

Some Recent Questions Regarding the European Union’s Public Access Fisheries Agreements

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1 Introduction

Public access fisheries agreements, also called ‘international fisheries agreements’ or ‘sustainable fisheries partnership agreements’ in the most recent Common Fisheries Policy (CFP) reform, are one of the main manifestations of the EU’s external fisheries activity at the international level. They are therefore one of the elements that best define the EU’s international legal personality, which is explicitly provided for under Art. 47 TEU.

According to Art. 4(37) of Regulation (EU) No 1380/2013 on the current CFP, these agreements are concluded ‘with a third state for the purpose of obtaining access to waters and resources in order to sustainably exploit a share of the surplus of marine biological resources, in exchange for financial compensation from the Union, which may include sectoral support’.¹ These public access fisheries

¹Regulation (EU) No 1380/2013 of the European Parliament and of the Council *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*, O.J. L 354/22 (2013). Art. 4(37) Regulation 1380/2013 is completed by Arts. 31 and 32 of the same normative act in relation to the principles and objectives of the sustainable fisheries partnership agreements as well as to the financial aid that will be given by the EU on the basis of these fishing agreements. For an overview of the current regulation of these agreements, see Sobrino Heredia and Oanta (2015), pp. 71–80.

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agreements are divided into tuna agreements, on the one hand,² and mixed or multi-species agreements, on the other.³ They must also be distinguished from private access agreements, which are concluded between private companies based in EU Member States and third countries.⁴

In the last 30 years, the EU has concluded more than 30 such agreements, affording its fishing fleet access to very diverse stocks in the respective partner country's economic exclusive zone (EEZ).⁵ Undoubtedly, this fisheries treaty activity has been possible due to the EU's exclusive international competence in this field. As is well known, in 1998 the EU concluded both the United Nations Convention of 10 December 1982 on the Law of the Sea (UNCLOS) and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof⁶ and also made a Declaration concerning its exclusive competences with regard to matters governed by the UNCLOS and that Agreement.⁷ Moreover, this exclusive competence is not restricted only to the maritime waters under the sovereignty or jurisdiction of EU Member States as, according to Art. 1(2) of Regulation (EU) No 1380/2013, it also extends to activities carried out by EU fishing vessels in the waters of third countries or on the high seas, as well as by European citizens 'without prejudice to the primary responsibility of the flag State'.

²The EU has concluded twelve such tuna agreements so far, by virtue of which EU fishing vessels have been able to fish tunas stocks in the Indian Ocean and the Pacific Ocean. Specifically, it has concluded them with Cape Verde, Comoros, Côte d'Ivoire, Gabon, Equatorial Guinea, Kiribati, Liberia, Madagascar, Mauritius, Mozambique, São Tomé and Príncipe, the Seychelles, and the Salomon Islands. See Le Manach et al. (2013), pp. 257–266.

³Seven mixed or multispecies agreements have been signed so far, affording the EU's fishing vessels access to very diverse fish stocks in the EEZs of the following countries: Greenland, Guinea, Guinea-Bissau, Morocco, Mauritania, Micronesia and Senegal. See *Fishing for Coherence in West Africa. Policy Coherence in the Fisheries Sector in Seven West African Countries* (2008).

⁴Molenaar (2002), pp. 137–138.

⁵For an overview of the international fisheries agreements concluded by the EU in the last 30 years, see, e.g., Andreone (2007), pp. 326–347; Ould Ahmed Salem (2009); Ruiloba García (2005), pp. 333–345; Sobrino and Oanta (2015), pp. 61–85; Van der Burgt (2013) and Witbooi (2012).

⁶Council Decision 98/392/EC concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, O.J. L 179/1 (1998).

⁷For the first time, an international treaty contains an EU's declaration of such characteristics. Concretely, the EU affirmed that its Member States had transferred its competences in this field and, therefore, 'in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the member States) and, within its competence, to enter into external undertakings with third States or competent international organizations'. See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 37 *Law of the Sea Bulletin* (1998), pp. 7–14. On the declaration of competences made by the EU in the field of fisheries, see, e.g., Lijnzaad (2014), pp. 187–207.

By virtue of this competence, the EU has been able to take part in different international fora and defend its fisheries interests at the global level.⁸ As a result, for the last 30 years it has been an active actor on the international fisheries scene.⁹ Moreover, the EU fish market is the largest in the world and, at the same time, depends on both fishing imports and fishing captures in waters not under the sovereignty or jurisdiction of its Member States.¹⁰ Currently, approximately 25% of EU fishing captures are made in such waters, approximately 8% are enabled by fisheries agreements with third countries and approximately 20% are carried out in the high seas, basically in areas under the jurisdiction of regional fisheries management organisations (RFMOs).¹¹

The aim of this chapter is to present the EU's treaty activity in the field of fisheries in light of the most relevant case law of the CJEU published in 2014 and 2015. Recent practice by EU fishing vessels has highlighted the need to look to the CJEU's position to clarify certain pending aspects of the EU's fisheries treaty activity on the international stage, such as, *first*, the issue of the European Commission's competence to represent the EU before the International Tribunal for the Law of the Sea (ITLOS), in a case in which the fisheries treaty activity of an international organisation, amongst other issues, was analysed—*Council v European Commission* (C-73/14) (Sect. 2); *second*, the necessary legal basis for the adoption of a normative act by virtue of which a third-country fishing vessel could fish in the waters of an EU Member State, as well as the scope of the international fisheries agreements—*European Parliament and European Commission v Council* (joined cases C-103/12 and C-165/12) (Sect. 3); and, *third*, certain aspects resulting from the application of the fishing agreement signed between the EU and Morocco and its successive Protocols—*Ahlström and Others* (C-) and

⁸See, e.g., De Yturriaga Barberán (2009), pp. 269–297, Sobrino Heredia (2002), pp. 53–82 and Treves (2008), pp. 1–20.

⁹As is well known, the EU is one of the most important coastal entities, has one of the largest long-distance fleet, being the third fishing power globally, having an important transformer sector of fishing.

¹⁰It is estimated that 90% of the fishing resources globally are in the developing countries EEZs. As is known, according to Art. 56(1)(a) of UNCLOS, '[i]n the exclusive economic zone, the coastal State has (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil'. In addition, Art. 61 of UNCLOS provides that '1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone' and Art. 62 of UNCLOS regarding the utilization of the living resources stipulates that '1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61. 2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch'.

¹¹Currently, the EU is a member of fourteen RFMOs. Regarding the EU's participation in the framework of these organizations, see, e.g., Antonova (2015), pp. 125–143, Franckx and Van den Bossche (2010), pp. 419–448 and Vázquez Gómez (2002).

Front Polisario v Council (T-512/12) (Sect. 4). In the author's view, all of these judgments will be very useful for the General Court in Luxembourg in case T-180/14 regarding the action for annulment brought on 14 March 2014 by Front Polisario against the Council in relation to Decision 2013/785/EU of 16 December 2013 on the conclusion of the Protocol between the EU and Morocco setting out the fishing opportunities and financial contribution provided for in the fisheries partnership agreement between the EU and that country. The Chapter will conclude with some final remarks.

2 The European Commission's Competence to Represent the EU Before the ITLOS

The judgment of the Court (Grand Chamber) of 6 October 2015 in the case *Council v European Commission (C-73/14)*¹² was the first decision of the Luxembourg court related to the European Commission's capacity to present allegations before an international court without prior authorisation from the Council. In this sense, it put on the table the question of who is responsible for a breach by European fishing vessels of a fishing agreement concluded by the EU: the EU Member State acting as the flag State or the EU itself? This judgment is a doubtless part of a larger procedural action of the Council that has been encouraged by the entry into force of the Lisbon Treaty,¹³ which contains, amongst other things, a new system for the EU's international representation through a new division of competences in the field of external action.¹⁴

Through this judgment, the Council questioned the legality of the European Commission's Decision of 29 November 2013 regarding the submission of written comments on behalf of the EU to the ITLOS in the framework of Case No 21 on the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC).¹⁵ In that case, the ITLOS was asked, *inter alia*, whether the flag State

¹²EU:C:2015:663. For an extensive analysis of this judgment, see Oanta (2016), pp. 208–216.

¹³Sánchez-Tabernero (2015), pp. 1057–1073.

¹⁴With regard to the changes in the division of competences in the field of external action resulting from the entry into force of the Lisbon Treaty, it should be mentioned that the EU's international representation is currently provided, depending on the field in question, by the European Council's President (Art. 15(5) and (6) TEU), the High Representative of the Union for Foreign Affairs and Security Policy (Art. 18 TEU), or the European Commission (Art. 17(1) TEU).

¹⁵The SRFC is a RFMO created on 29 March 1985. It is formed by seven African countries, namely: Cape Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone; it is based in Dakar (Senegal). For more details, see the SRFC official website <http://www.spcsrp.org>. Accessed 29 April 2016. This request for an advisory opinion was prepared in February 2013 in the framework of 'Atelier sur la lutte contre les pêches illicites, non déclarées et non réglementées (PINN)', which took place in Dakar on 25–26 February 2013. See http://www.spcsrp.org/medias/csrp/comm/at_PINN_publication_web.pdf. Accessed 29 April 2016.

or an international agency—such as the EU—would be responsible for the violation of the fisheries legislation of a coastal State by a fishing vessel with a fishing licence granted under an international fisheries agreement signed with that coastal State.¹⁶

The Council claimed, first, infringement of the principle of conferral of powers laid down in Art. 13(2) TEU, as well as of the principle of institutional balance, and, second, infringement of the principle of sincere cooperation. With regard to the principle of conferral of powers and the principle of institutional balance, the Council stated that Art. 218(9) TFEU—which provides that it may adopt a decision establishing the EU's positions in a body set up by an international agreement that could adopt acts having legal effects for the EU—and Art. 16(1) TEU had been infringed. As to the infringement of the principle of sincere cooperation, the Council claimed that the Commission had not submitted a proposal for a decision on the position to be adopted on behalf of the EU before the ITLOS, as required under Art. 218(9) TFEU, and also that it had not cooperated with it in good faith in the preparation of the written statement submitted to this international court in Case No 21.¹⁷

The EU submitted written statements on two occasions—on 29 November 2013 and on 13 March 2014—in the proceedings opened by the ITLOS.¹⁸ The first time the European Commission acted before the ITLOS on the basis of the decision adopted on 5 August 2013,¹⁹ without previously submitting its comments to the Council for approval, 'despite the latter's request',²⁰ notifying the Council the same day (namely on 29 November 2013).²¹ As a result of this action by the Commission

¹⁶The questions made by the SRFC to the ITLOS, which are regarding the phenomena of illegal, unreported and unregulated fishing, were the following: (1) What are the obligations of the flag State in cases where illegal, unreported and unregulated fishing activities are conducted within the Exclusive Economic Zones of third party States? (2) To what extent shall the flag State be held liable for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag? (3) Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question? (4) What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna? See <http://www.itlos.org/index.php?id=252&L=0%20and%207%253D2>. Accessed 29 April 2016.

¹⁷The European Commission considered that, under Art. 335 TFEU, it had the capacity to represent the EU in the judicial proceedings. Hence it decided to submit a written statement to the ITLOS on behalf of the EU, as well as to take part in the oral proceedings before the international court. Nevertheless, a few interveners in the case denied that this provision allowed the European Commission to represent the EU before the ITLOS.

¹⁸*Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Order of 24 May 2013, ITLOS.* See also *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Order of 20 December 2013, ITLOS.* For an overview of these issues, see Becker (2013) and Oanta (2014a), pp. 301–304.

¹⁹Decision C (2013) 4989 final.

²⁰EU:C:2015:663, para 37.

²¹*Ibid.*, paras 20–32.

in late 2013, on 10 February 2014, the Council, acting under Art. 263 TFEU, filed the action for annulment addressed by the Court in this judgment.

In relation to ITLOS Case No 21, it has to be mentioned that the European Commission argued before the ITLOS that the responsibility of the flag State or ‘international agency’—as would be its case—for infringement of the national fisheries legislation of a coastal State depended on the content of the applicable international agreement and that, in the absence of such a conventional act, the general rules concerning the international responsibility of the State would apply. Specifically, it argued that the flag State of a fishing vessel operating in the EEZ of a third State would be responsible for any violations by it of the coastal State’s national legislation.²²

The Court considered, on the one hand, that Art. 335 TFEU ‘provided a basis for the Commission to represent the European Union before the ITLOS in Case No 21’²³ since, as it had ruled in its judgment *Reynolds Tobacco and Others v Commission*,²⁴ Art. 335 TFEU ‘is the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission’.²⁵ On the other hand, it found that the Commission had fulfilled the obligation to consult the Council before acting before the ITLOS and, therefore, had not infringed the principle of sincere cooperation, as a working paper on the allegations it wished to present to the ITLOS had been referred to the Council and revised twice.²⁶

Underlying this power struggle between the Commission and the Council is an important pronouncement by the ITLOS with profound consequences for the EU’s treaty practice in the field of fisheries, namely, the international court ultimately attributed the international responsibility for infringement of a coastal State’s legislation by a vessel flying the flag of an EU Member State and fishing under a fisheries agreement to the EU. In other words, the EU can no longer hide behind the shield of the vessel, shifting the responsibility to the flag State; instead, the EU itself must deal with the consequences of such infringements.

In the author’s view, in its Advisory Opinion in Case No 21, the ITLOS seems, first, to accept the Commission’s assessment in considering (para 170) that the responsibility of an international organisation, as a result of the infringement of a coastal State’s fisheries legislation by a vessel flying the flag of a Member State in possession of a fishing licence obtained under a fisheries agreement depends on the existence in the agreement of specific provisions relating to liability in the case of

²²*Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Written Statement by the European Commission on Behalf of the European Union, 29 November 2013, ITLOS, paras 83 and 92.*

²³EU:C:2015:663, para 59.

²⁴C-131/03P, EU:C:2006:541, para 94.

²⁵EU:C:2015:663, para 58.

²⁶*Ibid*, paras 86–88.

such infringements; it stated that, in the absence of such provisions, the general rules of international law would apply, namely that the responsibility would correspond to the Member State that was the flag State.

However, the ITLOS qualified this consideration in the following paragraphs (paras 171 and 172) on the basis of the due diligence obligation applicable to the international organisation.²⁷ In this case, the Court considered that the international organisation, as the only contracting party of the fisheries agreement with the coastal State, must ensure that vessels flying the flag of a Member State respect the fishing regulations of the coastal State and do not engage in illegal, unreported and unregulated fishing (IUU fishing) in that State's EEZ; the EU must fulfil its due diligence obligation. Otherwise, the ITLOS considered (para 173) that only the international organisation, not its Member States, will be responsible under the fisheries agreement. That is, if the international organisation fails to comply with its obligation of due diligence, the coastal State (SBFC's Member States) may hold it liable for the infringement of fishing regulations by a fishing vessel flying the flag of one of its Member States when that vessel fishes in its EEZ within the framework of a fisheries agreement concluded between that organisation and the coastal State.²⁸

In the author's view, this should lead to a change in the EU's fisheries treaty activity with a view to including 'competence clauses' in the fisheries agreements. These clauses are intended for mixed agreements involving shared competences between the EU and its Member States, which is not the case with fisheries agreements, which are agreements affecting the EU's exclusive competences. However, such an inclusion would result in greater security for third countries and for the EU itself. Likewise, it has to be mentioned that many of these fisheries agreements affect marine areas that are the site of abundant IUU fishing, activities that constitute internationally wrongful acts and that go beyond the scope of the pure conservation of living marine resources for which the EU has exclusive competence.

²⁷On the issue of due diligence, see, e.g., Barnidge (2006), pp. 81–121 and Ouedraogo (2011), pp. 307–346.

²⁸*Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, ITLOS*, pp. 62–63. Moreover, the ITLOS considered that SRFC Members could ask an international organisation or its Members, provided they were Parties to UNCLOS, to inform them of who would be responsible for each specific issue. Both the international organisation and those States should facilitate the concerned information. Otherwise, it would result 'in joint and several liability of the international organization and the member States concerned' (para 174). For a general overview of the EU's international legal responsibility and the shared responsibility between the EU and its Member States for an internationally wrongful act committed, see, e.g., Cortés Martín (2013), pp. 189–199, Gaja (2013) and Palkokefalos (2013), pp. 385–405.

3 The Scope of the Public Access Fisheries Agreements

The judgment of the Court (Grand Chamber) of 26 November 2014 in the joined cases *European Parliament and European Commission v Council of the European Union* (joint cases C-103/12 and C-165/12)²⁹ addressed the legal basis for Council Decision 2012/19/EU of 16 December 2011.³⁰ This Decision had been used to adopt the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the Venezuelan flag in the EEZ off the coast of French Guiana. Both the European Parliament (EP) and the Commission considered that the legal basis chosen by the Council was wrong. Moreover, the EP claimed that the Decision had been adopted on the basis of an incorrect procedural provision. For its part, the Commission alleged, amongst other things, that the Council had failed to respect the EP's institutional powers when it adopted the Decision.

With the adoption of Decision 2012/19/EU, the Council sought to fill a gap in the legislation regarding the access of fishing vessels flying the Venezuelan flag to the EEZ of an EU Member State—in this case, France's EEZ off the coast of French Guiana.³¹ The aim was to circumvent the process of negotiating and concluding an international agreement in order to respond rapidly to the need to provide an international title for access to the French Guiana waters, which had no impact for fisheries in the EU as a whole.³² Hence, the Council considered that it would be more appropriate to issue a unilateral declaration in the above terms that would fulfil the same function as a fisheries agreement, generating international rights and obligations for the affected parties.

In the author's view, the cornerstone of this action for annulment is the legal basis used by the Council to adopt Decision 2012/19/EU, which, as noted, sought to offer a quick legal response to an activity that had existed for decades. Thus, the Council invoked Art. 43(3) TFEU in conjunction with Art. 218(6)(b) TFEU, whilst the EP and the Commission held that the contested Decision should have been adopted according to Art. 43(2) TFEU in conjunction with Art. 218(6)(a)(v) TFEU since it amounted to an international agreement for a third country—in this case Venezuela—to access and engage in fishing activities in EU waters and, therefore, required the EP's prior approval.

²⁹EU:C:2014:2400. For a larger study of this judgment, see Oanta (2016), pp. 200–208.

³⁰O.J. L 6/8 (2012).

³¹French Guiana is one of six French overseas departments (Guadelupe, French Guiana, Martinique, Mayotte, Reunion and Saint Martin) and one of the EU's nine outermost regions (together with: the Azores, the Canary Islands, Guadelupe, Madeira, Martinique, Mayotte, Reunion and Saint Martin). See 'The Outermost Regions: European Regions of Assets and Opportunities' (Luxembourg, 2012). With regard to this case, it should be noted that the fishing vessels flying the Venezuelan flag had been fishing in that EEZ for several decades and, moreover, that the French Guiana processing industry has begun to rely on those fish landings, which are of great economic and social importance for the region's population.

³²Opinion of Advocate General Sharpston in the joined cases *European Parliament and Commission v Council*, C-103/12 and C-165/12, EU:C:2014:334, para 108.

Regarding the legal basis for the adoption of an international fisheries agreement, this case is thought to reflect the tension of recent years, following the entry into force of the Lisbon Treaty, between the EP and the Commission, on the one hand, and the Council, on the other, in relation to the legislative procedure for the adoption of fisheries legislation. As is well known, prior to 1 December 2009, the EP had played only a marginal role in the legislative process in the field of the CFP. However, today, it has recognised legislative powers under Art. 43 TFEU.³³ Thus, Art. 43(2) TFEU provides for the ordinary legislative procedure for the adoption of provisions that are 'necessary for the pursuit of the objectives' of the CFP, whilst Art. 43(3) includes a reserved executive procedure for the 'fixing and allocation of fishing opportunities'. This situation has been interpreted by part of the doctrine³⁴ as a *sui generis* procedure and an exception to the legislative procedure under Art. 43(2) TFEU.

At the same time, Art. 218 TFEU also reflects the significant increase in the EP's influence in the adoption by the EU of fisheries treaties.³⁵ Art. 218(6)(b) TFEU provides that the Council, 'on a proposal by the negotiator', may conclude an agreement between the EU and a third country or international organisation 'after consulting the European Parliament', which must issue an opinion 'within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act'. On the other hand, in accordance with Art. 218(6)(a)(v) TFEU, unless it falls within the scope of the Common Foreign and Security Policy, the Council shall adopt the decision concluding an agreement between the EU and a third country or international organisation subject to the approval of the EP with respect to those agreements related to fields to which the ordinary legislative procedure applies or, where the EP's consent is required, the special legislative procedure. Moreover, in an urgent situation or emergency, the EP and the Council 'may [...] agree upon a time-limit for consent'.

The choice of the legal basis for such a legislative act is of extraordinary importance since, if it is wrong, the concluding act could be invalidated, thereby vitiating the EU's consent to be bound by the agreement signed.³⁶ In addition, as stated in the CJEU case law,³⁷ the choice of legal basis for an EU act must be based on objective factors amenable to judicial review, such as, in particular, the aim and

³³See De Sadeleer (2014), p. 801.

³⁴Ibid.

³⁵The same position has been expressed by professor Yves Petit. See Petit (2015), p. 64.

³⁶Opinion 2/00, of 6 December 2001, EU:C:2001:664, para 5; Opinion 1/08, of 30 November 2009, EU:C:2009:739, paras 108–110.

³⁷Judgment of the Court Parliament v Council, C-130/10, EU:C:2012:472, para 42; Judgment of the Court United Kingdom v Council, C-431/11, EU:C:2013:589, para 44.

content of the act.³⁸ The Court held that the purpose of the statement concerning the allocation of fishing opportunities to vessels flying the Venezuelan flag in the EEZ off the coast of French Guiana was not to ensure ‘the fixing and allocation of fishing opportunities’ in the sense of Art. 43(3) TFEU but rather to offer the Latin American country the opportunity to participate in the exploitation of fisheries resources in the EEZ of French Guiana, under the conditions set by the EU, and to ensure compliance with the requirement that the CFP provisions regarding conservation and control and other CFP regulations be met.³⁹

As for the question of the issues raised by the notion of an international agreement concluded in the field of fisheries, in the present case the EU had offered to allow a limited number of fishing vessels flying the Venezuelan flag to operate in relation to part of the surplus allowable catches in French Guiana’s EEZ.⁴⁰ The Court considered that the offer made to Venezuela was not a technical implementing measure but rather a measure involving the adoption of an autonomous decision, which should be made in the light of the EU policy interests pursued through its common policies, particularly its CFP.

In this judgment, the Court once again decided on a very broad concept of agreement. Indeed, as noted in its case law, on the one hand, it is irrelevant whether a treaty consists of a single document or several related legal instruments and, on the other hand, the term ‘agreement’ must be understood in a general sense to designate any kind of binding commitment expressed by a subject of international law regardless of its formal designation.⁴¹

In this case, Advocate General Sharpston expressed another position, moving away from this notion of ‘agreement’ and considering that the EU’s international legal personality allowed it to issue a unilaterally binding declaration. However, he noted that having the capacity to adopt a treaty ‘does not suffice to conclude that, in accordance with the principle of conferral, the EU is competent to do so’.⁴² The Advocate General further considered that there were two possibilities regarding the legal nature of the declaration made by the EU in the contested decision: either it was a unilaterally binding instrument for the EU or it was a unilateral declaration that would ‘produce legal effects only when subsequently accepted by the third State in whose favour it was made (in which case it is only one side of an international agreement)’.⁴³ Finally, the Advocate General concluded that

³⁸EU:C:2014:2400, para 51.

³⁹Ibid, paras 75, 77 and 78. Concretely, it was about the paras 1 and 3 of the EU’s Declaration, which was an Annex of the Decision 2012/19/EU. For a presentation of conservation and management measures adopted by the EU, see Oanta (2015), pp. 247–251. See also Sobrino Heredia et al. (2010), pp. 193–256.

⁴⁰Later, on 26 March 2012, the European Commission adopted Decision C (2012) 2162, which authorised 38 fishing vessels flying the Venezuelan flag to fish in French Guiana’s EEZ.

⁴¹The first position of the Luxembourg Court in this regard was with the occasion of the Opinion 1/75 (EU:C:1975:145). This Opinion has been repeatedly recalled in different occasions. See, amongst others, Opinion 2/92 (EU:C:1995:83), para 8; EU:C:2014:334, para 83.

⁴²Opinion of Advocate General Sharpston, EU:C:2014:334, para 64.

⁴³Ibid, para 72.

Venezuela had not agreed to be bound by the Declaration 'as an agreement concluded between it and the EU'.⁴⁴

Based on its interpretation of the act as an international agreement, however, the Court decided to annul the contested Decision as it considered that it should have been adopted by virtue of Art. 43(2) TFEU in conjunction with Art. 218(6)(a)(v) TFEU. Furthermore, the Court decided to maintain the effects of the Decision, as requested by both the Commission and the Council,⁴⁵ until the adoption of a new decision in this field, under the TFEU provisions. This happened on 14 September 2015, with the adoption of Council Decision (EU) 2015/1565.⁴⁶

Although the Court agreed with the Advocate General in declaring the contested Decision null and void and in maintaining its effects until a new decision could be adopted in accordance with the provisions of Art. 43(2) TFEU in conjunction with Art. 218(6)(a)(v) TFEU, it differed in its qualification of the act, which, in the author's view, can hardly be considered an international agreement. In so doing, the Court missed an excellent opportunity to rule, for the first time, on the EU's capacity to issue binding unilateral acts⁴⁷ in the field of international maritime affairs.

Thus, the Court strengthened its broad and, undoubtedly, conservative interpretation of the notion of 'international agreement'. On the one hand, this position will facilitate the conclusion of fisheries agreements; on the other, it is so permissive that it blurs the legal scope of such agreements. In keeping with the Opinion of the Advocate General, in the author's view, the CJEU could have addressed the nature of a unilateral declaration and its applicability to the EU's international fisheries activity. However, rather than embarking down the unexplored path of unilateral declarations, the CJEU opted to take a more prudent position, that is, to benefit from the broad notion of 'international agreement' that it defends in its case law and that perhaps best fits the factual context in which the case unfolded.

⁴⁴Ibid, para 81.

⁴⁵For its part, the EP had stated that it would not take a negative position toward such a solution.

⁴⁶This new Decision differs from the annulled Decision only with regard to the legal basis used for its adoption, namely Art. 43(2) TFEU in conjunction with Art. 218(6)(a)(v) TFEU. See Council Decision 2015/1565/EU *on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana*, O.J. L 244/55 (2015). See also Proposal for a Council Decision on the approval, on behalf of the European Union, of the Declaration on the granting of fishing opportunities in EU waters to fishing vessels flying the flag of the Bolivarian Republic of Venezuela in the exclusive economic zone off the coast of French Guiana, COM (2015) 1 final, 12.01.2015.

⁴⁷De Pietri (2015), pp. 22–32. On the issue of unilateral acts under the international law, see, e.g., Degan (1994), pp. 149–266 and Tomuschat (2008), pp. 1487–1507.

4 Some Aspects Arising from the Application of the Fishing Agreement Signed by the EU and Morocco and Its Successive Protocols

The activity of European fishing vessels carried out under the successive fisheries agreements concluded by the EU and Morocco⁴⁸ has sparked numerous controversies due to both possible imbalances in the allocation of rights and obligations to the parties—which have given rise to recurring criticism in the socio-economic sector of European fisheries (particularly in Spain)—and, more recently, fishing in waters off the Western Sahara coasts.⁴⁹ The CJEU examined some of the issues raised by this fisheries treaty activity on two occasions in 2014 and 2015, focusing mainly on the European fishing activity conducted in Western Sahara waters.

First, the judgment of the Court of 9 October 2014 in *Ahlström and Others* (C-565/13)⁵⁰ refers to a question submitted under the provisions of Art. 267 TFEU in the context of criminal proceedings before a Swedish court, in which the defendants had been accused of engaging in illegal fishing practices in Western Sahara waters between April 2007 and May 2008;⁵¹ it addresses the interpretation of the most recent fisheries agreement concluded between the EU and Morocco, which entered into force on 1 April 2007.⁵²

Second, the judgment of the EU's General Court (GC) of 10 December 2015 in *Front Polisario v Council* (T-512/12)⁵³ refers to an action for annulment brought by the Front Polisario in relation to Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the EU and Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the EU and its

⁴⁸For a detailed analysis of the different fishing agreements signed between the EU and Morocco, see, e.g., Lahlou (2005), pp. 39–46, Milano (2006), pp. 1–33 and Sobrino Heredia (2012), pp. 235–261.

⁴⁹See Chapaux (2012), pp. 217–237 and Dawidowicz (2013), pp. 250–276.

⁵⁰EU:C:2014:2273. For a larger study of this judgment, see Andreone (2014), pp. 680–686; Oanta (2016), pp. 216–219.

⁵¹For an overview of the illegal fisheries phenomena see Oanta (2014b), pp. 149–197.

⁵²It has been the fourth fishing agreement signed between these two subjects under international law: the first one was signed on 25 May 1988, the second one on 1 May 1992, the third on 1 December 1995. The Protocol in force of the 2006 Agreement was published through the Council Decision 2013/720/EU (O.J. L 328 (2013)).

⁵³Judgment of the General Court of 10 December 2015 *Front populaire pour la libération de la sagaïa-el-hamra et du rio de oro (Front Polisario) v Council*, T-512/12, EU:T:2015:953. See Gosalbo Bono (2016), pp. 21–77, King (2014), pp. 71–89 and Soroeta Licerias (2016), pp. 202–238.

Member States, on the one hand, and Morocco, on the other hand.⁵⁴ Although this second judgment raises multiple international legal issues of great significance for the Western Sahara,⁵⁵ it really addresses only a few issues related to the notion of public access fisheries agreements concluded by the EU with Morocco. The GC's judgment in the case *Front Polisario v Council* (T-180/14) is expected to be more relevant for the field of public access fisheries agreements concluded by the EU with third countries, as the action for annulment brought by the Front Polisario will refer specifically to fisheries activities off the coast of the Western Sahara under the provisions of the Protocol signed between the EU and Morocco setting out the fishing opportunities and financial contribution provided for in the fisheries partnership agreement between them.⁵⁶

Regarding the judgment of 9 October 2014 in *Ahlström and Others*, in the author's view the scope of the so-called 'exclusivity clause' that accompanies the public access fisheries agreements is perhaps the most interesting point for the purposes of this chapter. It should be noted that this clause excludes any type of fishing done by EU Member States' vessels outside the framework of the said agreements. Consequently, the European fleet's fishing activities in the waters covered by the agreements must be carried out solely and exclusively within the framework of the agreements.

In this regard, it has to be mentioned that the exclusivity clause is the most important issue to be addressed by the Court in this case. The Court was essentially asked whether Art. 6 of the fisheries agreement concluded by the EU with Morocco in 2006 must be interpreted as precluding any possibility for EU vessels to carry out fishing activities in waters under the sovereignty or jurisdiction of Morocco on the basis of a licence issued by Moroccan authorities without the intervention of the EU's competent authorities.

It should also be stressed that the aforementioned Art. 6 stipulates that EU fishing vessels 'may fish in Moroccan fishing zones only if they are in possession of a fishing licence issued under this Agreement. The exercise of fishing activities by Community vessels shall be subject to the holding of a licence issued by the competent Moroccan authorities at the request of the competent Community authorities'. Moreover, '[f]or fishing categories not covered by the Protocol [setting out the fishing opportunities and financial contribution provided for in the Fisheries Agreement ('the Protocol')], licences may be granted to Community vessels by the Moroccan authorities'. However, the granting of such licences is dependent on the

⁵⁴O.J. L 241/2 (2012). The Association Agreement EU-Morocco was concluded in Brussels on 26 February 1996 (O.J. L 70/2 (2000)).

⁵⁵Indeed, this judgment addresses issues unrelated to the purpose of this Chapter, namely: the legitimacy of Front Polisario when submitting applications to the CJEU, the legal status of the Western Sahara and the holder of sovereignty over Western Sahara resources, and the existence of an absolute prohibition on concluding an international agreement that could be applied to a territory controlled *de facto* by a State whose sovereignty is not recognised over that territory under international law. For an overview of these issues, see Soroeta Liceras (2016).

⁵⁶Action brought on 14 March 2014 by Front Polisario against the Council (T-180/14).

receipt of a favourable opinion from the European Commission. Furthermore, the potential access by EU vessels to a third country's waters will be determined under a bilateral public access fisheries agreement concluded by the EU with the said third country, and only then, on the one hand, will the Council be responsible for granting fishing opportunities according to the provisions of the agreement and, on the other, will the Commission be able to grant fishing licences to EU Member States for them to grant to vessels flying their flag.

With regard to fisheries, amongst other things, the exclusivity clause seeks to prevent EU vessels from fishing outside the framework of a public access fisheries agreement⁵⁷ or failing to contribute to the long-term conservation of fisheries resources, as stated in the second written statement it submitted to the ITLOS on behalf of the EU on 13 March 2014 in Case No 21.⁵⁸

The Court found that 'it cannot be accepted that Community vessels should be able to access Moroccan fishing zones in order to carry out fishing activities' through the conclusion of a specific contract 'with a Moroccan company holding a licence issued by the Moroccan authorities to Moroccan owners [...] or by using any other legal instrument in order to access those fishing zones for the purpose of carrying out such activities there outside the scope of the Fisheries Agreement and, consequently, without the intervention of the competent European Union authorities'.⁵⁹ Therefore, the aforementioned Art. 6 excludes any possibility for EU vessels to carry out fishing activities in the fishing areas of a third country with which the Union has concluded a public access fisheries agreement on the basis of a licence issued by the authorities of that country without the intervention of the competent EU authorities.

In the author's view, this judgment reinforces the value of the public access fisheries agreements concluded by the EU with more than 30 countries as necessary instruments for responsible and sustainable fishing; they contain the same obligations for the EU vessels fishing in third-country waters as those imposed on all EU fishing vessels fishing in EU waters. In so doing, the EU is seeking to prevent European vessels from changing their flag or fishing under a private access fisheries agreement. In such a context, the EU would not be able to hold fishing vessels that infringe the international, EU and national legislation regarding fish stocks conservation accountable.

Regarding the GC's judgment of 10 December 2015 in *Front Polisario v Council*, it is considered that the ninth plea in law used by Front Polisario in this case is the most relevant for the field of fisheries. It has to be underlined that Front Polisario relied, on the one hand, on the Association Agreement between the EU

⁵⁷This clause is also provided for in Art. 31(6)(b) Regulation (EU) 1380/2013.

⁵⁸*Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC). Second Written Statement by the European Commission on Behalf of the European Union, 13 March 2014, ITLOS, para 27.*

⁵⁹EU:C:2014:2273, paras 33–35.

and Morocco and, on the other hand, on the principles of UNCLOS; the fisheries Agreement or its most recent Protocol did not receive special attention in this case.

In relation to the Association Agreement, Front Polisario claimed that this treaty infringed 'the right to self-determination and the rights which derive from that, in particular, sovereignty over natural resources and the primacy of the interests of the inhabitants of Western Sahara'.⁶⁰ With respect to the UNCLOS, Front Polisario argued that, according to the provisions of this Convention, the people of Western Sahara had sovereignty over, firstly, the waters adjacent to the coast of Western Sahara and, secondly, the infringement of the basic criterion resulting from the UNCLOS, the Association Agreement, the Protocol 4 of the fisheries partnership agreement concluded by the EU with Morocco in 2006 and the Agreement of an exchange of letters concerning the provisional application of the Agreement on cooperation in the sea fisheries sector between the European Community and Morocco initialled in Brussels on 13 November 1995.⁶¹

This judgement has various positive contributions in this field. Thus, the General Court remembers that in the case *Intertanko and Others*, the Court of Justice held that 'the nature and the broad logic of that convention prevent the Courts of the European Union from being able to assess the validity of an EU measure in the light of that convention'.⁶² and also reiterates 'that the EU institutions enjoy a wide discretion as regards whether it is appropriate to conclude an agreement with a non-member State which will be applied on a disputed territory'.⁶³ Although the General Court considers correct the Council's argument of not being liable for any actions committed by a country, which has an agreement concluded with the EU,⁶⁴ the EU underlines the special situation of the Western Sahara, 'which is in fact administered by a non-member State, in this case the Kingdom of Morocco, although it is not included in the recognised international frontiers of that non-member State', and also the fact that Morocco neither has any mandate granted by the United Nations or by another international body for the administration of the Western Sahara territory nor transmits to the United Nations information relating to that territory, according to Art. 73(e) of the United Nations Charter.⁶⁵ Finally, the General Court has decided to annul the provisions of Council Decision 2012/497/EU referring to Western Sahara.

In the author's view, this judgment is only the first judicial step regarding the EU–Morocco relations that affect Western Sahara in the field of fisheries. This decision has already been the subject of an appeal before the Court. We are referring to the case *Council v Front Polisario* (C-104/16 P), which has been

⁶⁰EU:T:2015:953, para 189.

⁶¹O.J. L 306/1 (1995). See EU:T:2015:953, paras 190–191.

⁶²Judgment of 3 June 2008 *Intertanko and Others*, C-308/06, EU:C:2008:312, para 65. See also EU:T:2015:953, para 195.

⁶³EU:T:2015:953, para 223.

⁶⁴*Ibid*, paras 230–231.

⁶⁵*Ibid*, paras 232–233.

brought before the Court on 11 March 2016. It has to be mentioned that on 7 April 2016, the President of the Court has ordered this case to be judged through the accelerated procedure in accordance with Art. 133 of the Court's Rules of Procedure and on 13 September 2016 the Advocate General in this case has published his Opinion. Finally, on 21 December 2016 the Court of Justice has published its judgment in this case, deciding to set aside the judgment of the General Court of 10 December 2015 as well as to dismiss the action brought by the Front Polisario as inadmissible.⁶⁶

In addition, the General Court will have to publish its judgment in the case *Front Polisario v Council* (T-180/14). In this case, Front Polisario relies on 12 pleas in law in support of its action for annulment of Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco.⁶⁷ It claims that the contested Decision, amongst other things, is contrary to the objectives of the CFP and also represents an infringement of the UNCLOS provisions as Morocco sets fishing quotas for waters not under its sovereignty, as well as authorises EU vessels to exploit fisheries resources that are under the sole sovereignty of the Sahrawi people.

5 Final Remarks

Despite the EU's extensive experience with fisheries treaty activity at the global level, recently the CJEU's intervention has been needed to shed light on several relevant issues in this field.

Thus, the judgment in the case *Council v Commission* (C-73/14) solved a jurisdictional problem, reasserting the exclusive nature of the EU's competences with regard to the conservation and management of living marine resources and, therefore, the European Commission's right to explain the EU's position on issues affecting fisheries resources before an international court. It likewise highlighted the issue of the EU's possible international legal responsibility for infringements of the provisions of public access fisheries agreements.

In the joined cases *Parliament and Commission v Council* (C-103/12 and C-165/12), the Court considered, first, that public access fisheries agreements should be adopted according to Art. 43(3) TFEU in conjunction with Art. 218(6)(a)(v) TFEU, thereby strengthening the EP's role in the field of fisheries. Second, the judgment found that a unilateral declaration made by the EU regarding part of the surplus allowable catches in the EEZ of one of its Member States that is later accepted by a

⁶⁶EU:C:2016:232. EC:C:2016:677. EC:C:2016:973.

⁶⁷O.J. L 349/1 (2013).

third country should be considered part of an agreement concluded by the EU and the said country on the authorisation of exploitation under the conditions set out in the declaration. This legal solution is consistent with the CJEU's classic case law, which has interpreted public access fisheries agreements broadly; however, it also represents a missed opportunity to address the international scope of a unilateral declaration made by the EU in relation to these issues.

Finally, in *Ahlström and Others* (C-565/13) and *Front Polisario v Council* (T-512/12), the CJEU handed down two interesting judgments on various extremely important aspects of the public access fisheries agreement (including the corresponding Protocol) concluded between the EU and Morocco. In the first one, the Court showed the EU's clear position, regarding the exclusivity clause as a tool to reinforce the role of the public access fisheries agreement in achieving responsible and sustainable fisheries in the waters under the jurisdiction of a third country and also for fighting the reprehensible practice of fishing under private fisheries agreements that encourages overexploitation of resources for profit motives. And, in the second one, the General Court has made the first step forward in the international recognition of the special situation that Western Sahara is living under the *de facto* control of Morocco, although this African country does not any legitimacy on Western Sahara under international law.

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