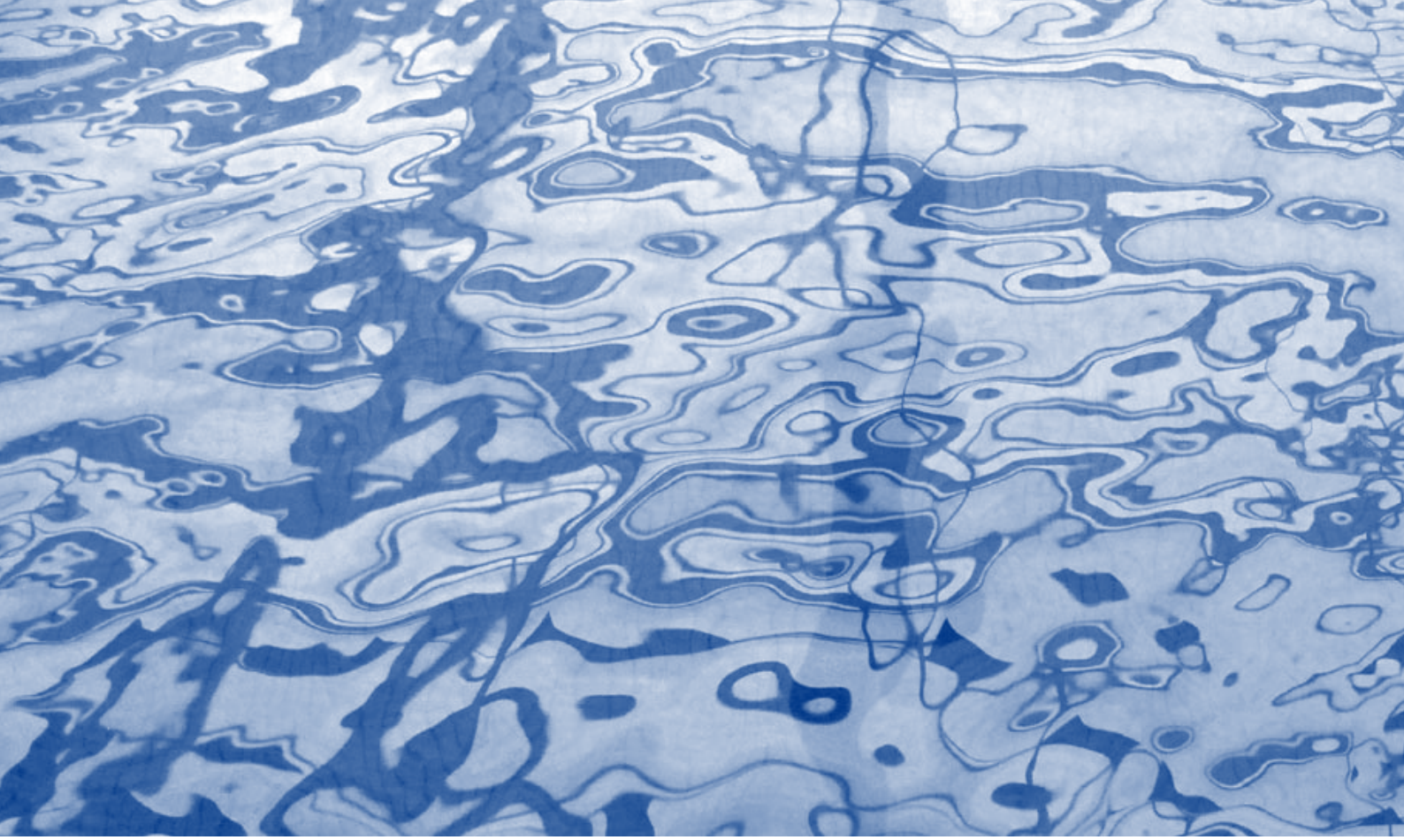
Fisheries agreements in promoting equity

The role of fisheries agreements in promoting equity within resource allocation



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Abstract

Equitable allocation of resources requires, within the achievement of sustainable development in international law, an equal balance between environmental and developmental aspects. Where progress can be noted regarding the inclusion of environmental aspects within international sustainable development law, it can be argued that the inclusion of development aspects such as equity require further attention. This paper addresses the extent to which aspects of developmental law can be found within international fisheries law, and if they can be promoted through fisheries agreements. The analysis of multilateral fisheries instruments on the inclusion of developmental provisions leads to the conclusion that they are mainly part of legally non-binding instruments and are formulated in broad and general terms, making it difficult to derive specific legal obligations there from. Considering the comprehensive framework offered by the EC-ACP policy, the potential role of the EC-ACP fisheries agreements in promoting equitable resource allocation between developed and developing countries is analysed. In contrast to the multilateral agreements, the EC-ACP fisheries agreements contain several categories of development law, specifically formulated in relation to fisheries issues. They can form an incentive for further elaboration of developmental rights within international fisheries law. Furthermore, they reflect a change in the pattern of a need-based approach towards one of partnership, indicating the gradual inclusion of participatory rights in fisheries law. The EC-ACP fisheries agreements can provide a useful example as they progressively develop and give content to the aspects of development cooperation within fisheries law, thereby also promoting equity of resource allocation at the international level.

Balancing environment and development in international fisheries law

Problems of equitable sharing and allocation of resources among states are not new.

To achieve sustainable development in general, or contribute to achieving equity within resource allocation in specific, the need for policies to address economic, environmental and social concerns in an integrated and coherent way is increasingly acknowledged by states, as can be illustrated by the outcomes of the 2002 World Summit on Sustainable Development. A broad approach towards the principle of sustainable development law has been provided by the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, outlining various of its key principles.[1]

However, it can be argued that while the practice of international law of the last decennia is characterised by an enormous growth of development, implementation and consolidation of environmental law principles, there is a stagnation of progress in international development law.[2] Similarly, a reference to 'sustainable fisheries' is in most cases understood as taking the environmental impacts of fishing in the short as well as long term into

1 The 2002 New Delhi Declaration on Sustainable Development, UN. Doc. A/57/329, by the International Law Association (ILA) is legal non-binding as such, but does also contain principles that are, for example, also part of international customary law or treaties. The seven key principles are: 1) The duty of states to ensure sustainable use of natural resources; 2) The principle of equity and the eradication of poverty; 3) The principle of common but differentiated responsibilities; 4) The principle of the precautionary approach to human health, natural resources and ecosystems; 5) The principle of public participation and access to information and justice; 6) The principle of good governance; and 7) The principle of integration and interrelationship, in particular in relation to human rights and social, economic, and environmental objectives.

2 See e.g. Schrijver, N. 2001. On the eve of Rio + 10: Development – the neglected dimension in the international law of sustainable development. Dies Natalis Address delivered on 11 October 2001 on the 49th Anniversary of the Institute of Social Studies, The Hague, p. 14 and Schrijver, N. 2003. The inception and meaning of sustainable development in international law. I *Reciel des Cours of the Hague Academy*, p. 9. In the latter, Schrijver refers to the gradual progress of the "consolidation, further development and implementation of international environmental law", whereas international development law has "practically come to a standstill, if it isn't in fact withering away". Furthermore, in its 2000 Report of the Sixty-ninth Conference Report (p.669), the ILA refers to the "erosion of some traditional principles of the law of international development cooperation".

account. This does not necessarily guarantee 'sustainable development of fisheries', in which not only conservation of natural resources should be met; equal emphasis is required for the incorporation of developmental aspects, such as equity, poverty eradication, and the achievement of an adequate standard of living for all.[3]

When looking at the developments within international fisheries law, the inclusion of environmental provisions increased significantly: where early conservation measures consisted of the concept of maximum sustainable yield and a single species approach, the emphasis has changed towards an ecosystem, and multi-species approach, strengthened by the inclusion of legal principles such as the precautionary approach and environmental impact assessment. As principles and norms derived from the environmental law pillar are considered to be progressively included within broad fields of international fisheries law, this paper chooses to focus on the inclusion of the developmental pillar within international fisheries law.[4]

One of the core principles of international law giving content to the developmental pillar of sustainable development is the principle of equity.[5] The International Law Association (ILA) refers to the principle of equity as including the eradication of poverty, rightfully emphasising their interrelationship.[6] When discussing the application of the principle of equity it is significant to refer to its underdetermined nature. As stated by Schachter[7]:

> The political demands for more equitable distribution find much of their intellectual and emotive justification in the ideal of equity, and few question the high, and even primary position of equality among social values. As one moves from the level of the ideal to practical to the

3 Rayfuse (Rayfuse, R. 1999. The interrelationship between the global instruments of international fisheries law. In Hey, E. (ed.), *Developments in international fisheries law*, Kluwer Law International, The Hague, p. 113) lists substantive and procedural requirements that have been developed in relation to the sustainable use of living resources, including both environmental and developmental elements: "maintenance of biological diversity, intergenerational equity, the precautionary approach, international cooperation on the basis of the common concern of mankind and common but differentiated responsibilities, informed and transparent decision making, national implementation of international commitments, institutional capacity to evolve and accommodate new members and effective monitoring, compliance and enforcement."

4 According to Bulajić (Bulajić, M. 1993. *Principles of international development law: Progressive development of the principles of international law relating to the new international economic order*, Martinus Nijhof, Dordrecht, p. 43) international development law can be defined as "an instrument or the economic and legal transformation of international relations and as a means for giving all states an opportunity to take part in international life on a footing of true equality".

5 In the North Sea Continental Shelf cases (1982, ICJ Reports 18), the ICJ referred to equity as being "a direct emanation of the idea of justice' and 'a general principle directly applicable as law' which should be applied as parts of international law 'to balance up the various considerations which it regards as relevant in order to produce an equitable result". According to Lachs (Lachs. 1983. Some reflections on the contribution of the International Court of Justice to the development of international law, 10 Syracuse J. Int'l L. &Com. 239, 272.) "accepting that the object of equity is not to reverse nature, its main purpose remains to temper the inequality created by nature and by man. Nature has divide its wealth very unevenly; states find themselves, by coincidence, in very different situations that create a gap between wealth and poverty".

6 *Supra* note 1.

> practical social policy, however, it becomes apparent that equality is in itself too general a concept to support concrete policy choices.[7]

Aspects that are part of the principle of equity, are intergenerational equity, i.e. equity between present and future generations, and intragenerational equity, i.e. fair and just relationships within the present generation.[8] The latter refers to both "more equality of development opportunities and a more just income distribution within a country as well as in an international North-South context".[9] The relevance of equity, as part of international fisheries law, between developed and developing countries is underlined by the allocation of surplus resources of developing countries to developed countries by means of (bilateral) agreements. An example can be found in the fisheries agreements between the European Community (EC) and certain African, Caribbean and Pacific states (ACP states).

Considering the aforementioned, this paper addresses the extent to which equity-related provisions can be found within international fisheries law, and if these aspects of development law can be promoted through fisheries agreements. First, fisheries instruments at the multilateral level are discussed. Second, the potential role of the EC-ACP fisheries agreements in promoting equitable resource allocation between developed and developing countries at the international level is analysed.[10]

7 Schachter, O. 1977. *Sharing the world's resources.* Cambridge University Press, New York, p. 6.

8 See for a thorough discussion of inter- and intragenerational equity, Brown Weiss, E. 1989. In fairness to future generations. International law, common patrimony, and intergenerational equity. The United Nations University, New York.

9 Schrijver, N. 2003. The inception and meaning of sustainable development in international law. *Reciel des Cours of the Hague Academy*, p. 68.

10 This paper has not as its objective to conclude on the practice or implementation of the EC-ACP fisheries agreements. It is limited to a theoretical analysis on the possible role of these fisheries agreements towards the promotion of equity within resource allocation.

Equity within international fisheries law

Why equity in international fisheries law?

The overall function of the principle of equity within international law could be described as taking into account considerations of justice and fairness when establishing, operating or applying a rule of international law.[11] Equity in relation to resource allocation can be characterised by a distributive or redistributive function and is inextricably bound to the objective of poverty eradication.[12] When placing equity of resource allocation in the North-South context, this means that "the needs of other users and necessitating assistance by industrialised countries to developing countries need to be taken into account" as this forms an inherent part of the fulfilment of our intergenerational obligations.[13] However, the allocation issues discussed within the North-South context should, in order to promote equity and poverty eradication, in the end, be included in the fisheries policies within countries. In practice, this should result in technical measures on management, control and surveillance at the one hand and measures building political and social infrastructures aiming at equal access and opportunities on the other hand.[14] The latter was argued by the Brundtland Commission (1987), noting that "threats to the sustainable use of resources comes as much from inequalities in peoples' access to resources and from the ways in which they use them as

11 See Franck, T.M. 1995. Fairness in international law and institutions. Clarendon Press, Oxford.

12 Franck, T.M. 1995. Equity in international law. In Jasentuliyana, N. (ed). *Perspectives on international law*, London, Kluwer Law International, p. 31.

13 Schrijver, N. 2001. On the eve of Rio + 10: Development – the neglected dimension in the international law of sustainable development. Dies Natalis Address delivered on 11 October 2001 on the 49th Anniversary of the Institute of Social Studies, The Hague, p. 9. A similar view can be found in Sands (Sands, P. 2003. Principles of international environmental law. Cambridge University Press, p. 253) who identifies various legal elements of sustainable development, including "the equitable use of natural resources, which implies that use by one state must take account of the needs of other states".

14 According to Hanna (Hanna, S.S. 1999. Strengthening governance of ocean fishery resources. *Ecological Economics* 31: 278-9) requirements towards fisheries governance are "that it coordinate institutional rules and individual actions by performing certain functions; incorporate multiple objectives representing different types of conservation and use; bring the time horizons of private individuals into line with those of the public; send signals of resource scarcity and enable effective adaptive responses; promote legitimacy by reflecting accepted norms of equity and by controlling harmful opportunism; contain both the level and distribution of transaction costs".

from the sheer numbers of people".[15] This implies that it is not only absolute resource scarcity that is at the basis of poverty: when incorporating equity considerations in resource allocation and management the difficulties of particular groups of people having equal access to those resources, resulting from a lack of social and political structure, are of equal importance.[16]

The legal framework of international fisheries law, established by the United Nations Convention on the Law of the Sea (LOS Convention), provides for the distribution of surplus resources according to equitable principles, taking account of, *inter alia*, economic need.[17] States are furthermore directed to determine the terms of such participation by considering "the need to avoid damaging the fishing communities of coastal states, the extent to which the land-locked state is already entitled, through agreement, to exploit the EEZ of other coastal states, the need to avoid disadvantaging any one coastal state in particular, and the nutritional needs of the populations of the respective states".[18] From this perspective, the next paragraph will examine fisheries instruments, concluded at the international level, on their inclusion of provisions that relate to the principle of equity.

The inclusion of equity-related provisions in international fisheries law instruments

Various international instruments relating to fisheries law have been regarded on the inclusion of provisions that relate to the principle of equity.[19] It has been researched whether they include provisions that contain aspects of international development law, in general or specifically related to fisheries. This resulted in the identification of different categories of principles.

The first identified category contains economic orientated principles. At the core of this category is the realisation of a just and equitable international economic order, in which social and cultural factors are equally important as economic factors. Although no specific link with fisheries is made, this

15 World Commission for Environment and Development. 1987. O*ur common future.* Oxford University Press, Oxford, p. 95.
16 See for this reasoning also the work of Amartya Sen. 1981. Poverty and famines; An essay on entitlement and deprivation. Clarendon Press, Oxford.
17 Article 62 (3) of the United Nations Convention on the Law of the Sea.
18 Third U.N. Convention on the Law of the Sea, 11th Sess., 10 December 1982, 21 I.L.M. at 1283-4.
19 The 1982 United Nations Convention on the Law of the Sea; 1992 Convention on Biological Diversity; 1995 FAO Code of Conduct for Responsible Fisheries; 1995 Kyoto Declaration (International Conference on the Sustainable Contribution of Fisheries to Food Security); 1999 **International Plan of Action for the Management of Fishing Capacity; 2001**International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU); 1995 Straddling Stocks Convention; 1989 Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas" of the United Nations Generally Assembly Resolution 44/225; 1995 Jakarta Ministerial Statement on the Implementation of the Convention on Biological Diversity; 1995 Rome Consensus on World Fisheries; 1992 Declaration of the International Conference on Responsible Fishing; and the 1999 **Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries.**

aspiration of the international community is a prominent part of the LOS Convention as well as the FAO Code of Conduct.[20] Incorporated within the international law of the sea, but only applying to the area, are the principles of equal and full participation in economic processes by developing countries, and protection (or monitoring) of developing countries from adverse effects on their economies.[21] That these principles can also apply to fisheries law, is illustrated by Article 25 of the 1999 International Plan of Action for the Management of Fishing Capacity: "(…) states should assess the possible impact of all factors, including subsidies, contributing to overcapacity on the sustainable management of their fisheries, distinguishing between factors, including subsidies, which contribute to overcapacity and unsustainability and those which produce a positive effect or are neutral". Another principle, aiming at the promotion of economic development, is the principle of optimum utilisation of marine living resources. This principle, being part of the fundament of the LOS Conventions' framework on the management of EEZ resources, also found its way in other declarations.[22] It concerns not only the economic growth and efficiency; as important is its relation to the world's food security. Finally, the category of economic orientated principles contains the idea of incorporation of international agreed market related measures, which can be summarised as the obligation to adopt trade-related measures in accordance with international law.[23]

A second category of principles identified, contains 'need-based' principles, which are considered to be more firmly established within international development law. The principle to give recognition to the special requirements of developing states has been established in the provision of taking into account the interests and needs of developing countries.[24] Most provisions refer to the 'interest of developing states' as such, without elaborating on the content of these interests or providing guidelines for its weighing with

20 Preamble UNCLOS; Article 150 UNCLOS; Article 150(g) UNCLOS; Article 7.6.7 of the FAO Code of Conduct; Article 10.2.2 of the FAO Code of Conduct. Furthermore, this principle can be found in: No. 7 of the 1995 Jakarta Ministerial Statement on the Implementation of the Convention on Biological Diversity and Article 6 of the Kyoto Declaration, 1995 (International Conference on the Sustainable Contribution of Fisheries to Food Security).

21 The principle regulating activities in the Area can be found in Article 150(d) UNCLOS and Article 150(c) UNCLOS. Furthermore, see Articles 150(h); 164(2)(c); 151(10); 146(2)(d); and 164(2)(b) of the United Nations Convention on the Law of the Sea.

22 Article 62(1)and (2)of the 1982 United nations Convention on the Law of the Sea; Article n of the 1999 **Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries;** Article 2(6) of the 1995 FAO Code of Conduct for Responsible Fisheries; and Article 2 of the 1995 Rome Consensus on World Fisheries.

23 Including principles, rights and obligations established in WTO Agreements and implemented in a fair, transparent and non-discriminatory manner. This principle can be traced back on two legally non-binding conventions: Article 65, 66, 67 and 68 of the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) and Articles 2(8), 6.14, 11.2.1, 11.2.4 and 11.2.7 of the 1995 FAO Code of Conduct for Responsible Fisheries.

24 Preamble and Articles 61(3), 62(3), and 119(1)(a) of the 1982 United Nations Convention on the Law of the Sea; Articles 5(b); 11(e); 11(f) and 24(2) of the 1995 Straddling Stocks Convention; Article c of the 1999 **Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries; A**rticle 5.2 of the 1995 FAO Code of Conduct for Responsible Fisheries; and Articles 9 and 85 of the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).

other interests (mainly containing economic or environmental factors).[25] The obligation to give due consideration to artisanal and subsistence fishers in developing countries can be considered a specification of the principle to take into account the needs and interest of developing countries.[26] Its main focus is on the needs of local coastal communities, traditional practices and indigenous people, depending on the exploitation of marine living resources.[27] It is noteworthy that only the small-scale fishery are referred to, not mentioning the developing industrial fishing fleets of developing countries.[28] An established principle within international development law, which is also embedded in international fisheries law, is the principle of providing assistance to developing states.[29] The content of the provisions, putting this principle into words, relates to a great extent to technical assistance and financial support. Where some provisions define assistance in relation to the collection of data information, stock assessment, control and surveillance, others focus on institutional capacity, including human resource development.[30] It is interesting to note that in this era in which developing states are to define their own policies and strategies, most provisions refer to 'assistance to' developing states, while only a few provisions use the words

25 An exception can be found in Article 5.2 of the Code of Conduct, referring to "areas of financial and technical assistance, technology transfer, training and scientific cooperation and in enhancing their ability to develop their own fisheries as well as to participate in high seas fisheries, including access to such fisheries".

26 Article 5(i), 11(d) and 11(e) of the 1995 Straddling Stocks Convention; Article 10(d) of the 1992 Convention on Biological Diversity; **Article 26 of the 1999 International Plan of Action for the Management of Fishing Capacity;** Article 7.6.6, 10.1.1, 10.1.3 and 11.2.15 of the 1995 FAO Code of Conduct for Responsible Fisheries; and the 'Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas' of the United Nations Generally Assembly Resolution 44/225 (1989).

27 **Article 26 of the 1999 International Plan of Action for the Management of Fishing Capacity contains the** most far-reaching provision, stating that: "States should reduce and progressively eliminate all factors, including subsidies and economic incentives and other factors which contribute, directly or indirectly, to the build-up of excessive fishing capacity thereby undermining the sustainability of marine living resources, giving due regard to the needs of artisanal fisheries".

28 See for analysis on the relation between fisheries and poverty, Béné, C. 2003. When fisheries rhymes with poverty: A first step beyond the old paradigm on poverty in small-scale fisheries. World Development 31(6).

29 While the Straddling Stocks Convention does contain some articles on assistance to developing countries, the LOS Convention has reserved this principle for application to the area: Article 24(1), 25(1)(b), 25(3)(a)(b)(c) and 26(1)(2) of the 1995 Straddling Stocks Convention; No. 16 of the 1995 Jakarta Ministerial Statement on the Implementation of the Convention on Biological Diversity; Article 43 of the 1999 **International Plan of Action for the Management of Fishing Capacity;** Article i of the 1999 **Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries;** (Article 10 of the 1995 Rome Consensus on World Fisheries; Article 10 of the Kyoto Plan of Action, International Conference on the Sustainable Contribution of Fisheries to Food Security; Article 17 of the 1992 Declaration of the International Conference on Responsible Fishing, Article 144 (1)(b), 144(2)(a), 268(d) and 274(a)(b)(c)(d) of the 1982 United Nations Convention on the Law of the Sea.

30 For example, Article 25(3)(a)(b)(c) of the Straddling Stocks Convention states that: "assistance shall, inter alia, be directed specifically towards improved conservation and management of straddling fish stocks and highly migratory fish stocks through collection, reporting, verification, exchange and analysis of fisheries data and related information; stock assessment and scientific research; and monitoring, control, surveillance, compliance and enforcement, including training and capacity-building at the local level, development and funding of national and regional observer programmes and access to technology and equipment". See in addition the 1995 Jakarta Ministerial Statement on the Implementation of the Convention on Biological Diversity (No. 16): "to assist developing countries to build their own institutional capacity, including human resource development, to conserve and use sustainable biological diversity" as well as Article 25(3)(a)(b)(c) of the Straddling Stocks Convention.

'cooperation with' or 'participation'.[31] Small islands developing countries have a special focus within the category of need-based principles.[32]

A third and last category, identified within international fisheries law are participatory rights. The principle of transparency, specifically in relation to the decision making processes and the fisheries management regimes, is essential for development and fisheries.[33] Closely related is the principle of participation in decision making and access to relevant information, which is to be found in the FAO Code of Conduct.[34] Article 10.1.2 of this code states that "States should ensure that representatives of the fisheries sector and fishing communities are consulted in the decision-making processes and involved in other activities related to coastal area management planning and development'. Lastly, the principle of public education and awareness was identified.[35]

Incorporation of development principles within fisheries law?

Although some interesting development principles can be found within international fisheries law, it cannot be concluded that they have been firmly established. The reason for this conclusion is twofold. In the first place, the principles on development law have, to a large extent, been found within the legal non-binding instruments.[36] This is especially the case with the more progressive, or more progressively formulated principles. Secondly, the developmental rights are formulated in such broad and general terms, that it is difficult to derive specific legal obligations and their content depends to a large extent on the interpretation of the individual states applying them.

In addition, it should be noted that the majority of the provisions on development law, included in international fisheries instruments, relates to financial or technical assistance towards developing countries, mainly

31 Article 25(2) Straddling Stocks Convention refers to: "Cooperation with developing states for the purposes set out in this article shall include the provision of financial assistance, assistance relating to human resources development, technical assistance, transfer of technology, including through joint venture arrangements, and advisory and consultative services", while Article 25(1)(c) of the Straddling Stocks Convention states that: "States shall cooperate (c) to facilitate the participation of developing states in subregional and regional fisheries management organisations and arrangements".

32 Mainly found in Articles 5.2 and 12.20 of the 1995 FAO Code of Conduct for Responsible Fisheries.

33 Article 7.1.9 of the 1995 FAO Code of Conduct for Responsible Fisheries.

34 Articles 7.1.6 and 10.1.2 of the 1995 FAO Code of Conduct for Responsible Fisheries.

35 Article 13(a) of the 1992 Convention on Biological Diversity and Article 10. 2. 1 of the 1995 FAO Code of Conduct for Responsible Fisheries.

36 From this perspective it is interesting to note that Slinn (Slinn, P. 1999). The international law of development: a millennium subject or a relic of the twentieth century? In: Benedek, W., Isak, H. and R. Kicker (eds.), *Development and developing international and European law*, p. 306.) states that "the concept of soft law has become closely associated with international development law, however, many principles "soft law" notions have now been translated into binding engagements". He continues to conclude that "the basic structure has not been undermined by steps to imbue the system with development objectives although the pursuit of those objectives has entitled the adoption of more flexible law-making processes".

reflecting a need-based approach. There is, on the other hand, a rise of participatory rights, such as transparency, participation and public awareness, which can be an indicator of leaving the path of the more traditional development rights.[37]

These characteristics, however, need to be partly interpreted in the light of the general character of equity, that needs to move from the level of ideal to social policy.[38] As inherent to the nature of multilateral legal instruments, for example considering the framework nature of the LOS Convention and the universal aspirations of the FAO Code of Conduct, the development aspects incorporated at the multilateral level are flexible and broadly formulated and thus do not contain very specific legal obligations for states. In contrast, the nature of agreements concluded at the bilateral level could be better equipped to provide a translation of these broadly formulated aspects into specific legal obligations.

37 This holistic approach of development, in contrast to the earlier economic orientated approach can be found in the Annex to UNGA Resolution 41/128 of 4 December 1986: "Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".
38 *Supra* note 7.

Equity within the EC-ACP fisheries agreements

The emerging role of development law in the EC-ACP fisheries agreements

Bilateral fisheries agreements between the EC and ACP states have evolved since the 1970s as a direct result of the establishment of the EEZs under the LOS Convention. As marine resources, traditionally fished upon by European fleets, came under the sovereign rights of coastal states, the EC Member States transferred the competence to conclude fisheries agreements to the EC, aiming at ensuring continuation of its fishing industry.39 The raisons d'être for concluding these fisheries agreements were thus both social and economic in nature. From a European perspective, internal and external changing circumstances led to a steady evolution in the nature and range of the fisheries agreements. The last decennia the EU's Common Fisheries Policy (CFP) has gone through a reform, restating its overall objective as the achievement of sustainable fisheries, whereby it aims at the protection of the waters outside the community with the same vigour as its internal waters. Important factors, outside the EU, necessitating the need for a constant evolution of the agreements are the legitimate aspirations of many developing countries to expand their own fishing industry, the increased focus on environmental and development policy considerations in fisheries management and the growing interest of civil society in fisheries matters.40 The conclusion of fisheries agreements between the EC and ACP states is thus part of an increasingly complex and dynamic area, characterised by (potentially) conflicting objectives and a strong interrelationship with other EC policy areas, such as developmental and environmental policies. Its objectives should nowadays be viewed in the light of other community objectives, as articulated in the Treaties of Maastricht and Amsterdam. Hence, the revised EC Treaty stipulates in Article 6 that environmental protection requirements must be integrated into the policies of the EU, in particular with a view to promoting sustainable development, while Article 174 provides that

39 Council Resolution of 3 November 1976, *Official Journal* C105, 7.5.1981.
40 See the Commission of the European Communities, Green Paper on the Future of the Common Fisheries Policy, COM (2001) 135 final, Brussels, 20.3.2001.

environmental policy should be based on the precautionary principle. The CFP furthermore has to take into account consumer protection requirements (art. 153), the objectives of social and economic cohesion (art.159), and the objectives regarding development co-operation (arts. 177 and 178).

The EC's first fisheries agreements with ACP states are referred to as 'pay for fish' or 'cash for access' agreements. They are characterised by their commercial and non-reciprocal nature, as access right to fish resources is returned with financial compensation, borne by the commission's budget in combination with licence fees, paid by individual ship owners. The ratio of moving away from the access agreements was a growing criticism on its contribution to the deterioration of marine resources. Other reasons included the (potential) conflicts of interest with local fishing communities and a lack of contribution of the agreements to the fisheries industry of the ACP states.[41]

Article 178 of the EC Treaty requires consistency between the fisheries agreements and the community's development policy as laid down in the Cotonou Partnership Agreement between the EC and ACP states.[42] First, the EC negatively formulated the development aspects within its fisheries agreements: they should not harm the development of the fisheries sector within ACP states.[43] In 1997, the EU Council, while emphasising that the fisheries agreements are to be considered primarily from a commercial point of view from which both parties derive benefits, reaffirmed that "these agreements should also provide actions for the development of the fisheries sector of the third country, whilst reflecting the legitimate demands of the third country in that respect".[44] The Commission's Green paper (2001) elaborates on this view of the council: the CFP's reform marks the end of a period of access agreements and a new approach based on the conclusion of fisheries partnership agreements is launched. The new agreements should be established with the developing coastal states, "with a view to not only ensure the community fleet access to the surplus resources, but also to contribute to

41 With regard to these types of agreements, the Commission (COM. 2000. 724 final, p. 5) has concluded that "these payment have not let to a development of a local fishing industry commensurate with the funds disbursed, and the access given to foreign vessels is by some local communities now considered a real threat to traditional local fishery".
42 The objective of the **Partnership Agreement between the members of the African, Caribbean and Pacific Group of States (ACP) of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (***Official Journal* **L 317 of 15.12.2000), is to set up a** framework for cooperation between the members of the ACP States and the Member States of the European Community. It is designed to promote and expedite the economic, social and cultural development of the ACP states, contribute to peace and security and promote a stable and democratic political environment. This cooperation began with the signing of the first cooperation convention (Yaoundé Convention) in 1964 and continued with the four Lomé Conventions, the last one expiring on 29 February 2000.
43 In this context, the Commission (COM(96) 488, p. 4-5.) notes that: "therefore, whilst the objective of our agreements is not to develop the domestic fishing industry of our partner country, including the artisanal fisheries, the community nevertheless must ensure that the agreement does not constrain their development or viability".
44 Conclusions on European Community Fisheries Agreements with Third Countries adopted by the Council on 30 October 1997, Brussels, 4 November 1997, (11784/97), PECHE 332, p. 5.

the establishment of a framework for policy dialogue and to responsible and sustainable fisheries".[45]

An in-depth analysis of the aspects directly relating to poverty reduction and fisheries in developing countries was conducted by the commission.[46] Furthermore, a direct link to the objective of poverty reduction is made through the application of the Cotonou Partnership Agreement.[47] Based on the idea that the sustainability of global fishery resources is an international concern, the EC takes the stand that a global response to sustainability and poverty eradication is needed.[48] By balancing objectives such as solidarity with developing countries, commercial, economic, social and environmental interest, the community aims at establishing a "long-term policy based on considerations of sustainability and equity".[49] This implies "giving serious consideration to support the development of local fishery industry, including processing and distribution networks for local consumption".[50] The implications of these evolving views on the relation between fisheries and development have been translated into the concept of Fisheries Partnerships Agreements (FPAs), advocating a new approach of fisheries agreements based on mutual interest and policy dialogue.[51]

The inclusion of equity-related provisions in Fisheries Partnership Agreements

At this moment, the EC has concluded 18 FPA's with ACP states, of which 17 are with African states.[52] Within the FPA structure, financial support to the ACP states is to be based on mutual interest.[53] A clear distinction within

45 Com(2001) 135, The Commission of the European Communities, Green Paper on the Future of the Common Fisheries Policy, Brussels, 20.3.2001, p. 37.
46 Communication from the Commission to the Council and the European Parliament. Fisheries and Poverty Reduction. COM(2000) 724 final, Brussels, 8.11.2000. This Communication was followed by Council Resolution of 10 November 2001 (Council Conclusions of 10 November on fisheries and poverty reduction (13077/01 DEVGEN 156 PECHE 212).
47 The central place of poverty eradication is affirmed in Article 1 of the Cotonou Agreement: "The partnership shall be centred on the objective of reducing and gradually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy".
48 This position of the EU can be found in (COM(2000)724, p.6) where it states that it aims at the protection of the sustainability of resources with the same vigour in European as in non-European waters.
49 COM(2002) 724, Communication from the Commission to the Council and the European Parliament. Fisheries and Poverty Reduction, Brussels, 8.11.2000, p. 7.
50 *Supra* note 49, p. 8.
51 COM (2002) 637, Communication on an Integrated Framework for Fisheries Partnership Agreements with Third Countries. This Communication was followed by the Adoption of Council Conclusions on a Communication on an Integrated Framework for Fisheries Partnership Agreements with Third Countries, Brussels 15 July 2004 (11485/1/04), PECHE 254.
52 As on 31.01.2006. The EC concluded agreements with Angola, Cape Verde, Comoros, Côte d'Ivoire, Gabon, Gambia, Guinea, Guinea-Bissau, Equatorial Guinea, Kiribati, Madagascar, Mauritius, Mauritania, Mozambique, São Tome and Principe, Senegal, Seychelles, and the Solomon Island. However, the latest protocols with Angola, Gambia and Equatorial Guinea were not renewed upon their expiry. The Agreements with Gabon, Guinea-Bissau and Mauritania are concluded in 2001, which is before the reform of the CFP.
53 COM 2002 637, Communication on an Integrated Framework for Fisheries Partnership Agreements with Third Countries, p. 8.

the payment is made between the financial contribution, in exchange for the fishing rights granted to the EC, and a financial contribution destined for fisheries partnership actions such as to combating overexploitation, illegal, unreported and unregulated (IUU) fishing practices and training.[54]

Depending on the outcomes of policy dialogues and identification of mutual interest between the EC and ACP states, the FPAs can include different aspects of international development law. These different aspects, referred to by the EC as targets, are categorised below in order to identify the extent to which equity-related provisions are included.

In consistency with an international focus on combating IUU fishing, the majority of the financial contribution in the various FPAs, is reserved for fisheries surveillance and monitoring. This includes support for fisheries monitoring, inspection and surveillance, the introduction of satellite based vessel monitoring systems (VMS), the development of programmes for the protection and monitoring of fishing zones and the training of observers. Closely related is the category of scientific and technical programmes. This category aims at the improvement of fisheries and biological knowledge, the improvement of fisheries statistics, the monitoring of the evolution of resources in the fishing zone and the functioning of the fisheries research laboratory, the financing of scientific programmes to improve knowledge of fisheries resources to guarantee sustainable management and the follow-up assessment of resources.

These first two categories, covering the main part of the financial contribution reserved for partnership actions, reflect an integrated approach towards environmental and developmental aspects of fisheries. Although the main focus is on resource management from an environmental perspective, it is also concerned with development aspects, as the development of the fisheries industry in ACP states is seriously damaged by IUU fishing practice.

Following, the agreements contain several categories of development law, elaborating the broad and general principles of development law towards more specific obligations or rules in relation to fisheries issues. First, the agreements include the objective of providing institutional support. This is done by supporting the ministry, responsible for fisheries, to formulate a fisheries and aquaculture development policy and providing institutional support for the administration for fisheries. Furthermore, a category of training can be identified. This includes the financing of study grants and practical training in the various scientific, technical and economic disciplines relating to fisheries. Closely related is the category of measures that foresee in the development of small scale fisheries. This category contains targets as assistance for the development of small scale fishing, vocational

54 *Supra* note 53, p. 8

training for young small-scale fishermen and fish farmers, technical assistance for private-sector small scale fishing and fish farming, support for investments in the small-scale fisheries sector and the improvement of safety of small-scale fishing. A focus towards the international level can be found in the category of promotion of participation. This category is concerned with the promotion of participation of developing countries in the international decision making process. Measures aim at the increased involvement of ACP states within the decision making processes at the regional or international level, by contributing in the costs of participating in training courses or international fisheries meetings and the contribution to international fisheries organisations and participation of delegates in international meetings on fisheries. Two smaller categories, only appearing in a few agreements, are provisions relating to the strengthening of human resources and health and quality control. The first category contains measures strengthening human resources and institutional support to maritime training with a view to developing and strengthening human resources. In addition, a focus on health can be identified in the agreements, by means of implementing measures strengthening fishery health inspection and quality control capacities and the improvement of health conditions in the sector.

This group of categories, primarily aiming at training, capacity building and participation in relation to fisheries management, applies on different levels: where the institutional supports builds at the national level of policy making, the category of training aims at improvement of technical skills as well as participation in fisheries management. By including an equal focus on institutional support and participation, combined with training, these categories reflect a need-based approach as well as an increasing emphasis on participatory rights towards development cooperation.

Incorporation of development principles within the EC-ACP fisheries agreements?

In contrast to the broad and general approach of developmental provisions found at the international level, the development cooperation provisions as agreed between the EC and ACP states reflect a more specific and detailed approach towards fisheries. They take into account the local, national and/or regional interests since they are the outcome of a policy dialogue aiming at concluding agreements in the mutual interest of the EC and the developing countries. This specification of legal obligations on development law in fisheries management could eventually lead to better implementation and enforcement. By means of bilateral fisheries agreements, the EC and ACP states crystallise the developmental aspects of fisheries law. Their progressive development can consist of the further elaboration and giving content to rights and principles on the one hand, while, on the other hand, stimulating

the development from the more traditional rights towards a partnership approach, indicating the gradual inclusion of participatory rights.

Although a process of progressive development can be identified at the European level, its implementation requires more time and efforts. At present, the majority of the targeted actions are reserved for the purpose of surveillance and monitoring, followed by technical and financial assistance, which, to a great extent relate to the combating of IUU fishing practice. In addition, there is and increasing focus on participatory rights and institution building, stimulating the formulation of fisheries management at the national and international level. This seems to reflect an increasing voice of the ACP states in determining the targets. In the future, further emphasis on participatory rights can be expected.

Concluding remarks

Sustainable development of fisheries requires a balance between the aspects of environmental conservation, poverty eradication and participation. Inherent to their differences in policy-level and related characteristics, the multilateral instruments within fisheries law include more broad and general equity-related provisions in comparison to the bilateral and regional instruments. The progressively formulated bilateral agreements between the EC and ACP states seem better equipped to further elaborate on the various meanings of equity in fisheries law, by proving it a specific content in relation to fisheries issues relevant to developing countries. It needs to be emphasised that this is not to say that these provisions cover the principle of equity as a whole; they only can be seen as a partly and specific application of a more broad and comprehensive principle.

This means that fisheries agreements concluded at the bilateral level could also promote the inclusion of equity at the international level. Equity-related provisions are found in many international fisheries law instruments. At the international level, instruments such as the LOS Convention and the FAO Code of Conduct are considered as framework instruments, setting minimum standards. However, those instruments rarely provide a working definition of equity for the context of its use, meaning that in the end, states, international organisations and international courts are to rely on the general concept as has been interpreted and applied by the ICJ and other international tribunals. Giving further content to the framework, it can be fisheries agreements, such as at the EC-ACP level, that provide these provisions with further and specific content.

To finally answer the questions addressed in this paper, it can be concluded that aspects of developmental law can be found within international fisheries law. As they are, however, formulated in broad and general terms, fisheries agreements can play a role in giving further content to and progressively develop these broad and general provisions. Without arguing that all newly concluded bilateral EC-ACP fishery agreements bring improvement for

the developing countries fisheries sector in practice, it can be concluded that the formulation of these agreements can contribute to the progressive development of equity in fisheries law, by the identification of instruments, measures and principles necessary for achieving equitable allocation of fishery resources. Fisheries agreements contribute, in the words of Schachter, to move from the general principle of equity as an ideal towards a more concrete policy in fisheries issues.