The Concept of EU Waters Explained

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Introduction

The EU has no maritime territory or jurisdiction except in so far as transferred to it by its Member States. The Union powers are delimited by the founding treaties and by secondary EU legislation. EU legislative competence does not extend to the establishment of maritime zones, as such competence rests with the Member States. This follows from the general scope of the Lisbon Treaty, which does not empower the Union to alter the maritime zones of its Members States.[2] This was already acknowledged by Regulation 2141/70 which provided that each Member State decides by means of national legislation, which waters come under its sovereignty and/or jurisdiction.[3] The extent of these waters is thereby a matter to be determined by each Member State.[4]

Nevertheless, the EU does have an interest in the establishment of maritime zones, as many of the rights and duties conferred upon coastal States in the different maritime zones touch upon issues that fall within the area of a shared (*e.g.* fisheries management, the environmental policy, maritime transport and security), or exclusive EU competence (*e.g.* fisheries conservation). Consequently, secondary Union legislation - especially in the field of fisheries – avails itself of the concept of 'Community waters', which should be referred to as 'Union waters' following the entry into force of the Lisbon Treaty.

This paper assesses to what extent the so-called 'Community' or 'Union waters'[5] encompass the maritime waters of the Member States and if any rights or title can be derived from this terminology. It will do so by geographically addressing the different maritime zones: the territorial sea, the exclusive economic zone (EEZ), the continental shelves and the high seas. The ECJ played an important role in clarifying the jurisdictional radius in this respect. In fact such issues have been on the agenda of the European Court of Justice (ECJ) from the outset. In line with the evolution *ratione loci*, the ECJ was asked to clarify the jurisdictional scope of Community fisheries law. Therefore, the case-law of the ECJ takes a prominent place in this paper.

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[2] In order to avoid confusion by the reader, the abbreviation EU is used throughout this paper, when referring to the European Community (EC), European Economic Community (EEC) and European Union (EU). Following upon the entry into force of the Treaty establishing the EC, the European Economic Community (EEC) was replaced by the EC. Following the entry into force of the Lisbon Treaty, the EC has been replaced by the EU. Only when referring to specific regulatory provisions the then contemporary abbreviation is used.

[3] This was implicitly confirmed in Case 61/77, *supra* note 7, para. 39; Council Regulation (EEC) N° 2141/70 of 20 October 1970 on the Establishment of a Common Structural Policy for the Fishing Industry, L 236 OFF. JOURNAL 1-4 (27 October 1970, Article 2 (3). This article reads "[t]he maritime waters referred to in this Article shall be those which are so described by the laws in force in each Member State." Regulation 2141/70 was replaced by Regulation 101/ Council Regulation (EEC) N° 101/76 of 19 January 1976 Laying Down a Common Structural Policy for the Fishing Industry, L 20 OFF. JOURNAL 19-22 (28 January 1976).

[4] As indirectly confirmed by the ECJ in Case C-146/89 that the seaward movement of the United Kingdom's baselines in light of the extension of its territorial sea to twelve nm did not affect the fishing zones defined by Regulation 170/83. Case C-146/89, Commission of the European Communities *v.* United Kingdom of Great Britain and Northern Ireland, 1991 ECR I-3533, para. 52. Hereinafter *Baseline* Case. D. Anderson, *The Strait of Dover and the Southern North Sea: Some Recent Legal Developments*, 7 IJEC 85-97 (1992).

[5] Secondary legislation avails itself of the wording 'Community Waters' in Regulation 2371/02. This instrument will be replaced by a new framework Regulation by the end of 2012, which will reflect the changes introduced by the Lisbon Treaty. Therefore, it is expected, the term 'Union waters' will replace the term 'Community waters'.

Territorial scope

There are no provisions in the Lisbon Treaty[6] determining the territorial extent of EU jurisdiction in general. In Case 61/77, the ECJ advocated that "as institutional Acts adopted on the basis of the Treaty, the regulations apply in principle to the same geographical area as the Treaty itself".[7] The Lisbon Treaty addresses its geographical scope by listing the Member States in Article 52 TEU (ex Article 299(1) EC Treaty),[8] which provides that "[t]he Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, [*etc*.]".[9] No reference, however, is made to the territory of the Member States.

In Case C-111/05, the territorial scope of Directive 77/388/EEC had to be clarified.[10] The ECJ pointed out that the territorial scope of this instrument was determined in its Article 3, according to which 'territory of a Member State' means the 'territory of the country', and 'territory of the Community' means the territory of the Member States. The 'territory of the country' corresponds to the scope of the EC treaty, as defined for each Member State by Article 299 EC Treaty (now Article 52 TEU).[11] In the absence of a more precise definition of the territory falling within the sovereignty of each Member State, the ECJ stressed that each of the Member States determines the extent of that territory, in accordance with the rules of public international law.[12]

By virtue of a rule commonly accepted in public international law, the geographical scope of a treaty covers, in principle, the entire territory of the States party to the agreement.[13] It follows that, when determining whether the Lisbon Treaty is applicable to a given geographical area, it is first necessary to ascertain whether that area forms part of the territory of one of the Member States.

Baselines

The *Baseline Case* touched upon a delicate issue of national sovereignty, *i.e.* the competence of Member States to define the maritime zones appurtenant to their land territory and, more especially, to determine the baselines from which such zones are measured. The United Kingdom when extending its territorial sea up to twelve nautical miles (nm) relied on this competence for justifying its use of ambulatory baselines, *i.e*. those that are defined from time to time by the Member States concerned. Following the extension of its territorial sea, certain low-tide elevations[14] situated within the twelve nm limit would henceforth constitute base points for the drawing of the baselines, on the basis of which the six nm and twelve nm fishery zones would also be measured. It led to an extension of those fishing areas in which

[6] The 2009 Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) constitute the so-called Lisbon Treaty. See: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, C 83 OFF. JOURNAL 1 (30 March 2010).
[7] Case 61/77, Commission of the European Communities *v*. Ireland, 1978 ECR 417, para. 46.
[8] Treaty Establishing the European Community [consolidated version], C 325 OFF. JOURNAL 33-184 (24 December 2002)
[9] TEU, *supra* note 6, Article 52 (1).
[10] Case C-111/05, Aktiebolaget NN *v.* Skatteverket, 2007 ECR I-2697. Sixth Council Directive 77/388/EEC of 17 May 1977 on the Harmonisation of the Laws of the Member States Relating to Turnover Taxes – Common System of Value Added Tax: Uniform Basis of Assessment, L 145 OFF. JOURNAL 1 (13 June 1977), as amended by Council Directive 2002/93/EC of 3 December 2002, L 331 OFF. JOURNAL 27 (19 January 2002).
[11] With the exception of certain national territories expressly excluded in the directive. Directive 2002/93/EC, *ibid*., Article 3 (3). Case C-111/05, *ibid*., para. 53.
[12] Case C-111/05, *ibid*., para. 55.
[13] The 1969 Vienna Convention makes it clear, that "[u]nless a different intention appears from the Treaty or is otherwise established, a Treaty is binding upon each party in respect of its entire territory". Vienna Convention on the Law of Treaties, multilateral, 23 May 1969, 1155 UNTS 331, Article 29.
[14] Low-tide elevations are naturally formed areas of land (rocks, sandbanks etc.), which are below water at high tide, but exposed at low tide. UN Convention on the Law of the Sea, 10 December 1982, multilateral, 1833 UNTS 396, Article 13. Hereinafter LOS Convention.

United Kingdom fishermen enjoyed exclusive fishing rights. It would also have the effect of excluding fishermen from other Member States - in particular Belgium and France - from the zones in which they had traditionally fished. The ECJ could not agree to the latter interpretation and observed that:

> [i]nternational law merely authorizes States to extend their territorial sea to 12 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. The decision to make use of the options under the rules of international law for the purpose of determining the areas listed in Annex I is attributable solely to the United Kingdom, which thereby unilaterally altered the scope of the provisions in Regulation 170/83."[15]

The scope of Annex I to the fisheries framework regulation could not altered by the unilateral action of a Member State.[16] The ECJ was thus faced with a Member State pleading international law as a defence against failing to fulfil its obligations under Community law. In areas where Member States still have exclusive jurisdiction to act under public international law, obligations deriving from (customary) international law may collide with the requirements of Community law. This case thus clarifies that Member States when acting within the sphere of their own competences, must have due regard to the Community legal system exists which is as a separate legal order, distinct from systems of national law and from the classic interstate arrangements of international law.

Territorial sea

Under international treaty law, in absence of an express or implied intention to the contrary, a treaty is binding upon each party in respect of its entire territory.[17] According to the ILC, in absence of any indication in the treaty as to its territorial application, this territory embraces "not only the land but also any appurtenant territorial waters . . . which constitute[s] the territory of the State."[18] From an international law perspective, the territorial sea is an extension of State sovereignty.[19] The Lisbon Treaty thus undoubtedly applies to the Member States' territorial seas. The ECJ took the same view in Case C-111/05, as it stressed that pursuant to the LOS Convention, the sovereignty of the coastal State extends to the territorial sea as well as to its bed and subsoil.[20] Consequently, the national territory of the Member States within the meaning of Article 52 TEU also consists of the territorial sea, its bed and subsoil. It being understood that it is for each Member State to establish the breadth of its territorial sea in accordance with the LOS Convention.[21]

Exclusive Economic Zone

During the beginning years of the European Common Fisheries Policy (CFP), the idea was advocated that the European Economic Community (EEC) had no competence outside the territorial sea of its Member States. The Commission in its 1967 report on

[15] Baseline Case, *ibid*., para. 25; Council Regulation (EEC) N° 3760/92 of 20 December 1992 Establishing a Community System for Fisheries and Aquaculture, L 389 OFF. JOURNAL 1-14 (31 December 1992), 6th Recital.
[16] Baseline Case, *supra* note 4, para. 24.
[17] 1969 Vienna Convention, *supra* note 13, Article 25.
[18] A. WATTS, 2 THE INTERNATIONAL LAW COMMISSION 1949-1998: THE TREATIES 672-673 (1999).
[19] LOS Convention, *supra* note 14, Article 2.
[20] Case C-111/05, *supra* note 10, para. 56.
[21] LOS Convention, *supra* note 14, Article 3. *Ibid*., para. 57.

the basic principles of a common policy, referred to "l'exploitation des ressources de la partie de la mer relevant de la souveraineté des différends Etats membres".[22] As regards the special fishing zones adjacent to them, such competence was doubted mainly because of their high seas character.[23] Most writers opposed this strict interpretation and advocated a more teleological approach, which did not hinder the then EEC in achieving its objectives.[24] They found themselves supported by Article 227 (1) EEC Treaty (currently Article 52(1) TEU) which does not mention 'territories' but the Member States themselves. This suggests that in principle the Lisbon Treaty has the same geographical reach as the jurisdiction of Member States in relation to the differing subject matters.

In relation to fisheries, there was never any explicit referral or strict confinement to the 'territory' of the Member States. Indeed, EU fisheries law has been taken to extend wider than the territorial sea. Regulation 2141/70 limited the application of the equal access principle to the maritime waters coming under the 'sovereignty' or within the 'jurisdiction' of the Member States.[25] This phrase does not use the conventional and customary international law terminology for describing and defining States' maritime zones, but takes each of its component parts: sovereignty and jurisdiction, which were not defined in the regulation.

The current basic regulation, Regulation 2371/02, uses the same terminology. Waters under 'sovereignty' in customary international law terminology appear to cover the Member States' internal waters and territorial seas. The waters under jurisdiction were originally considered to be those adjacent to the territorial sea in which the coastal State enjoyed exclusive rights to which they were entitled under the London Fisheries Convention.[26] In this way the geographical extent of the Community access regime was confined up to an external limit of twelve nm. This was retroactively confirmed by the ECJ in Joined Cases 3, 4 and 6 by stating that Article 5 of Regulation 2141/70 was applicable only to a geographical limited fishing area.[27]

Since 1977 the waters under jurisdiction also refer to the EFZ and EEZ, which may not extend beyond 200 nm. During the years of preparation for UNCLOS III (1970-1973) and the first phases of the conference leading up to the adoption of the 'Revised Single Negotiating Text' (1973-1976) by which time negotiation over fisheries issues were largely completed, the EU's fisheries policy was still in an embryonic state.[28]

In view of the developments at UNCLOS III, the Commission started to search for a Community solution to the anticipated establishment of 200 nm fishery zones worldwide.[29] Following the extra-ordinary Council meeting of 30 October 1976 in The Hague, the Council formally adopted on 3 November 1976 a resolution

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[22] European Commission, *Principes de bases pour une politique commune dans le secteur de la pêche*, C 58 OFF. JOURNAL 861-900 (29 March 1968). Hereinafter 1967 Report.
[23] C.A. Fleischer, *L'accès aux lieux de pêche et le Traité de Rome*, 141 RMC 148-156, 151 (1971).
[24] A.W. Koers, *The External Authority of the EEC in Regard to Marine Fisheries*, 14 CMLREV 269-301, 274-275 (1977); Y. Van der Mensbrugghe, *The Common Market Fisheries Policy and the Law of the Sea*, 6 NYIL 199-228, 202 (1975); D. Vignes, *The EEC and the Law of the Sea*, in 3 NEW DIRECTIONS IN THE LAW OF THE SEA 337-338 (R.R. Churchill *et al.* eds., 1973); E. Hiester, *The Legal Position of the European Community with Regard to the Conservation of the Living Resources of the Sea*, 1 LIEI 55-79, 60-62 (1976); M. Brouir, *Le règlement du Conseil de la CEE de 1970 sur les pêcheries*, 9 CDE 20-37, 28-32 (1973).
[25] Regulation 2141/70, *supra* note 3, Article 2 (1).
[26] 1964 London Fisheries Convention, 9 March 1964, multilateral, 581 UNTS 56. Article 3; D. Vignes, *La réglementation de la pêche dans le marché commun au regard du droit communautaire et le droit international*, 16 AFDI 829, 831 (1970).
[27] Joined Cases 3, 4 and 6/76, Officier van Justitie *v.* Kramer, 1976 ECR 1279, paras 30-33. Hereinafter *Kramer* Case.
[28] It was not until 1971 that it was clear that the EU had implied treaty-making powers and not until 1976 that these applied specifically to fisheries.
[29] COM(1976) 500 final, *Future External Fisheries Policy: an Internal Fisheries System* (23 September 1976).

requesting the EEC Member States to act in concert to extend their fishing zones as of 1st January 1977.[30]

This concerted action aimed to prevent the Member States from taking unilateral initiatives which could run opposite to the equal access principle and to underline the 'communitisation' of the EEC fishing waters. Through the implementation of this resolution, fishing limits of a uniform width have been established off all Member States' coasts in the North Sea and North Atlantic, and by Germany and later on by new Member States in the Baltic Sea.

These newly established waters were henceforth encompassed by the Community's internal fisheries policy. This was indirectly confirmed in Case 61/77, in which the Irish government raised an objection concerning the geographical scope of the Community's fisheries policy.[31] Regulation 101/76 stated that "[t]he maritime waters referred to . . . shall be those which are so described by the laws in force in each Member State".[32] The ECJ ruled that "as institutional acts adopted on the basis of the Treaty, the regulations apply in principle to the same geographical area as the Treaty itself".[33] Therefore Regulation 101/76 was to be understood as referring to the limits of the field of application of Community law in its entirety, as that field may at any given time be constituted. The reference to the 'laws in force' describing the maritime waters coming under sovereignty or within jurisdiction of the Member States must be interpreted as referring to the laws applicable from time to time during the period of validity of the regulation concerned.[34] It follows that "any extension of the maritime zones in question automatically means precisely the same extension of the area to which the regulation applies."[35]

In Case 812/79 the ECJ was more straightforward, as it stated that "[t]he fishery zones of the Member States which extend to 200 [nm] of the North Sea and Atlantic coasts are the subject of Community fishery rules."[36]

Community Waters

Regulation 2371/02 now provides that "[t]he Common Fisheries Policy shall cover . . . where such activities are practised on the territory of Member States or in Community waters."[37] The regulation provides a definition of these 'Community waters' as meaning the waters under the sovereignty or jurisdiction of the Member States.[38] Together they form the so-called 'Community waters'.

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[30] Résolution sur l'extension des zones de pêche des Etats membres de la Communauté à 200 miles au 1 janvier 1977, les accords de pêche conclus avec des pays tiers et une politique commune révisée de la pêche, C 259 OFF. JOURNAL 26 (4 November 1976);
[31] Case 61/77, *supra* note 7. In *casu*, failing the adoption of a Community conservation system, the Irish Government had adopted restrictive measures covering the waters adjacent to its twelve nm limit. By means of two orders it had prohibited the entry of sea fishing boats and fishing in a maritime area situated within that portion of the exclusive fishery limits of Ireland. The second order exempted from that prohibition sea fishing boats not exceeding 33 metres in length. By these unilateral actions, Ireland put weight on its demands for a fifty nm exclusive zone.
[32] Regulation 101/76, *supra* note 3, Article 2 (3).
[33] *Ibid*., para. 46.
[34] *Ibid*., paras 47-48.
[35] *Ibid*., para. 49.
[36] Case 812/79, Attorney General *v.* Juan C. Burgoa, 1980 ECR 2787, para. 16. In other words, equal access no longer applies just to zones of at most twelve nm from the coast, but to zones of up to 200 nm of the coast.
[37] Council Regulation (EC) N° 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources Under the Common Fisheries Policy, Article 2 (1), L 358 OFF. JOURNAL 59-80 (31 December 2002), Article 1 (1) Hereinafter Regulation 2371/02.
A.E. Croft, Written Question N° 330/89, *Definition of Community Waters*, C 305 OFF. JOURNAL 23 (4 December 1989); A.E. Croft, Written question N° 241/88, *Definition of Community Waters*, C 317 OFF. JOURNAL 46 (12 December 1988); F. Pierros *et al*., Written Question N° 2315/90, *Defining the European Community's Borders*, C 107 OFF. JOURNAL 22-24 (22 April 1991).
[38] Regulation 2371/02, *ibid*., Article 3 (a). Regulation 3760/92 used the terminology of 'Community *fishing* waters' as the waters under the sovereignty or jurisdiction of the Member States. Regulation 3760/92, *supra* note 15, Article 2 (a).

In Case C-391/05,[39] the ECJ was asked what interpretation was to be given to the term 'Community waters' in contrast to the term 'inland waters' for the purposes of Directive 92/81 concerning the harmonisation of excise duties on mineral oils.[40] The former concept required clarification for the purpose of determining whether excise duties were due on mineral oils used for the purposes of navigation within Community waters. Advocate General Bot in his opinion sought a criterion whereby the term 'Community waters' could be distinguished from the term 'inland waters'. The 'baseline'-criterion as used in the LOS Convention was ruled out.[41] That criterion had a different purpose from that of Directive 92/81, in that it determines the sovereign rights and reciprocal obligations of the parties.[42] A functional approach, as eventually followed by the ECJ, distinguishing between the two terms by having regard to the type of transport being carried out on Community waters and inland waterways was equally ruled out. Instead, Bot contented that the term Community waters was to be interpreted as covering marine waters falling within the sovereignty and jurisdiction of Member States, with the exception of the inland waterways listed in Annex I to Directive 82/714/EEC.[43] Bot noted that the term 'Community waters' was used in connection with the CFP,[44] namely to designate the Community fishing zone resulting from the *communitisation* of the Member States' EEZs (sic).[45] Moreover, the annual quota regulation described Community waters as, "waters falling within the sovereignty or jurisdiction of Member States as opposed to 'international waters', which are waters falling outside the sovereignty or jurisdiction of any State".[46] Thus, defined in contrast to international waters, Bot interpreted 'Community waters' broadly as being *marine* waters falling within the sovereignty or jurisdiction of Member States, covering all the *marine* territories of the Member States.[47] The ECJ adhered to a functional approach and concluded that "the term 'Community waters' meant all waters which could be used by all sea-going vessels, capable of travelling maritime waterways for commercial purposes."[48] In fact, it seems that the ECJ was obliged to follow this functional approach and not to equate the term Community waters as used in a fisheries context with the one to be used for clarifying this case. Adhering to the Advocate General's view would have attributed to the Community waters concept, as used in fisheries legislation and which is *in se* nothing more than a functional fishery zone, other characteristics associated with an EEZ.

[39] Case C-391/05, Jan De Nul NV *v.* Hauptzollamt Oldenburg, 2007 ECR I-01793.
[40] Council Directive 92/81/EEC of 19 October 1992 on the Harmonisation of the Structures of Excise Duties on Mineral Oils, L 316 OFF. JOURNAL 12 (31 October 1992), as amended by Council Directive 94/74/EC of 22 December 1994, L 365 OFF. JOURNAL 46 (31 December 1994). In this preliminary case, the claimant sought to benefit from an exemption from duty for certain quantities of mineral oils used for the operation of a hopper dredger, in respect of dredging operations carried out on the Elbe, in an area between Hamburg and Cuxhaven. The German Finanzgericht took the view that the outcome of the proceedings depended on the interpretation of the term 'navigation within Community waters'.
[41] Reference was made generally to Articles 3 to 7 of the LOS Convention, *supra* note 14.
[42] Case C-391/05, *supra* note 39, Opinion of Advocate General Bot, paras 56-60.
[43] Council Directive 82/714/EEC of 4 October 1982 Laying Down Technical Requirements for Inland Waterway Vessels, L 301 OFF. JOURNAL 1-66 (28 October 1982).
[44] Case C-391/05, *supra* note 39, para. 67.
[45] *Ibid*., para. 68. In particular, he referred to Case C-258/89, Commission of the European Communities *v*. Kingdom of Spain, Opinion of Advocate General Darmon, 1991 ECR I-3977, paras 12-13.
[46] Case C-391/05, *supra* note 39, para. 69. See, in particular, Council Regulation (EC) N° 27/2005 of 22 December 2004 Fixing for 2005 the Fishing Opportunities and Associated Conditions for Certain Fish Stocks and Groups of Fish Stocks, Applicable in Community Waters and, for Community vessels, in Waters Where Catch Limitations are Required, Articles 2 (b) & 3 (b), L 12 OFF. JOURNAL 1 (14 January 2005).
[47] Case C-391/05, Opinion of Advocate General Bot, supra note 40, para. 70.
[48] *Ibid*., para. 26.

Continental Shelves

Bearing in mind the particular nature of the rights enjoyed by coastal States over their continental shelves, the question arises whether the Lisbon Treaty provisions and fisheries legislation are applicable to it. In 1970 the European Commission issued a memorandum in which it argued that the EEC Treaty was also applicable to the Member States' continental shelves.[49] This view is still considered controversial since neither the jurisprudence of the International Court of Justice (ICJ) nor State practice supports the Commission's argument that "[t]he continental shelf may be considered the same as the territories of the signatory States over which these States exercise sovereign rights."[50] The EU Council has never endorsed such a wide view of the geographical scope of the founding treaties.[51] As Freestone points out, such an assertion suggests a fundamental misapprehension of the distinction between sovereignty and sovereign rights, upon which the continental shelf regime is based.[52] Nevertheless, Harders makes the point that when the EEC Treaty was signed in 1957, the original Member States may not have fully appreciated the significance of the issue.[53] This cannot have been the case for the States that acceded afterwards, when the major offshore oil fields had been discovered. Although, no declaration to the effect that the continental shelf was not included in the scope of the founding treaties has been made.

The issue of applicability of EU law to the continental shelf is a major concern of the Community and its Member States. If EU law applies to the continental shelf areas of the Member States and such important treaty provisions, in particular the principle of non-discrimination and the right of establishment therefore govern economic activities performed on it, other legal and political consequences ensue.[54] As such, on many occasions problems have arisen in the context of the exploitation and exploration of oil and gas resources.[55] The reason why the founding treaties and secondary legislation do not refer to the maritime zones at all or is limited to a 'territorial' provision is to be found in the fact that Member States want to reserve their off-shore activities as sovereign competence areas. Apart from fisheries, as demonstrated below, there are still much diverging legal opinions. The whole discussion also affected the competences of the EU to adopt measures aimed at the preservation of the marine environment or more specifically to adopt measures aimed at combating the adverse effects of fishing. The geographical scope of the Habitats Directive is limited to the 'European territory of the Member States to which the Treaty applies'.[56] In Case C-6/04, however, the ECJ ruled that the United Kingdom

[49] SEC(70) 3095 final, *Commission Memorandum of 19 September 1970 on the Application of the EEC Treaty Towards the Continental Shelf* 4 (18 September 1970).
[50] *Ibid*.
[51] Shortly after the 1972 Accession, this established legal standpoint was challenged by the United Kingdom with particular regard to the oil deposits present in the British sector of the North Sea continental shelf. See Council Reply to Question N° 490/73, C 53 OFF. JOURNAL 2 (1974); K. Winkel, *Equal Access of Community fishermen to Member State Fishing Grounds*, 14 CMLREV 329, 338 (1977).
[52] D. Freestone, *Some Institutional Implications of the Establishment of Exclusive Economic Zones by EC Member States*, 23 (2-3) ODIL 97-114, 10-104 (1992).
[53] J.E. Harders, *The EEC's Continental Shelf: A Terra Incognita,* 8 JENRL 263-279, 268 (1990).
[54] J.F. Buhl, *The EEC and the Law of the Sea*, 11 ODIL 181, 186 (1982).
[55] P. Reynolds, *The EEC and the Law of the Sea*, 1 MP 118, 125 (1977); M. MICHAEL, L'APPLICABILITÉ DU TRAITÉ INSTITUANT LA C.E.E. ET DU DROIT DÉRIVÉ AU PLATEAU CONTINENTAL DES ÉTATS MEMBRES 301 p. (1984); E. SOMERS, INLEIDING TOT HET INTERNATIONAAL ZEERECHT 187 (4th ed., 2004); K. LENAERTS, P. VAN HUFFEL, EUROPEES RECHT IN HOOFDLIJNEN 259-260 (1995).
[56] Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, L 206 OFF. JOURNAL 7-50 (22 July 1992), Article 2 (1). In the United Kingdom there has been a High Court Decision that the Habitats Directive applies to the United Kingdom continental shelf and superjacent waters out to the 200 nm fishing limit. United Kingdom High Court, Queen's Bench Division, R. *v.* The Secretary of State for Trade and Industry *ex parte* Greenpeace Ltd., 1336 Crown Office List (5 November 1999).

was obliged to implement the Habitats Directive beyond its territorial waters, *i.e.* beyond 12 nm.[57]

Even if the continental shelf is regarded as not part of a Member State's territory, fishing activities performed on it are covered by the CFP provisions.[58] A translation of the *Kramer* judgement to the present question leads to the conclusion that in so far as the Member States are competent under international law to regulate continental shelf fisheries, the Community must also be regarded as being competent to take such measures, at least to the extent that the subject matter of the measure falls within the substantive scope of the EC treaty's agricultural articles.[59] This is also the view of the Commission:

> Le droit communautaire s'applique au plateau continental pour autant qu'il s'applique aux activités économiques que les Etats membres y exercent en vertu de leurs droits souverains relatifs à l'exploration et l'exploitation des ressources du fond marin et du sous-sol du plateau continental.[60]

Likewise, the ECJ has held in Case 37/00 that:

> [w]ork carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a contracting State, in the context of the prospecting and/or exploitation of its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[61]

Apart from the territorial reference, the geographical scope of the CFP is limited to 'Community waters', meaning the water column under sovereignty or jurisdiction of the Member States.[62] From an international law perspective, the sedentary species living on the continental shelf would be excluded. On the other hand, the CFP extends to fishing activities performed by 'nationals of Member States', irrespective of the maritime zone where such activities are performed. Consequently, EU fisheries legislation covers continental shelf fishing by nationals of the Member States. This view is reinforced when confronted with the definition of which goods can be considered as 'wholly obtained or produced in one country'. Such goods are defined, *inter alia*, as "[p]roducts of sea-fishing and other products taken from the sea by vessels registered or recorded in that country and flying its flag" and as "[p]roducts

[57] Case C-6/04, Commission of the European Communities *v.* United Kingdom of Great Britain and Northern Ireland, 2005 ECR I-9017.
[58] Y. Van der Mensbrugghe, *La CEE et le plateau continental des états membres*, in 2 MELANGES FERNAND DEHOUSSE 212-313 (1979); SOMERS, *supra* note 55, 186. Y. Van der Mensbrugghe, *La mer et les Communautés européennes,* 5 BTIR 112-139 (1969); D. Vignes, *The EEC and the Law of the Sea*, 3 NDLS 335-347 (1973); Reynolds, *supra* note 55, 118-131; H. Kraemer, *Die Nordsee in der EWG*, 33 E-A 571, 575-577 (1978); T. Treves, *The EEC and the Law of the Sea: How Close to One Voice*, 12 ODIL 173-189 (1983).
[59] J.H. Jans, *The Habitats Directive, R. v. Secretary of State for Trade and Industry ex parte Greenpeace*, 12 JEL 385, 385 (2000); S. GUBBAY *ET AL.*, WORLD WILDLIFE FUND, THE DARWIN MOUNDS AND THE DOGGER BANK. CASE STUDIES OF THE MANAGEMENT OF TWO POTENTIAL SPECIAL AREAS OF CONSERVATION IN THE OFFSHORE ENVIRONMENT 5-6 (2002).
[60] Written Question N°2315/90, *supra* note 37, 24.
[61] Case 37/00, Herbert Weber *v.* Universal Services Ltd., 27 February 2000, 2002 ECR I-2013, para. 36; Decision 78/884/EEC, Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, L 304 OFF. JOURNAL 1-112 (30 December 1978).
[62] Regulation 2371/02, *supra* note 37, Articles 1 (1) & 3 (a).

taken from the sea-bed or beneath the sea-bed outside territorial waters, if that country has, for the purposes of exploitation, exclusive rights to such soil or subsoil."[63]

In Case C-111/05, the ECJ was requested to give a preliminary ruling on the question whether Community provisions relating to value added tax[64] applied to the installation, between Sweden and another Member State, of a fibre-optic cable, part of which was to be laid on the seabed in international waters. The ECJ stressed that in contrast to a coastal State's territorial sea, the sovereignty over its EEZ and the continental shelf is merely functional and limited to the right to exercise the activities of exploration and exploitation laid down in the LOS Convention.[65] To the extent that the supply and laying of an undersea cable was not included in those articles, the ECJ considered that part of the operation not within the sovereignty of the coastal State. The ECJ considered its finding was supported by the LOS Convention,[66] which permit, subject to certain conditions, any State to lay undersea cables in those zones.[67] Consequently, this activity could not be regarded as having been carried out in the territory of the country. The same was considered, *a fortiori*, true for such activity carried out at sea in a zone which pursuant to the LOS Convention[68] fell outside the sovereignty of any State.[69] The ECJ concluded that the supply and laying of a fibre-optic cable linking two Member States was not subject to value added tax (VAT) for that part of the transaction which is carried out in the EEZ, on the continental shelf and at the high seas.[70]

High Seas

The Lisbon Treaty does not explicitly make reference to the possibility of an extra-territorial application of it or of secondary legislation adopted under it. The high seas fall outside the scope of EU waters, since the Member States can not claim sovereign or jurisdictional rights over these waters. Community legislation defines 'International waters' as waters falling outside the sovereignty or jurisdiction of any State.[71] But the CFP covers, irrespective of the zone frequented, fishing activities "by Community fishing vessels or, without prejudice to the primary responsibility of the flag State, nationals of Member States."[72] EU legislation defines a 'Community fishing vessel' as a "fishing vessel flying the flag of a Member State and registered in the Community."[73] Member States have jurisdiction over their vessels on the high seas, which is stressed by the reference made to the 'flag State'.

ECJ case-law has been illustrative of the fact that EU legislation may apply beyond its Member States' territories.[74] One of the matters at issue in the *Kramer* Case was to what extent the authority of the Community extended to fishing on the high seas.

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[63] Council Regulation (EEC) N° 2913/92 of 12 October 1992 Establishing the Community Customs Code, Article 23 (f & h), L 302 OFF. JOURNAL 1-50 (19 October 1992). This regulation repealed Council Regulation (EEC) N° 802/68 of 27 June 1968 on the Common Definition of the Concept of the Origin of Goods, L 148 OFF. JOURNAL 1-5 (1968).
[64] Hereinafter VAT.
[65] In particular Articles 56 and 77 LOS Convention, *supra* note 14.
[66] In particular its Articles 58 (1) and 79 (1).
[67] Case C-111/05, *supra* note 10, para. 59.
[68] In particular its Article 89.
[69] Case C-111/05, *supra* note 10, para. 60. See also, in the area of supply of transport services, Case C-30/89, Commission *v.* France, 1990 ECR I-691, para. 17.
[70] Case C-111/05, *ibid*., para. 61.
[71] Regulation 27/05, *supra* note 46, Article 3 (b).
[72] Regulation 2371/02, *supra* note 37, Article 1.
[73] *Ibid*., Article 3 (r).
[74] This is clearly the case under EC competition law as demonstrated in the *Dyestuff* Case, the *Euroemballage* Case, the *Woodpulp* Case and the *Gencor* Case. Case 48/69, Imperial Chemical Industries Ltd. *v.* Commission, 1972 ECR 619; Case 6/72, Europemballage Corporation and Continental Can Company *v.* Commission, 1973 ECR 215; The Woodpulp Case, European Commission Decision [IV/29.725] Relating to a Proceeding Under Article 85 of the EEC Treaty, L 85 OFF. JOURNAL 1-52 (28 March 1985); Case T-102/96, Gencor Ltd *v.* Commission of the European Communities, 1999 ECR II-753.

After the ECJ had established that the Community had internal competence to adopt measures for the conservation of the biological resources of the seas, it continued that:

> [i]t none the less follows from Article 102 of the Act of Accession, from Article 1 of the said Regulation [2141/70] and moreover from the very nature of things that the rule-making authority of the Community *ratione materiae* also extends, in so far as Member States have similar authority under public international law, to fishing on the high seas. [75]

It has also been consistently held that:

> [a]s regard the high seas, the Community has the same regulatory powers, in areas falling within its authority, as are recognised under international law to the State whose flag the vessel flies or in which it is registered.[76]

Such authority has been found in the 1958 High Seas Fishing Convention, recognising coastal States' interests in the living resources in any area of the high seas adjacent to their territorial sea. In addition, the LOS Convention was to be taken into account, since it imposes a co-operation duty on States in conserving and managing the high seas' living resources.[77] In Case C-311/94, it was pointed out, that:

> [o]ne of the criteria for defining the applicability of the common [fisheries] policy relating to the Community fleets is the flag under which it sails. A vessel flying the flag of a Member State has access at any time to the Community's fishing resources, whether in waters under the sovereignty or jurisdiction of the Member states of the Community or in those covered by the external fisheries policy.[78]

Therefore, "a vessel flying the flag of a Member State is considered to form part of the Community fleet, irrespective of the area in which it fishes."[79]

Conclusion

Since Case 26/62[80] and Case 6/64[81], there have been very few judgements in which reference has been made to the term sovereignty either in relation to the Member States or in relation to the EU itself. The cases which invoke the term concern sovereignty over fishing waters, or so-called 'fiscal sovereignty' in tax cases.[82] As

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[75] Kramer Case, *supra* note 27, paras 30-33. This view was repeated in several other cases: Case C-405/92, Etablissements Armand Mondiet SA *v.* Armement Islais SARL, 1993 ECR I-6133, para. 12; Case 61/77, *supra* note 7, para. 73; Case C-258/89, *supra* note 45, para. 12.
[76] Case C-405/92, *ibid*., para. 12.
[77] *Ibid*., para. 13.
[78] Case C-311/94, IJssel-Vliet Combinatie BV *v.* Minister van Economische Zaken, 1996 ECR I-5023, para. 47.
[79] *Ibid*., para. 48.
[80] Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos *v.* Netherlands Inland Revenue Administration, 1962 ECR English special edition 1. Hereinafter *Van Gend Case*.
[81] Case 6/64, Flaminio Costa *v.* ENEL, 1964 ECR English special edition 585. Hereinafter *Costa Case*.
[82] One interesting exception was in a ruling given on the Euratom Treaty in 1978 concerning its compatibility with a draft nuclear convention, where the ECJ's stressed not only the independence and autonomy of the Community in the exercise of the powers originally transferred to it by the Member States, but asserted also a corresponding loss of sovereign power on the part of the States:

> To the extent to which jurisdiction and powers have been conferred on the Community under the EAEC Treaty it must be in a position to exercise them with unfettered freedom. The Member States, whether acting individually or collectively, are no longer able to impose on the Community obligations which impose conditions on the exercise of prerogatives which henceforth belong to the Community and which therefore no longer fall within the field of national sovereignty.

noted by De Witte, in the ECJ rulings on the subject, references to a strong notion such as a transfer of sovereignty are rare or non-existent. He draws a distinction between a transfer of sovereign rights or limitation of sovereignty on the one hand, and a transfer of sovereignty on the other hand. The former is reflected in the *Van Gend Case* and the *Costa Case*. In both cases, the ECJ declared that the Member States had 'limited their sovereign rights'. In the *Costa* Case, the ECJ considered that a 'limitation of sovereignty or a transfer of powers from the Member States to the Community' had taken place'. [83] From this distinction, De Búrca draws the implication that EU membership has not amounted to a transfer of ultimate legal authority. Although the Member States have delegated authority, or have transferred some of their powers, or have even transferred 'sovereign rights', they have not transferred or alienated their very sovereignty itself. De Búrca notes that it remains an unsolved and uncertain subject in EU law if this signifies that the rights transferred could be unilaterally withdrawn by the Member States in order to retract that authority to it again.[84]

Regulation 2371/02 now provides a definition of the concept of 'Community waters' as meaning the waters under the sovereignty or jurisdiction of the Member States.[85] Together they form the so-called 'Community waters'. Despite the terminology of 'Community waters', this water column is not to be attributed to the EU. It merely serves the purpose of delimiting the jurisdictional scope of the CFP. The European Commission worded this as follows:

> On ne peut pas parler des frontières de la Communauté; les frontières communautaires sont la somme des frontières des Etats membres qui restent compétents en ce qui concerne la délimitation de leurs frontières maritimes (en conformité avec le droit international). Juridiquement la Communauté n'a pas une frontière, il n'y a qu'un territoire ou les traités s'appliquent. [86]

Ruling 1/78 Delivered Pursuant to the Third Paragraph of Article 103 of the EAEC Treaty, Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports, 1978 ECR 2151.

[83] B. De Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, in THE EUROPEAN COURT AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE 277-304 (A. Slaughter *et al.* eds., 1998); B. De Witte, *Direct Effect, Supremacy and the Nature of the Legal Order*, in THE EVOLUTION OF EU LAW 177-213 (P. Craig, G. De Búrca eds., 1999).

[84] G. De Búrca, *Sovereignty and the Supremacy Doctrine*, in SOVEREIGNTY IN TRANSITION 449, 455-456 (N. Walker ed., 2003).

[85] Regulation 2371/02, *ibid*., Article 3 (a). Regulation 3760/92 used the terminology of 'Community *fishing* waters' as the waters under the sovereignty or jurisdiction of the Member States. Regulation 3760/92, *supra* note 15, Article 2 (a).

[86] Written Question 2315/90, *supra* note 37.