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Article

Towards achieving sustainable fishing through EU trade agreements?

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Abstract

The European Union (EU) has been supporting its Common Fisheries Policy (CFP) through its trade powers for 40 years. This practice has evolved significantly over the years. This paper explores this evolution with respect to achieving sustainable fishing beyond EU waters. In particular, this paper examines two major ways in which the EU trade agreements impact sustainable fishing abroad. First, the discussion looks at the EU's use of trade agreements to leverage access to the fishing resources of third States. The paper finds this EU practice to be lacking the necessary coherence and transparency and it raises doubts about the balance between commercial and sustainability concerns. Second, the discussion looks at the fisheries cooperation provisions included in the various EU trade agreements. In that regard the paper examines the changing and evolving emphasis on sustainable fishing. The paper finds that the EU's trade agreements have evolved greatly. The contemporary EU trade agreements seek to ensure sustainable fishing as none before them have. As such the EU is successfully using them as vessels for implementing its external CFP. The EU does so by setting the agenda on the international plane and diffusing specific CFP norms through its trade agreements.

Keywords: external CFP; fisheries cooperation; EU trade agreements; evolving practice

*Any and all views are of the author in his personal capacity.

1. Introduction

Trade and international cooperation in the area of fisheries have been closely connected in the European Union (EU) from the very creation of the Common Fisheries Policy (CFP). The practice of using the Common Commercial Policy (CCP or trade policy) to support CFP goals started developing in the late 1970s and has been intensifying increasingly in the last decade. EU policy documents started recognising the potential of using trade in seafood products, including fish, as a tool for achieving sustainability goals internationally in the late 1990s and early 2000s.¹ In particular, the EU has sought to influence the fishing practices of third States in order to achieve sustainability goals by adopting different types (unilateral, bilateral and multilateral) of trade-related instruments.

This paper focuses on the EU's practice with respect to trade agreements. Trade agreements are understood as bilateral and multilateral agreements, irrespective of their designation (framework, association, economic partnership, etc.), that use the CCP legal basis, exclusively or together with other legal bases. The examination, however, excludes the World Trade Organization (WTO) agreements and WTO-related practice due to space considerations. WTO practice aside, the paper provides an exhaustive account of the EU's relevant practice of using trade agreements. It examines the way in which the EU uses them to further its CFP and how such cross-policy action seeks to contribute (or not) to the achievement of sustainable fishing. This analysis is also contextualised in the evolution of the CFP itself and relevant international legal developments. Attention is focused on treaty provisions dealing with wider issues of fisheries cooperation than strictly trade in fisheries products.² Strictly trade issues are considered only in the discussion of trade-for-access arrangements where access to fisheries resources is linked to trade. This paper provides a textual analysis of the agreements discussed and does not look at the operation and impact of these agreements on the third States involved. The angle of analysis of the EU's practice provided in this paper is absent in the literature, making this paper an important contribution to the wider debate of using trade to achieve sustainability. It serves as groundwork for further legal and political research into the strategy of the EU's use of its trade partnerships and the EU's international role more broadly.

The paper is organised as follows. Section 2 provides just a brief exposition of the goal of sustainable fishing. In particular, it first outlines the international framework, setting out the concept of sustainable fishing and how it is achieved, and second, explains the place of sustainable fishing in the blueprint of the CFP. Section 3 examines the so-called 'trade-for-access' arrangements and the impact of such arrangements on sustainable fishing. Section 4 discusses the evolution of fisheries cooperation provisions in the EU's trade agreements with respect to sustainable fishing. The agreements are divided into four main groups in accordance with the nature of their provisions. The analysis of each group seeks to deduce a coherent core of EU practice seeking to achieve sustainable fishing. Section 5 concludes that after many years of evolution in international norms relating to fisheries sustainability and in the objectives of the CFP, the EU in its contemporary practice is indeed managing to operationalise its trade agreements in order to further sustainable fishing goals. Nevertheless, the analysis also shows incoherence in the EU's current practice. This incoherence seems to stem from the different types of partnerships the EU seeks with the third States in question. While it is understandable for the EU to seek different types of economic partnerships with different partners, the threats to sustainable fishing remain the same everywhere and the EU should have a more coherent approach to the fisheries cooperation provisions it includes in its

¹Communication from the Commission to the Council and the European Parliament on Fisheries Management and Nature Conservation in the Marine Environment, COM(1999)363, 6; Communication from the Commission to the Council and the European Parliament on Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy, COM(2001)143, 15; Green Paper on the Future of the Common Fisheries Policy, COM(2001)135, 36; Commission Staff Working Document on the Ecosystem-based Approach to Fisheries Management (EAFM): possibilities and priorities for international co-operation, SEC(2001) 1696, 9.

²On the impact of trade provisions *strictu sensu* on sustainable fishing see D Eugui, B Onguglo, R Hamwey, S Fevrier, J Ardron, M Razzaque, Y Soobramanien, and J Keane, *Sustainable Fisheries: International Trade, Trade Policy and Regulatory Issues* (UNCTAD/WEB/DITC/TED/2015/5, United Nations, Geneva 2016) 14–15; U Sumaila, 'Trade and Sustainable Fisheries' (2017) ADBI Working Paper Series No 676, 4–6; ICTSD, *Fisheries, International Trade and Sustainable Development* (ICTSD Natural Resources, International Trade and Sustainable Development Series, Geneva 2006) 25.

trade agreements. Such an approach would protect the EU from criticisms of ad hoc bargaining seeking to secure commercial interests rather than ensuring sustainability, and would increase its normativity.

2. The goal of sustainable fishing

The goal of sustainable fishing is at the heart of this paper. As such it is necessary to provide a brief discussion of what is sustainable fishing and how it is set to be achieved internationally and within the EU's CFP and its external dimension. Here I will adopt Witbooi's understanding of sustainable use, which is 'the regulated use of a natural resource in a way that protects the resource while facilitating the users' ability to maximise their socio-economic benefits in the long term'.³ Such resource use is to be considered sustainable, ensuring biological sustainability and long-term social and economic well-being of users.⁴ Sustainable fishing is also part of the wider concept of sustainable development and is informed and influenced by developments aimed at achieving that objective.⁵ One can hardly talk about sustainable development on the international plane without also addressing sustainable use of ocean resources, including fish. The Sustainable Development Goals (SDGs) are a prime example of this, with SDG 14 focusing on conserving and sustainably using the oceans, seas and marine resources for sustainable development.⁶

Despite the constantly increasing attention (political and academic) devoted to it, sustainability remains an elusive concept.⁷ This elusiveness is due to the varying nature of its defining aspects – 'what is being sustained, how it is to be sustained, and over how long a period of time'.⁸ In this paper the resource to be sustained is living aquatic resources, mostly fish, and they are to be sustained for as long a period as possible. A framework outlining how these resources are to be sustained is contained in a number of international instruments, the main ones being the United Nations Convention on the Law of the Sea⁹ (UNCLOS) and its implementing agreement on straddling and highly migratory fish stocks¹⁰ (UNFSA); the instruments adopted by the Food and Agriculture Organisation (FAO) such as the Code of Conduct for Responsible Fisheries¹¹ (CCRF), the International Plans of Action (IPoAs) on Illegal Unreported and Unregulated Fishing¹² (IUU), Sharks, Seabirds, and Fishing Capacity,¹³ the FAO Compliance Agreement,¹⁴ and the Port State Measures Agreement (PSMA);¹⁵ and various primary and secondary law instruments of Regional Fisheries Management Organisations (RFMOs). All of these instruments (and others) seek to address various aspects of sustainable fishing. An appraisal of the way they have done that is beyond the scope of this paper.¹⁶

³E Witbooi, *Fisheries and Sustainability: A Legal Analysis of EU and West African Agreements* (Brill 2011) 23.

⁴ibid.

⁵ibid, 3, 39–47.

⁶UNGA Res 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (UN Doc A/RES/70/1).

⁷S Hanna and M Munasinghe, 'An Introduction to Property Rights and the Environment' in S Hanna and M Munasinghe (eds), *Property Rights and the Environment: Social and Ecological Issues* (The Beijer International Institute of Ecological Economics and The World Bank 1995) 4.

⁸ibid.

⁹United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

¹⁰The United Nations Agreement for 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 (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.

¹¹Code of Conduct for Responsible Fisheries (FAO, Rome 1995).

¹²FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO, Rome 2001).

¹³FAO, *International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, International Plan of Action for the Conservation and Management of Sharks, International Plan of Action for the Management of Fishing Capacity* (FAO, Rome 1999).

¹⁴Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered into force 24 April 2003) 2221 UNTS 91.

¹⁵Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted 22 November 2009, entered into force 5 June 2016) FAO Doc C 2009/LIM/11 Rev.1.

¹⁶For such a discussion see Witbooi (n 3) 26–39.

What is relevant here is that these international instruments have not remained foreign to the EU and its CFP. To the contrary, they have had, and continue to have, a considerable impact on the way the EU conducts its CFP. One example of this impact is today's role of sustainable fishing in the CFP – an overarching CFP objective.¹⁷ The place of sustainability in the CFP's objective, however, has not been constant since its inception. To the contrary, it is through the evolution of the CFP and its objectives that sustainability has found its current place.¹⁸ It was not until the 2002 CFP reform that the concept of ecosystem-based management was included in the CFP. This evolutionary step was reflected in the very name of the 2002 Regulation setting out the detailed rules for the CFP (the Basic Regulation), which was 'on the conservation and sustainable exploitation of fisheries resources under the [CFP]'.¹⁹ The fourth recital of the preamble further stated that the CFP's objective 'should therefore be to provide for sustainable exploitation of living aquatic resources and of aquaculture in the context of sustainable development'.²⁰ This objective was reflected in the current 2013 Basic Regulation, which states in Article 2 as an objective that '[t]he CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies'.²¹

The sustainable fishing objective is explicitly extended to the external CFP as well. In particular, Article 28 on the external policy objectives states that '[i]n order to ensure sustainable exploitation, management and conservation of marine biological resources and the marine environment, the Union shall conduct its external fisheries relations in accordance with its international obligations and policy objectives, as well as the objectives and principles set out in Articles 2 and 3'.²² A specific external policy objective is to 'contribute to sustainable fishing activities that are economically viable and promote employment within the Union'.²³ The Basic Regulation also emphasises the role of sustainable fishing in the fisheries access agreements with third States, which are now called Sustainable fisheries partnership agreements (SFPAs). It does so by stating that the SFPAs are to ensure sustainable exploitation of the marine biological resources of third States.²⁴

The main tool adopted by the EU to achieve sustainable fishing is ensuring that fishing activities are conducted at maximum sustainable yield (MSY) level. The Basic Regulation sets a deadline for those exploitation rates to be achieved by 2015 or if the social and economic sustainability of the fishing fleets involved would be jeopardised by no later than 2020.²⁵ MSY is defined as 'the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process'.²⁶ The attractiveness of this tool is its apparent simplicity, but it has been heavily criticised for being too simplistic.²⁷ While other, newer, tools have evolved and some international legal instruments support them, the MSY is endorsed in the UNCLOS and as such is given much greater prominence.²⁸

A main aspect of ensuring that the CFP's sustainability objectives are achieved is establishing an effective system of control, inspection and enforcement, which includes the fight against IUU

¹⁷This has not always been so, however. For a discussion of the evolution of the CFP with respect to the role of sustainable fishing see Witbooi (n 3) 93–116.

¹⁸On the evolution of CFP objectives see L Goti-Aralucea, M Fitzpatrickc, R Döringa, D Reidd, J Mumforde and A Rindorf, 'Overarching Sustainability Objectives Overcome Incompatible Directions in the Common Fisheries Policy' (2018) 91 *Marine Policy* 49, 50.

¹⁹Council Regulation (EC) 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy [2002] OJ L358/59.

²⁰*ibid*, recital 4 and art 2.

²¹European Parliament and Council Regulation (EU) 1380/2013 on the Common Fisheries Policy [2013] OJ L354/22, art 2. See also recital 11.

²²*ibid*, art 28(1).

²³*ibid*, art 28(2)(c).

²⁴*ibid*, art 31(3) and recital 51.

²⁵*ibid*, art 2(2) and recital 7.

²⁶*ibid*, art 4(7).

²⁷Witbooi (n 3) 25.

²⁸UNCLOS (n 9) art 61(3) and art 119(1)(a).

fishing.²⁹ The fight against IUU fishing is particularly important for the CFP's sustainable fishing objective. According to the IUU Regulation, IUU fishing 'constitutes one of the most serious threats to the sustainable exploitation of living aquatic resources and jeopardises the very foundation of the common fisheries policy and international efforts to promote better ocean governance'.³⁰ The IUU Regulation sets out comprehensive definitions of each of the three parts of IUU fishing. Illegal fishing refers to fishing activities without permission, where permission is required or in violation of rules of national or international law binding upon the fishing vessels in question.³¹ Unreported fishing refers to fishing activities that have not been reported or have been misreported in contravention of applicable national or international rules on reporting of catch.³² Unregulated fishing relates to fishing activities conducted in (1) unregulated areas in a manner inconsistent with international conservation responsibilities or in (2) an area regulated by an RFMO but by a vessel without nationality or flying the flag of a State not party to the RFMO in question.³³

Accordingly, sustainable fishing appears at the pinnacle of the CFP objectives, both internally and externally. However, achieving this objective is not a straightforward process. This is because it involves not only environmental, but also social and economic concerns. A balance between all of them is critical. The 2013 Basic Regulation lists as one of the external CFP objectives improving 'policy coherence of Union initiatives, with particular regard to environmental, trade and development activities'.³⁴ The following two sections focus on the policy coherence between the EU's trade agreements and the CFP's sustainable fishing objective.

3. Trade-for-access arrangements and sustainable fishing

In the context of the 1970s UNCLOS negotiations and with the advent of the creation of Exclusive Economic Zones (EEZ) the EU was forced to negotiate fisheries agreements. These agreements have two core objectives – securing access to foreign resources and ensuring the sustainability of those resources.³⁵ Most fisheries agreements involve either monetary payment for access to fisheries resources or reciprocal access to such resources. However, some fisheries access agreements have been closely connected to the trade agreements the EU has concluded with the same States. In them, the EU provides certain trade concessions for access to foreign fisheries resources. Fisheries agreements provide an interesting case of the balance between commercial and normative (sustainability) preferences. Where trade-for-access arrangements are involved, such a balance is even harder to strike, questioning the contribution of the use of trade powers towards sustainable fishing. While operationally linked, fisheries access agreements are not trade agreements and are concluded under the exclusive CFP competence. The reason for focusing on them here is precisely that operational link. Although they are formally separate agreements, the dependence of the one on the other (where both exist) shows the way in which the EU uses trade agreements, and its trade policy more broadly, in a way that influences sustainable fishing in EU and foreign waters.

In the case of EU waters, this use of the EU's trade powers helps to keep the huge overcapacity of the EU fleet away from overfished EU waters and provides employment for EU fishermen and the EU processing industry through the supply of valuable stocks. With respect to foreign waters and stocks worldwide, the impact of this capacity-posting through fisheries access agreements on sustainable fishing is subject to controversy.³⁶ Many argue that these agreements have exerted undue pressure on stocks and have led to unsustainable fishing practices.³⁷ Irrespective of the side taken in the debate, there can be no doubt that these agreements strongly impact the state of the stocks due to the fishing pressure exerted

²⁹2013 Basic Regulation (n 21) art 28(2)(e), art 36(1), and recital 59.

³⁰Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, [...] [2008] OJ L286/1, recital 3.

³¹ibid, art 2(2).

³²ibid, art 2(3).

³³ibid, art 2(4).

³⁴ibid, art 28(2)(b).

³⁵H Zimmermann, 'Balancing Sustainability and Commerce in International Negotiation: The EU and Its Fisheries Partnership Agreements' (2016) 24 *Journal of European Public Policy* 135, 136.

³⁶ICTSD (n 2) 73.

³⁷ibid, 75–9; Witbooi (n 3) 4.

under them. Their link with trade concessions also creates problems for sustainable fishing, so much so that the FAO CCRF states explicitly that ‘States should not condition access to markets to access to resources’.³⁸ The underlying reason for this provision is to prevent, or at least limit, situations where too much pressure is allowed by coastal States (voluntarily or under demands) on stocks in order to reap the more immediate benefits of access to large markets. The EU’s practice in entering into such trade-for-access arrangements is very diverse. I will provide a brief overview of this practice and some comments on the impact of this practice on achieving the goal of sustainable fishing.

The first wave of EU fisheries access agreements included the 1976 Canada agreement.³⁹ Unlike other agreements from that period, it included a market-access clause. Market access, however, was not directly granted. Instead, it was to be formally provided in another (trade) agreement. In particular, reference was made to the 1976 Framework Agreement for Commercial and Economic Cooperation between the two parties, and it was stated that ‘periodic bilateral consultations regarding the development of economic cooperation in the field of fisheries’ will be carried out and furthermore that such consultations were to include ‘expansion of markets for fish and fish products originating in Canada’.⁴⁰ This drafting practice gives an early example of the fact that trade and fisheries agreements between the EU and States with which the EU shares fisheries interests are not necessarily negotiated in isolation but can be part of a package deal.⁴¹

Other examples of trade-for-access arrangements are those with the European Economic Area (EEA) States, Argentina, Greenland, Chile and South Africa. In all of them the trade-off materialises in different ways. The EEA agreement generally provides for free movement of goods, with the notable exception of agricultural and fisheries products, which are covered by special provisions.⁴² The trade concessions the EU agreed to with respect to fisheries products were made in exchange for increased access to the fishery resources in the waters of the EEA States.⁴³ The increased access to resources was, for reportedly political reasons, included in separate bilateral fisheries agreements with Sweden, Norway and Iceland. The EU, however, linked them together with a unilateral declaration in the Final Act to the EEA Agreement, which stated that ‘notwithstanding the fact that these agreements have been laid down in separate legal instruments, [they] are part of the overall balance of the results of the negotiations and essential elements for its approval of the EEA Agreement’.⁴⁴

In the case of Argentina, a fisheries agreement from the 1990s provided for joint ventures, joint enterprises, and establishment of undertakings. All three of them required the involvement of capital (conjoined by an Argentinian counterpart in the case of joint ventures and enterprises) coming from one or more EU Member States ‘for the purpose of exploiting, and where appropriate, processing Argentinian fisheries resources with a view to the priority supply of the [EU] market’.⁴⁵ The fisheries agreement with Greenland provides EU vessels with access to fishing resources in exchange for financial compensation and trade concessions under licence, and joint venture arrangements, similar to the Argentinian agreement.⁴⁶ Investment provisions were also used to access the fisheries resources of Chile, albeit in a completely different way. In the 2002 EU-Chile Association Agreement a short protocol on fishing enterprises was included, which governs, on a fully reciprocal basis, the rules of establishment and operation with respect

³⁸CCRF (n 11) [11.2.7].

³⁹Agreement on fisheries between the European Economic Community and the Government of Canada [1979] OJ L312/2.

⁴⁰ibid, art IX.

⁴¹On this point see further Committee on Fisheries, Report on International Fisheries Agreements, A4-0149/97, 15 and Oral Evidence of S Thorgeirsson at the House of Lords EU Energy and Environment Sub-Committee meeting on Brexit: Fisheries, 79–80 <<https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf>> accessed 11 April 2019.

⁴²Agreement on the European Economic Area [1994] OJ L1/3, arts 8(3) and 20.

⁴³R Churchill and P Ørebech, ‘The European Economic Area and Fisheries’ (1993) 8 *The International Journal of Marine and Coastal Law* 453, 457.

⁴⁴EEA Agreement (n 42) Final Act, Declaration by the European Community on bilateral agreements.

⁴⁵Agreement on relations in the sea fisheries sector between the European Economic Community and the Argentine Republic [1993] OJ L318/2, art 2.

⁴⁶Communication to the Council and the European Parliament on Fisheries Agreements: Current Situation and Perspectives, COM(96)488, 3.

to fishing.⁴⁷ That protocol allows EU investors to own Chilean companies, to register and transfer vessels, and, most importantly, to buy licences and quotas. The access provided by this protocol appears to have been enough for the EU as no separate fisheries access agreement has been concluded with Chile.⁴⁸

The situation with South Africa was a bit different. The EU and South Africa negotiated a Trade Development and Cooperation agreement (TDCA) in 1999.⁴⁹ While covering fish and fisheries products, this agreement did not spell out explicitly any customs duties reductions with respect to such products. Instead, it only stated that South Africa would progressively abolish the applicable customs duties in parallel with any such reductions by the EU.⁵⁰ The agreement also provided for fisheries cooperation. The arrangements for this cooperation were to be set out 'in a separate mutually beneficial fisheries agreement'.⁵¹ Such agreement, however, was never concluded and the EU's tariffs were not reduced.⁵² The text of the TDCA referring to a mutually beneficial agreement should be read in the larger context of the Lomé and Cotonou agreements. In particular, following the second Lomé Convention, the Lomé and Cotonou agreements feature texts where the African, Caribbean and Pacific (ACP) States declare their willingness to negotiate fishery agreements with the EU, which are aimed at guaranteeing mutually satisfactory conditions for fishing activities.⁵³ However, unlike the TDCA, the trade concessions in the Lomé and Cotonou agreements were not subject to actually concluding the fisheries agreements. Shortly after the TDCA, in 2000, the EU concluded an agreement with Mexico, also containing a fisheries cooperation provision.⁵⁴ In it, the EU and Mexico 'undertake to develop closer cooperation in this field in particular through the conclusion of a sectorial fisheries agreement' if they deem it appropriate. However, a clear link subjecting a fisheries trade concession to a fisheries access agreement is lacking in the text of the agreement.

All these trade-for-access arrangements show two main things. First, the problem of transparency that has followed fisheries deals from their very beginning has not yet been fully resolved. Although the EU's fisheries agreements have the highest transparency compared to the rest of the world, one may still question whether the monetary payments made through the fisheries agreements are all that is given in exchange for the access provided. There is, of course, an explanation for this lack of clarity. Explicit and direct trade-for-access arrangements can be considered problematic under WTO law, and against the FAO CCRF. They could be considered problematic under WTO law due to the resulting lack of reciprocity in providing the said market access. This lack of transparency casts doubt on whether the correct balance is struck between commercial and sustainability concerns and, in turn, whether the EU's use of trade agreements in that context supports the achievement of the sustainable fishing objective. Second, the EU's practice with respect to trade-for-access arrangements is incoherent. This author has not found any two arrangements the same. They all relate to trade agreements in different ways. This incoherence further questions whether a balance was sought to be struck between the above-mentioned competing interests. Such an incoherent approach suggests ad hoc bargaining, seeking to secure commercial interests rather than ensuring sustainability.

⁴⁷Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2002] OJ L352/3, Annex X, Appendix Protocol on Fishing Enterprises.

⁴⁸The Chile agreement did provide in art 25 for the possibility of concluding a fisheries agreement as expression of closer economic and technical cooperation. However, it was envisioned to cover high seas fisheries and was not going to be an access agreement as such but rather connected to Swordfish War agreement.

⁴⁹Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part [1999] OJ L311/3.

⁵⁰ibid, art 15(6).

⁵¹ibid, art 62.

⁵²Tariffs are now set to be reduced under the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part [2016] OJ L250/3.

⁵³Second ACP-EEC Convention [1980] OJ L347/2, Annex XVIII Joint declaration on sea fishing; Third ACP-EEC Convention [1986] OJ L86/3, art 55; Fourth ACP-EEC Convention [1991] OJ L229/3, art 64; Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L317/3, art 53.

⁵⁴Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2000] OJ L276/45, art 35.

The rationale for these arrangements is very clear. The EU needs the resources of others to keep the overcapacity of its fleet away from its waters and to provide employment to its fisheries industry, while the others need access to the EU market to sell the fish they catch or process. Brexit is also bringing about a similar situation. The European fishing communities have called on the EU for precisely such an arrangement in their Declaration of Santiago de Compostela: ‘make access to European markets for British seafood products conditional on access to fishing grounds for our fleets’.⁵⁵ This call appears to have found fertile ground in the EU’s Brexit position.⁵⁶ Furthermore, with the end of the Cotonou agreement and the current negotiation and conclusion of Economic Partnership Agreements (EPAs) with the ACP States, the EU is in the process of renegotiating many trade concessions. These trade negotiations will most probably also impact the EU’s future fisheries access agreements with some of these States. Thus, the EU’s practice in the next few years may finally provide a coherent and transparent approach with respect to the role of trade agreements in obtaining access to fisheries resources. Furthermore, this much-needed clarity will help to evaluate more precisely the impact of the EU’s use of its trade powers in that way on sustainable fishing abroad. Unfortunately, at the moment a definitive evaluation cannot be made. Nevertheless, the discussion in this section will hopefully serve as a starting point for further research on the matter.

4. Evolution of fisheries cooperation provisions and sustainable fishing

The discussion now turns to the EU’s trade agreements only. The EU has concluded, and is in the process of concluding, a large number of trade and trade-related agreements that feature fisheries cooperation provisions. In order to paint as detailed a picture as possible of the EU’s practice, it is important to analyse these agreement in their context. Such analysis allows us to see the evolution of fisheries cooperation provisions in these agreements over the years and the emphasis that they put on sustainable fishing. This evolution is also to be seen in light of the evolution of objectives of the CFP itself, which was mentioned above. The discussion is divided into several subsections. Each subsection examines a group of agreements and their fisheries cooperation provisions that have similar characteristics, allowing for en bloc analysis.

4.1. Agreements with ACP States

Reciprocal EU trade agreements with ACP States and, by extension, the fisheries provisions in them are a modern occurrence. However, they do not mark the beginning of EU–ACP post-colonial trade relations. These relations have been forged in the context of the Yaoundé and Arusha agreements, later superseded by the Lomé and Cotonou agreements. As such, a comprehensive analysis of the modern agreements needs to first take account of the legacy of the pre-existing agreements. As fisheries cooperation was not present in the Yaoundé and Arusha agreements, the discussion start with the Lomé and Cotonou agreements.⁵⁷

4.1.1. The Lomé and Cotonou agreements as context

The Lomé Conventions began featuring fisheries cooperation provisions with the advent of the 1970s’ law of the sea developments. The second Lomé Convention was the first to include such provisions. In the main body of the agreement, fisheries cooperation was mentioned in only two provisions, complemented by an annexed Joint declaration on sea fishing. First, Article 84 stated that ‘co-operation schemes in the field of rural development shall take the form *inter alia* of: . . . fishery and fish farming projects: exploitation of natural resources and development of new products; preservation and marketing of products’. Second, Article 93 added that, recognising the problems of ACP island States, including communication difficulties due to their geographical specificities, the EU was to ‘give priority attention to appropriate measures

⁵⁵Declaration of Santiago de Compostela by the European fishing communities on the future of the fisheries sector in Europe after Brexit, 23 October 2017.

⁵⁶European Parliament (EP) Resolution on the implementation of control measures for establishing the conformity of fisheries products with access criteria to the EU market 2017/2129(INI), [24].

⁵⁷These agreements do not strictly fall under the trade agreements definition given in the Introduction due to their legal bases. However, the strong trade component in these agreements and their antecedent role in the modern agreements with the ACP States justify their examination here.

aimed at: ... (b) developing sea fishing activities'. The Joint declaration mainly dealt with setting out basic provisions related to the conclusion of future fisheries access agreements, replicated in the main body of the later Lomé and Cotonou agreements. The Joint declaration also included a paragraph requiring the contracting parties to 'co-operate directly, or on a regional basis, or through appropriate international organizations with a view to ensuring conservation and to promoting the objective of optimum use of fishery resources, including highly migratory species'.

The third Lomé Convention built heavily on these basic provisions. It featured a whole separate Title dedicated to the development of fisheries, besides several provisions spread out in the body of the agreement that covered some fisheries cooperation-related aspects. That evolution was to a certain extent influenced by other international developments. In the context of the adoption of the UNCLOS in 1982, the FAO organised the first World Conference on Fisheries Management and Development in 1984. It was needed to garner the political will to operationalise the UNCLOS provisions and improve fisheries resource management, mainly in developing States.⁵⁸ Although at the time the EU was still only an observer at the FAO and had limited participation rights, its representatives attended the Conference and participated in it, pledging to continue making financial and technical development assistance available with the aim of supporting the outcome of the Conference.⁵⁹ The EU therefore recognised the role it could play with respect to the implementation of parts of the action programmes contained in the outcome strategy. In particular, the EU sought to do that through Lomé III.⁶⁰

According to Article 15 Lomé III, the aim of fisheries cooperation is generally to assist ACP States in developing their fisheries resources, yet the cooperation with the EU was designed to serve their mutual interests. This aim was repeated in the fisheries-specific Title's opening article. One of the recurrent themes in the provisions of that Title was the (rational) exploitation of stocks (by increasing catches) and cooperation to support it.⁶¹ At the same time the EU was to assist with fisheries management and protection, the improvement of environmental monitoring and control, and capacity building in those respects.⁶² Another theme, borrowing from the Joint declaration in Lomé II, was regional cooperation in management of stocks.⁶³ According to Article 113 Lomé III, the scope of regional cooperation includes 'evaluation, development, exploitation and preservation of fishery and marine resources, including scientific and technical co-operation with a view to the surveillance of exclusive economic zones'. The third theme was the already discussed conclusion of fisheries access agreements.⁶⁴ The fisheries provisions in Lomé IV almost completely replicated those of Lomé III. The only differences with respect to fisheries cooperation, beyond some language redrafting, were (1) to include improved 'knowledge of the fisheries environment and its resources' and increased 'means of protecting fishery resources and monitoring their rational exploitation [and] involvement of the ACP States in the exploration of [their] deep-sea fishery resources' as priority objectives of the cooperation; and (2) to pay special attention to least-developed, landlocked and island ACP States.⁶⁵

The Cotonou agreement was completely different from the Lomé Conventions with respect to fisheries cooperation provisions. The main changes were expressed in reducing the number of provisions dealing with fisheries cooperation, while putting an increased emphasis on sustainability. The original Cotonou agreement featured only four provisions covering fisheries cooperation. According to Article 23(d) of the Cotonou agreement, cooperation shall support *inter alia* sustainable policy and particularly 'sustainable development of water resources and fisheries as well as marine resources' within the ACP States' EEZs. That paragraph also touches upon fisheries agreements by stating that any such agreement 'shall pay due consideration to consistency with the development strategies in this area'. This is an example

⁵⁸EP Report on the follow-up of the FAO world conference on fisheries, A 2-3/85, Explanatory Statement, [5].

⁵⁹FAO, *Report of the FAO World Conference on Fisheries Management and Development: Rome 27 June–6 July 1984* (FAO 1984) 6.

⁶⁰EP Report (n 58) [18], [42]–[44].

⁶¹Lomé III (n 53) arts 50, 51, and 52.

⁶²*ibid*, art 52(b).

⁶³*ibid*, arts 53, 54 and 57.

⁶⁴*ibid*, arts 55, 56, 57 and 59.

⁶⁵Lomé IV (n 53) arts 59 and 62.

of using the Cotonou agreement to ensure horizontal coherence between the CFP and the development cooperation policy in fisheries agreements.

Fisheries agreements were further separately dealt with in Article 53. It contains a concise version of the provisions hitherto used in the Lomé conventions. A notable difference in the language was the inclusion of guaranteeing sustainable conditions for fishing activities as an aim of the fisheries agreements. Article 32 built on these sustainability provisions by stating that '[c]ooperation on environmental protection and sustainable utilisation and management of natural resources shall aim at ... supporting specific measures and schemes aimed at addressing critical sustainable management issues and also relating to current and future regional and international commitments' relating to, inter alia, fisheries resources. In Part 5 the Cotonou agreement also built further on the special attention to be paid to least-developed, landlocked and island ACP States. In that part, Article 84 states that 'special attention shall be paid in respect of these groups as well as countries in post-conflict situations to [inter alia] the strengthening of regional cooperation [and] the efficient exploitation of marine resources'.

The 2010 (second) amendment of the Cotonou agreement introduced a few changes with respect to the fisheries provisions. The main relevant amendment concerned Article 23(d), which was split into two. The first part was redrafted to read 'sustainable development of aquaculture and fisheries which include both inland fisheries and marine resources' within the ACP States' EEZs.⁶⁶ The second part, dealing with coherence of fisheries agreements and development strategies, was included in a new and expanded provision focusing only on fisheries.⁶⁷ In that provision even more attention was put on sustainability, through developing the ACP's fisheries sectors in a sustainable manner, 'development and implementation of sustainable aquaculture and fisheries development strategies', and enabling ACP States to 'yield maximum sustainable value from their fisheries and aquaculture'.⁶⁸

This overview of the context of the modern agreements with ACP States shows interesting developments. First, it shows that the origins of fisheries cooperation provisions in trade-related agreements date back to the formation of the basic framework of modern international fisheries law. Second, it shows that from the very beginning of including fisheries cooperation provisions, the EU has put emphasis on accessing and fully exploring foreign resources and establishing regional cooperation for conservation purposes. This emphasis shows that at the time, in line with the stage of CFP development, economic interests related to accessing resources prevailed over sustainability with strong environmental focus. Third, it shows that environmental and sustainability concerns have developed slowly and relatively late. The first, albeit brief, mention of the environmental aspect of fisheries management was at the beginning of the 1990s. This can be explained by the strong environmental movement at the international level at that time. Furthermore, sustainability and sustainable exploitation of fisheries resources gained more prominence only in the early 2000s and were further reinforced in the 2010s.

4.1.2. Modern reciprocal trade agreements with ACP States

Following the numerous WTO waivers and challenges of the EU's arrangements with the ACP States, the EU eventually had to move to a reciprocal agreement with respect to trade concessions.⁶⁹ An obligation to negotiate such future agreements was included in Article 37 of the Cotonou agreement. In 2002 the Council of the EU provided the Commission with a mandate to open negotiations with the ACP States.⁷⁰ The results of these negotiations are now taking shape in the various trade agreements. Building on the legacy of the Lomé and Cotonou agreements, they all feature, in some form, provisions on fisheries cooperation. Through these provisions one can also see the development of the EU's practice of diffusing certain aspects of its CFP and its understanding of sustainable fishing.

⁶⁶Cotonou agreement (2010 amendment) (n 53) art 23(f).

⁶⁷ibid, art 23A.

⁶⁸ibid.

⁶⁹On the waivers see D Marinberg, 'GATT/WTO Waivers: Exceptional Circumstances as Applied to the Lomé Waiver' (2001) 19 *Boston University International Law Journal* 129.

⁷⁰Council of the European Union, Recommendation authorising the Commission to negotiate Economic Partnership Agreements with the ACP countries and regions, 9930/02, 12 June 2002.

In the agreements with ACP States fisheries cooperation provisions are mostly grouped in separate chapters. The agreements with the Pacific States and the South African Development Community (SADC), however, provide for a deviation. The discussion here will start with the fisheries cooperation chapters. These chapters can substantively be divided into two sets. The first set covers the agreements with the Forum of the Caribbean Group of ACP States (CARIFORUM) and the West African States (WAS).⁷¹ The relevant chapters therein deal with agriculture and fisheries together. Notwithstanding this organisational similarity, the relevant provisions differ considerably in the detail and emphasis on fisheries cooperation.

The CARIFORUM agreement mentions very little in terms of fisheries cooperation. Article 37, which deals with objectives, focuses on the social importance and environmental specifics of fisheries in the CARIFORUM States as well as the sustainable management of natural resources. With respect to the environmental specifics, reference is made to the need for effective conservation and management based on, inter alia, 'the precautionary principle as defined by the FAO Code of Conduct on Responsible Fisheries'. In several of the following provisions of that chapter references are made to policy and institutional reforms that the CARIFORUM States commit to undertake in order to deepen their regional integration and facilitate the achievement of the objectives of the chapter.⁷² Discussions on such reforms form part of the cooperation, including by facilitating support, between the parties. This suggests that the EU will be closely involved in the said reforms, which could provide rich opportunities for it to promote certain CFP aspects and practices, thus furthering its principles and objectives.

The WAS agreement follows closely the objectives provision of the CARIFORUM agreement. However, in Article 49 it elaborates in much more detail the fisheries cooperation between the parties. IUU fishing emerges as one central area of cooperation. In particular, the parties undertake to 'coordinate efforts to enhance the means for preventing, discouraging and eliminating [IUU fishing] and for taking appropriate measures for this purpose'.⁷³ In that regard they also undertake to 'improve and reinforce fishery control, surveillance and monitoring mechanisms and arrangements in order to combat [IUU fishing]'.⁷⁴ With respect to monitoring, control and surveillance (MCS) the parties undertake to 'establish a vessel monitoring system (VMS) for all of West Africa' as well as 'lighten traceability and certification procedures and conditions for fishery products' that are exported to the EU.⁷⁵ Somewhat similar to the CARIFORUM agreement, Article 49 also contains policy development as an area of cooperation. In particular the parties will collaborate with a view to the 'preparation and implementation of a policy for the development of aquaculture in West Africa'.⁷⁶ The parties have also identified as an area of cooperation the sustainable management of fisheries resources of the WAS agreement by applying the precautionary principle. In that regard the EU has secured a right to be consulted, among other interested parties, before appropriate protection measures are taken if there is a danger to the sustainable management of the resources.⁷⁷

The second set of agreements covers the agreements with the Eastern and Southern African States (ESAS) and the East African Community (EAC).⁷⁸ The relevant chapter/part in these agreements is dedicated to fisheries covering marine and inland fisheries as well as aquaculture. The ESAS and EAC agreements contain very similar language and commitments. Thus, they will be examined together

⁷¹Economic Partnership Agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part, Chapter 6; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L289/4, Chapter 5.

⁷²*ibid.*, arts 38, 39, 41(2)(d), and 43(1).

⁷³WAS Agreement (n 71) art 49(1)(f).

⁷⁴*ibid.*, art 49(1)(i).

⁷⁵*ibid.*, art 49(1)(g)–(h).

⁷⁶*ibid.*, art 49(1)(d).

⁷⁷*ibid.*, art 49(1)(j).

⁷⁸Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern African States, on the one part, and the European Community and its Member States, on the other part [2012] OJ L111/2, Chapter III; Economic Partnership Agreement between the East African Community Partner States, of the one part, and the European Union and its Member States of the other part, Part III and Part V, Title IV.

and relevant divergences will be noted. In both agreements the objectives for cooperation in marine fisheries that bear the CFP mark are the sustainable exploitation and management of fisheries resources and ensuring effective MCS as necessary for combating IUU fishing, in Articles 31 and 53, respectively. One of the principles of cooperation in both agreements is conformity with, *inter alia*, relevant international instruments such as the UNCLOS and regional and sub-regional agreements. The areas of cooperation in marine fisheries developed in both agreements are fisheries management and conservation, vessel management and post-harvest arrangements, financial and trade measures, and development of fisheries and fishery products and marine aquaculture, Articles 32 and 88, respectively.

With respect to fisheries management and conservation, the application of the precautionary approach is stressed in determining levels of sustainable catch, capacity and other management strategies. Furthermore, the Indian Ocean Tuna Commission (IOTC) is mentioned and, specifically, the promotion of the membership in the IOTC of all States concerned and relevant fisheries organisations. As in the CARIFORUM and WAS agreements, the EU has secured some, albeit different, involvement in certain aspects of the fisheries management process of the ESAS and the EAC agreements. According to Articles 32(4) and 54(3), respectively, where a competent national management authority lacks sufficient scientific evidence to determine sustainable catch levels, both parties 'in consultation with the competent national authority and together with IOTC and where relevant, other regional fisheries organisations, shall support such scientific analysis'. Where catch levels go above the sustainable level established by the competent national authority, the parties agree to take appropriate measures.

With respect to vessel management and post-harvest arrangements, the emphasis is put on establishing compatible VMS for all ESAS, reporting of catch, and combating IUU fishing. With respect to reporting, there is an obligation to report discards and priority is to be given to avoiding discards. Furthermore, by-catch must as far as possible be brought ashore. These commitments are a softened version of the EU's discard ban. Related to IUU fishing, a prohibition on transshipment of fish at sea is introduced, except as specifically allowed by a relevant RFMO. The parties also agree to undertake coordinated efforts in combating IUU fishing and take appropriate measures in that regard.

With respect to financial and trade measures and development issues, the two agreements differ somewhat. The ESAS agreement refers briefly to the setting up of joint ventures, improving competitiveness of fishing and diversification of the fishery to include under or non-exploited non-tuna species. The EAC agreement fleshes out this part of the cooperation in a bit more detail elsewhere in the agreement under a part on Economic and development cooperation, without, however, adding substance relevant to this discussion.

The main body of the agreements with the Pacific States and the SADC does not feature fisheries cooperation provisions. This is surprising considering that the EU has important fishing interests in both areas. With respect to the Pacific States, one explanation is that it is still an interim agreement. Certain provisions are nevertheless included in Protocol II dealing with rules of origin (RoO). It includes provisions providing for the possibility of certain exceptions to the standard RoO in the EU's agreements. These provisions include references that are otherwise included in fisheries cooperation provisions, such as promoting sustainable fisheries and good fisheries governance, effective conservation and sustainable management of resources, regional management regimes, VMS, and combating IUU fishing.⁷⁹ Similarly, Protocol 1 to the SADC agreement on RoO includes a number of fisheries cooperation provisions. These provisions include VMS, compliance with EU IUU legislation, observance of RFMO commitments, monitoring and control of fishing activities, and even reporting on legislative changes concerning fishing activities.⁸⁰ These provisions, however, apply only to Namibia as only Namibia can rely on exceptions to the RoO.

This overview of the EU's agreements with ACP States shows that they have built heavily on the legacy of the Lomé and Cotonou agreements. In particular, they have continued developing, *inter alia*,

⁷⁹Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part [2009] OJ L272/2, Protocol II Concerning the definition of the concept of 'originating products' and methods of administrative cooperation, art 6(6).

⁸⁰SADC agreement (n 52) Protocol 1, art 7(3).

the older aspect of regional cooperation in fisheries management as well as the relatively new emphasis on sustainable fishing. They have done so in much greater detail with specific references to modern developments in international fisheries law as reflected also in the EU's CFP, such as VMS and combating IUU fishing. Furthermore, in most, but not all, of the agreements the EU has also sought to secure some degree of direct involvement in the fisheries policy development of the ACP States. Such involvement is notably one-sided and will allow the EU to diffuse even further aspects of its CFP.

4.2. Agenda-setting agreements for fisheries cooperation

The EU has concluded a large number of 'agenda-setting' trade agreements when it comes to their fisheries cooperation provisions. That is, these provisions only briefly identify fisheries as an area for future cooperation. Compared to the fisheries cooperation provisions in other agreements, the provisions in the agenda-setting agreements barely contain any specific commitments. These agreements generally span from the very late 1980s to the mid-2000s and cover (groups of) States from various parts of the world.

Of such agreements, the 1989 agreement with the Gulf States is the oldest. It identifies broadening and consolidating cooperation in fisheries on mutually advantageous terms as one of many main objectives of the agreement.⁸¹ In that area the parties 'shall strive to encourage and facilitate *inter alia* . . . promotion of contacts between enterprises, research institutions and other agencies in order to stimulate joint projects in . . . fisheries'.⁸² From the early 1990s to the early 2000s the agreements with Mercosur, its Member States and some Associated and Observer States followed. The Mercosur agreement features a provision on environmental protection cooperation. In its aim of achieving sustainable development, the provision requires the parties to encourage awareness of, *inter alia*, rational use of natural resources.⁸³ In the agreements with Argentina, Uruguay, and Brazil there is a common provision on economic cooperation, which refers to fisheries as an area of cooperation in different words.⁸⁴ The Brazilian agreement differs in that it refers, in the common provision, to 'the use of natural resources against a background of sustainable development' and then in a separate provision identifies fisheries as an area of cooperation.⁸⁵ From the Mercosur Associated States, the EU has an agenda-setting agreement only with Chile, which simply identifies 'developing regional cooperation on fisheries matters' as an area of regional cooperation.⁸⁶ Furthermore, the EU has an agenda-setting agreement with only one of the Mercosur observer States – Mexico. That agreement features a provision on the conclusion of a future fisheries agreement, mentioned in Section 4.1, as well as a Joint declaration on that provision with a specific commitment – to provide support for the adoption, entry into force, and enforcement of the CCRF.⁸⁷

From the late 1990s to the mid-2000s the EU concluded another set of agenda-setting agreements – the Euro-Mediterranean agreements. Building on the Mercosur States' agreements, the Euro-Mediterranean agreements feature an economic cooperation Title (as opposed to a provision) in which the aims of future cooperation are set out in separate articles. In these agreements, fisheries cooperation is set out in a provision together with agricultural cooperation. This drafting practice, however, does not always clarify what the desired fisheries-specific cooperation is. The most common aim is modernisation and restructuring of the fisheries sector, contained in the agreements with Tunisia,⁸⁸

⁸¹Cooperation Agreement between the European Economic Community, of the one part, and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait) of the other part [1989] OJ L54/3, art 1(1)(b).

⁸²*ibid*, art 4.

⁸³Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part [1996] OJ L69/4, art 17(1).

⁸⁴Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic [1990] OJ L295/67, art 4(2)(a); Framework Agreement for Cooperation between the European Economic Community and the Eastern Republic of Uruguay [1992] OJ L94/2, art 3(2)(b); Framework Agreement for Cooperation between the European Economic Community and the Federative Republic of Brazil [1995] OJ L262/54, art 3(2)(b).

⁸⁵Framework Agreement with Brazil (n 84) arts 3 and 26.

⁸⁶Agreement with Chile (n 47) art 49. The EU agreements with the other Associated States are discussed in Sections 4.2.1 and 4.2.3.

⁸⁷Agreement with Mexico (n 54) Joint Declaration relating to Article 35.

⁸⁸Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/3, art 54.

Morocco,⁸⁹ Egypt,⁹⁰ Algeria,⁹¹ and the Palestine Liberation Organization⁹² (PLO). The provisions in the agreements with Tunisia, Morocco and Egypt are quite concise and almost identical and do not go beyond that aim. The provisions in the agreements with Algeria and the PLO, however, do elaborate more aims. In particular, they add establishing closer relations between the businesses in the fisheries sector and promotion of environmentally friendly forms of fisheries. In that regard they refer to evaluation, conservation and rational management of fish stocks. The initialled text with Syria also refers to closer relations between the businesses and the conservation and rational management of fish stocks, but does not mention explicitly the promotion of environmentally friendly forms of fisheries.⁹³ The agreement with Lebanon, besides referring to closer relations between the businesses, features development of sea fishing and aquaculture.⁹⁴

More recently, the EU has concluded two other agreements that bear the characteristics of agenda-setting in fisheries cooperation. First, the 2009 Interim Agreement with Cameroon identifies fisheries and aquaculture and fish stocks as some of the priority areas for cooperation in capacity building and modernisation.⁹⁵ The same areas are repeated in the annexed 2007 Central Africa/European Union joint guidance document where such cooperation is contextualised in contributing to meeting the objectives of, inter alia, sustainable development.⁹⁶ Second, the 2014 Framework Agreement with Indonesia provides the most substantively advanced agenda-setting provision and is dedicated to marine and fisheries cooperation only. According to the agreement, the parties 'shall encourage marine and fisheries cooperation, at bilateral and multilateral level, particularly in view of promoting sustainable and responsible marine and fisheries development and management'.⁹⁷ As areas in which the EU and Indonesia may cooperate, the provision lists exchange of information, sustainable marine and fisheries policy, promoting efforts to prevent and combat IUU fishing, and market development and capacity building.

This overview shows the evolution of almost 30 years of EU practice in using trade agreements to set the agenda for future fisheries cooperation. As in the Lomé agreements at the beginning of the 1990s, attention was put on the environmental aspects of fisheries cooperation. However, this has not been done in a coherent manner. While certain agreements expressly refer to sustainability, others do not. Instead, the economic aspects of the cooperation appear to be emphasised much more. IUU fishing was included only in the 2014 Indonesia agreement, which should be considered quite late for an agenda-setting agreement, considering that it is an issue that started developing in the late 1990s.

4.3. Agreements with neighbouring European States

In its recent practice with neighbouring European States, the EU appears to have an even more specific approach with respect to fisheries cooperation provisions. The agreements with Ukraine, Georgia, Moldova and Montenegro are a case in point. In the first three, besides a Trade and Sustainable Development (TSD) chapter, the EU has also negotiated an additional chapter dedicated to fisheries and maritime policies, each

⁸⁹Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2, art 54.

⁹⁰Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39, art 50.

⁹¹Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2, art 58.

⁹²Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L187/3, art 44.

⁹³Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, on the one part, and the Syrian Arab Republic, on the other part (initialled in 2004 and reinitialled in 2008), art 103.

⁹⁴Euro-Mediterranean Agreement establishing an association between the European Community and its Member States of the one part, and the Republic of Lebanon, of the other part [2006] OJ L143/1, art 51.

⁹⁵Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part [2009] OJ L57/2, art 5.

⁹⁶ibid, Annex I(A)(2).

⁹⁷Framework Agreement on comprehensive partnership and cooperation between the European Community and its Member States, of the one part, and the Republic of Indonesia, of the other part [2014] OJ L125/15, art 30.

divided into a separate section.⁹⁸ Understandably, due to the landlocked status of Moldova, the cooperation provisions in the Ukrainian and Georgian agreements are more detailed. The Stabilisation and Association Agreement with Montenegro contains only one provision on fisheries cooperation. Although that provision is structurally closer to the provisions in the agenda-setting agreements, it is examined here because it has substantive similarities to certain provisions in the Ukrainian and Georgian agreements.

With respect to the fisheries policy section, the Moldovan agreement differs from the others in its opening provision. It calls for ‘developing closer bilateral and multilateral cooperation in the fisheries sector’ as well as encouraging ‘an integrated approach to fisheries issues and [promoting] sustainable fisheries development’.⁹⁹ The Ukrainian and Georgian agreements instead open by stating in Articles 407 and 335 respectively that the parties shall cooperate on various mutually beneficial matters such as ‘conservation and management of living aquatic resources, inspection and control, data collection, and the fight against [IUU] fishing’. In relation to IUU fishing, the Georgian agreement makes a specific reference to the FAO IPoA on IUU fishing. All three agreements state that the parties will promote sustainable fisheries conservation and management, responsible fishing and fisheries management, and regional cooperation including through RFMOs.¹⁰⁰ They also state that the parties will support initiatives in order to ensure the implementation of a sustainable fisheries policy.¹⁰¹

The Ukrainian and Georgian agreements expand on this point a bit further. In particular, the Ukrainian agreement states that the implementation of the sustainable fisheries policy is to be based on priority areas in the EU *acquis* in that field. This reference to the EU *acquis* can be read as an indirect reference to, inter alia, the CFP, thereby giving the CFP considerable influence. The Georgian agreement contains more balanced language in that regard. It states that the implementation is to be based on the EU *acquis* and priority areas of interest for the parties in this field. The EU *acquis* point is also present in the fisheries cooperation provision in the Montenegrin agreement. According to the agreement, the parties ‘shall explore the possibility of identifying mutually beneficial areas of common interest in the fisheries sector’ and that cooperation ‘shall take due account of priority areas related to the Community *acquis* in the field of fisheries’.¹⁰² Respect for RFMO conservation and management rules is given as an example of such priority areas.

The implementation of the fisheries policy includes in all three agreements, inter alia, management of fisheries and aquaculture resources, VMS, data collection of catch, landing, fleet and others, management of fishing capacity, improving the efficiency of the markets, and development of a structural policy. The Ukrainian and Georgian agreements provide an additional provision, which states that the parties will step up their cooperation in the Black Sea and will promote wider international cooperation in the Black Sea, aiming at developing relations within an appropriate RFMO. The latter seems to suggest a commitment to work towards establishing a Black Sea-specific RFMO.

With respect to maritime policy, the Moldovan agreement succinctly states that the parties shall develop cooperation by ‘actively supporting an integrated approach to maritime affairs and good governance in the Black Sea in the relevant international maritime fora’, similar to the provisions in the New Zealand and Australia agreements discussed below.¹⁰³ The Ukrainian and Georgian agreements also gravitate around these points but spell out some of the specifics of this cooperation. In particular, they refer to marine spatial planning, promoting sustainable development of coastal regions, promoting strategic alliances between maritime industries, improvement of maritime safety, and exchange of information.

⁹⁸ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3, Chapter 18; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4, Chapter 13; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/4, Chapter 11.

⁹⁹ Association Agreement with Moldova (n 98) art 71.

¹⁰⁰ *ibid.*, art 72; Association Agreement with Ukraine (n 98) art 408; Association Agreement with Georgia (n 98) art 336.

¹⁰¹ Association Agreement with Moldova (n 98) art 73; Association Agreement with Georgia (n 98) art 338; and Association Agreement with Ukraine (n 98) art 410.

¹⁰² Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3, art 98.

¹⁰³ Association Agreement with Moldova (n 98) art 74.

These several agreements show an interesting variation in the EU's practice. In particular, they show that the EU has a more specific attitude towards its immediate European neighbours with respect to fisheries cooperation. As with the TSD chapters, great emphasis is put on fighting IUU fishing, cooperating in RFMOs, vessel surveillance, and sustainable fishing. An important addition is the central role given to the priority areas in the EU *acquis* in the area of fisheries in the implementation of the sustainable fisheries policies of the EU's partners. This indirect reference to the CFP gives the EU influence over these States' policies. This influence is reminiscent of the involvement the EU secured in the fisheries policy-making of certain ACP States. The difference here is the express reference to the EU *acquis* and its leading role. This difference goes to show that the EU seeks cooperation that closely follows the CFP. The EU's more specific attitude and the leading role given to the CFP can be explained with the EU membership prospects of these States and the usual pre-membership approximation of policies.

4.4. Contemporary agreements promoting trade and sustainable development

In its more recent practice, starting with the 2010 South Korea agreement, the EU has also started negotiating TSD chapters in some of its trade agreements. The agreements including TSD chapters cover various States in Europe, the Americas and Asia, with fairly developed to strongly developed economies. The EU has so far secured the inclusion of TSD chapters including a provision on trade in fisheries and aquaculture products in its agreements with the Andean Community (excluding Bolivia),¹⁰⁴ Central America,¹⁰⁵ Moldova,¹⁰⁶ Ukraine,¹⁰⁷ Georgia,¹⁰⁸ and Canada¹⁰⁹ and in the negotiated texts with Singapore,¹¹⁰ Vietnam,¹¹¹ and Japan.¹¹² The TSD chapter in the agreement with South Korea does not include a fisheries provision. Instead, Annex 13 to the agreement simply identifies 'cooperation on trade-related measures to promote sustainable fishing practices' as one area of cooperation for the parties.¹¹³ The Partnership Agreement with New Zealand, pending deeper trade negotiations, features a Title on cooperation in, inter alia, sustainable development. That Title includes a fisheries and maritime affairs provision,¹¹⁴ similar to the fisheries provisions in standard TSD chapters. The situation with Australia is the same as with New Zealand, although there are certain differences in the content of the respective provisions.¹¹⁵ The agreement with Cuba provides another variation.¹¹⁶ While not containing a whole TSD chapter, it features a TSD provision mentioning fisheries, which is supplemented by two other

¹⁰⁴Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/3, art 274.

¹⁰⁵Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other [2012] OJ L346/3, art 290.

¹⁰⁶Association Agreement with Moldova (n 98) art 370.

¹⁰⁷Association Agreement with Ukraine (n 98) art 295.

¹⁰⁸Association Agreement with Georgia (n 98) art 234.

¹⁰⁹Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union of the other part [2017] OJ L11/23, art 24.11.

¹¹⁰EU-Singapore Free Trade Agreement: Authentic text as of May 2015, Chapter 13, art 13.8.

¹¹¹EU-Vietnam Free Trade Agreement: Agreed text as of February 2016, Chapter 15, art 8.

¹¹²Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L330/3, art 16.8. The EU-Japan agreement features one more provision relating to fisheries cooperation – Article 16.12(k), under which the parties may cooperate directly or in relevant international fora to promote sustainable fishing and combat IUU fishing.

¹¹³Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6, Annex 13, 1(h).

¹¹⁴Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part [2016] OJ L321/3, art 50. The agreement is partly based on Article 207 Treaty on the Functioning of the European Union (TFEU).

¹¹⁵Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other Part [2017] OJ L237/7, art 52.

¹¹⁶As with the New Zealand agreement, the agreement with Cuba covers certain trade issues and is partly based on Article 207 TFEU.

provisions.¹¹⁷ In contrast, the agreement with the SADC contains only one provision on TSD, which mentions cooperation on trade aspects of sustainable fishing practices in a short subparagraph.¹¹⁸

The fisheries provisions in the TSD chapters vary as between the agreements. Yet, they always start with an opening paragraph along the lines that the parties take into account/recognise (1) the importance of ensuring conservation and sustainable management of fish stocks, or (2) the need to promote sustainable fisheries. In that regard the parties undertake/commit to a number of actions. These actions also vary in terms of the number and detail of the undertakings. Some general points can nevertheless be made about their content. They almost invariably include references to (1) taking measures against IUU fishing, (2) cooperating with and within RFMOs, including as members, observers or cooperating non-contracting parties, (3) relevant UN and FAO instruments (e.g. UNCLOS, UNFSA, the PSMA, the Compliance Agreement, and the CCRF), and (4) taking control and surveillance measures. The undertakings occasionally also refer to promoting best practices, development of sustainable aquaculture, revision and adjustment of fishing capacity, and promoting an integrated approach to maritime affairs.

Under the short paragraph in the Cuba agreement, the parties agree to cooperate in ‘promoting trade in products derived from sustainably managed natural resources’.¹¹⁹ Such cooperation is to take place through, inter alia, ‘effective measures regarding the conservation and sustainable management of wildlife, fisheries and forestry as well as developing measures to combat illegal trade with environmental relevance’.¹²⁰ This provision lacks specificity and can cover many aspects of cooperation but one can infer that its latter part refers to IUU fishing. There are two other provisions in the Cuba agreement addressing cooperation in fisheries. The first one covers cooperation on environment and climate change and it covers conservation and the sustainable management of natural resources including fisheries.¹²¹ The second provision covers economic development in agriculture, rural development, fisheries and aquaculture. Similar to the fisheries provisions in the TSD chapters examined above, it provides for promoting sustainable exploitation and management of fish resources, fighting IUU fishing, and taking control and surveillance measures. However, notably, it does not mention cooperation in RFMOs or relevant international instruments.

The growing number of agreements promoting trade and sustainable development, mainly through dedicated chapters, are substantively the most advanced in terms of fisheries cooperation provisions. They provide for the most detailed cooperation commitments to date in EU trade agreements. Undoubtedly, compared to the other trade agreements, they are set to contribute the most to achieving sustainability in fisheries. They would do so through the various commitments on fighting IUU fishing, cooperating in RFMOs, giving further support to binding and non-binding international fisheries governance instruments, taking control and surveillance measures, as well as other commitments that vary among the agreements. Notwithstanding the variations between the agreements, this EU practice also shows the highest degree of coherence in terms of substance. It is to be expected that this practice will provide the core model of provisions for ensuring sustainable fishing through trade in the foreseeable future.

5. Conclusion

The EU’s trade policy is increasingly becoming a conduit of non-trade matters, including fisheries. In line with this trend the trade agreements the EU negotiates increasingly feature provisions on fisheries cooperation. These provisions first started appearing in trade-related agreements in the late 1970s starting with Lomé II and certain trade-for-access arrangements. This development was clearly responding to the contemporary law-of-the-sea changes and the creation of modern international fisheries law. These initial linkages between the CFP and the CCP focused on the economic aspects of fisheries cooperation. It was in response to the early 1990s’ developments in the area of international environmental law and the increasing attention given to sustainability that the EU’s practice evolved to include certain environmental

¹¹⁷Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part [2016] OJ L337/I/3, art 77.

¹¹⁸SADC agreement (n 52) art 11(3)(f).

¹¹⁹Agreement with Cuba (n 117) art 77(2)(c).

¹²⁰ibid.

¹²¹ibid, art 47(4)(c).

aspects of fisheries cooperation. Since then, the EU's trade agreements have gradually given increased attention to sustainable fishing in their fisheries cooperation provisions. Their content has continued to be influenced by international environmental and fisheries law developments.

Combined, the fisheries cooperation provisions in the EU's modern trade agreements resemble a colourful palette of commitments matching a variety of interests that the EU and its partners may have. Nevertheless, a core of cooperation commitments appears to be emerging. This core includes combating IUU fishing, taking vessel management measures (such as control, monitoring and surveillance), cooperating in RFMOs and other relevant international fora, promoting adherence to international fisheries governance instruments, sustainable fisheries management, and cooperation between the industries. Irrespective of this core, the EU does not have a coherent practice with all of its partners. With some of them the EU has agreements reflecting a relationship of equals, while with others certain imbalances appear. These differences and imbalances flow from the different types of agreements discussed, which in turn result from the different (political, economic, historical) character of the EU's partners and the different types of relationship the EU seeks to have with these partners. Examples of such imbalances are commitments on the development and implementation of fisheries and related policies such as (1) aquaculture and maritime policies, which appear to be addressed to the EU's partners only, (2) subjecting the implementation of the sustainable fisheries policy to CFP priority areas, and (3) securing a right to be consulted in the process of taking some fisheries management decisions by its partners.

All in all, the EU, in its contemporary practice, is managing to operationalise its trade agreements in order to further sustainable fishing. It is successfully using them as vessels for its external CFP by setting the agenda in international fora or diffusing specific norms that are part of the CFP. While there is an emerging core of cooperation provisions resulting from decades of evolving practice, there are still important matters of coherence that the EU needs to address in the relationship with its partners. These coherence matters relate to the trade-for-access arrangements as well as to the fisheries cooperation provisions in the various trade agreements. It is understandable for the EU to seek different political and economic partnerships through its trade agreements. However, where the EU seeks to use its trade powers to support non-trade objectives such as sustainable fishing it should have a more coherent approach. This is needed because, irrespective of the type of partnership sought, the threats to sustainable fishing remain the same everywhere. A balance between commercial and sustainability concerns should always be sought. The link between trade concessions and access to resources should take a clear form that is in line with the EU's international trade and fisheries commitments. The emerging core of cooperation commitments in the trade agreements should be replicated in all trade-related agreements. Any differences in treatment should be based on objective reasons. After all coherence is an important aspect of legitimacy, which the EU needs in order to fulfil its normative aspirations of ensuring sustainability in international fisheries.

Declarations and conflict of interests

The author declares no conflicts of interest.