced. Only through the market and technology? It is considered that it would be dangerous and inefficient. The same applies to the assertion that the Union should not have an external fleet at all, as otherwise the European market would be even more dependent on the import of a crucial product, which could affect European food security. In this regard, the maintenance of these fishing agreements is fundamental in order to create conditions, with the view to having economically viable fleets without overexploiting marine biological resources, to favour the fishing products transformation and the land-based fishing related activity, especially in the European regions directly dependent on this economic activity.<sup>83</sup>

Hence, one of the main ideas of this paper has been regarding the convenience and necessity for the EU to maintain an active fisheries treaty policy with third States, being the SFPAs one of the main, if not the most, manifestation, and as one of the essential tools for the achievement of the objectives of the CFP. The EU is already dependent on imports, which sometimes come from countries with very unstable domestic situations. Thus, the logical and cautious thing to do would be to maintain an operational EU external fleet to meet, if not all the needs of its internal market. This will be possible only if the SFPAs will be maintained and reinforced. In other words, there is a strategic interest in maintaining such a fleet, so as to be able to combat potential food shortages and abusive market prices and to internationalize sustainable and responsible fishing practice in the waters of third States that lack the human and material resources to ensure it themselves. The SFPAs seem to be a suitable instrument to fulfil it.

Just as in the negotiations of the previous reforms of the CFP every ten years, during the negotiations of the latest reform of this policy it was argued that the EU should not become involved in fisheries agreements as they are of interest only to the fleets of a few Member States. Therefore, these agreements should be renationalized and those countries that wish to benefit from them should bear the costs they generate. As noted, in the authors' view, this position is questionable for several reasons: it undermines a key economic sector in some regions that are dependent on fishing; it undermines a common policy (fisheries) and an exclusive Union competence (the conservation of fisheries resources); and it opens the door for less transparent private agreements more likely to be geared towards short-term profit to take on the duties associated with responsible and sustainable fishing practices. It would thus conflict with what one of the main objectives of the CFP is and has always been. Maintaining these agreements and, in particular, the SFPAs would contribute to the achievement of these objectives.

Such a renationalization would also be a disservice to the impoverished economies of many coastal countries that rely on these agreements to improve their fleets, organize their fishing grounds, and ensure a predictable, contractual activity that is essential for the development and food security of their populations. Furthermore, it would create a dangerous vacuum that would quickly be filled by the distant-water fishing fleet of states less scrupulous in this field.

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<sup>83</sup> Article 2(5) of Regulation (EU) No. 1380/2013.



Therefore, under our point of view, SFPAs that are fully integrated into a comprehensive fisheries treaty policy, have clear and hierarchical objectives (specific to the CFP), are properly coordinated with other EU policies, particularly in the areas of development cooperation and trade, are exclusively European and attentive to the interests of the EU fleet, and are transparent and legally secure would promote better governance of the sea and, in particular, of fishing. Such a fisheries policy would also result in the transmission and dissemination of responsible and sustainable fishing practices, thanks, largely, to the mechanisms of control and surveillance that already exist in the CFP, but not always, as has been shown, in other public or private legal frameworks.