Introduction: External Aspects of the European Union Common Fisheries Policy

The European Union as an Actor in Fisheries Law and Policy

The European Union (EU) is a unique international organisation. Its constituent treaties establish a regional legal order separate from international law but also integral to the legal systems of its Member States. EU law has supremacy over the domestic laws of the Member States.¹ The EU also possesses international legal personality² and is empowered to enter exclusively into binding legal relations with non-EU States (hereinafter third States) on behalf of its twenty-seven Member States in respect of those matters over which it enjoys competence.³ The exclusive competence of the EU extends to the conservation and management of marine living resources,⁴ which has allowed it to play a significant role in the development of fisheries law and policy.

The Common Fisheries Policy (CFP) is a set of rules agreed by Member States for regulating the conservation and management of stocks in so-called Union waters – the combined waters of the EU's constituent Member States⁵

1 The papers in this Issue were selected from the proceedings of a one-day symposium of the Edinburgh Europa Research Group entitled 'External Challenges for the Common Fisheries Policy', which took place on 11 May 2018 at the University of Edinburgh. The symposium received financial and logistical support from the Edinburgh Europa Institute, the University of Edinburgh Law School, and the Institute for Academic Development. The symposium was also supported by the European Commission and was a recognised 2018 European Maritime Day event. See, e.g., Case C-221/89 *R v. Secretary of State for Transport ex parte Factortame Ltd and others*, Judgment of 25 July 1991, [1991] ECR I-03905; see further Declaration concerning Primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed 13 December 2007.

2 Consolidated version of the Treaty on European Union, *OJ C* 326, 26.10.2012, pp. 13–46, Article 47.

3 Consolidated version of the Treaty on the Functioning of the European Union (TFEU), *OJ C* 326, 26.10.2012, pp. 47–390, Article 3(2).

4 *Ibid.*, Article 3(1)(d).

5 Regulation (EU) No 1380/2013 of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, *OJ L* 354, 28.12.2013, at p. 22, Article 4(1)(1).

– as well as the regulation of fishing vessels flying the flag of an EU Member State in the waters under the jurisdiction of third States or on the high seas. In broad terms, it treats the waters and resources therein as a common resource and EU nationals enjoy equal access to waters and fishing opportunities, subject to some legally defined exceptions or conditions.⁶ The CFP was introduced in 1970,⁷ and been subject to periodic reviews and reform.⁸ In order to ensure the functioning of the market and common standards in fisheries management, the CFP is generally comprised of Regulations. Regulations are legal acts that become immediately enforceable as law in all Member States, without the need for further implementing measures.⁹ If a Regulation confers rights upon individuals, then those rights can be asserted against third parties and enforced in national courts. The CFP takes the form of a ‘Basic Regulation’ which establishes the overarching framework for managing fish stocks. The current Basic Regulation has been in effect since 2014.¹⁰ This is supplemented by a series of specialist Regulations dealing with specific aspects of fisheries management.

The CFP has four main policy areas: fisheries management, market and trade policy, structural funding, and international policy. Fisheries management is broadly concerned with safeguarding stocks in order to provide the basis for long-term fishing yields, which the CFP aims to achieve through the concept of maximum sustainable yield (MSY). This is pursued through a combination of input (rules on access to waters, fishing effort controls and technical measures) and output controls (setting total allowable catches and quotas). These controls are increasingly framed as part of multi-annual plans.¹¹ Market and trade policy is focused on the common organisation of the market in fisheries products.¹² This entails setting out common marketing standards

6 *Ibid.*, at p. 22, Article 5.

7 Council Regulation (EEC) No 2141/70 of 20 October 1970 laying down a common structural policy for the fishing industry, *OJS* Ed 1970 (111) 703; Council Regulation (EEC) No 2142/70 of 20 October 1970 on the common organization of the market in fishery products, *OJS* Ed 1970 (111) 707. For a discussion of the origins of the CFP, see RR Churchill and D Owen, *The EC Common Fisheries Policy* (Oxford University Press, Oxford, 2010) 4–6.

8 See, e.g., J Wakefield, *Reforming the Common Fisheries Policy* (Edward Elgar, Abingdon, 2016).

9 TFEU (n 3), Article 288.

10 Regulation No 1380/2013 (n 5), at p. 22.

11 *Ibid.*, Article 9.

12 See Regulation (EU) No 1379/2013 of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, *OJL* 354, 28.12.2013, pp. 1–21.

and competition rules, which are linked to EU requirements for consumer information, and health and safety standards. International policy, also referred to as the external policy, deals with the relationship between the EU and third States/international organisations.

External Dimensions of the EU Common Fisheries Policy

Alongside internal rules harmonising regulations between Member States, the CFP also has an important external dimension. It is this aspect of EU fisheries law which is the focus of this special issue. The articles in this issue have been selected from the proceedings of a one-day symposium entitled 'External Challenges for the Common Fisheries Policy', which took place on 11 May 2018 at the University of Edinburgh, and brought together speakers, presenters, and discussants from both legal and political science disciplines.¹³ The selected articles provide an insight into the key challenges facing the EU in the development of its external fisheries policy at the present time.¹⁴ Before introducing these articles, some context on the EU external fisheries policy is necessary to show why such insights are important to the regulation of fisheries.

The EU has a multitude of interests in global fisheries governance. The EU is the world's biggest market for seafood.¹⁵ If one includes the outlying regions, EU Member States collectively boast the world's largest maritime territory,¹⁶ and they have more than 82,700 fishing vessels in their combined fleet.¹⁷ The EU is thus in a strong position to play a leading role in the governance of the world's seas and oceans. Indeed, such a commitment is an important part of its general policy.¹⁸ Since more than 20% of fishing takes place outside EU waters, external action is a significant part of the CFP.

13 Further information on the symposium can be found at <https://www.europaresearchgroup.ed.ac.uk/page-3183>; accessed 25 April 2019.

14 See further, S Guggisberg, 'The EU's regulation on the sustainable management of external fleets: International and European law perspectives' (2019) 34 *IJML* 291–324.

15 See European Commission, *The EU Fish Market* (2018 Edition), available at https://www.eumofa.eu/documents/20178/132648/EN_The+EU+fish+market+2018.pdf; accessed 25 September 2019.

16 European Commission, Maritime Affairs, 'Facts and Figures' available at https://ec.europa.eu/maritimeaffairs/documentation/facts_and_figures_en; accessed 27 September 2019.

17 Eurostat, 'Fishery statistics' available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Fishery_statistics#Fishing_fleet; accessed 27 September 2019.

18 The EU considers itself to be under a 'specific responsibility in leading international efforts in the fight against IUU fishing' because of its status as a major fishing power; as the biggest market for fish and fish products in the world; and because of its self-imposed

The EU signed and ratified the 1982 United Nations Convention on the Law of the Sea (LOSC) in 1998, the 1995 United Nations Fish Stocks Agreement in 2003, it accepted the Compliance Agreement in 1996, and it played an active role in the development of the Port State Measures Agreement, which it approved in 2011.¹⁹ The EU represents its Member States in international fora, such as the Food and Agriculture Organization of the United Nations (FAO) Committee on Fisheries,²⁰ and it is actively engaged in five tuna regional fisheries management organisations (RFMOs)²¹ and nine non-tuna RFMO/As.²² The EU has

objective to improve management and avoid overexploitation of natural resources (Commission Staff Working Document, Accompanying document to the Proposal for a Council Regulation establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, impact assessment, Brussels, 17 October 2007, SEC(2007) 1336, pp. 19–20). More recently, see, European Commission, *International Ocean Governance: An Agenda for the Future of Our Oceans*, JOIN(2016) 49 final. See also, European Commission, Maritime Affairs, 'International Ocean Governance: An Agenda for the Future of Our Oceans' available at https://ec.europa.eu/maritimeaffairs/policy/ocean-governance_en; accessed 3 November 2019.

- 19 For details on participation in the LOSC and Fish Stocks Agreement, see https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm. For the FAO Compliance Agreement, see <https://treaties.un.org/pages/showDetails.aspx?objid=o8000028007be1a>. For the Port State Measure Agreement, see http://www.fao.org/fileadmin/user_upload/legal/docs/o37s-e.pdf. All accessed 3 November 2019.
- 20 The EU became a full member of the FAO on 26 November 1991 following amendment of the FAO Constitution to allow participation of regional economic integration organisations. Prior to that time, the EU had participated as an observer. For further discussion, see JM Pedersen, 'FAO-EU Cooperation: An Ever Stronger Partnership' in J Wouters *et al.* (eds), *The United Nations and the European Union: An Even Stronger Partnership* (Cambridge University Press, 2006) 64; R Frid, 'The European Economic Community: A member of a specialised agency of the United Nations' (1993) 4 *European Journal of International Law* 241.
- 21 These are the International Commission for the Conservation of Atlantic Tunas, Inter-American Tropical Tuna Commission, Western and Central Pacific Fisheries Commission, Indian Ocean Tuna Commission, and Commission for the Conservation of Southern Bluefin Tuna (as a member of the extended Commission). The EU is also a party to the Agreement on the International Dolphin Conservation Programme.
- 22 These are the Northwest Atlantic Fisheries Organization, North East Atlantic Fisheries Commission, General Fisheries Commission for the Mediterranean, Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, North Atlantic Salmon Conservation Organization, South East Atlantic Fisheries Organisation, Southern Indian Ocean Fisheries Agreement, South Pacific Regional Fisheries Management Organisation, and Commission for the Conservation of Antarctic Marine Living Resources. The EU is also a member of two regional advisory bodies, namely the Western Central Atlantic Fishery Commission and the Fishery Committee for the Eastern Central Atlantic, both of which are going through a process of reform with the aim of

also consented to be bound by the 2018 Agreement to Prevent Unregulated High Seas Fishing in the Central Arctic Ocean.²³ In addition, the EU has entered into a range of bilateral access agreements with third States, which fall into two main types. Firstly, it has concluded Sustainable Fisheries Partnership Agreements with a number of developing countries in order to allow EU fleets to fish in third States' exclusive economic zones (EEZ). In return for access, the EU makes payments for fishing rights and makes financial contributions to help build local capacity to manage fisheries. The second type of agreement are so-called 'northern agreements' which involve the mutual exchange of fishing opportunities with neighbouring States in the north of Europe (Iceland, Norway, Faroe Islands). These latter agreements deal with the share of catch rights for shared stocks and mechanisms to allow for quota swaps.

For many years, a key objective of EU external fisheries policy was to secure greater opportunities for the EU fleet to fish outside EU waters. In this respect, the EU was often accused of pursuing irresponsible fishing practices and prioritising socio-economic objectives over sustainability.²⁴ Over time, the record of the EU in this respect arguably has improved. Successive reforms to the CFP and the emergence of an integrated oceans policy²⁵ – which seeks to achieve a better balance between economic and environmental objectives – have led to an improvement in the state of fish stocks within EU waters,²⁶ as well as a recalibration of the EU's fisheries policy at the international level, to the extent that it today claims a leadership role in promoting sustainable

conferring management responsibilities on them. The EU has also requested to join the North Pacific Fisheries Commission, but its application has been blocked by the Russian Federation; see North Pacific Fisheries Commission, 5th Commission Meeting Report, Document NPFC-2019-COM05-Final Report, paras 6–12.

23 European Council, 'Central Arctic: EU to enter agreement against unregulated fishing', Press Release, 4 March 2019, available at <https://www.consilium.europa.eu/en/press/press-releases/2019/03/04/central-arctic-eu-to-enter-agreement-against-unregulated-fishing/>; accessed 27 September 2019.

24 See analysis in RR Churchill, 'The EU as an international fisheries actor: Shark or minnow?' (1999) 4 *European Foreign Affairs Review* 463.

25 See European Commission, Maritime Affairs, 'Integrated Maritime Policy' available at https://ec.europa.eu/maritimeaffairs/policy_en; accessed 27 September 2019.

26 See Communication from the Commission to the European Parliament and Council on the state of play of the Common Fisheries Policy and consultation on the fishing opportunities for 2020, 7 June 2019, COM(2019) 274 final, suggesting an upward trend in the sustainability of fishing with 78% of all total allowable catches being set in accordance with MSY.

fishing.²⁷ Key principles such as the achievement of MSY,²⁸ the pursuit of a precautionary approach,²⁹ and the minimisation of discards³⁰ are now embedded in the Basic Regulation, although full and effective implementation remains a challenge.³¹

EU action towards better ocean governance also extends to the international level. The Basic Regulation expressly calls for the EU to 'conduct its external fisheries relations in accordance with ... the objective and principles [of the CFP]'.³² To this end, the EU has pushed for important reforms within RFMOs of which it is a member.³³ Moreover, there have been changes to the Regulation governing the access of EU vessels to external fishing grounds in order to strengthen the ability of the EU to prevent illegal or unsustainable fishing.³⁴ The EU also uses its power as a market State to encourage other fishing entities to take appropriate steps to encourage responsible fishing practices. For example, EU efforts to tackle illegal, unreported or unregulated (IUU) fishing require not just measures to control the conduct of EU fishing vessels, but co-ordination of activities with international bodies, such as RFMOs and third States, as well as market-based approaches to ensure that fish caught through IUU fishing by foreign vessels do not enter EU markets. It is true that such measures are not purely inspired by altruism on the part of the EU; by requiring other States to tackle IUU fishing, the EU is ensuring that its own vessels are not operating at a competitive disadvantage. Regardless of its intentions,

27 See, e.g., JA Machado, 'EU leads the way to sustainable fisheries,' European Commission, Fisheries, 23 November 2017, available at https://ec.europa.eu/fisheries/eu-leads-way-sustainable-fisheries_en; accessed 25 September 2019.

28 Regulation 1380/2013 (n 5), Article 2(2).

29 *Ibid.*

30 *Ibid.*, Article 2(5)(a).

31 Various shortcomings have been identified leading to the conclusion that (as of 2016) the EU did not have a sufficiently effective system for fisheries controls in place to support the success of the CFP (European Court of Auditors, 'EU Fisheries Controls: More Efforts Needed', 30 May 2017, Special Report No 08/2017, 78). Though some shortcomings are currently being addressed through the ongoing reforms of the Control Regulation, this is no panacea, and the lack of coherent implementation by Member States (referred to in the Special Report) remains a challenge.

32 Regulation 1380/2013 (n 5), Article 28(1).

33 See *ibid.*, Article 28(2)(f).

34 See Regulation (EU) 2017/2403 of 12 December 2017 on the sustainable management of external fishing fleets, and repealing Council Regulation (EC) No 1006/2008, *OJ L* 347, 28.12.2017, pp. 81–104. In particular, the Regulation has sought to increase oversight of direct allocations to fishing vessels and chartering arrangements.

however, as a major market for fisheries products, the EU can play an important role in promoting positive change far beyond its own borders.

Challenges remain for the EU in the pursuit of its external fisheries policy, however. In part, these challenges are simply a reflection of the difficulties in achieving international cooperation on fisheries matters due to uncertainties in fisheries science and conflicting demands of various fishing entities.³⁵ With the impacts of climate change on the oceans, such conflicts are only likely to increase.³⁶ At the same time, the nature of the EU as an international actor brings with it unique challenges arising from the complex distribution of power between EU institutions and the rules limiting the freedom of action for the EU as an international actor. The five articles in this special issue explore and offer critical insights into areas where the external dimension of the CFP has come under pressure.

IUU Fishing

IUU fishing is often referred to as one of the leading conservation challenges in today's fisheries governance. The cost of IUU fishing to the global economy has been estimated between \$10 and \$23.5 billion per year.³⁷ The EU seeks to be a leader in the fight against IUU fishing and its central instrument in that regard has been the IUU Regulation.³⁸ The Regulation builds on a decade of EU action to combat IUU fishing and creates various mechanisms to this effect;

35 For example, the so-called mackerel war discussed in P Orebeck, 'The "lost mackerel" of the North East Atlantic: The flawed system of trilateral and bilateral decision-making' (2013) 28 *IJMC* 343.

36 See, e.g., discussion in A McIlgorm *et al.*, 'How will climate change alter fishery governance? Insights from seven international case studies' (2010) 34 *Marine Policy* 170. The latest report of the Intergovernmental Panel on Climate Change (IPCC) concludes that 'in many regions, declines in abundance of fish and shellfish stocks due to direct and indirect effects of global warming and biogeochemical changes have already contributed to reduced fisheries catches (high confidence)'; IPCC, 'Summary for Policymakers' in H-O Pörtner, DC Roberts, v Masson-Delmotte *et al.* (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (September 2019, in press), para A5.4.

37 D Agnew *et al.*, 'Estimating the worldwide extent of illegal fishing' (2009) 4 *PLoS ONE* 1. The quantity of IUU fishing is however difficult to determine accurately (G Macfadyen *et al.*, 'Review of Studies Estimating Levels of IUU Fishing and the Methodologies Utilized' (Poseidon Aquatic Resource Management Ltd, 2016), at p. 23, available at <http://www.fao.org/3/a-bl765e.pdf>; accessed 3 November 2019).

38 Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC)

predominantly, the EU catch certificate scheme.³⁹ The toolkit it puts in place to strengthen the fight against IUU fishing also demands cooperation with third States globally.⁴⁰ This cooperation takes place through a so-called 'carding mechanism' or 'blacklisting'. The EU pushes for legislative and administrative reforms in targeted third States, in line with their international fisheries related obligations. Where cooperation with these third States has failed, they risk being blacklisted. The IUU Regulation specifies a number of measures that may be taken vis-à-vis blacklisted third States, including and most importantly the imposition of trade restrictions. It is in this context that the article by Arron Honniball, titled 'What's in a Duty? EU Identification of Non-cooperating Port States and Their Prescriptive Responses', evaluates the contribution of the IUU Regulation to third States' implementation of international port State obligations. Whilst no State has been officially blacklisted by the EU solely for having failed their international port State obligations, Honniball nevertheless demonstrates that port State performance is an important aspect of the EU's evaluation of third State behaviour under the IUU Regulation. It is therefore carefully suggested that EU influence may have contributed to the adoption of particular port State reforms. More generally, Honniball points to the increasingly widespread acceptance of port State duties to combat IUU fishing, and the fact that many targeted third States now prescribe wide ranging port State offences – sometimes even going beyond EU practice *and* international law. Whilst these measures may lead to more effective enforcement of fisheries laws, Honniball also recognises that the IUU Regulation itself presents some challenges. In particular, he highlights the need to ensure procedural transparency in the implementation of the IUU Regulation.

Accessing EU Waters

Access to resources is a central part of the CFP. The EU has entered into many binding undertakings on access to fisheries resources. Most of them secure a right for EU vessels to fish certain stocks in third State waters. Only a few of

No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, *OJ* L286, 29.20.2008, pp. 1–32.

39 So as to avoid the direct or indirect importation into the EU of fish products obtained from IUU fishing, the IUU Regulation makes it mandatory that imports of fishery products into the EU, or re-exports from an EU country, are accompanied by a catch certificate.

40 Communication from the Commission to the European Parliament and the Council on the application of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, Brussels, 1 October 2015, COM(2015) 480, at p. 5.

them allow third States' vessels to fish within EU waters due to the already high level of resource exploitation by the EU fleet. The article by Eva Kassoti and Mihail Vatsov, titled 'A Missed Opportunity? Unilateral Declarations by the EU and the ECJ's *Venezuelan Fisheries* Judgment', deals with this more unusual case of providing access to third States to the resources in EU waters. This article focuses on the broader implications for the way the CFP is conducted externally as a result of a formal interinstitutional dispute in the *Venezuelan Fisheries* case.⁴¹

In the *Venezuelan Fisheries* case, the Council adopted a Decision containing a Declaration providing access to Venezuela-flagged fishing vessels to the waters of French Guiana. According to the European Court of Justice (ECJ), that Decision was a constitutive part of an international agreement. As such, the ECJ rejected the submissions of all parties before the Court, particularly that there was a unilateral measure. Notably, the Opinion of Advocate General Sharpston concluded that the Decision in fact constituted a unilateral declaration under international law, with all the legal specificities such an instrument implies internationally and under the EU's 'constitutional' organisation.

Kassoti and Vatsov disagree with the ECJ's conclusions on the type of legal instrument and argue that there was indeed a unilateral declaration involved. In particular, Kassoti and Vatsov consider that the ECJ showed a degree of judicial recalcitrance towards international law. They argue that it missed an opportunity to, *inter alia*, explore the EU's capacity and competence to issue binding unilateral acts in cases where political circumstances render the conclusion of an agreement impossible, such as in the *Venezuelan Fisheries* case. According to Kassoti and Vatsov, the *Venezuelan Fisheries* case shows that the EU requires making use of a variety of instruments at its disposal in order to give effect to the objectives of the CFP. The authors see this lack of clarity in respect of the EU's international involvement as a challenge for the CFP in general. Kassoti and Vatsov also see a challenge for the EU's external CFP action in that the ECJ's reluctance to admit that the Declaration is a binding unilateral declaration does not change its status under international law. They consider that this creates a problematic duplication of legal status. This may come to haunt the EU if and when the access to resources needs to be revoked.

Accessing Foreign Waters

As already pointed out, accessing foreign waters represents the greater part of the EU's external engagement in international fisheries management. As such,

41 Joined Cases C-103/12 and C-165/12 *Parliament and Commission v. Council* EU:C:2014:2400.

it also provides the basis for more and different types of challenges for the CFP. This special issue includes two articles on this topic, which indeed look at two very different challenges: the relationship between fisheries management and other international rules, such as self-determination, and the relationship between the CFP and historical treaties, namely the Svalbard Treaty.

In order to secure fishing opportunities outside Union waters, the EU has entered into a series of agreements with third States. One such agreement is with Morocco. The fisheries partnership agreement and protocol thereto has given rise to a number of questions concerning its scope and wider political legitimacy, because it initially extended to the non-self-governing territory of Western Sahara. The EU is also bound to ensure that any such agreements respect the principles of self-determination and permanent sovereignty of natural resources. The article by Anne-Carlijn Prickartz, titled 'The European Union's Common Fisheries Policy, the Right to Self-Determination and Permanent Sovereignty over Natural Resources', examines critically the relationship between the CFP and the EU's wider commitments to comply with fundamental principles of international law. This is done by examining the treatment of these issues in two key cases: *Front Polisario*⁴² and *Western Sahara Campaign UK*.⁴³ Following these judgments, it is clear that EU fisheries partnership agreements must comply with the principle of self-determination. What is interesting is that this result was achieved not through a direct examination of the legality of the EU's conduct in light of fundamental principles, but rather by focusing on the 'presumption of applicability', that is, limiting the territorial scope of a territorially ambiguous access agreement to ensure that it did not apply to the territory of Western Sahara. Whilst this resolved the matter at hand, it does suggest that questions still remain about how the EU best reconciles its approach to third party fisheries agreements with its obligation to observe the right of self-determination. Following the Western Sahara cases, the EU has had to more carefully articulate its position. The replacement fisheries partnership agreement with Morocco extends to the territory of Western Sahara and this could constitute an implied recognition of Morocco's claims to sovereignty over the territory. Noting this, the EU has been careful to include clear statements qualifying any such consequence of the agreement noting that 'there is nothing in the terms of the Fisheries Agreement or of the

42 Case T-512/12 *Front Polisario v. Council of the European Union* [2015] EU:T:2015:953; Case C-104/16 P *Council v. Front Polisario* [2016] ECLI:EU:C:2016:973.

43 Case C-266/16 *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs* [2018] ECLI:EU:C:2018:118.

Implementation Protocol thereto which implies that it would recognise the Kingdom of Morocco's sovereignty or sovereign rights over Western Sahara and the adjacent waters'.⁴⁴ The EU seems to favour a pragmatic approach, and so it is not surprising that Prickartz concludes that the wider implications of the judgments on the conduct of the EU's external CFP remain to be seen.

The article by Robert Steenkamp, entitled 'Svalbard's "Snow Crab Row" as a Challenge to the Common Fisheries Policy of the European Union', considers how effective the CFP is at dealing with novel situations. The context for this discussion is a disagreement between Norway and the EU over access by EU vessels to waters around the Svalbard archipelago, a situation exacerbated by the recent invasive presence of highly valuable snow crabs to such waters. Snow crab are a sedentary species and harvestable on the continental shelf. The EU has adopted the position that its vessels may harvest such species under the Svalbard Treaty, which provides for access to waters around Svalbard to all States parties. However, Norway takes the view that such rights do not arise, because at the time of the conclusion of the agreement, such fishing rights were limited to territorial waters. The subsequent emergence of an entitlement to a continental shelf does not extend any such rights in territorial waters to fishing on the continental shelf. This raises interesting questions of intertemporal law. The situation is further complicated by the fact that the EU is not a party to the Svalbard Treaty. The EU has exclusive competence for fisheries requiring it to act on behalf of its Member States on this matter – something to which Norway objects since the EU is not a party to the treaty in question. In his evaluation of their respective claims, Steenkamp makes a number of important observations. First, we must acknowledge that longstanding treaty rights (be it questions of application or interpretation) are subject to change as international law develops. Second, the EU and the external dimensions of the CFP cannot be viewed in isolation from wider international law. There is no categorical answer to these questions, but Steenkamp rightly points out the wider issues at stake that should not be forgotten: first, the need to secure proper management of marine living resources and, second, the political implications of this dispute for wider EU/Norway relations, including Arctic policy. These wider considerations may push the EU to moderate its position.

44 Council Decision (EU) 2018/2068 of 29 November 2018 on the signing, on behalf of the Union, of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the exchange of letters accompanying the Agreement, *OJ L* 331, 28.12.2018, pp. 1–3, preamble, para 12.

Brexit

Brexit has become a major challenge for the EU as a whole in a time of rising populism and disinformation. Brexit has significant repercussions for the CFP, and it raises the prospect of the EU having to negotiate access to waters in which EU vessels have traditionally fished, as well as the challenge of ensuring the continued compatibility of regulations adopted by the United Kingdom (UK) and the EU in relation to shared stocks. Despite the fact that the deadline for the UK leaving the EU was extended beyond the initial date of 29 March 2019, much of the analysis in the article by Valentin Schatz – titled ‘The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union’ – remains valid, as it explains the legal framework that will govern fisheries relations between the UK and the EU following Brexit and the policy choices that face the two sides in negotiating a new fisheries arrangement. Indeed, the on-going challenges of Brexit emphasize the contingency and hence greater complexity of managing fisheries against wider political and legal developments. Whilst difficult questions arise about the basis for any division of quotas, Schatz also points out that fisheries access is likely to be linked to access to markets in any future negotiation. Schatz highlights the advantages of transitional measures in order to allow a smoother transition to a new balance of fishing activity in the North Sea, Celtic Sea and wider North-East Atlantic. Even beyond EU–UK relations, Brexit is going to have broader ramifications for fisheries governance in the region, as the UK will become an additional independent actor in already difficult coastal State consultations on fishing for mackerel and Norwegian spring spawning herring.⁴⁵ The UK will also have to seek membership of the North-East Atlantic Fisheries Commission, which regulates fishing in the high seas adjacent to what may become the UK EEZ.

45 In relation to mackerel, the EU, Norway, and the Faroe Islands have agreed on a long-term management strategy, including the setting of individual quotas, but Iceland remains outside this arrangement (see Agreed Record of Conclusions of Fisheries Consultations between the Faroe Islands, the EU and Norway on the management of mackerel in the North-East Atlantic for 2019, Bergen, 29 November 2018). A new long-term management strategy has also been agreed between all relevant coastal States in relation to Norwegian spring-spawning (NSS) herring, which provides the basis for setting an agreed total allowable catch, but States have not been able to agree upon the appropriate division of this total allowable catch, so that they continue to set unilateral quotas (see Agreed Record of Fisheries Consultations between Iceland, the EU, the Faroe Islands, Norway, and the Russian Federation on the Management of the NSS Herring Stock). In the North-East Atlantic in 2019, London, 6 November 2018.

Key Reflections

Similar to the stocks it aims to manage, the CFP is facing considerable pressure and challenges. This special issue contains samples of different kinds of external challenges the CFP is currently facing. These challenges show how connected the CFP is to issues that go far beyond matters of conservation and management of fish stocks. The CFP was initially created because of international political and legal developments in the 1970s. This special issue shows that despite the increased emphasis on conservation and management, access concerns and the problems associated with them are still an important factor for the functioning of the CFP. It shows that the CFP's nature is such that it is just as inextricably linked to and influenced by general international political and legal developments as it is linked to and influenced by fisheries conservation and management matters. This interconnectedness also calls for greater attention to be paid on the coherence and consistency between the CFP and various areas of EU (external) action.

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