# Maritime Border Diplomacy

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# STEPPING OVER MARITIME BOUNDARIES TO APPLY NEW NORMATIVE TOOLS IN EU LAW AND POLICY

## Ronán Long\*

#### Abstract

One of the objectives of the European research project, Options for Delivering Ecosystem-Based Marine Management (the "ODEMM Project"), is to examine the legal constraints and opportunities for improving the implementation of the ecosystems approach by European coastal States. This paper focuses on one of the legal obstacles, which has the potential to impede the successful implementation of the ecosystems approach, and that is the mismatch between ecological boundaries and the various maritime limits established by EU coastal Member States in accordance with the applicable rules of international law governing maritime boundary delineation and delimitation. The paper starts by outlining briefly the division of legal competence between the EU institutions and the Member States regarding the determination of maritime limits, as well as their respective competence in relation to the prescription and enforcement of EU fisheries and environmental law. The paper then reviews some of the practical issues that arise in fisheries and environmental management, which will have a direct bearing on the successful implementation of the ecosystem approach on a trans-boundary basis at European regional seas levels. The paper emphasises that recent developments in EU law promoting new normative approaches to marine resource management are entirely consistent with the hortatory nature of several multilateral initiatives including the 2009 Manado Ocean Declaration, which calls upon States and international organisations to implement ecosystem(s) based management with a view to ensuring the long-term sustainability of marine living resources. The experience of the EU Member States and the research findings of the ODEMM Project may therefore be of interest to countries

<sup>\*</sup> Ronán Long read for his PhD at the School of Law at Trinity College Dublin. He holds the Jean Monnet Chair of European Law at the School of Law at National University of Ireland Galway, and was the first recipient of the Michael Manahan Research Fellowship. He is author of Marine Resource Law (Dublin, 2007), co-author of Enforcing the Common Fisheries Policy (Oxford, 2000) and co-editor of Law, Science and Ocean Management (Boston/Leiden, 2007), and Legal Challenges in Maritime Security (Boston/Leiden, 2008). He is the Director of an off-campus research company, Marine Law and Ocean Policy Research Ltd., and is engaged in a number of European projects including the ODEMM Project on ecosystem based management in the marine environment. This research paper is undertaken as part of the ODEMM Project which is examining various management options and impediments for implementing the ecosystem-based approach in the European marine environment. Supported by the European Commission's 7th Framework Research Programme, Theme ENV.2009.2.2.1.1, Project No 244273. Further information is available at: <a href="http://www.liv.ac.uk/odemm/">http://www.liv.ac.uk/odemm/</a>. The author wishes to acknowledge the assistance of Margaret Armstrong MSc in preparing the tables and collating research material for this paper, as well as Erin McVeigh for proof reading an earlier draft. This paper remains the sole work of the author and his PowerPoint is available at <a href="http://www.virginia.edu/colp/pdf/Bali-Long.pdf">http://www.virginia.edu/colp/pdf/Bali-Long.pdf</a>.

setting of the European landmass, which is bordered by the North-East Atlantic Ocean, as well as a number of regional seas including the Baltic Sea, the Mediterranean Sea, and the Black Sea. Peculiarly enough, the role of European land-locked States should not be forgotten as they have also played a unique role in the formulation of the international rules governing the law of the sea in modern times.2 History teaches us, however, that it was the prospect of international trade and the projection of sea power that influenced the great European maritime powers in taking an active interest in the progressive development of international law of the sea since the Early Middle Ages. To support this contention, we can of course instance the great work of scholarship undertaken by Hugo Grotius, Mare Liberum, in the early 16th century which had a profound influence on the subsequent development of the law. As is well known to all students of the discipline, this was a treatise aimed at vindicating the claims of the Dutch East India Company to trade in South-East Asia and marks the beginning of what legal scholars now often refer to as legal positivism in contemporary international law of the sea.

Since the early middle ages, the rise of positivism in the law of the sea and its emphasis on what States actually do in practice is often associated with the practice of European countries in maritime matters.<sup>3</sup> Thus, it is unsurprising to recall that the law on straight baselines developed in the context of a dispute between two European States, Norway and Great Britain, which may be traced back to a mid-nineteenth century Norwegian law (as well as a 1935 Norwegian Decree) and the subsequent objection of Great Britain to this system in the 1930s on the grounds that it was incompatible with international law. Over a decade later, this dispute was resolved by the celebrated judgment of the

On legal positivism in the law of the sea, see R. Churchill, A.V. Lowe, *The Law of the Sea*, 3rd Ed, (Manchester, Manchester University Press, 1999), pp. 4–5.

on the European Union which provides that the "Union shall replace and succeed the European Community". The twenty-two coastal States of the EU are Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, and the United Kingdom. Croatia signed an accession Treaty with the EU in December 2011 and will become a full Member State in June 2013.

<sup>&</sup>lt;sup>2</sup> The five land-locked states of the EU are Luxembourg, Austria, Hungary, Slovakia, and the Czech Republic. Austria in particular has actively pursued the progressive development of international law of the sea as it applies to geographically disadvantaged countries. See G. Hafner, "The "Land-Locked" Viewpoint" (1981) 5 Marine Policy 281; S.P. Menefee, "The Oar of Odysseus: Landlocked and Geographically-Disadvantaged States in Historical Perspective," 23 California Western International Law Journal 1–65 (1992); H. Tuerk, G. Hafner, "The land-locked Countries and the United Nations Convention on the Law of the Sea" in B. Vukas (ed.): Essays on the New Law of the Sea, (University of Zagreb, Faculty of Law, 1985). Similarly, Switzerland, a non-EU country, has a well-developed body of maritime law and a merchant fleet sailing under its flag, see, A. Von Ziegler "Helvetia and the Sea" in Il Diritto Marittimo, numero speciale 2010, p. 1162.

developments in EU law towards the application of the ecosystem approach as a new normative tool in marine resource management. A central feature in this approach is the identification of marine areas and the application of management measures on the basis of ecological boundaries and not necessarily on the basis of political boundaries established by the Member States in accordance with the applicable rules of international law. Moreover, this trend in EU law towards ecosystem-based management is entirely consistent with several important international initiatives including the 2009 Manado Ocean Declaration, which calls upon States to apply "precautionary and ecosystem approaches with a view to achieving long-term conservation, management and sustainable use of marine living resources."

For those unfamiliar with the legal nature of the EU, there are three further preliminary points which need to be mentioned here. Firstly, where there is a conflict between treaties and the law adopted by the EU and the national law of a Member State, EU law always prevails even if the national law is part of the Constitution.9 This is commonly referred to as the primacy of EU law or the doctrine of "supremacy", which means that EU law is supreme over the national law of the Member States. Secondly, laws made by the EU in many instances have direct applicability and direct effect, which allows individuals or corporate entities to rely on EU measures in national courts or tribunals.<sup>10</sup> This is particularly the case in relation to EU fisheries law, which is predominantly made-up of regulations, and this makes it an ideal medium for undertaking the management of marine resources on a cross-boundary basis irrespective of the maritime limits or boundaries established by the Member States. Thirdly, it should also be noted that all 27 Member States and the EU in its own right are party to the 1982 Convention and its related agreements,11 which now forms an integral part of the European legal order. 12 The European institutions therefore have significant responsibilities and a vital role to play in the implementation of the 1982 Convention.

Regarding terminology, many academic sources use the terms "boundary" and "limits" interchangeably and this can often give rise to a degree of confusion regarding their precise meaning. Where possible, however, this paper uses the term "limits" and "outer limits" in accordance with the usage of these terms in the 1982 Convention to refer to the line that defines the outermost extent of

<sup>&</sup>lt;sup>8</sup> Para. 1 of the 2009 Manado Ocean Declaration. Adopted at the World Ocean Conference, Manado, Indonesia, 14 May 2009.

<sup>9</sup> Case 6/64, Costa v ENEL [1964] ECR 585.

Article 288 Treaty Functioning of the European Union. Case 26/62, Van Gend en Loos [1963] ECR 1.

<sup>&</sup>lt;sup>11</sup> Approved by Council Decision 98/392 of 23 March 1998. OJ L 179/0001, 23.06.1998.

See, inter alia: Case C-459/03 Commission v Ireland [2006] ECR I-4635, paragraph 82 citing inter alia: Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 36.

the zone, that is to say two miles beyond the limits of the territorial sea. Nineteen Member States have established 200-mile EEZs and state practice in his regard appears to be evolving continuously. In recent years, for example, several Member States such as Ireland and Finland have adjusted their fisheries zones into full-scale EEZs.<sup>18</sup> Unusually, the UK has only done this in relation to its overseas territories and dependencies and not in relation to the UK mainland proper where it has a 200-mile zone for fisheries and energy purposes. Malta has established a 25-mile exclusive fishery zone. Similarly, Spain has established an EEZ in the Atlantic but only an EFZ in the Mediterranean Sea that is delimited by geographical coordinates. The overall position regarding maritime zones in the Mediterranean Sea is incredibly complex with few of the 21 littoral States claiming the full gamut of maritime jurisdiction zones provided for in the 1982 Convention. There remains considerable scope for maritime delineation and delimitation disputes in contentious areas such as the Adriatic Sea and in the eastern Mediterranean Sea. Thus, for example, there has been protracted difficulty regarding the establishment by Croatia, of an "ecological and fisheries protection zone" in the broader context of its application for EU membership. 19 In 2006, Italy established an "ecological protection zone" beyond the outer limit of the territorial sea and this provides a legal basis in national law for the exercise of jurisdiction in relation to the protection and conservation of the marine environment, including the archaeological and historic heritage.<sup>20</sup> The European institutions have been active on the general question of maritime limits and have commissioned a cost benefit analysis study on the establishment of maritime zones in the Mediterranean Sea by the EU coastal Member States and this is scheduled for publication in 2012.

Similarly, the position in relation to the assertion of coastal State sovereign rights and jurisdiction over the continental shelf is multifaceted with some Member States such as the United Kingdom and Spain asserting their rights out to the outer edge of the continental margin, or to 200 miles where the edge does not extend that distance. For inexplicable reasons, it appears from the information provided in table of claims of maritime jurisdiction recorded on the DOALOS website, several other Member States such as Denmark, Finland, Germany, Greece, Italy, Malta, the Netherlands and Sweden appear to rely upon the 200 metres per depth of exploitability formula in relation to their

<sup>&</sup>lt;sup>18</sup> See Sea Fisheries and Maritime Jurisdiction Act 2006 in Ireland and the Act on the Exclusive Economic Zone of Finland, 26 November 2004.

<sup>&</sup>lt;sup>19</sup> See, *inter alia*: D. Vidas, "The UN Convention on the Law of the Sea, the European Union and the Rule of Law, What is going on in the Adriatic?", Available at: <a href="http://www.fni.no/doc&pdf/FNI-R1208.pdf">http://www.fni.no/doc&pdf/FNI-R1208.pdf</a>; I. Papanicolopulu, "Note on Maritime Delimitation in a Multizonal Context: The Case of the Mediterranean" (2007) 34 (4) ODIL 381–398.

<sup>&</sup>lt;sup>20</sup> Gazzetta Ufficiale della Republica Italiana, No. 52, 3 March 2006.

In this context, it is interesting to note that the state practice of EU Member States on maritime delimitation lacks uniformity, with some boundaries determined as a result of international judicial dispute resolution proceedings or arbitration between sister Member States of the EU, and in some instances by recourse to dispute settlement with third countries (that is to say, countries that are not members of the EU).26 Thus, for example, all of the States that had recourse to dispute settlement in the Anglo-French Continental Shelf Arbitration<sup>27</sup> and in the landmark North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)28 were at the time of the proceedings members of the EEC, which was the fore-runner of the EU as constituted today. A more recent example of maritime delimitation dispute settlement proceedings between a Member State and a third country is the Greenland/Jan Mayen case, which was decided by the International Court of Justice in 1993, and arose out of a dispute between Denmark and Norway concerning their respective continental shelf and the fishery zones in the area between Greenland and Jan Mayen.<sup>29</sup> There is some consensus in the specialist literature that these cases and EU Member State practice in general regarding the delimitation of maritime boundaries have made a significant contribution to the progressive development of international law on this subject.<sup>30</sup> One notable feature in these cases is that they involve recourse to dispute settlement proceedings outside of the European legal order and the Court of Justice of the EU in particular.31 More commonly, however, disputed maritime boundaries in Europe are settled by means of negotiation between Member States on a bilateral basis. There are many reasons for this including the fact that this approach has given the Member States a greater array of options in accommodating their respective interests in relation to the disputed areas. Indeed, a typical example of an innovative technical solution to a difficult boundary delimitation problem is the continental shelf boundary agreement concluded between the United

See inter alios: J.I. Charney and L.M. Alexander (ed.), International Maritime Boundaries (Martinus Nijhoff, Dordrecht, 1991 and 1997) Vols 1, 2 and 3; R. Smith, J. Charney, International Maritime Boundaries (Martinus Nijhoff, The Hague/London/New York, 2002), Vol. 4; D. Colson and R. Smith (ed.), International Maritime Boundaries (Martinus Nijhoff, Leiden/Boston, 2005), Vol. 5; P. Weil, The Law of Maritime Delimitation – Reflections (Grotius Publications Limited, Cambridge, 1989); P. Kolb, Case Law on Equitable Maritime Delimitation (Martinus Nijhoff Publishers, The Hague/London/New York, 2003); Y. Tanaka, Predictability and Flexibility in the Law of Maritime Delimitation (Hart Publishing, Oxford, 2006).

<sup>&</sup>lt;sup>27</sup> (1979) 18 ILM 397.

<sup>&</sup>lt;sup>28</sup> 1969 ICJ Rep pp. 3.

<sup>&</sup>lt;sup>29</sup> [1993] ICJ Rep 38.

<sup>&</sup>lt;sup>30</sup> *Op. cit.*, note 13.

<sup>31</sup> See discussion on the principle of conferral infra.

is separate from international law.<sup>35</sup> The functioning of the EU as a *sui generis* supranational regional integration organisation is facilitated by the delicate and rather complex distribution of powers between the European institutions and the Member States. Simply stated, Member States have pooled their sovereignty in certain policy areas, most notably in the area of trade, while at the same time they have retained their national sovereignty in core areas such as their power to determine their maritime limits and agree their maritime boundaries with neighbouring States.<sup>36</sup>

Importantly since the ratification of the Lisbon Treaty, stability within the European legal order is facilitated by the principle of conferral, which is now codified in the Treaty on European Union. This principle provides that the EU must "only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein." As a consequence, "competences not conferred upon the Union remain with the Member States." The Treaty of European Union underlines this core value in so far as it provides that the EU must respect "essential State functions, including ensuring the territorial integrity of the State" (emphasis added). 39

As pointed out by several speakers at this conference, the drawing of maritime boundaries is an essential and manifest function of statehood. If this axiom is accepted, then it must also be accepted that the principle of conferral in the EU Treaties now provides an unambiguous legal safeguard that ensures that this power remains the exclusive responsibility of each individual Member State. Following on from this it may also be contended that a Member State(s) may institute legal proceedings in the Court of Justice of the EU to review and annul any legislative acts adopted by the European institutions in the domain of maritime boundary delineation and delimitation should they stray into this field of Member State competence on a number of grounds including: lack of legal competence; infringement of a rule of law emanating from the Treaties; or the misuse of European institutional powers.<sup>40</sup>

Viewed from this standpoint, the principle of conferral serves as a legal bulwark that prevents the unlawful trespass and unwarranted interference by the European institutions into areas that remain the prerogative of individual Member States such as their powers to delineate and delimit their maritime limits and boundaries. In principle, EU Member States are free in a strict legal sense to establish their maritime zones in accordance with the applicable rules

<sup>35</sup> Case 26/62, Van Gend en Loos [1963] ECR 1, at 12.

<sup>&</sup>lt;sup>36</sup> See discussion on the scope and the exercise of EU competences in paragraph 5 infra.

<sup>&</sup>lt;sup>37</sup> Art. 5(2) of the TEU.

<sup>38</sup> Art. 4(1) and 5(2) of the TEU.

<sup>&</sup>lt;sup>39</sup> Art. 4(2) of the TEU.

<sup>&</sup>lt;sup>40</sup> Art. 263 of the TFEU.

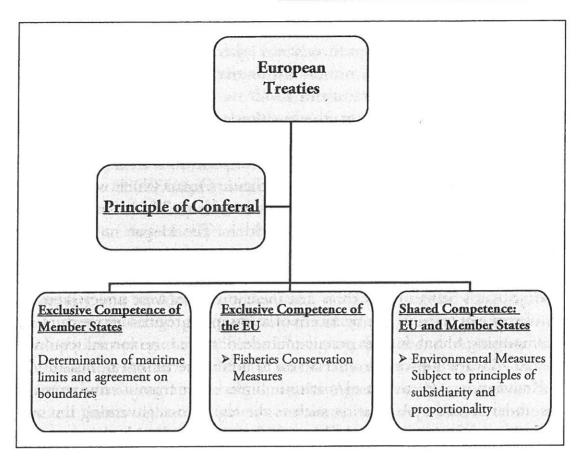


Fig. 1. Division of competence between EU and the Member States in maritime matters

expressly provided for in the Treaties, all other powers or competencies remain with the Member States.<sup>44</sup>

For illustrative purposes only, the division of legal competence between the EU and the Member States in the domain of maritime boundaries, fisheries, and environmental matters is simplified and shown in Figure 1 below. This illustration is of course subject to a number of caveats which are further elaborated upon in the following text.

## 5.1 Member State Competence to Determine their Maritime Boundaries

One of the principal arguments presented in this paper is that the role of the EU in matters pertaining to maritime limits and boundaries of the Member States is clearly circumscribed by the division of their respective areas of competence under the EU Treaties. One should exercise a degree of caution in relation to this assertion as the allocation of competence between the EU and the Member States is not always clear-cut and as a consequence is sometimes open to a number of interpretations. Indeed, the exclusive power of the Member States to determine their maritime limits in accordance with the applicable rules

<sup>44</sup> House of Lords, The Treaty of Lisbon: An Impact Assessment, p. 30.

or harmonisation measure.<sup>53</sup> This explains why the EU does not have any role in relation to the submissions by Member States of their extended continental shelf claims to the Commission on the Limits of the Continental Shelf in accordance with the scheme set down in the 1982 Convention. In a similar vein, the exclusive power of the Member States to determine their maritime boundaries in accordance with the applicable provisions of international law is not dealt with in either of the declarations regarding the transfer of competence lodged by the EEC/EC (predecessors of the EU) and the Member States with their instruments of formal confirmation of the 1982 Convention, the 1994 Implementation Agreement, and the 1995 Fish Stocks Agreement.<sup>54</sup>

A close examination of the latter reveals, nonetheless, that there is an indirect reference to the maritime limits in so far as the declarations deposited by the Community and its Member States upon ratification of the 1995 Agreement records that the terms 'geographical particularities,' 'specific characteristics of the sub-region or region,' 'socio-economic geographical and environmental factors,' 'natural characteristics of that sea' or any other similar terms employed in reference to a geographical region in the Agreement does not prejudice the rights and duties of States under international law.<sup>55</sup> As an aside, it should be mentioned that this particular declaration was aimed in part at protecting EU interests in high seas fisheries from coastal State hegemony such as Canadian interests in the fisheries on the nose and tail of the Grand Banks of Newfoundland which had been particularly problematic in the negotiation period leading up to the conclusion of the 1995 UN Fish Stocks Agreement.<sup>56</sup>

## 5.2 EU Competence in Fisheries Matters

The power of the Member States to determine their maritime boundaries may be contrasted with other areas where competence has been transferred to the

<sup>53</sup> For an update on these limits see DOALOS website.

<sup>&</sup>lt;sup>54</sup> Declaration made pursuant to Article 5(1) of Annex IX to the 1982 Convention and to Article 4(4) of the 1994 Agreement. 1998 *UNTS* 227–235. Declaration concerning the Competence of the European Community with regard to Matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the Implementation of Part XI of the Convention, 1 April 1998, OJ L 179, 23 June 1998, p. 130.

Declaration by the European Community made pursuant to article 47 of the Agreement, 2167 UNTS 3. Also, see Annex B of Council Decision 98/414/EC of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing 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 stocks and highly migratory fish stocks, OJ L 189, 3.7.1998, p. 14.

<sup>&</sup>lt;sup>56</sup> P. Curran, R. Long, "Unilateral Fishery Law Enforcement: the case of the *Estai*", *Irish Journal Of European Law*, December 1995, Vol. 5, No. 2, 1996, pp. 123–163.

In areas of shared competence, both the EU and the Member States are empowered to legislate and adopt legally binding acts subject, however, to the requirement that Member States must exercise their competence only to the extent that the EU has not exercised its competence.<sup>64</sup> Also, competence may revert to the Member States to the extent that the EU has decided to cease exercising its competence. 65 Moreover, it is well settled that Member States cannot exercise their powers in areas of shared competence in breach of fundamental principles in EU law such as the prohibition on discrimination on the grounds of nationality, or contrary to the principle of sincere cooperation which requires the EU and Member States to assist each other in the tasks which flow from the Treaties.66 Broadly speaking, in areas of shared competence, the EU can exercise its competence by either acting at an internal level within the European legal order by adopting legislation or by acting at an external level through entering into a binding international agreement on the subject matter in question. This was clarified by the Court of Justice in Commission v Ireland, where it was held that Ireland had breached EU law by commencing legal proceedings against the United Kingdom outside of the European legal order and by having recourse to a judicial forum such as the Arbitral Tribunal under Annex VII of the 1982 Convention.<sup>67</sup> Essentially, the Court held that in matters of environmental law, the European Community (predecessor to the EU) and its Member States shared competence and by becoming party to the 1982 Convention in its own right, the Community had exercised its competence in environmental matters relating to the law of the sea.<sup>68</sup>

Therefore, although the role of the EU in matters pertaining to maritime limits and boundaries is ostensibly circumscribed by the Treaty under the principle of conferral as noted previously, it has to be kept in mind that following on from the decision in the *Mox Plant* case, the Court of Justice of the EU has jurisdiction to deal with disputes relating to the interpretation or application of the provisions in the 1982 Convention where competence is shared with Member States on environmental matters, and most notably in relation to Articles 123, 192, 193, 194, 197, 206, 207, 211 and 213 of the 1982 Convention, and to assess Member State compliance with these provisions. In other words, it appears from this decision that where the substance of a maritime limits or boundary dispute relates to the marine environment, then the Court of Justice

<sup>&</sup>lt;sup>64</sup> Arts. 2(2) and 4 of the TFEU. Protocol No. 25 of the Treaties provides that where the EU has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.

<sup>65</sup> Art. 2(2) of the TFEU.

<sup>66</sup> Case 61/77, Commission v. Ireland [1978] E.C.R. 417 and Art. 4(3) of the TFEU.

<sup>67</sup> Case C-459/03, Commission v. Ireland [2006] ECR I-4635.

<sup>68</sup> Ibid. para. 126.

## 6.1 History of European Fishery Limits

The history of European fishery limits predates the advent of the EU by many centuries. If one goes back to the post-medieval period, it is clear that European countries claimed different maritime limits for different purposes, with many countries adopting a 3-mile fishery limit, and this limit was codified by Great Britain and America in the 1818 Fisheries Convention.<sup>73</sup> As mentioned above, fishery limits was one of the issues contested by Great Britain and Norway in the Anglo-Norwegian Fisheries Case in 1951 and came to the very fore of international attention at both the First and Second United Nations Conference on the Law of the Sea in 1958 and 1960 (UNCLOS I and II).74 Indeed, agreement on a six-mile territorial sea with an additional six-mile fishery zone as proposed by Canada failed by one vote at the UNCLOS II in 1960. In the 1960s, there was a major shift in state practice in Western Europe, with the coming into force of the 1964 European Fisheries Convention which provided for the six plus six formula, with coastal States enjoying exclusive jurisdiction within the inner six-mile zone measured from the baselines and access to the outer six- to twelve-mile zone granted to vessels of other Contracting Parties to the Convention which had habitually fished in that belt between 1953 and 1962.75 Seaward of twelve miles, fisheries were managed in the North Atlantic with questionable effectiveness by two international fishery commissions, the International Commission for the Northwest Atlantic Fisheries and the North-East Atlantic Fisheries Commission. The extension of European coastal State jurisdiction out to twelve miles in the North-East Atlantic came about for a number of reasons, namely: in response to state practice elsewhere including the unilateral extension of coastal State jurisdiction and the loss of traditional fishing grounds to European vessels in third-country waters such as what were perceived as traditional fishing grounds in Iceland; and partly in response to the failure of the Second United Nations Conference on the Law of the Sea (UNCLOS II) in Geneva to resolve the maximum permissible breadth of the territorial sea and the associated issue concerning the extent of coastal State fishery limits.

In the 1970s, the management of commercial sea-fisheries came firmly within the scope of the EU's common fisheries policy.<sup>76</sup> Originally, this policy was focused on resource allocation but in more recent decades the emphasis has

<sup>74</sup> Op. cit. note 4 supra.

<sup>&</sup>lt;sup>73</sup> See D.P. O'Connell, *The International Law of the Sea* (Oxford, Clarendon Press, 1982), pp. 129–151 and especially 135–139.

Arts. 2 and 3 of the 1964 European Fisheries Convention, London, 9 March 1964, entered into force 15 March 1966, 58 UNTS 76. Signed by Austria, Belgium, Denmark, the French Republic, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland.
 Case 804/79 Commission v United Kingdom [1981] ECR 1045.

reflected in specific provisions in the TEU and the TFEU (which supersedes the EC Treaty) concerning the geographical scope of application of European law in general. The former provides that the territorial scope of the Treaties shall apply to the Member States. The latter provides for a range of territories for which the Member States are responsible and where the treaties do not apply such as the Faeroe Islands. The *ratione loci* of European fisheries law is also addressed in the EU's Basic Fishery Management Regulation which provides the CFP applies to the "conservation, management and exploitation of living aquatic resources… where such activities are practiced on the territory of Member States or in Community waters or by Community fishing vessels or, without prejudice to the primary responsibility of the flag State, nationals of Member States." "Community waters" are defined in the said Regulation as meaning "the waters under the sovereignty or jurisdiction of the Member States with the exception of waters adjacent to the territories mentioned in Annex II to the Treaty."

Accordingly, the maritime limits and boundaries of the Member State define the geographical scope of application the CFP internally within the EU. As such, the policy applies to the territory of the Member States, internal waters, the territorial sea, the exclusive economic zone or exclusive fishery zone, the continental shelf, and in a more limited extent to fishing on the outer continental shelf for sedentary species. She as a result, commercial sea fisheries in the North-East Atlantic and in the Baltic Sea come within the scope of the policy and are subject to EU conservation and management measures. In contrast, fisheries in the Mediterranean and Black Seas are only governed by the CFP to a limited extent in so far as there are far fewer EU Member States in these geographical sea basins and in view of the fact that Member States have claimed a variety of fisheries and environmental protection zones as seen above. Seas are only governed by the CFP to a variety of fisheries and environmental protection zones as seen above.

Also relevant to the topic of maritime limits and the implementation of ecosystem-based management measures, is the extensive application of the CFP outside of sea areas under the sovereignty and jurisdiction of the Member States, which arises on the basis of Member State flag State jurisdiction under international law, as well as on basis of the principle of nationality which bring

<sup>82</sup> Art. 52 of the TEU and 349 and 355 of the TFEU.

<sup>83</sup> Art. 1(1) of Council Regulation No. 2371/2002.

<sup>84</sup> Art. 3(a) of Council Regulation No. 2371/2002. This Annex sets out the twenty-one overseas countries and territories of the Member States such as Greenland, French Polynesia and the British Indian Ocean Territory where there are special arrangements in place for association with the EU and where the CFP has only limited relevance, mainly in the context of trade.

<sup>&</sup>lt;sup>85</sup> Regarding the application of the CFP to the various maritime zones and the continental shelf in particular see R.R. Churchill, D. Owen, *The EU Common Fisheries Policy* (Oxford: Oxford University Press, 2010) pp. 61–65.

<sup>86</sup> See paragraph 2 supra.

example the area of the Shetland Box marked out by a system of rhumb lines linking a series of geographical coordinates. This may be contrasted with some of the other specific management regimes for fisheries under the CFP which are delineated by specifying in the relevant European regulation a distance in nautical miles measured from the baselines of the territory of the Member State in question. A good example of the latter approach is the management regime that is said to apply in "the waters up to 100 nautical miles from the baselines" of the Azores, Madeira and the Canary Islands.<sup>94</sup>

So how important are maritime limits and boundaries to the practical aspects of fisheries management under the CFP? There is no simple answer to this question and their relevance is best understood perhaps if one looks at a number of examples of how the European fishery management system works in practice. Take for example the annual TAC and Quota Regulation which sets out the fishing opportunities and associated conditions for exploiting certain fish stocks and groups of fish stocks. <sup>95</sup> In particular, this regulation sets out the conditions for the utilisation of quotas for over 140 stocks of fish in sea areas under the sovereignty and jurisdiction of the Member States, as well as in high seas areas under the management of regional fishery management organisations such as the North East Atlantic Fisheries Commission (NEAFC) and the International Commission for the Conservation of Atlantic Tunas (ICCAT).

As is well known, fisheries resources that straddle or migrate across international boundaries are inherently difficult to manage successfully. Indeed, this reality is reflected in the 1995 UN Fish Stocks Agreement. The CFP addresses this difficulty by providing for a common area of jurisdiction for the adoption of EU fishery management and conservation measures. Essentially, stocks are managed on the basis of the ICES statistical areas, sub-areas, divisions and subdivisions, and where necessary on the basis of subdivisions adopted by the United Nations FAO, or by means of the management zones adopted by regional fisheries management organisations. What is notable here is that ICES statistical areas are not coterminous with the fishery limits and zones claimed by EU Member States. In some instances, these sub-areas extend across the maritime zones of several EU Member States. Take, for instance, ICES VIIh which straddles across the EEZ/EFZ's claimed by the UK, France and Ireland as can be seen in Figure 2 below.

<sup>94</sup> See, for example, Art. 5(1) of Council Regulation 1954/2003.

Ouncil Regulation (EU) No. 57/2011 of 18 January 2011 fixing for 2011 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in EU waters and, for EU vessels, in certain non-EU waters, OJ L 24/1, 27.1.2011.

<sup>96</sup> Op. cit. note 53 supra.

<sup>&</sup>lt;sup>97</sup> ICES (International Council for the Exploration of the Sea) zones are as defined in Regulation (EC) No. 218/2009 of the European Parliament and of the Council of 11 March 2009 on the submission of nominal catch statistics by Member States fishing in the north-east Atlantic (recast) (OJ L 87, 31.3.2009), p. 70.

How this system operates in practice can be seen if we take the example of the mackerel stock (scomber scombrus), which is shown in Table 1 below. In 2010, the allocation of this fish stock was undertaken on the basis of the following ICES statistical areas II (non EC waters), Vb (EC waters), VI, VII, VIIIa-e, XII and XIV. This area covers the geographical distribution of the entire stock from northern Norway down to the Bay of Biscay-an extensive area of the North-East Atlantic. Under this system, the Total Allowable Catch ("TAC"), which is the quantity that can be taken and landed from each stock each year, is agreed by the Council of Fisheries Ministers and individual quotas are allocated to individual Member States or third countries on the basis of a fixed percentage under a principle referred to as relative stability. In the case of mackerel stock illustrated in Table 1, these fishing opportunities are allocated to ten Member States as well as Norway and the Faroe Islands. In practice, the percentages used in 1982 became the "allocation keys" and they are adjusted from time to time to take into account the needs of new Member States on their accession to the EU. The European Commission may immediately stop fishing activities once the respective quota has been exhausted and in some instances allow

Table 1. Allocation of mackerel (scomber scombrus) for EU Member States in 2010

| Species: Mackerel<br>Scomber scombrus  |   | Zone: IIa (non-EC waters), Vb (EC waters), VI, VII, VIIIa, b, d, e, XII, XIV MAC/2CX14–                     |  |
|--|---|---|--|
| Germany Spain Estonia France Ireland Latvia Lithuania The Netherlands Poland United Kingdom EC Norway Faroe Island | 14,369<br>20<br>119<br>9,580<br>47,894<br>88<br>88<br>20,954<br>1,012<br>131,713<br>225,837<br>9,000 <sup>(1)</sup><br>3,496 <sup>(2)</sup><br>415,824 <sup>(3)</sup> | Analytical TAC. Article 3 of Regulation (EC) No. 847/96 does not apply.                                     |  |
|  |   | Article 4 of Regulation (EC) No. 847/96 does not apply. Article 5(2) of Regulation (EC) No. 847/96 applies. |  |

(1) May be fished only in IIa. VIa (north of 56°30'N), IVa, VIId, e, f, h.

(3) TAC agreed by the EC, Norway and Faroe Islands for the northern area.

<sup>(2)</sup> Of which 1,055 tonnes may be fished in ICES Division IVa north of 59°N (EC zone) from 1 January to 15 February and from 1 October to 31 December. A quantity of 2 908 tonnes of the Faroe Islands' own quota may be fished in ICES Division VIa (north of 56°30'N) throughout the year and/or in ICES Divisions VIIe, f, h, and/or ICES Division IVa.

EU and the third-country, as well to fishing activity by EU vessels in areas beyond national jurisdiction that are managed by regional fisheries management organisations.

Starting with third-country waters, a brief review of European secondary legislation reveals that the references to maritime boundaries in the various partnership agreements and protocols are not entirely uniform. As a general rule, it appears that EU fisheries regulations make reference to "third-country waters" without dwelling on the nature of third-country maritime limits as can be seen from the reference in the 2011 TAC/Quota Regulation to the fishery for "Herring, north of 62° 00' N" in "Norwegian waters and fishery zone around Jan Mayen."102 In this instance, the relevant limits are those that are defined in Norwegian legislation and under the terms of the agreements or protocols on fisheries relations between the EU and Norway. 103 The latter agreement simply provides that "each Party shall within its area of fisheries jurisdiction extending up to 200 nautical miles from the baselines from which the territorial sea is measured, grant access to fishing vessels of the other Party to fish."104 A similar approach to fisheries boundaries is evident in the EU fisheries agreements that apply to the Faroe Islands and Greenland where reference is simply made to the "fishery zone extending to 200 nautical miles off the coast within which the Faroe Islands" and to "the Greenlandic EEZ" respectively. 105

A brief perusal of the partnership agreements and protocols with third-countries reveals a very similar broad-brush approach to maritime limits and the various jurisdictional zones provided for in the 1982 Convention. By way of example the partnership agreement with the Seychelles simply makes reference to "Seychelles waters" and to "the waters over which the Republic of Seychelles has sovereignty or jurisdiction in respect of fisheries" without specifying anything further on fisheries limits. <sup>106</sup> In practice, EU fishing vessels must carry a

<sup>&</sup>lt;sup>102</sup> Annex III of Council Regulation (EU) No. 57/2011.

<sup>&</sup>lt;sup>103</sup> Agreement on fisheries between the European Economic Community and the Kingdom of Norway, OJ L 226, 29.8.1980, p. 48.

<sup>&</sup>lt;sup>104</sup> Art. 1 of Agreement on fisheries between the European Economic Community and the Kingdom of Norway.

Agreement on fisheries between the European Economic Community, of the one part, and the Government of Denmark and the Home Government of the Faeroe Islands, of the other part, OJ L 226, 29.8.1980, p. 12. Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand (OJ L 172, 30.6.2007, p. 4) and Protocol setting out the fishing opportunities and financial contribution provided for in that Agreement, OJ L 172, 30.6.2007, p. 9.

Fisheries Partnership Agreement between the European Community and The Republic of Seychelles, OJ L 290, 20.10.2006, p. 2; and Council Regulation (EU) No. 1263/2010 of 20 December 2010 concerning the allocation of the fishing opportunities under the Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries

Under the NEAFC Convention, the NEAFC Commission is empowered to make recommendations "concerning fisheries conducted beyond the areas under jurisdiction of Contracting Parties." This is a very general clause that says little about the precise boundaries of the Convention area. In practice, however, it is the fishery limits of sea areas under the jurisdiction of Denmark (in respect of the Faroe Islands & Greenland), the EU Member States, Iceland, Norway and the Russian Federation that define the geographical area that comes within the scope of NEAFC conservation and management measures. This area is shown in Figure 3 below.

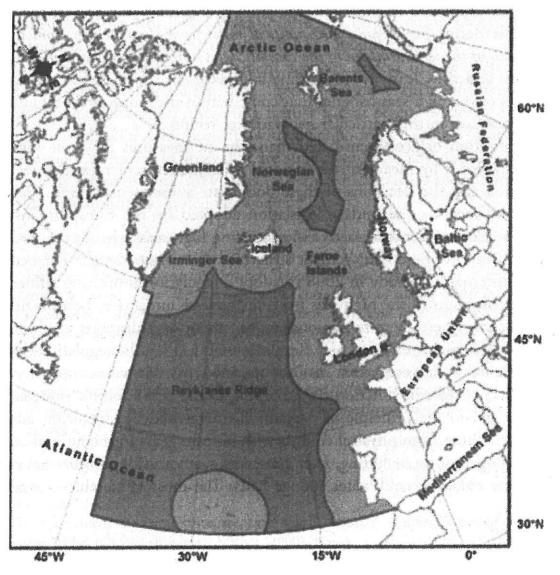


Fig. 3. Map of the NEAFC Regulatory Area

<sup>110</sup> Article 5 Ibid.

are those that are easily disturbed and in addition are very slow to recover, or may never recover". 114

## 6.5 Fishery Limits and Law Enforcement at Sea

Maritime limits are of crucial importance to the law enforcement task at sea and to determining the *ratione loci* of Member State enforcement jurisdiction. More specifically, the enforcement task within the EU is undertaken by the coastal States in relation to waters under their sovereignty or jurisdiction, by flag States when their vessels operate on the high seas, or by parties to the enforcement scheme established by regional fisheries management organisations, such as the Northwest Atlantic Fisheries Organisation (NAFO) scheme of inspection and enforcement in the NAFO Regulatory Area.

In general, fishery law enforcement agencies appear to work relatively well and considerable efforts have been used to improve their effectiveness on a cross-boundary basis. An interesting feature is that several Member States have established bilateral arrangements with neighbouring Member States for law enforcement purposes in areas that are subject to boundary disputes. These are commonly referred to as "grey areas," a term which has no specific legal meaning. As this author has noted elsewhere:<sup>116</sup>

In practice, grey areas do not present a problem for the management of European fisheries which are managed as biological units under the CFP and not on the basis of the maritime limits claimed by Member States. National fishery limits of course circumscribe the areas under the sovereignty and jurisdiction of coastal States for the purpose of enforcing fishery law. Member States such as Ireland and the UK have agreed a reciprocal arrangement for the enforcement of fishery law in disputed areas. There are also a number of joint enforcement schemes between national fishery inspection services at a European level. At a practical level, the adoption of European regulations governing the introduction of a satellite based fishery monitoring system necessitated Member States exchanging and publishing their maritime limits for fishery protection purposes. 118

On enforcement and compliance, see, inter alia: R. Long, P. Curran, Enforcing the Common Fishery Policy (Oxford: Blackwell Science, 2000), passim.

<sup>117</sup> C.R. Symmons, *Ireland and the Law of the Sea* (2nd ed., Round Hall Sweet & Maxwell, 2000), at pp. 164–167.

<sup>114</sup> Ibid. Art. 2(b).

This is updated from R. Long, *Marine Resource Law* (Dublin, Thomson Round Hall, 2007), p. 47.

Council Regulation (EC) 686/97 of 14 April 1997 amending Council Regulation (EC) 2847/93 establishing a control system applicable to the common fishery policy [1997] O.J. L 102/1; and Commission Regulation 1498/97 of 29 July 1997 laying down detailed technical rules for the application of Council Regulation 2847/93 as regards satellite-based vessel monitoring systems [1997] O.J. L 202/18.

make it very straightforward to draw maritime charts with two 12-mile limits which deviate at certain points." 123

In practice, this decision of the Court of Justice of the EU means that the UK has two 12-mile limits for different purposes. However, the United Kingdom Hydrographic Office does not depict these two limits on the navigation chart because it would cause a degree of confusion for those engaged in maritime activities at sea including, it must be assumed, the law enforcement agencies. A more pragmatic approach has been taken with the fishery authorities and the fishermen that are affected by the ruling relying upon the 1983 limits for fishery purposes without having the limits depicted on the standard Admiralty navigation charts. Two of the areas affected by the Courts decision are in the south west approaches to the English Channel in the vicinity of Wolf Rock and Seven Stones, as can be seen in Figure 4 below. Seaward of the 12-mile limit, this decision has little relevance to the allocation of fishing entitlements as these are undertaken as seen above on the basis of ICES statistical areas and not on the basis of national jurisdictional zones or the fishery limits of the Member States.

This decision is very relevant to ecosystem-based management and to the pressing issue of sea level rise and the receding low water mark of many coastal States in light of climate change. As noted in the paper presented by Professor Mayer in these proceedings, many scholars have presented different views on the fixing of baselines for the purpose of ensuring legal clarity regarding the accuracy of maritime limits.<sup>124</sup> Indeed, if one is to follow the logic of the judgment in the *UK Baseline Case*, then the fixing of maritime limits for the purpose of marine resource allocation and management is not an insurmountable obstacle under EU law. This decision appears to support the contention that rising sea levels and the dynamic and ambulatory nature of many coast-lines does not affect the geographical area of application of the European CFP. Ostensibly, it may be contended that the approach of the Court to this issue brings stability and clarity to EU law and will greatly facilitate the application of ecosystem based fishery management measures on a cross-boundary basis in

<sup>&</sup>lt;sup>123</sup> Para. 54 of Case C-146/89 Commission v. United Kingdom [1991] E.C.R. I-03533.

See, inter alia: J. Lisztwa, "Stability of Maritime Boundary Agreements", (2011) 37(1) Yale Journal of International Law 153–200; R. Rayfuse, International Law and Disappearing States: Utilising Maritime Entitlements To Overcome the Statehood Dilemma (Univ. N.S.W. Faculty of Law Research Series, Paper 52, 2010); D. Caron, "Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal To Avoid Conflict", in Seoung-Yong Hong, Jon M. Van Dyke eds., Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea (The Hague, Martinus Nijhoff, 2009); J. Lusthaus, "Shifting Sands: Sea Level Rise, Maritime Boundaries and Inter-state Conflict", (2010) 30(2) Politics 113; A.H.A. Soons, "The Effects of Rising Sea Level on Maritime Limits and Boundaries", (1990) 37 Netherlands International Law Review 207.

resources under the CFP. However, this position must be distinguished very carefully from the situation where there is a boundary dispute between an EU Member State and a third-country. In such instances, there is some support in judicial and arbitral determinations of maritime boundaries that access to fishery resources may be a special circumstance to be taken into account in modifying a provisional equidistant line or other form of boundary arrangement provided that the rigorous evidentiary standards are satisfied.<sup>127</sup>

## 6.6 Fishery Limits and EU Fisheries in the Mediterranean Sea and Black Sea

For oceanographic and other scientific reasons, fisheries in the Mediterranean Sea are considerably different from fisheries in the Atlantic and the Baltic Sea. The European fishing fleet operating in the Mediterranean Sea is predominantly artisanal and most fishing activity is undertaken close to the coast in territorial waters due to the narrowness of the continental shelf and the relatively small size of individual vessels. These differences are also reflected in the management measures under the CFP. 129

As noted above, the maritime zones claimed by the coastal States in the Mediterranean Sea lack uniformity. This has always been the case and it is interesting to see that the European Commission pointed out in 2002 that the diversity of fisheries and environmental protection zones claimed by Member States included the following: a 12-mile fisheries jurisdiction coterminous with territorial sea limits; a 49-mile fisheries protection zone; a 25-mile exclusive fishing zone; and a variety of environmental protection zones. In a surprising move, the Commission recommended in the Action Plan that all coastal States of the Mediterranean basin ought to establish fishery protection zones and this

On the role of fisheries in boundary delimitation see inter alia: Arbitral Award in the Question of the Delimitation of a Certain Part of the Maritime Boundary between Norway and Sweden (1910) AJIL 226; Eritreal Yemen Arbitration, 17 December 1999; Barbados v Trinidad and Tobago (2006) ILM 798 at 266–269.

<sup>128</sup> It is estimated that more than 80% of all Member State fishing vessels are less than 12 metres in length.

<sup>&</sup>lt;sup>129</sup> Council Regulation (EC) No. 1967/2006 of 21 December 2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea, amending Regulation (EEC) No. 2847/93 and repealing Regulation (EC) No. 1626/94, OJ L 409 of 30.12.2006, [corrigendum: OJ L 36 of 8.2.2007].

<sup>130</sup> Op. cit. note 2 supra.

Communication from the Commission to the Council and the European Parliament of 9 October 2002 laying down a Community Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean Sea under the Common Fisheries Policy. COM (2002) 535 final.

on the basis of geographical regions and fish stocks and not on the basis of the maritime limits and boundaries established by individual Member States. 138 The so-called Regional Advisory Councils, which fulfil the stakeholder consultation function, are in operation for the Baltic Sea, the North Sea, North-Western Waters, South-Western Waters, the High-Seas/Long-Distance Fleet, Pelagic Stocks, and the Mediterranean Sea (see Table 2). The precise geographical coverage of these bodies is set out in a European Council of Fisheries Ministers Decision and this simply refers to ICES areas, CECAF divisions (1) and General Fisheries Commission for the Mediterranean. 139 The justification for this approach is that it corresponds to the biological distribution of the various fish stocks in the various regions that come within the scope of the CFP.140 As an aside, it should also be noted that in the regulatory instrument establishing the RACs, the High Sea and sea areas under the sovereignty or jurisdiction of thirdcountries are referred to as "non EC-waters." This is not a term of art and very much a misnomer under international law. Regrettably, the use of such terms now appears to permeate a whole raft of EU secondary legislation and detracts from the clarity of many instruments.

Table 2. Regional Advisory Councils under the CFP

| Name of the Regional Advisory Council | ICES areas, CECAF divisions <sup>141</sup> and General Fisheries Commission for the Mediterranean |
|---------------------------------------|---|
| Baltic Sea                            | IIIb, IIIc and IIId   |
| Mediterranean Sea                     | Maritime Waters of the Mediterranean of the   |
|                                       | East of line  |
|                                       | 5°36' West  |
| North Sea                             | IV, IIIa  |
| North Western waters                  | V (excluding Va and only EC waters in Vb), VI,  |
|                                       | VII   |
| South Western waters                  | VIII, IX and X (waters around Azores), and  |
|                                       | CECAF divisions 34.1.1, 34.1.2 and 34.2.0   |
|                                       | (waters around Madeira and the Canary Islands)  |
| Pelagic stocks (blue whiting,         | All areas (excluding the Baltic Sea and the   |
| mackerel, horse mackerel, herring)    | Mediterranean Sea)  |
| High seas/long distance fleet         | All non EC-waters   |

<sup>&</sup>lt;sup>138</sup> Council Decision 2004/585/EC of 19 July 2004 establishing Regional Advisory Councils under the Common Fisheries Policy. OJ L 256/17. 3.8.2004.

<sup>&</sup>lt;sup>139</sup> Annex 1 to Council Decision 2004/585/EC of 19 July 2004 establishing Regional Advisory Councils under the Common Fisheries Policy. OJ L 256/17, 3.8.2004.

<sup>&</sup>lt;sup>140</sup> Recital 2 of Council Decision 2004/585/EC.

<sup>&</sup>lt;sup>141</sup> For the purposes of this Decision, ICES areas are as defined in Regulation (EEC) No. 3880/91 (OJ L 365, 31.12.1991, p. 1), Regulation as last amended by Regulation (EC) No. 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1) and CECAF Divisions are as defined in Regulation (EC) No. 2597/95 (OJ L 270, 13.11.1995, p. 1). Regulation as last amended by Regulation (EC) No. 1882/2003.

## 7. Maritime Boundaries and EU Environmental Law

Outside of the domain of fisheries, maritime limits and boundaries are relevant to the implementation of EU environmental law instruments such as the Habitats Directive, the Birds Directive, the Water Framework Directive and the Marine Strategy Framework Directive. In this regard, one of the inexplicable oversights in EU secondary legislation that applies to the marine environment up until relatively recently has been the failure of the EU legislature to explicitly state the geographical scope of certain important instruments such as the Habitats Directive. 144 Fortunately, as will be seen below, this omission is no longer evident in the new generation of EU secondary legislation such as the Marine Strategy Framework Directive which specifically addresses this issue and is focused on applying new normative tools, such as the ecosystem approach and the precautionary principle, to the task of managing maritime activities. As mentioned in the introduction of this paper, this brings with it a new range of challenges for the EU as it entails the implementation of marine environmental management measures on the basis of ecological boundaries and not necessarily on the basis of maritime limits and boundaries of the Member States.

## 7.1 Maritime Limits and the Protection of Biodiversity

The Habitats and Birds Directives are two of the principal instruments for protecting biodiversity in the marine environment. The Court of Justice of the EU, in Case C-6/04 Commission v United Kingdom, addressed the geographical scope of the Habitats Directive. Although this issue had previously been dealt with by the High Court in the United Kingdom, the Court of Justice of the EU noted that it was "common ground between the parties that the United Kingdom exercises sovereign rights in its EEZ and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the Member States' territorial waters." Accordingly, it followed that the Directive must be implemented in the EEZ and other offshore areas under coastal Member State jurisdiction. This decision thus resolved an important issue that arises in ecosystem-based management, which is that many of the most fragile habitats

<sup>144</sup> See para. 7.1 infra.

<sup>&</sup>lt;sup>145</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.07.1992, pp. 7–50 (as since amended); Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version), OJ L 20/7, 26.1.2010.

<sup>146 [2005]</sup> ECR I-9017.

<sup>&</sup>lt;sup>147</sup> Para. 117 of Case C-6/04 Commission v United Kingdom.

<sup>148</sup> *Ibid*.

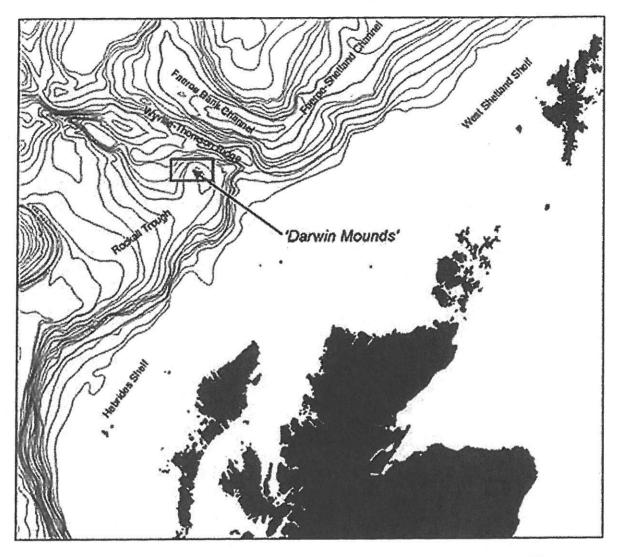


Fig. 5. The Darwin Mounds Marine Special Area of Conservation 152

## 7.2 Maritime Limits / Boundaries and the OSPAR Network of Marine Protected Areas

In addition to the measures taken to protect biodiversity within national jurisdiction, an essential feature of ecosystem-based management in the EU is in the designation of marine protected areas in areas beyond national jurisdiction. Perhaps one of the best examples of a proactive approach is the measures adopted by the Contacting Parties to the Convention for the Protection of the Marine Environment of the North-East Atlantic (referred to as the 'OSPAR

Reproduced from E.M. De Santo, P.J.S. Jones, "The Darwin Mounds: from undiscovered coral to the development of an offshore marine protected area regime" in *Bulletin of Marine Science* 81(s1), 147–156. Courtesy of Brian Bett, National Oceanography Centre, Southampton.

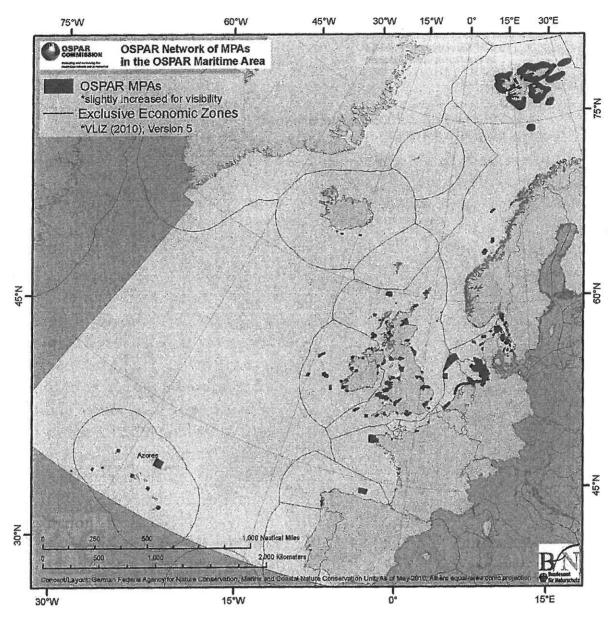


Fig. 6. Network of MPAs in the OSPAR Maritime Area

Seamount, and the Josephine Seamount Complex) and part of the Rockall and Hatton Banks where there are important deep-water coral reefs. Since the initial work on the identification of potential MPAs, there have been a number of major changes to the designation process in view of the various continental shelf outer limits claimed by OSPAR Contracting Parties. More specifically, the Reykjanes Ridge was dropped as a potential MPA as it comes within the area that is subject to an extended continental shelf claim by Iceland. Similarly, the OSPAR Commission has set the nomination of the Rockall and Hatton Banks MPA aside as it is in an area of extended continental shelf that is contested by the UK, Ireland, Iceland and Denmark (on behalf of the Faeroe Islands). Furthermore, part of the designated site came within Ireland's EEZ.

This statement did not stop work on the designation process and a major milestone was achieved in 2010 when the OSPAR Ministerial Meeting adopted Decisions establishing six MPAs in areas beyond national jurisdiction and a number of recommendations regarding their initial management. Most notably, the Milne Seamount Complex is established and managed as an OSPAR MPA and it is an area that is totally beyond national jurisdiction. However, in relation to the other sites, the Ministerial Meeting adopted measures to establish and manage an OSPAR MPA in the High Seas superjacent to the seabed of the Altair, of the Antialtair and of the Josephine Seamounts, as well as of an area of the Mid-Atlantic Ridge North of the Azores. Since the seabed of these areas is subject to a submission by Portugal to the Commission on the Limits of the Continental Shelf (CLCS), these measures complement the management measures for MPAs reported by Portugal to the OSPAR Commission as components of the OSPAR network of MPAs.

Considerable progress was made at the Ministerial Meeting in 2010 regarding the most difficult sites from a maritime limits perspective. Commendably, Contracting Parties recorded their commitment to resolve by 2012 any outstanding issues with regard to the waters of the High Seas of the northern part of the Charlie-Gibbs Fracture Zone MPA. Moreover, they adopted what they termed as "significant and innovative measures" to establish and manage the southern part of site (now referred to as the "Charlie-Gibbs South MPA") where the seabed and superjacent waters are situated in areas beyond national jurisdiction.

Over the years OSPAR has worked with a number of competent international bodies, including the International Seabed Authority, to develop appropriate schemes of management for these sites. These measures entail "awareness raising" with other competent authorities, a science and technical component including the application of code of conduct for marine scientific research in the sites, the requirement of undertaking environmental impact and strategic environmental impact assessment for new activities, as well as the obligation to work with competent third parties in relation to achievement of management and conservation objectives.

Previously, a major step was taken by the North East Atlantic Fisheries Commission in 2009 when it agreed to close five areas in the Mid-Atlantic Ridge which overlap four of the proposed OSPAR MPAs (Charlie-Gibbs Fracture Zone, Mid-Atlantic Ridge north of the Azores, Altair Seamount, and the Antialtair Seamount) to bottom fisheries with a view to protecting these vulnerable marine ecosystems from the destructive impacts of trawling until 2015. Clearly,

<sup>&</sup>lt;sup>160</sup> See Ministerial Statement, Meeting of the OSPAR Commission, Bergen, 20–24 September 2010.

| 1 10 0       |     |    |     |       |
|--------------|-----|----|-----|-------|
| $T_{\alpha}$ | hla | /1 | (co | n+ )  |
| 1 al         | סוכ | T  | 100 | 111.1 |

| OSPAR MPA in ABNJ | Jurisdiction  |
|-------------------|---|
| Reykjanes Ridge   | Seabed subject to submission by Iceland for an extended continental shelf Water column above beyond national jurisdiction Dropped as proposed MPA |

## 7.2 Maritime Limits/Boundaries and the Marine Strategy Framework Directive

The Marine Strategy Framework Directive (MSFD) is part of a new generation of legal instruments that implement the ecosystem approach and requires all Member States to achieve good environmental status of marine waters by 2020 at the latest. 161 The Directive provides for an expansive definition of marine waters in so far as it means the "waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the UNCLOS."162 The Directive therefore applies in: the territorial sea; the EEZ, or any derivative of an EEZ such as the 200-mile renewable energy zone claimed by the UK; and the continental shelf including the outer continental shelf, that is to say areas of the shelf where it extends beyond the 200-mile EEZ. The Directive does not apply to the waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities. 163 Moreover, it has only limited application in the territorial sea in so far as particular aspects of the environmental status of the marine environment are not already addressed through the Water Framework Directive or other EU legislation. 164 The instrument is innovative in so far as it relies on the institutional structures established under the regional seas convention for implementation and requires the establishment of marine regions or sub regions on the basis of geographical and environmental criteria, and not sensu stricto on the basis of the maritime limits and boundaries established by the Member States.

Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) OJ L 164/19, 25 June 2008. For commentary on this Directive see, R. Long, "The EU Marine Strategy Framework Directive: A New European Approach to the Regulation of the Marine Environment, Marine Natural Resources and Marine Ecological Services", 29 (1) (2011) Journal of Energy and Natural Resources Law pp. 1–45.

<sup>&</sup>lt;sup>162</sup> Article 3(a) of the Marine Strategy Framework Directive.

<sup>163</sup> Ibid.

Article 3(b) of the Marine Strategy Framework Directive excludes from the scope of the instrument "coastal waters as defined by Directive 2000/60/EC, their seabed and their subsoil, in."

sea basins and not on the basis of the maritime limits and boundaries claimed or established by the EU Member States. Furthermore, it requires Member States to coordinate their approach in marine environmental management without having regard to maritime boundary disputes. Of course, it does not detract from the importance of maritime limits and boundaries in the enforcement of EU law in the Member States in so far as this follows the maritime jurisdictional framework codified by the 1982 Convention.

### 7.4 Water Framework Directive

Another EU environmental instrument that applies to the marine environment to a more limited extent is the Water Framework Directive, which establishes a new framework for Community action in the field of water policy. The Directive applies to the management of estuarine waters and coastal waters, which are defined in the context of the baselines. More specifically, under the Directive, Member States must achieve "good chemical status" of all territorial waters by 2015, and "good ecological status" for all coastal waters which is defined therein as meaning "surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional water." <sup>168</sup>

The use of the baselines for the purpose of implementation of the Directive by the Member States is to be welcomed as it brings an important element of legal precision to the geographical scope of application of the instrument in the marine environment. This does not really accord with the ecosystem approach, however, as some ecosystems such as benthic communities will clearly extend across such inshore limits or boundaries. Moreover, the geographical scope of coverage of the Directive will vary according to various methods of baselines relied upon by Member States to project their maritime limits. <sup>169</sup> In particular, States such as Ireland that make extensive use of straight baselines will have to apply the Directive more extensively. This is compounded by the fact that there are different approaches to the application of the Directive in the different Member States and indeed within Member States such as the regional areas in the United Kingdom. <sup>170</sup> This varies from one mile on the coast of England, Wales and Northern Ireland, and extends to three miles around the coast of

Directive 2000/60/EC of the European Parliament and of the Council of October 23, 2000, establishing a framework for Community action in the field of water policy [2000] O.J. L 327/1.

<sup>&</sup>lt;sup>168</sup> Article 2(7) of Directive 2000/60/EC.

<sup>169</sup> See R. Long, Marine Resource Law (Dublin, Thomson Round Hall, 2007), passim.

<sup>170</sup> Ibid.

## 8. Concluding Remarks

For the purpose of the ODEMM project, this paper has reviewed some recent developments in EU law that impinges upon the maritime limits and boundaries of the Member States. This review suggests that considerable progress has been made at an EU level in implementing an ecosystem-based approach to fisheries and environmental management on a trans-boundary basis. Moreover, in the context of the ODEMM project, it is therefore possible to conclude that the maritime boundaries claimed by the Member States are not an insurmountable obstacle to the successful implementation of the approach in practice. Undoubtedly, as seen above, the size and nature of the task of ecosystem-based management is compounded by the complexity of the maritime zones claimed by the Member States and the evolving nature of claims to an extended continental shelf. In a recent publication, this author has summarised the position regarding the implementation of the ecosystem approach at an EU level as follows:

[P]ractical difficulties arise when the boundaries of the ecosystem do not correspond to the maritime jurisdictional zones set down by the Law of the Sea. These difficulties arise because the physical extent of an ecosystem is based on ecological, rather than political or economic, criteria. The resulting mismatch between ecosystem boundaries and the boundaries of the various maritime jurisdictional zones as codified in the 1982 LOS Convention may mean that the rights and duties of various parties vary across the ecosystem. Frequently, these difficulties are compounded by the absence of a single regulatory body with exclusive legal competence to adopt management measures that apply to the entire ecosystem. Significantly, the International Court of Justice has consistently rejected attempts to redraw maritime boundaries in accordance with ecosystem or environmental considerations. 171 As a result, cross boundary cooperation at global and regional levels is essential to implementing the concept in practice. From the perspective of EU law, this problem is mitigated to a certain extent as the European institutions have legal competence in a number of areas to adopt regulatory measures that are trans-boundary in scope such as fisheries conservation measures under the CFP. This is particularly relevant in light of the ambulatory nature of ecosystem boundaries and the need to adjust the geographical scope of the various regulatory measures that are common to the entire ecosystem from time to time. Moreover, in exercising its exclusive competence with regard to the conservation and management of living aquatic resources, the rule-making powers of the EU extend to concluding agreements with third countries and international organisations. 172 These powers are clearly germane to implementing the ecosystem approach on a regional basis. Indeed, the MSFD is predicated on utilising the regional seas institutional structures to deliver

172 Joined Cases 3, 4, 6/76, Kramer (1976) ECR 1279.

Gulf of Maine Case 1984 ICJ 246; Jan Mayen Case (1993) ICJ Reports 38.