

Legal Reflections on the Small-Scale Fisheries Guidelines: Building a Global Safety Net for Small-Scale Fisheries

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Abstract

The Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication, endorsed by the Committee on Fisheries of the Food and Agriculture Organization of the United Nations in 2014, heightened the recognition and protection of small-scale fisheries globally. The guidelines are voluntary and non-binding, but does this mean they have no normative significance or legal force? Based on international legal theories of soft law, this article explores the legal status of the guidelines and argues that the guidelines have normative significance and legal force for three main reasons: (i) the legitimate process of development and adoption of the guidelines; (ii) the normative content of the provisions; and (iii) their law-making effects at various levels of governance. The guidelines contribute to building a global safety net for small-scale fisheries, which should continue to improve and expand thus securing the sector's sustainability worldwide.

Keywords

Small-Scale Fisheries (SSF) Guidelines – soft law – normative significance – legal force – legitimate process – normative content – law-making effect

Introduction¹

The law of the sea regime, encompassing international fisheries law,² has been for the most part silent with respect to artisanal or small-scale fisheries (SSF).³ Within the fisheries sector, SSF are very diverse, with characteristics that vary from one context to another.⁴ SSF generally carry out hand fishing and/or use small fishing vessels with low motor power and fishing capacity on both inland and marine waters. SSF play an essential role in the livelihoods of rural and coastal communities, but this fisheries subsector tends to lack adequate support from governments in developing countries⁵ and developed countries.⁶ According to the United Nations Convention on the Law of the Sea (LOSC),⁷ coastal States and archipelagic States exercise sovereignty over their internal waters, archipelagic waters, and territorial seas, whilst enjoying sovereign rights to explore, exploit, conserve and manage natural resources of their exclusive economic zones (EEZ).⁸ Fishing activities operating in such zones

- 1 The author wishes to thank Professors Elisa Morgera, Ratana Chuenpagdee, Svein Jentoft, Richard Barnes, David Freestone, as well as Lena Westlund and Mostafal El Halimi, for their insightful comments and critiques on earlier drafts of this article, all which have contributed to improve the manuscript. The author is responsible for the current text and any remaining errors of fact or interpretation.
- 2 The branch of international law specifically devoted to the regulation of marine capture fisheries, including the sustainable utilisation of fishery resources, fisheries management and conservation. For a contemporary analysis of international fisheries law, see EJ Molenaar and R Caddell (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing, Oxford, 2019).
- 3 There is no internationally agreed definition of 'small-scale fisheries'. Artisanal and small-scale fisheries are used interchangeably. See R Chuenpagdee and S Jentoft, 'Small-scale fisheries: Too important to fail' in International Ocean Institute – Canada (ed), *The Future of Ocean Governance and Capacity Development: Essays in Honor of Elisabeth Mann Borgese (1918–2002)* (Brill Nijhoff, Leiden, 2019) 349–353.
- 4 More about the meaning of SSF is discussed in the next section of this article.
- 5 S Jentoft and R Chuenpagdee (eds), *Interactive Governance for Small-Scale Fisheries* (Springer, Cham, 2015); S Purcell and R Pomeroy, 'Driving small-scale fisheries in developing countries' (2015) 2 *Frontiers in Marine Science* 1–7; V Batista *et al.*, 'Tropical artisanal coastal fisheries: Challenges and future directions' (2014) 22(1) *Review in Fisheries Science & Aquaculture* 1–15; C Béné, B Hersoug and E Allison, 'Not by rent alone: Analysing the pro-poor functions of small-scale fisheries in developing countries' (2010) 28 *Development Policy Review* 325–358.
- 6 LCL Teh, 'Small-scale fisheries in developed countries: Looking beyond developing country narratives through Japan's perspective' (2020) 122 *Marine Policy* 104274. See also relevant case studies in Europe in J Pascual-Fernández, C Pita and M Bavinck (eds), *Small-Scale Fisheries in Europe: Status, Resilience and Governance* (Springer, Cham, 2020).
- 7 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396 [LOSC].
- 8 *Ibid.*, Articles 2, 49, 56(1)(a).

are a matter for coastal States and archipelagic States to govern, regulate and control. This does not mean that SSF are of no interest to international law, or that treaties, international guidance and standards do not apply to SSF. On the contrary, as this article explains, various international instruments apply and are relevant to SSF.

International fisheries law has evolved in recent decades to meet the environmental, social and economic needs of the global community.⁹ However, the LOSC does not explicitly mention SSF¹⁰ and has few articles relating to SSF.¹¹ The UN Fish Stocks Agreement (UNFSA),¹² which elaborates on the LOSC's provisions relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, includes the principle of 'taking into account the interests of artisanal and subsistence fishers' in guiding States Parties on their duty to cooperate under the Agreement.¹³ Despite this provision of the UNFSA, most fisheries agreements do not address the social and cultural conditions within which fishing operates, as well as the conflicts between subsidised vessels and local SSF fleets unfairly competing for space and stocks.¹⁴ The constitutive instruments of some regional fishery bodies, in turn, refer to SSF under principles or objectives,¹⁵ but do not require members to effectively

9 For an analysis of selected international fisheries law developments and evolution within the period 1994–2021, see J Nakamura, 'International fisheries law: Past to future' in A Hornidge, M Hadjimichael and S Partelow (eds), *Ocean Governance. Past, Presents, Futures* (Mare Series, Springer, in preparation 2022).

10 Nor any of SSF terminologies, for example, artisanal, subsistence and aboriginal fisheries.

11 These include provisions that are not directly relating to SSF but can be interpreted as relevant to SSF, as will be examined in the next subsection of this article.

12 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 December 1995, in force 11 December 2001) 2167 UNTS 3 [UNFSA].

13 *Ibid.*, Article 5(i). More detailed analysis of the UNFSA's provisions relevant to SSF is given further below.

14 A Gagem and J van den Bergh, 'A critical review of fishing agreements with tropical developing countries' (2013) 38 *Marine Policy* 375–386; A Antonova, 'The rhetoric of "responsible fishing": Notions of human rights and sustainability in the European Union's bilateral fishing agreements with developing states' (2016) 70 *Marine Policy* 77–84.

15 Such principles include taking into account potential or adverse impacts of conservation and management measures on SSF; access to fishery resources by small-scale fishers; recognising SSF's contribution to employment, income and food security; and improving their livelihoods. See Agreement for the establishment of a General Fisheries Commission for the Mediterranean (Rome, 6 November 1997, in force 29 April 2004), as amended by the General Fisheries Council for the Mediterranean at its first special session (May 1963), at its thirteenth session (July 1976) and at its twenty-second session (October 1997) and approved by the Food and Agriculture Organization of the United Nations (FAO)

protect the rights of small-scale fishers from situations of unfair competition against foreign fishing fleets accessing coastal and archipelagic waters. Neither do these instruments require members to ensure participation of small-scale fishers and fishing communities' representatives in the decision-making processes of conservation and management measures affecting those fishers and communities.

In the past decades, SSF have received greater attention from the international community through important legal developments and initiatives.¹⁶ A turning point was the endorsement of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines)¹⁷ by the Committee on Fisheries (COFI) of the Food and Agriculture Organization of the United Nations (FAO).¹⁸ States and non-State actors took a step forward in agreeing on a broad set of non-exhaustive international recommendations devoted to the social, economic and environmental sustainability of inland and marine SSF.¹⁹ The SSF Guidelines broadly reflect contemporary social and environmental matters that would not have been considered had this instrument been created

Conference at its twelfth session (December 1963) and by the FAO Council at its seventieth session (December 1976) and at its hundred and thirteenth session (November 1997) 2275 *UNTS* 157, Article 5(a); Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Auckland, 14 November 2009, in force 24 August 2012) 2899 *UNTS* 211, Article 19(2)(b); Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (Windhoek, 20 April 2001, in force 13 April 2003) 2221 *UNTS* 189, Article 21(2)(b); Agreement establishing the Caribbean Regional Fisheries Mechanism (Belize, 2 February 2002, in force 4 February 2002) 2242 *UNTS* 271, Article 5(e); Convention for the Establishment of the Fishery Committee for the West Central Gulf of Guinea (Cotonou, 7 November 2007), Article 5(2)(b).

- 16 There is growing interest from transdisciplinary work, involving fisheries scientists and legal researchers, to better understand how SSF issues are addressed in laws and policies. A recent study provides a 'step-zero' for how national laws and policies address key issues relevant for SSF based on international standards. See J Nakamura, R Chuenpagdee and M El Halimi, 'Unpacking legal and policy frameworks: A step ahead for implementing the Small-Scale Fisheries Guidelines' (2021) 129 *Marine Policy* 104568.
- 17 Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (Rome, 31st Session of the FAO Committee on Fisheries, 9–13 June 2014) [SSF Guidelines].
- 18 FAO, *Report of the Thirty-first Session of the Committee on Fisheries* (FAO Fisheries and Aquaculture Report No. 1101, Rome, 2014).
- 19 The SSF Guidelines are global in scope, apply to SSF in all contexts, in marine and inland waters, covering men and women involved in all activities, from preparation, capture fishing, to processing and trade. See SSF Guidelines (n 17), sections 2.1, 2.2.

some decades ago.²⁰ As such, it marks an evolutionary and forward-looking instrument in international fisheries law²¹ by following a human rights-based approach (HRBA)²² and an ecosystem approach to fisheries (EAF).²³ In contrast to the traditional focus on fisheries management that most international fisheries law instruments have, the SSF Guidelines are attentive to the need to recognise, protect and empower individuals, vulnerable groups, including children, women, indigenous peoples and migrants, across the entire SSF supply and value chains. The SSF Guidelines contribute to building a global safety net for SSF, strengthening the application of existing international obligations and guidance that support SSF sustainability.

The SSF Guidelines are voluntary and non-binding, but does this mean they have no normative significance or legal force? This article explores this question, reflecting on SSF from an international law standpoint.²⁴ It is structured in three main parts, following this introduction. The first part clarifies the reasons why SSF have been poorly addressed by international law, and the growing importance given to SSF by the international community until the adoption of the SSF Guidelines. The second part explores the legal status of the guidelines and argues, based on international legal theories of soft law, that the SSF Guidelines have normative significance and legal force for three main reasons: (i) the legitimate process of development and adoption of the guidelines, (ii) the normative content of the provisions, and (iii) their law-making

20 What if the SSF Guidelines had been developed at that time? Reflections and alternative approaches to thinking of potential different outcomes that historical momentum brings to an international fisheries law instrument has been stimulated by Barnes in his intriguing chapter. See R Barnes, 'Alternative histories and futures of international fisheries law' in Molenaar and Caddell (eds), (n 2), 25–50.

21 This has been explained elsewhere in J Nakamura and F Hazin, 'Assessing the Brazilian Federal Fisheries Law and Policy in light of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries' (2020) 113 *Marine Policy* 1–10, at pp. 2–3.

22 SSF Guidelines (n 17), sections 1.2, 3(3.1). For a more specific analysis of the HRBA in the context of fisheries and SSF, see A Song and A Soliman, 'Situating human rights in the context of fishing rights: Contributions and contradictions' (2019) 103 *Marine Policy* 19–26.

23 In various ways, an EAF can be applied to SSF, one fundamental way being the contributions of sustainable fisheries to provision of ecosystem services and poverty alleviation. See D Diz, E Morgera and M Wilson, *Sharing the Benefits of Sustainable Fisheries: From Global to Local Legal Approaches to Marine Ecosystem Services for Poverty Alleviation*, Science Policy Working Paper No. 7 (Strathclyde Centre for Environmental Law & Governance, University of Strathclyde, 2017).

24 Very few scholars have explored the links between SSF and international legal obligations. For example, see E Morgera and M Ntona, 'Linking small-scale fisheries to international obligations on marine technology transfer' (2018) 93 *Marine Policy* 295–306.

effect at international, regional and national levels of governance. The third part presents some conclusions, highlighting challenges in the SSF Guidelines' implementation and posing questions for future research.

Legal Reflections on Small-Scale Fisheries

At least two key points deserve special attention when reflecting on SSF from an international law perspective. The first concerns the reasons why the law of the sea regime, for so long, has had so little to say about SSF. The second point is how the contemporary law of the sea regime has evolved to accommodate the emerging needs of the international community in relation to SSF. The next subsections explore these two key points.

Small-Scale Fisheries in International Law

As SSF are a very diverse, dynamic and evolving fisheries subsector,²⁵ States have not agreed on a single international definition of 'small-scale fisheries'.²⁶ International law has not established minimum criteria for what SSF entails as a concept,²⁷ but for the purpose of the present analysis it is sufficient to understand SSF as generally characterised by the relevant literature. As such,

25 Scientific literature has been contributing to clarifying the meaning of SSF and outlines the importance of a flexible and open-ended definition that is not stringent to fixed and objective parameters such as the size of the boat, gross tonnage capacity, etc. See H Smith and X Basurto, 'Defining small-scale fisheries and examining the role of science in shaping perceptions of who and what counts: A systematic review' (2019) 6 *Frontiers in Marine Science* 1; Y Rosseau *et al.*, 'Defining global artisanal fisheries' (2019) 108 *Marine Policy* 103634.

26 Due to the peculiar characteristics of SSF and the multiple diverse legal definitions provided by countries, no single universal definition has been set out by international law yet. See SSF Guidelines (n 17), section 2.4.

27 Morgera and Nakamura contributed to this by identifying, within the definition of 'peasants' (which include persons engaged in artisanal and small-scale fishing) as established by the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, two parameters, namely, 'reliance on family labour or other non-monetized way of organizing labour' and 'special dependency on and attachment to the land'. They also emphasize the similar considerations that can be depicted from the criteria used for definition of 'indigenous peoples', 'traditional communities' and 'local communities' in so far as small-scale fishing communities self-identify with these concepts. See E Morgera and J Nakamura, 'Shedding a light on the human rights of small-scale fishers: Complementarities and contrasts between the UNDROP and the Small-Scale Fisheries Guidelines' in M Alabrese *et al.* (eds), *The United Nations' Declaration on Peasants' Rights* (Routledge, London, 2022), available at <https://ssrn.com/abstract=3850133>; accessed 10 December 2021.

SSF are considered vulnerable, marginalised by governments and societies, whilst fundamental to coastal and rural communities as contributors to food security and nutrition, jobs creation, cultural practices, traditional and local knowledge, and livelihoods, in both developing and developed countries.²⁸ SSF operations include pre-harvesting activities (e.g., preparatory works on fishing gears), post-harvesting activities (e.g., processing and selling) on land and/or floating facilities, as well as capture fisheries and small-scale aquaculture in both inland waters (e.g., rivers and lakes) and marine waters in and around the coast.²⁹ As SSF generally involve hand fishing or use of non-motorised vessels (e.g., canoes) or low-power motorised vessels of up to 12 metres length overall,³⁰ marine capture SSF are mostly found in coastal waters,³¹ over which States exercise sovereignty and control. The management of marine capture SSF is nevertheless influenced by the LOSC, which governs and provides rules for all maritime zones.

Coastal States and archipelagic States exercise primary authority in their waters and they have the competence to legislate and regulate the exploitation of fishery resources. This power, however, is not absolute. The LOSC limits States' discretion on certain fisheries management requirements in the EEZ (e.g., total allowable catch, best scientific evidence for adoption of management measures).³² It also requires all States to protect and preserve the marine environment in all maritime zones.³³ The fisheries-dedicated provisions of the LOSC are more detailed with respect to fisheries management in the EEZ,³⁴ and few provisions of the LOSC relate to SSF. Article 61(3) requires coastal States to determine conservation and management measures in the EEZ, taking into account the '*economic needs of coastal fishing communities*' (emphasis

28 See (n 5) and (n 6).

29 FAO, *The State of World Fisheries and Aquaculture 2020: Sustainability in Action* (FAO, Rome, 2020) 7, 37–39, 99.

30 Motorised vessels in the length overall class of less than 12 m, mostly undecked, represented 82 percent of all motorised fishing vessels in the world in 2018. See *ibid.*, at p. 44.

31 SSF activities are not expected in areas beyond national jurisdiction due to their low technical capacity to reach distant waters. See D Pauly, 'A vision for marine fisheries in a global blue economy' (2018) 87 *Marine Policy* 371–374, at p. 373.

32 LOSC (n 7). These requirements include the establishment of a total allowable catch (Art. 61(1)), adoption of conservation and management measures taking into account the best scientific evidence available (Art. 61(1)), promotion of the objective of optimum utilisation of living resources (Art. 62(1)), provision of giving other States access to the surplus of the allowable catch (Art. 62(2)).

33 *Ibid.* The requirements include the general obligation to protect and preserve the marine environment (Art. 192) and to take all measures to prevent, reduce and control pollution of the marine environment (Art. 194(1)).

34 *Ibid.*, Articles 55–75. See also Nakamura (n 9).

added).³⁵ This provision does not refer to the social, cultural, and historical values that are essential to small-scale fishing communities.³⁶ Articles 69(2)(a) and 70(3)(a) of the LOSC concern fishing access agreements between coastal States, respectively with land-locked States and geographically disadvantaged States, to exploit living resources in the coastal States' EEZ, taking into account 'the need to avoid effects detrimental to *fishing communities*' (emphasis added) of the coastal State.³⁷ While important, these provisions are limited to land-locked States and geographically disadvantaged States. The LOSC does not establish a similar requirement to consider the interests of 'other States' that fish in coastal States' EEZ. For these 'other States', the LOSC establishes a broad requirement – to have due regard to the rights and duties of the coastal State and to comply with the laws and regulations of such State³⁸ – without any special attention to affected fishing communities.

The LOSC does not impose any specific requirement on the territorial seas, which is relevant to SSF,³⁹ except in relation to fishery species that move across maritime zones, in and out the territorial seas, and that are multi-targeted by SSF and other fisheries subsectors. States Parties have the duty to cooperate for the conservation and management of these species.⁴⁰ Additionally, States have the general duty to protect the marine environment in any maritime zone, which contributes to the protection of fishery resources upon which SSF depend.⁴¹ In turn, Article 51 requires archipelagic States to recognise 'traditional fishing rights' in certain areas falling within archipelagic waters. There is no definition of 'traditional fishing' under the LOSC, but international case law has interpreted this term to encompass artisanal fishing.⁴² In addition to the LOSC, the human rights conventions limit the level of States discretion, as

35 LOSC (n 7), Article 61(3). In this connection, it is important to note that, while the LOSC establishes TACs in the EEZ, the UNFSA provides for stock-specific reference points when applying the precautionary approach, which is applicable to areas under national jurisdiction, including the EEZ and the territorial sea. See UNFSA (n 12), Articles 3(1), 5(c), 6(3)(4).

36 D Johnson, 'The values of small-scale fisheries' in D Johnson *et al.* (eds), *Social Wellbeing and the Values of Small-Scale Fisheries* (Springer, Cham, 2018).

37 LOSC (n 7), Articles 69(2)(a) and (4), 70(3)(a) and (5).

38 *Ibid.*, Article 58(3).

39 *Ibid.*, Articles 3–26, 46–54.

40 *Ibid.*, Articles 64–67.

41 *Ibid.*, Articles 192–196. The broad duty is to protect the marine environment in any maritime zone. This is in line with the SSF Guidelines (n 17), section 5.14.

42 *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award, 12 July 2016, Permanent Court of Arbitration (PCA), PCA Case No. 2013–19, para 798.

examined further below, in territorial waters by requiring States to respect, recognise and protect fundamental human rights of their nationals.⁴³ This means that States have the legal obligation to respect and protect human rights of small-scale fishers in all the respective national territories, being it on land or at sea.⁴⁴

Aside from a reluctance of States to accept restrictions on their authority, there is also a silo problem in international fisheries law, which has been historically disconnected from social issues⁴⁵ and environmental concerns.⁴⁶ The SSF Guidelines have helped to formally link these concerns, addressing the needs for environmental sustainability in fisheries, social development, protection of the rights of people dependent on fish for their livelihoods and food security, particularly their participation in co-managing resources.⁴⁷ Indeed, the SSF Guidelines cover a range of subjects other than fisheries management, shedding light on human rights, gender equity, sea safety, labour, trade, climate change, and sustainability.⁴⁸ This broad scope enables opportunities for a mutually supportive, coherent interpretation and application of multiple international law instruments relevant to SSF,⁴⁹ while fostering stakeholders' collaboration in contributing to SSF sustainability. These measures include, for example, the full realisation of human rights of SSF people (social aspect);⁵⁰ their contribution to sustainable use and conservation of fishery resources,

43 B Ratner, B Åsgård and E Allison, 'Fishing for justice: Human rights, development, and fisheries sector reform' (2014) 27(1) *Global Environmental Change* 120–130.

44 For a better understanding how existing international human rights instruments should be interpreted and applied in a mutually supportive manner, strengthening the protection of human rights of small-scale fishers, see Morgera and Nakamura (n 27).

45 For a thorough and broader analysis and discussion on this matter, see I Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, Oxford, 2018).

46 See Molenaar and Caddell (n 2); M Palma, M Tsamenyi and W Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff, Leiden, 2010); S Kaye, *International Fisheries Management* (Kluwer Law International, The Hague, 2001).

47 As pointed out by the UN Special Rapporteur on the right to food, Olivier De Schutter, in his report submitted to the UN General Assembly in 2012. See United Nations General Assembly (UNGA), *The Right to Food: Note by the Secretary-General*, UN Doc A/67/268, 8 August 2012, paras 42, 52–59.

48 See SSF Guidelines (n 17), sections 3.1, 6.12, 6.15, 6.16, 7.6, 8.2, 9.1.

49 Mutual supportiveness can be a powerful principle to guide international lawyers in interpreting and applying international legal instruments that are relevant and apply to the same context, but which contribute to it in different ways. See R Pavoni, 'Mutual supportiveness as a principle of interpretation and law-making: A watershed for the 'WTO-and-competing-regimes' debate?' (2010) 21(3) *European Journal of International Law* 649–679.

50 Morgera and Nakamura (n 27).

benefits from ecosystem services (environmental aspect);⁵¹ and the allocation of subsidies to support SSF sustainable development and the equitable sharing of benefits from trade in SSF products (economic aspect).⁵²

Developing the International Law on Small-Scale Fisheries

International legal developments relating to SSF have been primarily facilitated and promoted by the FAO, which is regarded as a key institution for international fisheries law-making and development.⁵³ The FAO's institutional practice is grounded on a *substantive* mandate for normative activities⁵⁴ provided by the FAO Constitution.⁵⁵ Fisheries are included among the topics subject to the FAO law-making.⁵⁶ In the case of the SSF Guidelines, the FAO has performed 'delegated law-making'⁵⁷ as requested by the UN General Assembly (UNGA).⁵⁸ The FAO has also facilitated the adoption of legally binding instruments by State members.⁵⁹ SSF have been more intensively addressed by the FAO from the early 1980s onwards, when COFI members have brought attention to SSF's importance to food production and nutrition, as well as their social and economic needs.⁶⁰ In 1984, fishworkers built a historical interna-

51 Diz, Morgera and Wilson (n 23).

52 A Schunbauer *et al.*, 'How subsidies affect the economic viability of small-scale fisheries' (2017) 82 *Marine Policy* 114–121.

53 J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, Cambridge, 2011) 220–236.

54 J Friedrich, 'Legal challenges of non-binding instruments: The case of the FAO Code of Conduct for Responsible Fisheries' in A von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (Springer, Heidelberg, 2010) 511–540, at p. 518.

55 FAO, *Basic Texts of the Food and Agriculture Organization of the United Nations* (FAO, Rome, 2017), FAO Constitution, Article 1(2)(3).

56 Pursuant to Article 1(1) of the FAO Constitution, *ibid.*, the term 'agriculture' includes fisheries.

57 As categorised by Johnstone in reference to the ability of international organisations to contribute law-making by delegation. See I Johnstone, 'Law-making by international organizations' in J Dunoff and M Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, Cambridge, 2013) 266–292, at p. 275.

58 This will be detailed further below as it is one of the key points contributing to the legitimacy of the SSF Guidelines' process of development and adoption.

59 In this respect, Johnstone sheds light on the fact that international organisations not only contribute to law-making through nonbinding instruments, but also through 'operational activities', as will be discussed further below. This amounts to the subsequent work of FAO in implementing the SSF Guidelines through assistance to State members. See Johnstone (n 57) at p. 275.

60 FAO, *Report of the Fifteenth Session of the Committee on Fisheries* (FAO Fisheries Report No. 302, Rome, 10–19 October 1983), paras 18, 69–85.

tional collaboration through the International Conference of Fishworkers and their Supporters, and a programme of action for the development of SSF was adopted at the FAO World Fisheries Congress on Fisheries Management and Development.⁶¹ This initiative influenced subsequent debates at COFI, which later emphasised the importance of integrated development programmes to enhance the quality of life of rural small-scale fishers⁶² and the need to protect and improve the socio-economic wellbeing of small-scale fishing communities affected by overfishing.⁶³ As a consequence of the growing significance of SSF, the 1995 Code of Conduct for Responsible Fisheries (CCRF)⁶⁴ specifically provides for SSF's recognition, protection of small-scale fishers' rights to a secure and just livelihood, and SSF's preferential access to traditional fishing grounds.⁶⁵

In turn, the 1995 UNFSA ascertained explicit consideration to artisanal and subsistence fishers in the Agreement's general principles and in respect of States Parties' duty to cooperate in establishing conservation and management measures for straddling and highly migratory fish stocks.⁶⁶ States Parties are also required to take into account the needs of fishing-dependent coastal communities when determining the nature and extent of participatory rights for new members of regional fisheries management organisations and/or arrangements (RFMO/As).⁶⁷ There are various other international legal developments relevant to SSF that occurred from 2000 onwards. SSF were explicitly mentioned in the UNGA resolutions on sustainable fisheries, which, for instance, encouraged States to consider SSF's special needs and include SSF stakeholders in the policy-making process.⁶⁸ Other guiding instruments relevant to SSF were adopted, notably on the progressive realisation of the right to

61 FAO, *Report of the Sixteenth Session of the Committee on Fisheries* (FAO Fisheries Report No. 339, Rome, 22–26 April 1985).

62 FAO, *Report of the Seventeenth Session of the Committee on Fisheries* (FAO Fisheries Report No. 387, Rome, 18–22 May 1987), para 61.

63 FAO, *Report of the Nineteenth Session of the Committee on Fisheries* (FAO Fisheries Report No. 459, Rome, 8–12 April 1991); FAO, *Report of the First Session of the Advisory Committee on Fisheries Research* (FAO Fisheries Report No. 571, Rome, 1998) 5.

64 FAO, Resolution 4/95: Code of Conduct for Responsible Fisheries (31 October 1995) [CCRF].

65 *Ibid.*, Articles 6.18, 7.2.2(b), 7.6.9, 8.11.3.

66 See (n 13); and UNFSA (n 12), Articles 5(i), 24(2)(b).

67 UNFSA (n 12), Article 11(d).

68 These developments in international fisheries law with respect to SSF were noted elsewhere. See Nakamura (n 9).

adequate food,⁶⁹ safety in decked fishing vessels of less than 12 metres length and undecked fishing vessels,⁷⁰ responsible governance of tenure,⁷¹ and finally the SSF Guidelines, on which the next part of this article is focused.

Legal Status of the Small-Scale Fisheries Guidelines

The SSF Guidelines are 'voluntary in nature' and considered soft law.⁷² States are not obliged *a priori* to implement the SSF Guidelines, and no State responsibility arises from non-compliance with this instrument. In principle, FAO members are morally obliged to implement the SSF Guidelines.⁷³ Many recommendations of the SSF Guidelines are qualified by the phrase 'in accordance with national legislation'.⁷⁴ This means that national legislation prevails over the SSF Guidelines' recommendations, unless stated otherwise in the legislation. FAO members are encouraged to align their national legislation and policies with the SSF Guidelines,⁷⁵ which may result in two main activities. One is assessing the alignment of existing national legislation with the recommendations of the SSF Guidelines,⁷⁶ potentially leading to legislative

69 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Rome, 127th Session of the FAO Council, November 2004).

70 Safety Recommendations for Decked Fishing Vessels of Less than 12 metres in Length and Undecked Fishing Vessels (London, 87th Session of the IMO Maritime Safety Committee, 12 to 21 May 2010; Geneva, 309th Session of the ILO Governing Body, November 2010; Rome, 29th Session of the FAO Committee on Fisheries, January 2011).

71 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Rome, 38th (Special) Session of the Committee on World Food Security, 22 May 2012).

72 SSF Guidelines (n 17), section 2.1.

73 S Jentoft, 'Walking the talk: Implementing the international voluntary guidelines for securing sustainable small-scale fisheries' (2014) 13(1) *Maritime Studies* 1–15, at pp. 2–3.

74 As provided in section 4.1 of the SSF Guidelines (n 17) and in many other recommendations therein.

75 As seen *infra*, Costa Rica has implemented the SSF Guidelines through the enactment of a decree that expressly provides the mandate for certain national authorities to implement the SSF Guidelines.

76 This could be carried out by government institutions, but also by SSF actors interested in such evaluation. For examples of studies that have conducted such assessment, see Nakamura and Hazin (n 21); Nakamura, Chuenpagdee and El Halimi (n 16); M Ariadno and F Amlina, 'An evaluation of the Indonesia law and policy on small-scale fisheries' (2016) 7 *Journal of Sustainable Development Law and Policy* 48–64.

reform.⁷⁷ Another is drafting and adopting new national legislation that specifically reflects the recommendations of the SSF Guidelines.⁷⁸ Executing such activities largely depends on States' will, their financial and technical capacity, resulting in different forms of the SSF Guidelines' implementation, as detailed below.⁷⁹

Notwithstanding their non-binding and voluntary nature, soft law instruments may have normative significance and legal force. Proponents of soft law attribute various legal consequences to soft law instruments,⁸⁰ often explaining these attributes in terms of the process of law creation, the substantive content of the provisions and its law-making effect. It is based on these three main attributes that the present article argues that the SSF Guidelines have normative significance and legal force. On international soft law more generally, Guzman and Meyer termed the concept of 'international common law' as non-binding rules and standards issued by non-State actors,⁸¹ through which States transfer soft law-making authority to non-State entities.⁸² Soft law can also be used to interpret legally binding rules and shape States' expectations on compliant behaviour.⁸³ As will be demonstrated, the SSF Guidelines serve these purposes and, like other FAO non-binding instruments,⁸⁴ have an under-recognised normative significance and legal force. The next subsections explain the legitimate process of the SSF Guidelines' development and adoption, the normative content of the provisions, and its law-making effect at various levels of governance.

77 This may result in amendments to existing legislation. See SSF Guidelines (n 17), section 4.2.

78 SSF Guidelines, *ibid*. The FAO has developed legislative guidance on how to legislate for SSF according to the recommendations of the SSF Guidelines. See FAO, *Legislating for Sustainable Small-Scale Fisheries: A Guide and Considerations for Implementing Aspects of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication in National Legislation* (FAO, Rome, 2020).

79 See *infra* on the recognition of the SSF Guidelines and its implementation by countries.

80 D Shelton, 'Introduction: Law, non-law and the problem of soft law' in D Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, Oxford, 2003) 1–18; A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007) 10–13, 212–229; J Brunnée and S Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge, 2010) 46–52; A Guzman and T Meyer, 'International soft law' (2010) 2 *Journal of Legal Analysis* 171–225; B Druzin, 'Why does soft law have any power anyway?' (2017) 7 *Asian Journal of International Law* 361–378.

81 Guzman and Meyer (n 80), at p. 201.

82 *Ibid.*, at p. 221.

83 *Ibid.*, at pp. 221–222.

84 See analysis of other FAO's non-binding instruments *infra*.

Legitimate Process of International Law-making

Legitimacy in international law-making processes can be explained on the basis of a long-established process led by a competent international actor and grounded on transparency, multi-stakeholderism, and a consensus-based outcome.⁸⁵ These elements were present in the process of development and adoption of the SSF Guidelines. In 2006, UNGA set out the mandate of the FAO to develop guidelines for enhancing SSF's contribution to poverty alleviation and food security.⁸⁶ The FAO executed this mandate by exercising its capacity to further develop the law within its own special field, in response to emerging needs and priorities.⁸⁷ In 2007, COFI's meeting agenda included a specific topic on social issues in SSF.⁸⁸ The debates on SSF intensified, leading to the first Global Conference on Small-Scale Fisheries in 2008.⁸⁹ COFI members expressed the need for developing guidelines for securing sustainable SSF in 2009,⁹⁰ and then approved the development of the guidelines in 2011.⁹¹ Subsequently, a broad consultative process took place through activities assisted by the FAO at international, regional and national levels, with a view to develop the expected instrument.⁹²

Boyle and McCall-Smith note that, in general, international organisations 'value the sense of legitimacy that *transparency* may help to convey' (emphasis

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- 85 A Boyle and K McCall-Smith, 'Transparency in international law-making' in A Peters and A Bianchi (eds), *Transparency in International Law* (Cambridge University Press, Cambridge, 2010) 419–435; W Benedek, 'Multi-stakeholderism in the development of international law' in U Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, Oxford, 2011) 201–210.
- 86 UNGA, Res 61/105 (8 December 2006) Sustainable fisheries, including through the 1995 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, and related instruments, UN Doc A/RES/61/105, paras 12, 97.
- 87 Boyle and Chinkin (n 80), at p. 127.
- 88 COFI members also welcomed the proposal of Norway for a broad-based international conference devoted to SSF. See FAO, *Report of the Twenty-Seventh Session of the Committee on Fisheries* (FAO Fisheries Report No. 830, Rome, 2007).
- 89 FAO, *Report of the Global Conference on Small-Scale Fisheries – Securing Sustainable Small-Scale Fisheries: Bringing Together Responsible Fisheries and Social Development* (FAO Fisheries and Aquaculture Report No. 911, Rome, 2009).
- 90 FAO, *Report of the Twenty-Eighth Session of the Committee on Fisheries* (FAO Fisheries and Aquaculture Report No. 902, Rome, 2009).
- 91 FAO, *Report of the Twenty-Ninth Session of the Committee on Fisheries* (FAO Fisheries and Aquaculture Report No. 973, Rome, 2011), para 56.
- 92 FAO, *Update on the Development of International Guidelines for Securing Sustainable Small-Scale Fisheries*, FAO Doc COFI/2012/7 (2012), paras 8–23.

added).⁹³ The authors argue that participation, deliberation and accessibility of information bring transparency to international law-making processes. For them, a participatory process that involves States and non-State actors can foster effectiveness in multilateral negotiations and strengthen the role of international law-making institutions in global governance.⁹⁴ Deliberation, in turn, supports proceedings that allow participants to raise their opinions and actively contribute to the discussions.⁹⁵ Accessibility of information is embedded in the whole process, thus ensuring adequate information is made available and clear to stakeholders involved in the process.⁹⁶ Complementing these notions of a legitimate process of international law-making, Benedek explains that ‘multi-stakeholderism’ is part of ‘innovative forms of governance’, which allow the decision-making process to benefit from and be founded on a wider knowledge base and expertise.⁹⁷ In Chinkin’s words, the openness of governmental proceedings can also assure ‘democratization of international law-making’.⁹⁸

All these elements of transparency, through participation, deliberation, accessibility of information, and multi-stakeholderism, were embedded in the process of making and adopting the SSF Guidelines. A transparent and legitimate process of developing the SSF Guidelines was strengthened because the process was largely driven by civil society organisations (CSOs) and included the participation of small-scale fishers’ representatives. As SSF have been historically overlooked by governments, it would have been very difficult to develop an international instrument for SSF if it were to rely solely on States’ will.⁹⁹ In contrast to the CCRF, as largely influenced by political objectives,¹⁰⁰ the SSF Guidelines were the outcome of a multi-stakeholder process, which involved more than four thousand stakeholders overall, and which took special account of the needs and interests of small-scale fishers.¹⁰¹ This multi-stakeholder

93 Boyle and McCall-Smith (n 85), at p. 420.

94 *Ibid.*, at pp. 422–428.

95 *Ibid.*, at pp. 428–430.

96 *Ibid.*, at pp. 431–434.

97 Benedek (n 85), at p. 202.

98 C Chinkin, ‘Normative development in the international legal system’ in Shelton (ed) (n 80), 21–42, at p. 29.

99 Voluntary instruments of international organisations often have been the alternative adopted by States to ‘transfer their sovereign powers to the international level’. See Friedrich (n 54), at p. 512.

100 *Ibid.*, at p. 519.

101 For a comparison between the participatory international law-making processes of the SSF Guidelines and the UNDROP, both of which characterises local communities’

process led to the instrument's acceptance by States through consensus. The draft SSF Guidelines were analysed in a two-session consultation in 2013 and 2014¹⁰² by 87 FAO members and other stakeholders.¹⁰³ Following this, section 6.18 (on the protection of human rights in situations of armed conflict) was agreed upon with a footnote attached.¹⁰⁴ The SSF Guidelines were fully endorsed by consensus of 110 COFI members, representing all regions of the world, at the 31st Session of COFI in June 2014.¹⁰⁵

Boyle and Chinkin observe that 'where law is made through a long-established process that gives effect to State *consent* there is less likelihood of it being deemed illegitimate' (emphasis added).¹⁰⁶ The consensus-based adoption of the SSF Guidelines means that no formal opposition by the FAO members was made to the adoption of this instrument. As such, like other FAO guidelines agreed by consensus, the SSF Guidelines carry substantial weight from international support given through FAO members. The larger consensus based on a multi-stakeholder process results, according to Benedek, 'increased *legitimacy* of the normative outcome and more effective implementation' (emphasis added).¹⁰⁷ Consensus therefore strengthened the SSF Guidelines' legitimacy and the international recognition of its authoritative status, on the basis of which subsequent State practice is more likely to be consistent, and States are less likely to object to the instrument's implementation.¹⁰⁸ Additionally, the benefits of a wider expertise and different world views in the guidelines' multi-stakeholder process have ascertained a broader support by diverse actors of the international community overall.

As such, the participatory, transparent, and inclusive process relating to the SSF Guidelines is a concrete example of how international law-making

engagement in the development of an international instrument, see Morgera and Nakamura (n 27).

102 FAO, *Chairperson's Report of the Technical Consultation on International Guidelines for Securing Sustainable Small-Scale Fisheries* (Thirty-first Session of Committee on Fisheries, FAO Doc COFI/2014/Inf.10 (2014), para 1.

103 *Ibid.*, paras 2–4.

104 It deals with the protection of human rights and dignity of SSF stakeholders in situations of armed conflict and their participation in decision-making on related matters that affect them.

105 See FAO (n 18).

106 Boyle and Chinkin (n 80), at p. 25.

107 Benedek (n 85), at p. 202.

108 Boyle and Chinkin (n 80), at p. 160. Chinkin also noted the significant factor of non-State actors' participation in international negotiations, which can keep 'informed pressure upon governments to comply with the expectations articulated, thus ensuring greater weight for the agreed statements'. See Chinkin (n 98), at pp. 28–29.

processes can be expanded to benefit not only States, but also non-State actors, including local stakeholders. For Brunnée and Toope, law-making arising from a diversity of participants is grounded on an interactional theory of law, according to which '[w]hen norms [including soft law] are rooted in shared understandings and adhere to the conditions of legality, they generate *fidelity*' (emphasis added).¹⁰⁹ As a product of multi-stakeholderism, the ssf Guidelines are explicitly addressed to multi-stakeholders. In the ssf Guidelines, the emphasis is placed on ssf actors, described as 'fishers, fish workers, their communities, traditional and customary authorities, and related professional organizations and csos'.¹¹⁰ The legitimate process of making the ssf Guidelines has, therefore, strengthened its normative significance and legal force, while propelling more fidelity and potentially more effectiveness in its application,¹¹¹ enhancing its likelihood of being implemented by a wider range of stakeholders. Turning now to the substantive content of the ssf Guidelines, the next subsection explores the normativity in the ssf Guidelines' text.

Normative Content of the ssf Guidelines

The ssf Guidelines' text is essentially declaratory ('recognize'), hortatory ('encouraged') and programmatic ('should') in character, but this does not mean that the guiding-text carries no legal substance or lacks normative content.¹¹² It is worth noting the position of Cotula with respect to the FAO guidelines on responsible governance of tenure,¹¹³ who considered them as 'inherently normative', 'not merely describ[ing] phenomena', and as 'provid[ing] pointers on what states and/or non-state actors *should* do'.¹¹⁴ Also, accepting a wider normative authority for soft law instruments, Redgwell observes that the degrees of 'compliance pull and relative normativity' are common to both hard law and

¹⁰⁹ Brunnée and Toope (n 80), at p. 51.

¹¹⁰ ssf Guidelines (n 17), section 2.3.

¹¹¹ The implementation of the ssf Guidelines has advanced and generated legal effects at various levels of governance, as discussed further below. Challenges remain, however, as highlighted in the conclusion of this article.

¹¹² The framed recommendations might have facilitated the adoption of this instrument by consensus. See Morgera and Nakamura (n 27). Chinkin also points to the accommodation of '[d]ifferent cultural and economic structures and interests', which the subjective application of soft law language may convey. See Chinkin (n 98), at p. 41.

¹¹³ FAO (n 71).

¹¹⁴ L Cotula, 'International soft-law instruments and global resource governance: Reflections on the Voluntary Guidelines on the Responsible Governance of Tenure' (2017) 13 *Law Environment and Development Journal* 115–133, at p. 124.

soft law instruments.¹¹⁵ In other words, the form and title (voluntary, legally binding or not) of an international instrument may not necessarily reflect the normative character of its content. The SSF Guidelines' guiding text often assembles what has already been agreed to and adopted by States in existing legally binding instruments, as detailed further below. The difference is that the SSF Guidelines specify the applicability of those rules to the SSF context. Moreover, the SSF Guidelines complement the CCRF, which already reflects 'provisions that may be or have already been given binding effect by means of other obligatory legal instruments'.¹¹⁶ By supporting national, regional and international initiatives on human rights, responsible fisheries and sustainable development,¹¹⁷ the SSF Guidelines can be considered as part of subsequent State practice following the LOSC, as alternatively performed by States in the place of cumbersome tasks of amending or modifying existing international legally binding instruments.¹¹⁸ As such, the SSF Guidelines contribute to the evolution of the law of the sea regime. They function as soft law that guides States on their interpretation of international instruments,¹¹⁹ similar to the CCRF and the International Plan of Action (IPOA) on illegal, unreported and unregulated (IUU) fishing, which arguably cover lacunas in and strengthen the law of the sea regime overall.¹²⁰

The explicit reference to hard law instruments,¹²¹ especially human rights treaties, strengthens the normative content of the SSF Guidelines by making the obligations of States Parties to the relevant treaties more apparent, restating and reinforcing such obligations in the SSF context.¹²² As Boyle argues,

115 C Redgwell, 'International soft law and globalization' in B Barton *et al.* (eds), *Regulating Energy and Natural Resources* (Oxford University Press, Oxford, 2006) 89–107, at pp. 92–94. See also Guzman and Meyer (n 80), at pp. 192–197.

116 CCRF (n 64), Article 1.1.

117 SSF Guidelines (n 17), at Preface and section 4.1.

118 I Buga, 'Between stability and change in the Law of the Sea Convention: Subsequent practice, treaty modification, and regime interaction' in D Rothwell *et al.* (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 47–68.

119 Guzman and Meyer (n 80), at p. 221.

120 DM Sodik, 'Non-legally binding international fisheries instruments and measures to combat illegal, unreported and unregulated fishing' (2008) 15 *Australian Journal of International Law* 129–164.

121 SSF Guidelines (n 17), sections 3.1(2), 6.12, 6.15, 8.2, 9.1.

122 On the legal status of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Barnaba argued that 'since the UNDRIP restates right and principles already existing and emerging in the general body of international human rights law ..., its provisions must be respected by the UN Member States to the extent they are consistent with States human rights obligations under legally binding human rights instruments'. See S Barnabas, 'The legal status of the United Nations Declaration on the Rights of Indigenous

'although of themselves these [soft law] instruments may not be legally binding, their interaction with related treaties may transform their legal status into something *more*' (emphasis added).¹²³ And even in the absence of a direct linkage between a soft law instrument and a binding one, Weiss suggests that the placement of the former 'within the context of a complex international regime may *enhance compliance*' (emphasis added).¹²⁴ In the case of the SSF Guidelines, there is interaction between the guidelines text and many legally binding instruments which are explicitly mentioned therein, namely, the LOSC, the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹²⁵ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹²⁶ the Convention on the Rights of the Child (CRC),¹²⁷ and the UN Framework Convention on Climate Change (UNFCCC).¹²⁸ The SSF Guidelines also refer to 'relevant conventions of the International Labour Organization (ILO),¹²⁹ which include the Revised Migration for Employment Convention (ILO Convention 97),¹³⁰ the Abolition of Forced Labour Convention (ILO Convention 105),¹³¹ the Indigenous and Tribal Peoples Convention (ILO Convention 169),¹³² the Worst Forms of

Peoples (2007) in contemporary international human rights law' (2017) 6(2) *International Human Rights Law Review* 242–261, at p. 256.

- 123 A Boyle, 'Some reflections on the relationship of treaties and soft law' (1999) 48(4) *International and Comparative Law Quarterly* 901–913, at p. 906. In the words of Boyle and Chinkin, 'once soft law begins to interact with binding instruments its non-binding character may be lost or altered'. See Boyle and Chinkin (n 80), at p. 160.
- 124 E Weiss, 'Conclusions: Understanding compliance with soft law', in D Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, Oxford, 2003) 535–556, at p. 537.
- 125 International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, in force 3 January 1976) 993 *UNTS* 3 [ICESCR].
- 126 Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979, in force 3 September 1981) 1249 *UNTS* 13 [CEDAW].
- 127 Convention on the Rights of the Child (New York, 20 November 1989, in force 2 September 1990) 1577 *UNTS* 3 [CRC].
- 128 United Nations Framework Convention on Climate Change (New York, 9 May 1992, in force 21 March 1994) 1771 *UNTS* 107.
- 129 SSF Guidelines (n 17), section 6.12.
- 130 Convention concerning Migration for Employment Convention (Revised) (ILO Convention 97) (Geneva, 2 July 1949 in Geneva, in force 22 January 1952) 120 *UNTS* 70.
- 131 Convention concerning Abolition of Forced Labour Convention (ILO Convention 105) (Geneva, 25 June 1957, in force 17 January 1959) 320 *UNTS* 291.
- 132 Convention concerning Indigenous and Tribal in Independent Countries (ILO Convention 169) (Geneva, 27 June 1989, in force 5 September 1991) 1650 *UNTS* 383.

Child Labour Convention (ILO Convention 182),¹³³ and the Work in Fishing Convention (ILO Convention 188).¹³⁴

By recalling the need of States to comply with CEDAW, the SSF Guidelines reinforce the obligation of States Parties to that treaty to modify, in the SSF context, social and cultural patterns of conduct for eliminating prejudices and practices based on the idea of inferiority or superiority of either sex or stereotyped roles.¹³⁵ Applying this provision to SSF is a fundamental step for securing equal and fair participation of women in decision-making processes for SSF related policies.¹³⁶ Another example is the right of the child to education, the recognition of which is part of the obligation of States Parties to the CRC. The CRC also requires States Parties to encourage regular attendance at school,¹³⁷ similar to the SSF Guidelines recommendations,¹³⁸ emphasising the protection of children's rights in SSF. Many other provisions of the ICESCR are also reflected in the SSF Guidelines,¹³⁹ recalling provisions that recognise the human rights to just and favourable conditions of work, fair remuneration, safe and healthy working conditions,¹⁴⁰ social security,¹⁴¹ adequate standard of living,¹⁴² education,¹⁴³ and cultural rights.¹⁴⁴

With respect to labour issues, the SSF Guidelines call upon States to eradicate forced labour,¹⁴⁵ the suppression of which the parties to ILO Convention 105 are obliged to undertake.¹⁴⁶ The elimination of forced labour for children and ensuring decent employment of youth, as stated in the SSF Guidelines,¹⁴⁷ recall obligations of States Parties to ILO Convention 182.¹⁴⁸ ILO Convention 188,¹⁴⁹

133 Convention concerning Worst Forms of Child Labour (ILO Convention 182) (Geneva, 17 June 1999, in force 19 November 2000) 2122 UNTS 161.

134 Convention concerning Work in Fishing (ILO Convention 188) (Geneva, 14 June 2007, in force 16 November 2017) 54755 UNTS 1.

135 CEDAW (n 126), Article 5.

136 SSF Guidelines (n 17), section 8.2.

137 CRC (n 127), Article 28.

138 SSF Guidelines (n 17), section 6.15.

139 *Ibid.*, sections 6.12, 6.3, 6.2, 6.14, 3(3.1)(2).

140 ICESCR (n 125), Article 7.

141 *Ibid.*, Article 9.

142 *Ibid.*, Article 11.

143 *Ibid.*, Article 13.

144 *Ibid.*, Article 15.

145 SSF Guidelines (n 17), section 6.13.

146 ILO Convention 105 (n 131), Article 1.

147 SSF Guidelines (n 17), sections 6.13, 6.14.

148 ILO Convention 182 (n 133).

149 ILO Convention 188 (n 134).

despite its few ratifications,¹⁵⁰ is also particularly relevant to workers in SSF, establishing duties on States Parties, fishing vessel owners and fishers to ensure occupational safety and health, which the SSF Guidelines call for.¹⁵¹ Other two noteworthy ILO treaties concern migrants and indigenous peoples, groups to which the SSF Guidelines draw special attention.¹⁵² The former group is subject to ILO Convention 97,¹⁵³ which requires parties to, *inter alia*, apply adequate treatment to immigrants lawfully within its territory, including remuneration, accommodation and social security.¹⁵⁴ The latter group falls under the scope of ILO Convention 169,¹⁵⁵ which recognises indigenous and tribal peoples' right to 'enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination'.¹⁵⁶

Multiple States are parties to those treaties, which makes their influence almost global. At the time of writing, the status of the key agreements is as follows:¹⁵⁷ LOSC (168 parties), ICESCR (171 parties), ILO Convention 105 (176 parties), ILO Convention 182 (187 parties), CEDAW (189 parties), CRC (196 parties), and UNFCCC (197 parties). The EU is not a party to the ICESCR, ILO Conventions 105 and 182, CEDAW and CRC, but all EU Member States are parties.¹⁵⁸ Yet, there remain a few States non-parties to those treaties. The classic example is the United States (US), which is not a party to the LOSC, ICESCR, CEDAW and CRC (the last three having been only a signatory). Certain coastal developing countries also raise concern in being non-parties to treaties that the SSF Guidelines refer. Colombia, El Salvador, Eritrea, Israel, Peru, Turkey and

150 Among the 18 countries that have ratified this treaty are some coastal developing countries, namely, Angola, Argentina, Congo, Morocco, Namibia, Senegal, South Africa and Thailand.

151 SSF Guidelines (n 17), section 6.12.

152 *Ibid.*, sections 3(3.1)(1)(2)(3), 5.4, 6.2, 6.10.

153 ILO Convention 97 (n 130).

154 *Ibid.*, Article 6.

155 ILO Convention 169 (n 132).

156 *Ibid.*, Article 3(1).

157 The number of parties to each treaty was counted through consultation at the UN Treaty Collection website and the ILO NORMLEX website on 10 December 2021. See UN, 'United Nations Treaty Collection' available at https://treaties.un.org/Pages/Home.aspx?clang=_en; accessed 10 December 2021; ILO, 'NORMLEX – Information System on International Labour Standards' available at <https://www.ilo.org/dyn/normlex/en/f?p=1000:12001; accessed 10 December 2021>.

158 Ahmed and Butler nevertheless note that the 'efforts by the EU to comply with [international human rights law] obligations common to all EU member states would signal a firmer commitment to comply'. See T Ahmed and I de Jesús Butler, 'The European Union and human rights: An international law perspective' (2006) 17(4) *European Journal of International Law* 771–801, at pp. 911–915.

Venezuela, for instance, are not parties to the LOSC. Non-parties to the ICESCR include Malaysia, Mozambique, Saudi Arabia and some of the so-called small-island or big-ocean States: Comoros, Cook Islands, Cuba, Kiribati, Micronesia, Nauru, Niue, Palau, Samoa, Singapore, St. Kitts and Nevis, St. Lucia, Tonga, Tuvalu and Vanuatu. Additionally, Niue and Palau are not parties to CEDAW and ILO Convention 105. Non-parties to ILO Convention 105 also include Marshall Islands, Micronesia, Myanmar, Nauru, Tonga, Tuvalu and Viet Nam.

For all those coastal developing countries, the SSF Guidelines arguably play a standard-setting role, representing key international standards for SSF's sustainability, human rights and gender equality in small-scale fishing communities.¹⁵⁹ As such, the SSF Guidelines have more than a complementary role (to the CCRF and other existing international fisheries law instruments); they may be the primary guiding instrument from which subsequent State commitments can emerge. Where, by consent, some States have endorsed the SSF Guidelines as COFI members, they have arguably confirmed their political commitment, at least indirectly, in sustainably managing fisheries, protecting economic, social and cultural rights, women's rights and prohibiting forced labour in the SSF context.¹⁶⁰ As such, those States could still implement the SSF Guidelines and address those matters independent of being non-parties to the LOSC, ICESCR, CEDAW and ILO Convention 105. Reaching consensus on adopting a non-binding instrument is indeed less difficult as monitoring and enforcing States' compliance are less stringent, if at all in place.¹⁶¹ As mentioned, consensus elevates the degree of legitimacy and validity of soft law instruments. Therefore, the parts of the SSF Guidelines concerning human rights, labour rights and gender equality are, in fact, the international standard of reference for States which are non-parties to those relevant treaties, but which have supported, at least through a political commitment as COFI members, the endorsement of the SSF Guidelines. These States include the Cook

159 Here it is worth noting Guzman and Meyer's theory of 'international common law', which argues that soft law would in this case allow States, favouring greater specificity in rules, to bind even those States not engaging with the international institution. See Guzman and Meyer (n 80), at p. 204.

160 This is, of course, to the extent that SSF issues are concerned and as addressed in the SSF Guidelines. There remains the gap of being a party to the relevant treaty, which applies to a much broader community and not only to the SSF context.

161 For this reason, States are more willing to accept such instruments and agree on more detailed and precise provisions, as noted in Boyle and Chinkin (n 80), at pp. 214–216. See also the 'loss avoidance theory', where the authors explore compliance in soft law and understand that the reduced losses from non-compliance to soft law instruments can actually make them realise added value to their commitments. See Guzman and Meyer (n 80), at pp. 192–197.

Islands, Cuba, Eritrea, Malaysia, Micronesia, Mozambique, Palau, Peru, Samoa, Saudi Arabia, Singapore, Tonga, Turkey and Venezuela.¹⁶² For these countries, the SSF Guidelines function as the consensus-based international standard, which can promote widespread, consistent State practice and good faith commitment by the States concerned.¹⁶³ The extent to which the SSF Guidelines are capable of influencing the concerned States' practice, according to international human rights standards in SSF, requires analysis that goes beyond the scope of this manuscript.¹⁶⁴

The normative content of the SSF Guidelines is also strengthened by the references to long-established non-binding instruments, which have authoritative legal status in international law (e.g., CCRF¹⁶⁵ and UNDRIP¹⁶⁶). Consequently, the SSF Guidelines trigger multi-stakeholders' engagement to mutually supportive interpretation and implementation of the relevant instruments for the benefit of SSF sustainability.¹⁶⁷ While the references to treaties and other forms of guidance strengthen the SSF Guidelines' normative significance, this does not mean that the SSF Guidelines contain all relevant standards for SSF.¹⁶⁸ That is no different from previous FAO guidelines, which have

162 FAO, 'Governing and Statutory Bodies Web site' available at <http://www.fao.org/unfao/govbodies/gsbhome/committee-fi/en/>; accessed 4 June 2021.

163 Boyle and Chinkin (n 80), at p. 127.

164 An ongoing book project is aiming to address these questions through various case studies. In preparation for the book collection, the Too Big To Ignore (TBTI) research network published an electronic version of some case studies. See V. Kerezi *et al.* (eds), *Unlocking Legal and Policy Frameworks for Small-Scale Fisheries: Global Illustrations* (TBTI Global, 2020), available at <http://toobigtoignore.net/unlocking-legal-and-policy-frameworks-for-ssf-global-illustrations/>; accessed 1 October 2021.

165 See W Edeson, 'Closing the gap: The role of soft international instruments to control fishing' (1999) 20(1) *Australian Yearbook of International Law* 83–104, at p. 103.

166 See Barnabas (n 122).

167 See Pavoni (n 49).

168 In this respect, it is worth noting De Schutter's comments on the cross-reference to certain international instruments, notably the UN Guiding Principles on Business and Human Rights, the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, and the ILO Conventions 182 (on the worst forms of child labour) and 138 (on the minimum age for admission to employment and work). Reference to these instruments would have facilitated their interpretation and application, clarifying, for instance, the responsibility of business enterprises to respect human rights in the SSF context; considering social, economic and environmental impact studies prior to the implementation of large-scale development projects; and facilitating gainful and decent employment of youth. The distinction between youth and children was also not considered in the final text of the SSF Guidelines, as noted by De Schutter. See SSF Guidelines (n 17), sections 3(3.1)(1), 5.10, 6.14, 6.15; De Schutter (n 47), at pp. 2–3. De Schutter also suggested referencing General Comment Nr. 7: The right to adequate housing: forced

been complemented by technical documents and supplementary materials.¹⁶⁹ The SSF Guidelines have, in turn, the unique characteristic of being a fisheries instrument embedded in a HRBA.¹⁷⁰ This approach sheds light on the importance of applying the international human rights regime to SSF and fosters the connection between international fisheries law instruments and human rights law. Opportunities for collaboration in the implementation of international law instruments relevant to sustainable SSF may therefore involve the FAO *with* the UN Office of the High Commissioner for Human Rights (OHCHR),¹⁷¹ as well as with other institutions such as the ILO, International Maritime Organization, World Trade Organization, and UNFCCC, which are referred to in the SSF Guidelines.

With respect to constraints in the text of the SSF Guidelines, there is limited coverage of conservation and environmental issues, which are dealt with from a duty-bearers perspective. That is, focusing on small-scale fishers' responsibilities to avoid environmental impacts by harmful, illegal and irresponsible fishing practices,¹⁷² rather than explicitly referring to small-scale fishers' right to a clean, sustainable, and healthy environment, as recently recognised as a human right by the UN Human Rights Council (UNHRC).¹⁷³ The SSF Guidelines also lack reference to the Convention on Biological Diversity (CBD) and

evictions (Article 11(1)) of the Committee on Economic, Social and Cultural Rights (UN Doc E/1998/22, Annex IV); and the Basic Principles and Guidelines on Development-Based Evictions and Displacement (UN Doc A/HRC/4/18, Annex 1).

169 Harrison (n 53), at p. 214.

170 This is reflected in emphasizing small-scale fishers as 'benefit-holders of the social development, security and safety, which is the State's responsibility to deliver'. Additionally, the SSF Guidelines help to translate international human rights obligations into 'action-points that specialised managers and decision-makers are expected to implement'. See Morgera and Nakamura (n 27).

171 The OHCHR and FAO have already been working together on the implementation of the SSF Guidelines. See FAO, *Introducing the Advisory Group of the Global Strategic Framework in support of the implementation of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (FAO, Rome, 2020), available at <http://www.fao.org/3/ca8803en/CA8803EN.pdf>; accessed 10 December 2021.

172 See SSF Guidelines (n 17), sections 1.1(d), 3(3.1)(10), 5.10, 5.14, 7.5. See also Morgera and Nakamura (n 27).

173 United Nations Human Rights Council (UNHRC), Res 48/13 (5 October 2021) Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, UN Doc A/HRC/48/L.23/Rev.1. See also the UN Framework Principles on Human Rights and the Environment, presented by Special Rapporteur John H. Knox, UNGA, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Note by the Secretariat*, UN Doc A/HRC/37/59, 24 January 2018.

decisions of its bodies,¹⁷⁴ the definition of an EAF provided by the FAO,¹⁷⁵ and clear guidance on careful engagement with traditional knowledge holders.¹⁷⁶ Another limitation in the SSF Guidelines is the inconsistent use of terms that are not fully aligned with international human rights standards, as suggested by De Schutter,¹⁷⁷ particularly with respect to free, prior and informed consent (FPIC). However, while FPIC would have set out a higher standard for the SSF Guidelines,¹⁷⁸ the reference to 'equity' (in addition to 'equality') therein brings value to its text, linking the HRBA with the 'equity' dimension of an ecosystem approach.¹⁷⁹ Equity is part of the EAF, which recognises the importance of

174 Only a single subsection on responsible and sustainable refers to 'aquatic biodiversity'. Reference to the CBD and its decisions would be particularly relevant in the sections of the SSF Guidelines that address benefit-sharing from responsible management of fisheries, the role of indigenous peoples to restore, conserve, protect and co-manage aquatic ecosystems, and in informing responsible local governance and sustainable development processes. See SSF Guidelines (n 17), sections 5.1, 5.5, 6.2, 11.6.

175 FAO defines an EAF as an approach that 'strives to balance diverse societal objectives, by taking into account the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries'. See FAO, *The Ecosystem Approach to Fisheries* (FAO Technical Guidelines for Responsible Fisheries No. 4, Suppl. 2, Rome, 2003). Cross-reference to the Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem would have added value to the text of the SSF Guidelines. See Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem (Reykjavik, Conference on Responsible Fisheries in the Marine Ecosystem, 1–4 October 2001); S Garcia *et al.*, *The Ecosystem Approach to Fisheries: Issues, Terminology, Principles, Institutional Foundations, Implementation and Outlook* (FAO, Fisheries Technical Paper No. 443, Rome, 2003).

176 As noted by Morgera and Nakamura, the safeguards concerning impact assessment, consultation and benefit-sharing with respect to engagement with traditional knowledge-holders are not addressed in the SSF Guidelines. See Morgera and Nakamura (n 27).

177 Instead of 'gender equality', 'equality and non-discrimination', FPIC, 'forced eviction', 'sanitation', 'right to an adequate diet', the SSF Guidelines refers to 'gender equality and equity', 'equity and equality', 'active, free, effective, meaningful and informed participation', 'arbitrarily evicted', 'basic sanitation' and 'nutritional rights'. On 'restitution, indemnity, just compensation and reparation', De Schutter noted these could be misinterpreted as optional rather than a human right. De Schutter also recommended replacing 'eradication of hunger and poverty' with 'realization of the right to an adequate standard of living, including the right to adequate food and to freedom from hunger'. See SSF Guidelines (n 17), sections 3(3.1)(4)(5)(6), 5.9, 5.11, 6.2, 7.7, 10.5; De Schutter (n 47), at pp. 2–4.

178 Morgera and Nakamura (n 27).

179 As Morgera explains, this is one of the key dimensions of an ecosystem approach, entailing a decentralised and social process that takes due account of the rights and interests of local communities. See E Morgera, 'The ecosystem approach and the precautionary principle' in E Morgera and J Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (Edward Elgar, Cheltenham, 2017) 70–80.

balancing societal goals and addressing the human element through participatory and equitable processes.¹⁸⁰

Based on the legitimate process of development and adoption of the ssf Guidelines and its normative content, the ssf Guidelines arguably purport a hybrid legal nature. While it stands as a 'formally non-binding instrument', due to the formal multi-stakeholder process of law-making, it can also be interpreted as being 'non-formally binding' as it reinforces existing international obligations and their applicability to the ssf context. As such, States may not be formally bound by the ssf Guidelines, but they are bound by the treaties they are parties to and have an obligation to apply them in the ssf context. The third reason grounding the ssf Guidelines' normative significance and legal force is the ability of this instrument to generate law-making effects, influencing legal and policy developments at international, regional and national levels, as examined next.

Law-making Effects at Various Levels of Governance

Soft law instruments, like treaties, may influence State practice and mobilise States' consistent and general response.¹⁸¹ Druzin argues that the compliance pull of soft law instruments may stem from 'network effects' pushing actors towards a single standard.¹⁸² As such, soft law can 'exert significant adoption and compliance pressure' when underpinned by these network effects.¹⁸³ The more a legal standard is applied, the higher its inherent value becomes. For Druzin, a significant degree of power of soft law instruments derives from their potential in allowing actors to coordinate around common unified standards, bring clarity,¹⁸⁴ and that robust network-effect pressures can elicit *continued* adoption.¹⁸⁵ This understanding resonates with Brunée and Toope's interactional theory, according to which '[t]he hard work of building obligation begins at law-making stage, as do the foundations for compliance.'¹⁸⁶ Law-making and compliance questions are 'best seen as located on a continuum',¹⁸⁷ which begins

180 C De Young, A Charles and A Hjort, *Human Dimensions of the Ecosystem Approach to Fisheries: An Overview of Context, Concepts, Tools and Methods* (FAO Fisheries Technical Paper No. 489, Rome, 2008). See also FAO, *A How-to Guide on Legislating for an Ecosystem Approach to Fisheries* (FAO EAF-Nansen Project Report No. 27, Rome, 2016), at Components 4–7.

181 Boyle and Chinkin (n 80), at p. 215.

182 Druzin (n 80), at p. 364–368.

183 *Ibid.*, at p. 367.

184 *Ibid.*

185 *Ibid.*, at p. 369.

186 Brunée and Toope (n 80), at p. 98.

187 *Ibid.*, at p. 98.

with a legitimate law-making process grounding the legal compliance pull and then continues to be grown and maintained. This continuity was identified in the participatory and multi-stakeholder process driving the development and adoption of the SSF Guidelines as well as the Guidelines' subsequent and ongoing implementation. Additionally, the SSF Guidelines call upon States to establish and promote local, national, regional, and global institutional structures, linkages and networks for achieving policy coherence and cross-sectoral collaboration.¹⁸⁸ SSF stakeholders are called upon to promote collaboration among their professional associations and to establish networks and platforms for exchange of knowledge and experiences.¹⁸⁹ Legitimate representatives of small-scale fishing communities are to be involved in the development and application of implementation strategies for the SSF Guidelines.¹⁹⁰ As such, the SSF Guidelines foster continuous network effects, as reflected in various initiatives taken worldwide, corresponding to good practices for securing sustainable SSF.¹⁹¹

Similar law-making effects can be observed in other FAO voluntary instruments. On the FAO International Guidelines for the Management of Deep-Sea Fisheries in the High Seas,¹⁹² Korseberg argued that 'the law-making effect of these guidelines stems from their identification of the typical sets of measures that States are expected to take when engaging in fishing activities in the deep seas.'¹⁹³ This law-making effect has improved the degree of clarity and predictability of States obligations whilst also limiting the discretion of States with respect to their deep-sea fishing duties. This has informed the content of the due diligence obligation relating to deep-sea fisheries on the high seas.¹⁹⁴ Lugten, in turn, submitted that the four FAO IPOAs respectively on sharks,

188 SSF Guidelines (n 17), section 10.5.

189 *Ibid.*, section 10.6.

190 *Ibid.*, section 13.5.

191 In various countries around the world, good practices in SSF have contributed to their sustainability and resonated with one or more recommendations of the SSF Guidelines. Experiences from Uruguay, Senegal, Nepal, Myanmar, Bangladesh, Caribbean countries, Madagascar, Mozambique and Southeast India were reported in L Westlund and J Zelasney (eds), *Securing Sustainable Small-Scale Fisheries: Sharing Good Practices from Around the World* (FAO Fisheries and Aquaculture Technical Paper No. 644, Rome, 2019). See also A Graham and A D'Andrea, *Gender and Human Rights in Coastal Fisheries and Aquaculture. A Comparative Analysis of Legislation in Fiji, Kiribati, Samoa, Solomon Islands, Tonga and Vanuatu* (Noumea, Pacific Community, 2021).

192 International Guidelines for the Management of Deep-Sea Fisheries in the High Seas (Rome, FAO Technical Consultation, August 2008).

193 L Korseberg, 'The law-making effects of the Deep-Sea Fisheries Guidelines' (2018) 67(4) *International and Comparative Law Quarterly* 801–832, at pp. 830–831.

194 *Ibid.*, at pp. 830–831.

fishing capacity, seabirds and IUU fishing are soft law ‘with hidden teeth’, given that many elements of marine sustainability enshrined therein have been implemented by States through customary law practice.¹⁹⁵ For Erikstein and Swan, the FAO Voluntary Guidelines for Flag States Performance could be used ‘as a basis for setting *binding* requirements in national law or guiding procedures at national and regional levels’ (emphasis added).¹⁹⁶ Kuemlangan *et al.* analysed the UNFSA and the CCRF, demonstrating how the ‘provisions of two high-level instruments trickle down into management approaches and tools’, including fisheries controls on catch, gears, targeted species, fishing areas and financial incentives.¹⁹⁷ There is nothing to prevent the SSF Guidelines generating similar effects as well. The SSF Guidelines can promote change in the behaviour of States and non-State actors, potentially leading to the practical implementation of the SSF Guidelines’ provisions at the national level. Its trickling down effect may be reflected not only in fisheries management approaches and tools, but also in policy and legal instruments on other subjects (i.e., human rights, environmental conservation, labour), which the SSF Guidelines cover.

Work led by the FAO in implementing the SSF Guidelines represents concrete evidence of what Johnstone referred to as ‘*hardening* of soft law through operational activities’ (emphasis added).¹⁹⁸ These activities may trigger ‘reactions from affected governments’ followed by discourses that ‘can cause soft law to harden’.¹⁹⁹ As such, one of the consequences of involving States and non-State actors in the law-making process and implementation of the SSF Guidelines²⁰⁰ is that these activities have the potential to influence governments in better dealing with SSF issues. This can serve to ‘harden’ the SSF Guidelines. The FAO has been supporting the implementation of the SSF Guidelines through a programme and a strategic framework,²⁰¹ and reporting

195 GL Lugten, ‘Soft law with hidden teeth: The case for a FAO International Plan of Action on Sea Turtles’ (2006) 9 *Journal of International Wildlife Law and Policy* 155–173.

196 K Erikstein and J Swan, ‘Voluntary Guidelines for Flag State Performance: A new tool to conquer IUU fishing’ (2014) 29 *International Journal of Marine and Coastal Law* 116–147, at p. 146.

197 B Kuemlangan *et al.*, ‘Integrative policy and legal instruments, approaches and tools: Fisheries and biodiversity conservation’ in S Garcia, J Rice and A Charles (eds), *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Co-Evolution* (John Wiley & Sons, Chichester, 2014) 166–180, at pp. 171–177.

198 Johnstone (n 57), at p. 275.

199 *Ibid.*

200 Benedek (n 85), at p. 209.

201 FAO, *Global Strategic Framework in Support of the Implementation of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security*

on the progress achieved at subsequently held COFI sessions. In 2020, the FAO showcased several activities that have contributed to raising awareness on the SSF Guidelines, strengthening the science-policy interface, empowering stakeholders, and supporting the Guidelines' implementation around the world.²⁰² SSF were also taken into account in legal guidance developed for an EAF,²⁰³ supplementary guidelines to the CCRF,²⁰⁴ and legal guidance specifically on how to legislate for sustainable SSF.²⁰⁵ More recently, COFI endorsed a declaration that promotes policies supporting and recognising the contribution of SSF to food security, employment and income, improving SSF data collection systems, and supporting the SSF access to multi-scale markets, including through the SSF Guidelines' implementation.²⁰⁶

The influence of the SSF Guidelines in the years following their adoption can be seen in the UNGA Resolution A/RES/70/1 on the 2030 Sustainable Development Agenda, which addresses SSF among its 17 Sustainable Development Goals (SDGs). Specifically, SDG 2.3 aims to 'double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers' and SDG 14b refers to providing 'access for small-scale artisanal fishers to marine

and Poverty Eradication (FAO, Rome, 2020), available at <http://www.fao.org/3/ca7737en/CA7737EN.pdf>; accessed 1 October 2021.

- 202 FAO, *Small-Scale and Artisanal Fisheries: Progress on Implementing the SSF Guidelines since the Thirty-Third Session of COFI in 2018*, FAO Doc COFI/2020/Inf.12 (December 2020).
- 203 This guidance provides for a set of 17 EAF components, which include broadening stakeholder participation and ensuring transparency in fisheries management, planning and conservation. See FAO (n 180); FAO, *A Diagnostic Tool for Implementing an Ecosystem Approach to Fisheries through Policy and Legal Frameworks* (FAO, Rome, 2021).
- 204 These include, for example, the 2017 Voluntary Guidelines for Catch Documentation Scheme, which highlight the needs and special requirements of SSF under catch documentation schemes, and the 2019 Voluntary Guidelines on the Marking of Fishing Gear, which provide more detailed information on how such markings should be made suitable to SSF, stressing the special requirements of SSF in implementing a system of gear marking consistent with the guidelines, including the 'assessment of risk and feasibility'. See Voluntary Guidelines on Catch Documentation Schemes (Rome, 40th Session of the FAO Conference, July 2017), section 1.6; Voluntary Guidelines on the Marking of Fishing Gear (Rome, 32nd Session of the FAO Committee on Fisheries, 9–13 July 2018), sections 67–70. See also *Safety at Sea for Small-Scale Fishers* (FAO, Rome, 2019).
- 205 FAO, *Legislating for Sustainable Small-Scale Fisheries – A guide and considerations for implementing aspects of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication in national legislation* (FAO, Rome, 2020).
- 206 FAO, *2021 COFI Declaration for Sustainable Fisheries and Aquaculture*, FAO Doc COFI/2020/2.3 (January 2021), para 9.

resources and markets'.²⁰⁷ Other UNGA Resolutions on Sustainable Fisheries also explicitly mention SSF, as I have described in another publication.²⁰⁸

In 2017, the UNGA proclaimed 2022 as the International Year of Artisanal Fisheries and Aquaculture (IYAFA),²⁰⁹ for which the FAO has been serving as lead agency. The FAO developed a Global Action Plan of IYAFA to guide activities and expected outcomes for 2022.²¹⁰ Another international legal development relevant to SSF was the adoption, in 2018, of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).²¹¹ This Declaration recalls the extensive work of the FAO on the right to food, tenure rights, access to natural resources and other peasants' rights, explicitly mentioning the SSF Guidelines.²¹² The UNDROP clearly applies to any person engaged in artisanal or small-scale agriculture, fishing, hunting or gathering, and handicrafts related to agriculture or a related occupation in a rural area.²¹³ As such, it affirms the recognition and protection of human rights of small-scale fishers and fish workers in the context of peasants, including their legitimate customary tenure rights to fishing grounds in inland waters, marine waters and adjacent land.²¹⁴ The UNDROP complements and strengthens the SSF Guidelines with respect to human rights and environmental safeguards in SSF.²¹⁵ Another important international initiative for SSF was the 2019 Plan of

207 UNGA, Res 70/1 (25 September 2015) Transforming our world: The 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1. Other SDGs are also relevant to SSF, and the growing attention given to the SDGs by scholars may incite legal developments in other international and regional legal regimes. See A Said and R Chuenpagdee, 'Aligning the Sustainable Development Goals to the Small-Scale Fisheries Guidelines: A case for EU fisheries governance' (2019) 107 *Marine Policy* 103599.

208 Nakamura (n 9).

209 UNGA, Res 72/72 (5 December 2017) Sustainable fisheries, including through the 1995 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, and related instruments, UN Doc A/RES/72/72, para 31.

210 FAO, *International Year of Artisanal Fisheries and Aquaculture 2022 Global Action Plan* (FAO, Rome, 2021), available at <https://www.fao.org/3/cb4875en/cb4875en.pdf>; accessed 29 November 2021.

211 UNHRC, Res 39/12 (28 September 2018) United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN Doc A/HRC/RES/39/12 and UN Doc A/C.3/73/L.30 (30 October 2018) [UNDROP].

212 *Ibid.*, preamble.

213 *Ibid.*, Article 1(2).

214 This argument is posited by Morgera and Nakamura in their comparative analysis of the SSF Guidelines and the UNDROP. See Morgera and Nakamura (n 27).

215 *Ibid.*

Action adopted by members of parliament from 50 countries²¹⁶ promoting the adoption of legislation that recognises, protects, sustains and empowers SSF, as well as the implementation of the SSF Guidelines.²¹⁷

At the regional level, numerous examples illustrate the influence of the SSF Guidelines in policy- and law-making. These examples include the 2015 Noumea Strategy adopted by the members of the Secretariat of the Pacific Community;²¹⁸ the 2015–2025 Integration Policy of Fisheries and Aquaculture adopted by the Central American Fisheries and Aquaculture Organization,²¹⁹ which informs that the SSF Guidelines will be taken into account in SSF planning of all countries of the Central American Integration System;²²⁰ the Model Law for Artisanal or Small-Scale Fishing agreed upon in 2016 by the Latin American and Caribbean Parliament;²²¹ the 2017 Regional Plan of Action for the Management of Fishing Capacity of the Association of the Southeast Asian Nations,²²² which included, amid the measures to address overcapacity, the application of areas reserved for traditional and SSF supported by co-management arrangements;²²³ the 2017 Jakarta Declaration on Blue Economy adopted by the Indian Ocean Rim Association member States, which reinforces

216 The list of participants at the 41st Annual Forum of Parliamentarians for Global Action, detailing the members of parliament by country, is available at https://www.pgaction.org/pdf/annual-forum/lop_en.pdf; accessed 29 September 2021.

217 Parliamentarians for Global Action, *Praia Plan of Action on Promoting Democratic Renewal and Inclusion, Safeguarding Human Rights, and Protecting the Oceans*, available at https://www.pgaction.org/pdf/annual-forum/Praia_Plan_of_Action_en.pdf?v=2; accessed 24 June 2021.

218 Secretariat of the Pacific Community (SPC), *A New Song for Coastal Fisheries, Pathways to Change: The Noumea Strategy* (Tuvalu, 11th Ministerial Forum Fisheries Committee Meeting, July 2015). For a comparison between this instrument and the SSF Guidelines, see A Song, P Cohen and T Morrison, 'Policies in harmony? Does the New Song agree with the Small-Scale Fisheries Guidelines?' SPC Traditional Marine Resource Management and Knowledge Information Bulletin #38 (June 2017).

219 Central American Fisheries and Aquaculture Organization (OSPESCA), *Política de Integración de la Pesca y la Acuicultura para el período 2015–2025* [Integration Policy of Fisheries and Aquaculture for the period 2015–2025] (approved by Resolution No. 10 of 25 March 2015, Ministerial Council for Fisheries and Aquaculture of the Central American Integration System).

220 *Ibid.*, Chapter VI(VI.5.6).

221 Latin American and Caribbean Parliament, *Model Law for Artisanal or Small-scale Fishing* (Panama City, 2017).

222 Association of the Southeast Asian Nations (ASEAN), *Regional Plan of Action for the Management of Fishing Capacity of the Association of the Southeast Asian Nations* (Singapore, 38th Meeting of the ASEAN Ministers on Agriculture and Forestry, October 2016).

223 *Ibid.*, section II(2.1)(3)(d).

SDG14.b as well as the encouragement of women and youth to support SSF;²²⁴ the 2018 Regional Plan of Action for SSF in the Mediterranean and the Black Sea²²⁵ adopted by various countries and the EU,²²⁶ comprising most of the membership of the General Fisheries Commission for the Mediterranean; the 2018 Protocol on Securing Sustainable Small-Scale Fisheries under the Caribbean Community Common Fisheries Policy²²⁷ endorsed by the Ministerial Council of the Caribbean Regional Fisheries Mechanism; and the 2019 Regional Fisheries Management Plan of the Fisheries Committee for the West Central Gulf of Guinea, which included the SSF Guidelines within its guiding framework.²²⁸ These regional legal developments are significant for SSF, because regional fishery bodies govern and provide advice (while RFMO/As decide) on the conservation and management of straddling fish stocks (e.g., salmon) and highly migratory fish stocks (e.g., species of sharks), which are simultaneously targeted by SSF and large-scale fisheries. If SSF are not adequately considered in these regional forums, the conservation and management measures of RFMO/As can have a negative impact on SSF that highly depend on the stocks concerned.

At the national level, the general and detailed regulation of marine capture SSF is a matter of coastal States and archipelagic States' discretion and relies on such States' willingness to develop adequate rules and legislation for SSF. National implementation of the SSF Guidelines is nevertheless fundamental

224 Indian Ocean Rim Association (IORA), Declaration of the Indian Ocean Rim Association on the Blue Economy in the Indian Ocean Region (Jakarta, Second IORA Ministerial Blue Economy Conference, 10 May 2017), paras 19, 20.

225 General Fisheries Commission for the Mediterranean, Ministerial Declaration on a Regional Plan of Action for Small-Scale Fisheries in the Mediterranean and the Black Sea (Malta, 26 September 2018).

226 Also in 2018, the European Commission issued a proposal to amend an EU regulation on the European Maritime and Fisheries Fund, which includes an entire section on 'small-scale coastal fishing' and an action plan for the development of profitable and sustainable small-scale coastal fishing, taking into account the SSF Guidelines. See European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund and repealing Regulation (EU) No 508/2014 of the European Parliament and of the Council, COM(2018) 390 final (Strasbourg, 12 June 2018).

227 Ministerial Council of the Caribbean Regional Fisheries Mechanism, Protocol on Securing Sustainable Small-Scale Fisheries (Montserrat, 12th Regular Meeting of the Ministerial Council of the Caribbean Regional Fisheries Mechanism, 18 May 2018).

228 Fisheries Committee for the West Central Gulf of Guinea, Fisheries Committee for the West Central Gulf's Regional Fisheries Management Plan (May 2018).

in ensuring compliance with international law.²²⁹ As a consequence of the poor governance of SSF in many countries,²³⁰ national fisheries legislation has generally fallen short in regulating this sector, failing to provide special attention to the needs of SSF.²³¹ One primary constraint is in understanding which rules should be observed by small-scale fishers living in a context of legal pluralism, that is, where SSF is governed and regulated by various systems of both traditional customary and statutory law, as well as informal legal values, cultural practices and other social local beliefs.²³² Jentoft and Bavinck flagged the importance of governments being ‘culturally attentive and respectful’ in a legal pluralism context, especially in relation to integrated coastal zone management and marine spatial planning, in order to ensure that SSF, their customary regimes and existing tenure rights are not negatively affected.²³³ These interventions, which often fall under a broader ‘blue economy’ or ‘blue growth’ banner, require caution from the governments in dealing with a range of factors (including SSF) that are susceptible to suffer negative impacts from the interventions.²³⁴ Caution can be operationalised through ensuring safeguards

229 For Redgwell, ‘[l]egislative implementation of a state’s international obligations performs a “delegated normativity” function, conditioning not only states but non-state actors’ behaviour as well. And ‘[i]t may also afford opportunities for non-state actors successfully to challenge national implementation of international law through judicial review and other mechanisms, national rules on standing and remedies permitting’. See Redgwell (n 115), at p. 101.

230 Unfortunately, this marginalisation persists in small-scale fisheries in many countries, despite the progress made with the adoption of the SSF Guidelines. Reliance on governments for a change in this scenario should not be the only resource. Rather, as Jentoft *et al.* have recently argued, the ‘engagement of small-scale fisher and fish workers in collective action is a crucial step towards empowering poor and vulnerable communities’. See S Jentoft *et al.*, ‘Working together in small-scale fisheries: harnessing collective action for poverty eradication’ (2018) 17(1) *Maritime Studies* 1–12. Especially in developing countries, where most SSF is located, the political, social and economic issues faced by these countries make it more difficult to overcome their low financial and technical capacity and address the challenges in SSF. See S Jentoft and A Eide (eds), *Poverty Mosaics: Realities and Prospects in Small-Scale Fisheries* (Springer, Dordrecht, 2011).

231 This highlights the need to better understand how current national fisheries laws address SSF. See Nakamura, Chuenpagdee and El Halimi (n 16).

232 S Jentoft and M Bavinck, ‘Reconciling human rights and customary law: Legal pluralism in the governance of small-scale fisheries’ (2019) 51(3) *Journal of Legal Pluralism and Unofficial Law* 271–291.

233 *Ibid.* See also SSF Guidelines (n 17), sections 5.4, 5.9.

234 P Cohen *et al.*, ‘Securing a just space for small-scale fisheries in the blue economy’ (2019) 6 *Frontiers in Marine Science* 1–8; M Keen, A Schwarz and L Wini-Simeon, ‘Towards defining the blue economy: Practical lessons from pacific ocean governance’ (2018) 88 *Marine Policy* 333–341.

such as the undertaking of impact assessments, consultation and benefit-sharing with holders of traditional knowledge, which the SSF Guidelines refer to. Such safeguards represent emerging standards for international human rights law applicable to SSF.²³⁵

National fisheries legislation may also not be sufficient in providing for the rights and duties of SSF people in accordance with the parameters set forth by the SSF Guidelines.²³⁶ This normative insufficiency is reflected in the lack of provisions that explicitly guarantee the protection of human rights and fishing rights of SSF people. One needs to identify and understand the applicability of national legislation for the benefit of SSF.²³⁷ In addition to fisheries legislation, many other legal instruments are relevant to SSF, including the constitution and legislation relating to human rights, environment, maritime safety, labour, etc.²³⁸ The interpretation, application and enforcement of these laws and regulations largely depend on understanding what these instruments mean.²³⁹ Efforts to better understand these instruments can be more difficult in developing countries, especially at the local level, and practically unrealistic in remote locations where many SSF people live. In these local and remote places, traditional and customary legal systems function alongside national statutory law. Indeed, they may be the prevailing system of law followed by local communities.²⁴⁰ Facing these legal challenges by improving the knowledge about what is the current law in force and relevant to a SSF context can ultimately help SSF people to better understand and claim their rights, authority and safeguards. Other stakeholders can also better contribute to tackling issues of poor development, unsustainable practices, and illegal fishing in

235 Morgera and Nakamura (n 27).

236 This is the case in Brazil. See Nakamura and Hazin (n 21).

237 See, for instance, the Brazil case study in *ibid.*

238 It may be useful to analyse existing studies that have furthered the knowledge about an EAF in national legal frameworks, as an EAF is enshrined in various sectoral legislation other than fisheries legislation. See J Nakamura, *Legislating for an Ecosystem Approach to Fisheries – Revisited: An Update of the 2011 Legal Study on the Ecosystem Approach to Fisheries*, FAO EAF-Nansen Programme Report No. 36 (FAO, Rome, 2021).

239 At the national level, the ‘inaction of political and judicial leaders in enforcing laws and regulations’ has been considered the most visible way by which lack of political will has been manifested in SSF governance. See B Carbonetti, R Pomeroy and D Richards, ‘Overcoming the lack of political will in small scale fisheries’ (2014) 44 *Marine Policy* 295–301, at p. 297.

240 As Jentoft and Bavinck put it, ‘[i]n small-scale fisheries, one often finds diverse systems of law, values and norms straddling both customary and statutory systems of governance.... Customary law, which frequently prevails at the local level, adds another dimension to explore’. See Jentoft and Bavinck (n 232), at p. 272.

SSF.²⁴¹ It is therefore crucial that people working in and with SSF know the laws applying to SSF in a country and understand how the SSF Guidelines can be useful and applied nationally.

The national law-making process deriving from an international law instrument differs depending on the country's legal, political and institutional system and how the government implements these instruments. Law-making within countries is complex, a context-based matter to analyse on a case-by-case basis.²⁴² Chuenpagdee and Jentoft examined several case studies from a transformative governance perspective and identified how the SSF Guidelines are not 'necessarily breaking new ground', but rather providing 'normative support to governance transformations that are already underway in many countries around the world' (emphasis added).²⁴³ A country's legal framework may already be sufficient for implementing the key recommendations of the SSF Guidelines. The recognition and protection of human rights, including special protection of women, are anchored in national constitutions,²⁴⁴ and other matters dealing with environmental protection, climate change and gender would be usually addressed in sectoral legislation. The question, however, is whether States have improved their normative legal and policy frameworks in reaction to the SSF Guidelines. In this respect, the scope of the present article and the limited space herein do not afford a detailed assessment of multiple countries. Highlighting some examples nevertheless contributes to understanding the law-making effects of the SSF Guidelines at the national level.

Costa Rica is known for being a 'champion' of the SSF Guidelines,²⁴⁵ having enacted a specific decree implementing the SSF Guidelines.²⁴⁶ The enactment of a national law endorsing the SSF Guidelines is concrete evidence of a country's commitment to applying this soft law instrument, which then becomes

241 See L Nahuelhual *et al.*, 'A social-ecological trap perspective to explain the emergence and persistence of illegal fishing in small-scale fisheries' (2020) 19(1) *Maritime Studies* 105–117; M Isaacs and E Witbooi, 'Fisheries crime, human rights and small-scale fisheries in South Africa: A case of bigger fish to fry' (2019) 105 *Marine Policy* 158–168.

242 For a case study assessing the alignment of a specific country's national fisheries and aquaculture policy in respect of the SSF Guidelines, see Nakamura and Hazin (n 21).

243 R Chuenpagdee and S Jentoft, 'Transforming the governance of small-scale fisheries' (2018) 17 *Maritime Studies* 101–115, at p. 104.

244 This has been identified in a recent rapid appraisal framework assessment of 25 countries across different regions of the world. See Nakamura, Chuenpagdee and El Halimi (n 16).

245 G Sabau, 'Costa Rica: A champion of the Small-Scale Fisheries Guidelines' in S Jentoft *et al.* (eds), *The Small-Scale Fisheries Guidelines: Global Implementation* (Springer, Cham, 2017) 355–378.

246 Decree No. 39195 MAG-MINAE-MTSS of 2015 (Costa Rica, 7 August 2015, published in the Gazette 22 September 2015).

hard law at the national level. The extent to which the national law reflects all the recommendations of the SSF Guidelines requires analysis in further detail. The national law may not have the same normative content of the SSF Guidelines, but may provide an enabling legal framework, which facilitates the SSF Guidelines implementation in a country. As such, the Costa Rican decree sets out the institutional arrangements for the implementation of the SSF Guidelines. It identifies the ministries in charge of implementing them,²⁴⁷ the duty of the competent authorities and institutions to incorporate the SSF Guidelines into the institutional operative plans and to allocate the necessary financial resources for the realisation of such activities,²⁴⁸ and promotes the SSF Guidelines' dissemination through websites of national authorities and institutions.²⁴⁹ Whether other national legislation in Costa Rica provides for the human rights of small-scale fishers, their conservation and management duties, and the duties of authorities and others to respect and protect small-scale fishers' rights, it is subject to further exploration.

Cabo Verde has recently enacted a legislative decree that explicitly provides that the fisheries management plan promotes and supports the SSF Guidelines. This decree acknowledges the important social, economic and professional role of SSF, particularly in more vulnerable fishing communities and in the economy of the country.²⁵⁰ The decree allows the fisheries management plan to provide for the delegation of shared management responsibilities to any local authority, including fishing communities for the management of artisanal fisheries.²⁵¹ Further, it reserves to artisanal and semi-industrial fishing vessels access to fishing in internal waters, archipelagic waters and territorial sea.²⁵² The decree also exempts subsistence fishing from licensing without prejudice to other forms of control, monitoring and access that may be in place for such types of fishing, in accordance with local customary or internal rules of operation and management of fisheries and their associations.²⁵³ Human rights and other social development considerations, however, are not addressed by the decree, but may be found in the country's constitution and other legislation.

²⁴⁷ *Ibid.*, Article 2.

²⁴⁸ *Ibid.*, Article 3.

²⁴⁹ *Ibid.*, Article 4.

²⁵⁰ Legislative Decree No. 2 defining the general regime for the management of fishing activities in national maritime waters and on the high seas (Cabo Verde, 16 March 2020), Article 13.

²⁵¹ *Ibid.*, Article 12(3).

²⁵² *Ibid.*, Article 63.

²⁵³ *Ibid.*, Article 83.

It is worth noting that countries with fisheries legislation enacted after the endorsement of the SSF Guidelines in 2014 do not necessarily have a better degree of conformity with them in substance.²⁵⁴ The 2016 Indonesian law for the 'protection and empowerment of fishermen, fish raisers and salt farmers'²⁵⁵ offers an interesting illustration. This law provides rules for a protection policy (through provisions for, e.g., security and safety guarantee, legal facility and aid)²⁵⁶ and for an empowerment policy (through provisions for, e.g., education and training, easy access to science, technology and information).²⁵⁷ However, other matters relevant to SSF (e.g., climate change and gender) may be regulated by other legislation through an EAF.²⁵⁸ This example signals how rich and vast the analysis of relevant legislation can be if all the social, economic and environmental aspects of sustainability in SSF are taken into account. In a different manner, the 2015 Marine Fisheries Code of Guinea does not explicitly mention the SSF Guidelines, but it provides that the Code is to be interpreted according with the applicable rules of international law, including those reflected in the LOSC. It also refers to the CCRF and the Port State Measures Agreement.²⁵⁹ Chile enacted a law in 2018 consistent with specific recommendations of the SSF Guidelines, creating a national institute dedicated to the sustainable development of artisanal fisheries and small-scale aquaculture.²⁶⁰ Chile has also recently modified the country's general fisheries and aquaculture law to include provisions promoting gender equality in the sector and a gender quota system to ensure adequate representation of women in the mentioned national institute.²⁶¹

The SSF Guidelines can also be implemented through national fisheries policies, plans and strategies, prior to or after amendment and legislative processes.²⁶² As part of the activities supported by FAO, certain countries have

254 Nakamura, Chuenpagdee and El Halimi (n 16).

255 Law of the Republic of Indonesia No. 7 on the Protection and Empowerment of Fishermen, Fish Raisers and Salt Farmers (Jakarta, 14 April 2016).

256 *Ibid.*, Articles 16–42.

257 *Ibid.*, Articles 43–58.

258 U Muawanah *et al.*, 'Review of national laws and regulation in Indonesia in relation to an ecosystem approach to fisheries management' (2018) 91 *Marine Policy* 150–160.

259 Law No. 2015/026/AN on the Marine Fisheries Code (Guinea, 14 September 2015), Article 27.

260 Law No. 21069 creating the National Institute of Sustainable Development of Artisanal Fisheries and Small-Scale Aquaculture, INDESPA (Chile, 15 February 2018).

261 Law No. 21370 modifying the legal bodies with a view to promote gender equity in the fisheries and aquaculture sector (Chile, 25 August 2021).

262 As indicated in an FAO report, Indonesia and South Africa have addressed SSF issues through the development of specific policies. See FAO (n 202), para 14.

been developing national plans of actions to implement the ssf Guidelines.²⁶³ Additionally, the ssf Guidelines have been explicitly mentioned in at least seven national fisheries policies. Liberia's Fisheries and Aquaculture Policy and Strategy of 2014 includes the principle of securing ssf access, referring to the ssf Guidelines as the basis for consultation for securing ssf access to resources and giving the resources stewardship responsibilities.²⁶⁴ Cambodia's Strategic Planning Framework for Fisheries (2015–2024) places the government's focus on supporting the practical and legal establishment of community fisheries as complementing the government's commitment to implement the ssf Guidelines, which is also reflected in the Cambodian Code of Conduct for Responsible Fisheries.²⁶⁵ The Cabo Verde's Blue Growth Letter of 2015 was developed according to the ssf Guidelines,²⁶⁶ and is aimed at fostering participatory governance,²⁶⁷ recognising the fisheries sector as pivotal to jobs, wealth creation, and the promotion of fishing communities' development.²⁶⁸ Malawi's National Fisheries and Aquaculture Policy supports the obligations of Malawi in relation to the ssf Guidelines.²⁶⁹ Uganda's National Fisheries and Aquaculture Policy of 2017 stresses that Uganda upholds the ssf Guidelines and supports the strengthening and facilitation of co-management institutions with clearly identified roles and responsibilities.²⁷⁰ The Seychelles' Fisheries Sector Policy and Strategy of 2019 includes the ssf Guidelines among the international instruments on which the fisheries and aquaculture sector should be developed.²⁷¹ Finally, the draft of India's National Fisheries Policy

263 Tanzania launched its plan in 2021. Namibia and Madagascar are in the process of developing their national plans. See FAO 'Launching workshop of the National Plan of Action (NPOA) – Towards Implementation of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication in Tanzania' (31 March 2021), available at <https://www.fao.org/voluntary-guidelines-small-scale-fisheries/news-and-events/detail/en/c/1394838/>; accessed 3 November 2021.

264 Fisheries and Aquaculture Policy and Strategy (Republic of Liberia, 2014), Chapter 2(2.6).

265 The Strategic Planning Framework for Fisheries: Update for 2015–2024 (Ministry of Agriculture, Forestry and Fisheries, Cambodia), Chapter 4.

266 Resolution No. 112/2015, Annex, Charter in Favour of the Promotion of the Blue Growth in Cabo Verde (Republic of Cabo Verde, 25 November 2015).

267 *Ibid.*, section 2.

268 *Ibid.*, section 4(4.1).

269 National Fisheries and Aquaculture Policy, (Malawi, Ministry of Agriculture, Irrigation and Water Development, June 2016), Chapter 1(1.3.8).

270 National Fisheries and Aquaculture Policy (Uganda, Ministry of Agriculture, Animal Industry and Fisheries, July 2017), Chapters 1, 5.

271 Seychelles Fisheries and Aquaculture Policy and Strategy (Seychelles, Ministry of Fisheries and Agriculture, 2019), p. 9.

of 2020²⁷² states the governments' commitment to make all efforts to implement the SSF Guidelines, taking into account the complexities and divisions within SSF, particularly subsistence fisheries.²⁷³

Indeed, the flexible nature of a soft law instrument such as the SSF Guidelines leaves States with a large margin of discretion to decide upon the best way to 'fit' the guidelines into their existing legal and policy frameworks. This characteristic of soft law instruments facilitates their adoption by States and implementation at national level. As seen above, some States have already taken action to reflect the SSF Guidelines in their national legislation and policies. The examples highlighted represent concrete evidence of State practice on law- and policy-making influenced by the SSF Guidelines, while being useful to other States in adequately reflecting the guidelines in their national legislation and/or policy. The variety of ways through which some States have done so offers options, based on which other States may take the most appropriate action (e.g., legislative and/or policy review and reform) pursuant to their particular national contexts.

Discussion and Conclusions

The legal force and normative significance of the SSF Guidelines cannot be understated.²⁷⁴ The SSF Guidelines contribute to the empowerment of a fisheries occupation and way of living, which sustain millions of livelihoods around the world. Moreover, the SSF Guidelines spur the awareness of the global community and the fisheries sector to observe and implement the HRBA and an EAF in securing sustainable SSF. The SSF Guidelines, despite being voluntary and non-binding, have legal force and normative significance for three main reasons: (i) the legitimate, participatory, transparent and multi-stakeholder process of development and adoption of the guidelines; (ii) the normative content of the Guidelines, reinforcing existing international obligations and their applicability in the SSF context; and (iii) the Guidelines' law-making effects, having influenced policy and legal developments at international, regional, and national levels.

The limitations identified in the final text of the SSF Guidelines pointed to the need for continuous work in building and strengthening the global safety

272 National Fisheries Policy of 2020 (draft, India, Ministry of Fisheries, Animal Husbandry & Dairying, unknown status regarding adoption).

273 *Ibid.*, Chapter 18.3.

274 As argued by Korseberg in respect of the FAO's Deep-Sea Fisheries Guidelines, (n 193).

net for SSF. There is also room for more research on how courts and arbitral tribunals have, if at all, used the SSF Guidelines in their judicial reasoning and decisions. Based on Edeson's analysis of international fisheries soft law instruments, the SSF Guidelines could also be considered as a source of law, like the CCRF, to which a 'judicial body might turn for evidence of the possible development of new norms or principles in the area of the international regime of fisheries'.²⁷⁵ This is a challenge given that the current practice of international courts has not favoured granting this authority to non-binding instruments for the purposes of adjudication. Whilst international environmental soft law instruments have often not been recognised by the International Court of Justice,²⁷⁶ certain international fisheries law instruments, such as the CCRF, have been found in the views of a few judges of the International Tribunal for the Law of the Sea.²⁷⁷ The Inter-American Court of Human Rights may be the best example of a court using soft law, including human rights declarations and biodiversity guidelines, as alternative sources for interpretation and reasoning in judicial decisions.²⁷⁸ It is therefore desirable, from the author's perspective, that international courts and arbitral tribunals make use of the SSF Guidelines in future decisions, especially human rights courts, as the SSF Guidelines are anchored in international human rights standards.

While the influence of international human rights standards on international fisheries instruments may be a promising new trend, those standards have been influential in other specialised areas of international law, such as international biodiversity law. As shown by Morgera,²⁷⁹ despite the qualifications made by parties to the CBD in respect of the CBD's associated

275 Edeson (n 165), at p. 103.

276 J Juste-Ruiz, 'The International Court of Justice and international environmental law' in N Boschiero *et al.* (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser, The Hague, 2013) 383–401, at pp. 399–400.

277 See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, *ITLOS Reports 2015*, Separate Opinion of Judge Paik, para 5; *The M/V "Virginia G" case (Panama/Guinea-Bissau)*, Judgment, *ITLOS Reports 2014*, Dissenting Opinion of Judge Ndiaye, paras 179, 185, 209.

278 See A Fodella, 'Indigenous peoples, the environment, and international jurisprudence' in Boschiero *et al.* (eds) (n 276), 349–364, at pp. 359–360; E Morgera, 'Dawn of a new day? The evolving relationship between the Convention on Biological Diversity and International Human Rights Law' (2018) 53(4) *Wake Forest Law Review* 691–712, at p. 709.

279 E Morgera, 'Against all odds: The contribution of the Convention on Biological Diversity to international human rights law' in D Alland *et al.* (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff, Leiden, 2014) 983–995.

guidelines,²⁸⁰ and their reluctance in accepting this guidance as more than best practices,²⁸¹ one should not expect States to act in a manner inconsistent with or against the opinions they take and hold in international negotiations that lead to the adoption of decisions by consensus.²⁸² A similar lesson can be applied to the SSF Guidelines. As the result of a multi-stakeholder collective effort, the SSF Guidelines are expected to be observed and implemented by at least the FAO COFI members that have endorsed them by consensus. The operational activities should also rely on multi-stakeholder collaboration through the FAO and other UN agencies and forums, as Morgera and Nakamura suggested with respect to UN human rights bodies.²⁸³

The main challenge faced in implementing the SSF Guidelines, as Jentoft highlighted, is the open-ended language of the text, which leads to broad, flexible and changing interpretation by users, as well as reliance on governments' will, susceptibility to power struggles, and dependence on effective interactive governance to facilitate stakeholder participation in implementing the instrument.²⁸⁴ The translation of the HRBA into practice is another underlying difficulty with the SSF Guidelines that Song and Soliman pointed out when clarifying the reciprocal relationship between fishing rights and human rights, which should be coherently respected in support of SSF sustainability.²⁸⁵ Understanding the extent to which national legal and policy frameworks can contribute to the implementation of the SSF Guidelines adds another layer of complexity.²⁸⁶ The identification of the relevant policy and legal instruments, their interpretation and analysis touch upon a broad range of subjects (e.g., human rights, environmental conservation, women protection) that the SSF Guidelines comprise, hence inter-sectoral collaboration is fundamental. However, as Chuenpagdee and Jentoft have noted, the 'often complex, multi-level, and fragmented nature of the governing system poses difficulties for their coordination, integration, and formulation of a holistic and inclusive policy agenda', as well as the asymmetrical power relations that hinder their meaningful interactions.²⁸⁷ For these authors, it is crucial to have coherence

280 Morgera noted the recent trend by CBD parties to further qualify the voluntary nature of the guidelines, limiting its ability to interfere in States' discretion when legislating at the national level. See Morgera (n 278), at p. 709.

281 As opposed to authoritative agreement on treaty interpretation. See *ibid.*, at p. 709.

282 Boyle and Chinkin (n 80), at pp. 213–215.

283 Morgera and Nakamura (n 27).

284 Jentoft (n 73), at pp. 6–15.

285 Song and Soliman (n 22).

286 See Nakamura and Hazin (n 21).

287 Chuenpagdee and Jentoft (n 243), at p. 104.

across the three governing modes (the meta-, second- and first- orders, as they classify), which respectively entail overarching governance principles, institutional design, and governing practices.²⁸⁸ The present article clarified some of the transformations occurring in the second-order, where law-making and enabling laws are the key drivers in implementing the ssF Guidelines.

Implementation of the ssF Guidelines largely depends on the technical and financial capacity of countries and resource mobilisation,²⁸⁹ which remain long-lasting implementation challenges in international fisheries law more broadly. Freestone flagged these challenges two decades ago, when the UNFSA, at that time not yet in force, was considered as a 'revolution' with 'enormous potential impact' on international fisheries law.²⁹⁰ Arguably, the 'revolution' now focuses on the potentially strong ability of soft law instruments to influence the behaviour of States and non-States actors towards better addressing issues of paramount concern to the international community. As far as the implementation of the ssF Guidelines is concerned, such outcomes have been advanced by certain countries, as shown in the examples of national laws and policies, and collectively through international and regional initiatives. The governments concerned may now face subsequent challenges of monitoring and enforcing the existing laws and ensuring policies are well implemented according to the ssF Guidelines.²⁹¹ It remains to be seen which enforcement measures countries are willing to put in place, if not already, to ensure implementation of the ssF Guidelines at various levels of governance. With the recent launching of IYAFSA in November 2021 and the expected activities and events for 2022, it is about time to showcase greater initiatives that strengthen the global safety net for ssF, ensuring that the net continues to expand and improve for securing sustainable ssF around the world.

288 *Ibid.*

289 FAO (n 202).

290 D Freestone, 'The challenge of implementation: Some concluding notes' in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, Oxford, 1999) 359–364, at p. 360.

291 Enforcement may also not depend on the non-binding form of an instrument as, for instance, trade sanctions could arguably be applied to enforce respect for and implementation of the ssF Guidelines. Bodansky recalled a similar point in his analysis of the legal status of the Paris Agreement, noting that trade sanctions are imposed by US law against States hindering the effectiveness of an international conservation programme, irrespective of the State committing a legal violation or not. See D Bodansky, 'The legal character of the Paris Agreement' (2016) 25(2) *Review of European, Comparative and International Environmental Law* 142–150, at p. 143.