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Sea Fisheries Cases before the European Court of Justice

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A. Introduction

1 Approximately 300 sea fisheries cases have been dealt with by the judicial institutions of the European Community (European (Economic) Community; European Communities, Court of Justice [ECJ] and Court of First Instance [CFI]). Their nature evolved in line with the changes *ratione loci* and *materiae* of the European Common Fisheries Policy ('CFP') and can be grouped around seven main issues. The first three issues deal with jurisdictional matters: Before the establishment of 200-mile zones, thereafter, and relating to the specific regime of coastal waters (Fisheries, Coastal). Two fundamental concepts underlying the European internal fisheries regime—the principles of equal access and relative stability—are dealt with next. The former means that, as a rule, Member States have equal access to each other's maritime waters. The latter underlies the allocation of fisheries resources between the Member States. The ensuing practice of so-called quota-hopping is dealt with next. A final issue concerns the integration of environmental aspects into the CFP. In many of these cases and when confronted, inter alia, with lacunae in Community fisheries law, international law has been relied upon (European Community and Union Law and International Law).

B. Jurisdictional Matters

2 EC legislation does not use the customary international law terminology for describing and defining Member States' maritime zones, but refers to the waters under sovereignty and jurisdiction of the Member States. These are not defined by EC legislation, but the former would seem to refer to the Member States' territorial seas, whereas the latter comprises the Member States' exclusive economic zones or fishery zones (Exclusive Economic Zone; Fishery Zones and Limits). The jurisdictional competence of the EC has been challenged both with regard to the high seas (Fisheries, High Seas) and the waters under jurisdiction of the Member States. The main reason was that certain Member States wanted to preclude large offshore waters from the application of the EC's access and conservation regime. In the Joined Cases 3/76, 4/76 and 6/76 Cornelis Kramer and others the ECJ held, after establishing the internal competence by reference to the European Economic Community ('EEC') Treaty and the 1972 Act of Accession, that it follows 'from the very nature of things that the rule-making authority of the Community ratione materiale also extends—in so far as the Member States have similar authority under public international law—to fishing on the high seas' (at para. 30/33 ; see also International Organizations or Institutions, Implied Powers).

C. Principle of Equal Access

3 Shortly after the concerted establishment of 200 nautical mile fishery zones in 1977, the ECJ pointed out that '[a]s institutional acts adopted on the basis of the Treaty, regulations apply in principle to the same geographical area as the Treaty itself' and 'any extension of the maritime zones automatically means the same extension of the area to which the regulation applies' (Case 61/77 *Commission v Ireland* paras 46, 50; Treaties, Territorial Application). The most important result of this judgment is the finding that EC fishermen have the right of equal access to the fishing grounds of all Member States, a right which flows from the strict application of the non-discrimination principle. In an analogous case, the United Kingdom ('UK') claimed that the Member States had an inherent power of regulating fishing in waters within their own jurisdiction, the extent of which at any given time depends on the rules of international law. Such interpretation limits EC fisheries measures to the Member States' coastal waters, extending maximum up to 12 nautical miles as measured from the baselines. The ECJ deduced from the relevant EC provisions and the above case-law that such competence was vested in the EC institutions (Case 32/79 *Commission of the European Communities v United Kingdom of Great-Britain and Northern Ireland*).

4 An important derogation to the principle of equal access is found in the authorization for Member States to restrict fishing in their coastal waters to fishing vessels that traditionally fish in those waters from ports on the adjacent coast (Fishing Boats). In doing so, the traditional fishing activities of other Member States need to be respected. The extension of this derogatory regime

until the end of 2012 has led to the view that the arrangements with respect to this zone take the form of a general non-discriminatory rule with objectively justified exceptions. Consequently, the principle of equal access would seem to apply in principle to the Member States' adjacent waters (Case C-91/03 *Kingdom of Spain v Council of the European Union* [Opinion Advocate General Tizzano]). Indirectly, the extent of the Member States' coastal waters stood central in Case C-146/89 *Commission of the European Communities v United Kingdom of Great-Britain and Northern Ireland*. The UK availed itself of its competences under international law to justify the use of ambulatory baselines, those defined from time to time by the Member States. Following the extension of its territorial sea from three to 12 miles in 1987, certain low-tide elevations would also constitute base-points for the drawing of the baselines from which the six and 12 mile fishery zones and limits would be determined. As a result, fishermen from other Member States would be excluded from the zones in which they had hitherto fished and non-habitual fishermen were to be excluded from areas where they were previously entitled to fish. The ECJ endorsed the view that the zones located in the UK's coastal waters between the six- and 12-mile limit were to be measured from the baselines as they existed on 25 January 1983, the date on which Council Regulation (EEC) 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources ([1983] OJ L 24, 1) ('Council Regulation 170/83') defining the fishing rights of other Member States in these zones, was adopted. The ECJ observed that '[i]nternational law merely authorizes States to extend their territorial sea to 12 nautical miles and, in certain circumstances, to draw the baselines used to measure the breadth of the territorial sea to and from low-tide elevations which are situated within that territorial sea' (Case C–146/89 Commission of the European Communities v United Kingdom of Great-Britain and Northern Ireland para. 25). Since the decision to make use of the options under the rules of international law was attributable solely to the UK, the latter had unilaterally altered the scope of the provisions in the regulation concerned (see also Unilateral Acts of States in International Law). This judgment touches on the delicate issue of national sovereignty and shows that Member States cannot invoke competences, which they have under international law, in order unilaterally to modify obligations incumbent upon them under EC law.

D. Principle of Relative Stability

5 The accession of Spain to the EEC constituted an important vehicle for change to the CFP. The prospect of the Spanish fishing armada invading the European waters greatly facilitated the adoption of an EC conservation policy in 1983. The main features of this policy are the yearly adoption of total allowable catches and the distribution of quotas among the Member States in conformity with the principle of relative stability. This allocation key was devised to appease the annual negotiations on quota allocations. It soon proved an instrument to conserve the EC status quo. In particular, Spain and Portugal challenged this concept, or rather their exclusion from it. The ECJ consequently specified its aim, function and scope. In Case 216/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd*, the aim of the system of national quotas was considered to 'assure each Member State relative stability of fishing activities for each of the stocks considered' (at para. 22). In conformity with the recitals of Council Regulation 170/83, relative stability was to be understood in the sense 'that stability … must safeguard the particular needs of regions where local populations are especially dependent on fisheries and related industries' (ibid). It follows that the aim of the quota system is 'to assure each Member State a share of the Community's total allowable catch, determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that member State benefited before the quota system was established' (ibid para. 23). Addressing the function of the notion of relative stability—establishing an equitable distribution of resources (see also Equitable Utilization of Shared Resources)—the ECJ noted that 'in order to make a fair allocation of available resources, particular account must be taken of traditional fishing activities, the specific means of areas particular dependent on fishing and its dependent industries and the loss of fishing potential in the waters of third countries' (ibid para. 22). It is for the Council, when allocating fishing opportunities among the Member States, 'to reconcile, for each of the stocks concerned, the interests represented by each Member State with particular regard to its traditional fishing activities and, where relevant, its local populations and industries dependent on

fishing' (Case C-4/96 *Northern Ireland Fish Producer's Organisation Ltd (NIFPO) and Northern Ireland Fishermen's Federation v Department of Agriculture for Northern Ireland* para. 48). As far as the scope of the notion of relative stability is concerned, the ECJ in Case 46/86 *Albert Romkes v Officier van Justitie for the District of Zwolle* specified that 'the requirement of relative stability must be understood as meaning that in that distribution each Member State is to retain a fixed percentage' and that this allocation key 'is to continue to apply until an amending Regulation is adopted in accordance with the procedure followed for Regulation No 170/83' (at para. 17). To date no such action has been taken. This solution is also applicable to the new Member States, including the allocation of external resources, in so far as their act of accession did not modify the existing EC rules (Joined Cases C-63/90 and C-67/90 *Portuguese Republic and Kingdom of Spain v Council of the European Communities* para. 44). For the purposes of assuring the principle of relative stability, the latter 'must be assured, for each Member State, for each of the stocks considered, that is to say for fish of a particular species located within a specified geographical area' (ibid para. 28; Fish Stocks). From Case C-179/95 *Kingdom of Spain v Council of the European Union*, it seems to follow that the quotas need to be uptaken in the specified geographical area. Finally, following applications from individual Spanish fishermen and fishery organizations after the Estai incident, the ECJ pointed out that 'the principle of relative stability concerns only relations between Member States, it cannot confer individual rights upon private parties' as it cannot be applied to a bilateral fisheries agreement concluded by the EC either, since the latter is concluded on the basis of international law 'to which the principle in question is unknown' (Case T-196/99 *Area Cova SA and others v Council of the European Union and Commission of the European Communities* paras 152, 151; see also Individuals in International Law). The allocation of quotas in case of bi- or multilateral fisheries agreements, on the other hand, remains the sole competence of the EC (Case C-120/99 *Italian Republic v Council of the European Union* para. 63). The ECJ has stressed that the quota system, and by implication the principle of relative stability, constitutes a derogation from the general rule of equal conditions of access to fishery resources (Case C–216/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd* para. 24). Nonetheless, the principle of equal access seems de facto to have been replaced by the principle of relative stability. The derogations to the equal access principle in the coastal regime have been renewed following each major review of the CFP. In contrast, no explicit temporal limit has been placed on the quota regime. The necessity of ensuring relative stability is found in the precarious economic state of the fishing industry and the dependence of certain coastal communities on fishing. Additionally, the temporary biological situation of stocks is invoked (recitals 16 and 17 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy [2002] OJ L 358/59). Because of these justifications, reference to the equal access principle merely seems to serve as a tool to keep the EC concept alive. This dual situation is exemplary for the indistinctness of the CFP regime.

E. Practice of Quota-Hopping

6 The registration of vessels stood central in a series of cases concerning quota-hopping. This refers to the situation where fishing vessels beneficially owned by the nationals of one Member State are registered under the flag of another Member State and fish for the quota allocated to the latter (Flag of Ships). Spanish nationals in particular resorted to this practice in order to circumvent the stringent conditions on quota allocation. The UK and Ireland sought to prevent this in their waters by enacting legislation laying down certain conditions, inter alia, as regards crew composition, residency and nationality of ships. The ensuing case-law shows that it is very difficult for Member States to adopt effective measures aimed at preventing quota-hopping. In Case 223/86 *Pesca Valentia Limited v Minister for Fisheries and Forestry, Ireland and the Attorney General*, it is true, the EC's exclusive competence in fisheries matters was held to relate to conservation, excluding rules on crew composition (Conservation of Natural Resources). But in Case 3/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd*, the ECJ held that Member States could determine which of their vessels could fish for their quotas only in so far as those conditions are not governed exclusively by EC legislation and provided that the criteria used were compatible with EC law. In Case 216/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd* it was specified that such measures are justified only if they are

suitable and necessary for attaining the aim of the quota system. Conditions designed to ensure a real economic link between a Member State and its vessels are justified provided that 'the purpose of such conditions is that the populations dependent on fisheries and related industries should benefit from the quotas' (at para. 26). Both in Case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others ('Factortame Case')* and C-246/89 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, the ECJ held that Member States' legislation conditioning the nationality of ships must be exercised consistently with EC law. The argument that the position should be otherwise because the 1958 Convention on the High Seas requires there to be a genuine link was rejected since 'that argument might have some merit only if the requirements laid down by Community law … conflicted with the rules of international law' (*Factortame Case* para. 16 and Case C–246/89 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* para. 14). In the *Factortame Case*, the nationality conditions relating to the owners, shareholders and directors of companies owning fishing vessels were held contrary to the freedom of establishment. The requirement for owners, directors, shareholders, managers, and operators to be resident in the Member State concerned, as well as the requirement for a fishing vessel to be managed, operated and controlled from within the UK was set aside on the same grounds.

F. Implementation

7 If implementation of the CFP is left to the Member States, and therefore rather diverse and giving rise to inequalities, the ECJ has repeatedly emphasized the importance of Member States strictly fulfilling their obligations in this respect and adopting adequate inspection measures. With these concerns in mind, it has tried to provide certain remedies. The court, for instance, has stated that 'the failure to comply with an obligation imposed by a rule of Community law is sufficient to constitute the breach, and the fact that such a failure had no adverse effects is irrelevant' (Case 209/88 *Commission of the European Communities v Italian Republic* para. 14). The burden of proof, and more specifically the rule that the Commission cannot rely on mere presumptions, has been alleviated by the fact that if the scale of figures adduced and their repetition demonstrate a failure to comply with monitoring obligations, this will be accepted by the ECJ (Case C-333/99 *Commission of the European Communities v French Republic* para. 35). The court will also evaluate whether particular penal or administrative sanctions adopted by Member States are adequate (Joined Cased C-418/00 and C–419/00 *Commission of the European Communities v French Republic* ; see also European Community and Union Law and Domestic [Municipal] Law). This does not mean that the Member States have lost all discretionary power in this respect, as indicated in a preliminary ruling where numerous questions arose on the relation between an EC fisheries regulation and the international law of the sea (Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp ['Poulsen Case']*). A Panamanian registered and flagged vessel, operated by Danish crew, had caught tonnes of salmon on the high seas in the North Atlantic. While under way to Poland, the vessel had engine problems and, in view of difficult weather conditions, headed for a Danish port, where its cargo was seized. The ECJ was asked whether a non-EC vessel could be subjected to EC legislation, prohibiting, inter alia, the retention on board of salmon caught in the North Atlantic area (Maritime Jurisdiction). In response to the question, whether a vessel registered in a non-member country could be treated as a vessel with the nationality of a Member State on the grounds that there is a genuine link, the ECJ answered that 'under international law a vessel in principle has only one nationality, that of the State in which it is registered' (*Poulsen Case* para. 13). The EC's personal jurisdiction was set aside, in that 'the law governing the crew's activities does not depend on the nationality of the crew members, but on the State in which the vessel is registered and, where appropriate, the sea area in which the boat is located' (ibid para. 18). On the high seas EC legislation cannot be applied to a vessel registered in a non-member country, 'since in principle such vessel is there governed only by the law of its flag' (ibid para. 22). Nor may it be applied in respect of such vessel crossing the territorial sea of a Member State 'in so far as the vessel is exercising the right of innocent passage in those waters' (ibid para. 25; Innocent Passage). The same conclusion applies in respect of the exclusive economic zone of a Member State, 'since that vessel enjoys freedom of navigation in that area' (ibid para. 26; Navigation, Freedom of). An EC regulation may be applied to a non-EC vessel 'when

it sails in the inland waters or, more especially, is in a port of a member State, where it is generally subject to the unlimited jurisdiction of that State' (ibid paras 26–28). With respect to the immunity of ships in distress, it was held that it is for the national courts 'to determine, in accordance with international law, the legal consequences which flow from a situation of distress involving a vessel from a non-member country' (ibid para. 38).

G. Integration of Environmental Aspects into the Common Fisheries Policy

8 In a series of cases the question arose whether a measure aimed at the protection of the marine environment was to be taken under the CFP or under the environmental title of the EC Treaty (Marine Environment, International Protection). In Case C-405/92 *Etablissements Armand Mondiet SA v Armement Islais SARL* the ECJ ruled that:

> Articles … of the Treaty are intended to confer powers on the Community to undertake specific action on environmental matters. However, those articles leave intact the powers held by the Community … if the measures to be taken under the latter provisions pursue at the same time one of the objectives of environmental protection. (At para. 26)

H. Conclusions

9 It can therefore safely be concluded that the European judicial institutions have played an important role in the fine-tuning of the CFP. In a system where implementation is left to the Member States, these judicial institutions have helped, through their case-law, to develop the CFP by giving the Council and Commission amply leeway to develop their policies while at the same time ensuring that the Member States comply with their commitments.

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