NETHERLANDS FISHERIES IN A EUROPEAN AND INTERNATIONAL LEGAL CONTEXT*

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1. INTRODUCTION

The Netherlands' special relationship with the sea is widely known. For instance due to the prominent role of its merchant and naval fleet in particularly the 17th and 18th centuries or due to Hugo de Groot, one of the founding fathers of modern international law in general and the international law of the sea in particular. In present times the Netherlands no longer ranks among the main players in marine issues. As regards marine capture fisheries, the quantitative involvement of the Netherlands is still fairly sizeable in a European context, but not very significant on a global scale. This does not mean, however, that the involvement of the Netherlands in marine capture fisheries is a purely domestic affair. Fishing vessels flying the Netherlands flag do not just operate within the maritime zones of the Netherlands or other Member States of the European Union (EU) but also on the high seas and within the maritime zones of non-EU Member States. Also, Netherlands companies and individuals have (beneficial) ownership of vessels under foreign flag.

As marine fish are a common property and renewable natural resource that is incapable of being spatially confined, exploitation often causes transboundary effects and thereby acquires an international dimension. The circumstance that coastal states are under general international law and the LOS Convention[1] entitled to an exclusive economic zone (EEZ) in which they, *inter alia* have, 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living'[2] which implies exclusive fisheries access, cannot alter that reality. The international dimension of marine capture fisheries on the high seas is evident in view of the right of all states for their nationals to engage in high seas fishing.[3] Both the LOS Convention and one of its implementing agreements, the 1995 Fish Stocks Agreement,[4] address this by linking (sovereign) rights with obligations to cooperate in relation to transboundary stocks, whether directly or through international organizations.[5]

The founding of the European Economic Community (EEC) in 1957 was not motivated by a need for closer cooperation in marine capture fisheries. However,

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1. United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *UNTS* 396; *Trb*. 1983 No. 83; <www.un.org/Depts/los>.
2. Art. 56(1)(a) of the LOS Convention.
3. Art. 116 of the LOS Convention.
4. Agreement for the Implementation 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 Fish Stocks and Highly Migratory Fish Stocks, New York, 4 December 1995. In force 11 December 2001, 34 *ILM* (1995) 1542; *Trb*. 1976 No. 279; <www.un.org/Depts/los>.
5. E.g., Arts. 63-67, 166(b) and 117-118 of the LOS Convention and Arts. 5, 7(a) and (b) and 8 of the 1995 Fish Stocks Agreement.

the current Common Fisheries Policy (CFP) of the EU can be seen as a mechanism by which the fifteen[6] EU Member States intend to give effect to their international obligations to cooperate. The supranational character of the CFP has gradually expanded which, as a corollary, has led to a constantly diminishing residual competence of EU Member States in fisheries matters, especially in the sphere of prescription.

This article offers an overview of the international (legal) dimension of Netherlands fisheries[7] and examines in this context the following four main issues: fisheries access by foreign vessels to the Netherlands maritime zones (section 4); access by Netherlands fishing vessels to the maritime zones of other states and the high seas (section 5); residual regulatory (prescriptive) competence of EU Member States in the conservation and management of fisheries in the context of the CFP (section 6); and participation by the Kingdom of the Netherlands in regional fisheries organizations (RFOs) and regional fisheries management organisations (RFMOs)[8] (section 7). These sections are preceded by some background information on the Netherlands maritime zones and the main relevant species that occur therein (sections 2 and 3). The article ends with some conclusions in section 8.

In view of the broadness and complexity of the topic of marine capture fisheries, the scope of the article is delimited in several ways. The first main delimitation relates to the fact that the Netherlands in Europe is merely one of the three countries of which the Kingdom of the Netherlands, as a subject of international law, is composed. The other two countries are the Netherlands Antilles and Aruba.[9] This article deals predominantly with the Netherlands in Europe. This is an important delimitation as the EC Treaty[10] and the CFP do not apply to the Netherlands Antilles

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6. The implications of the recently concluded 2003 Treaty of Accession (Treaty of Accession to the European Union, Athens, 16 April 2003 (text at <europa.eu.int/comm/enlargement>)), which allows ten states to become EU Member States, will not be examined in this article. The ten prospective EU Members are: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

7. For a historical background see A.W. Koers, 'The Netherlands and International Fisheries Law', in H.F. van Panhuys et al., eds., *International Law in the Netherlands* (Alphen a/d Rijn, Sijthoff & Noordhoff 1978) pp. 315-331.

8. The acronym RFOs is meant to encompass a broad range of inter-governmental organizations related to fisheries that either perform management functions, (scientific) advisory roles or strive for development cooperation. RFMOs encompasses a smaller group of organisations that are charged with management functions.

9. See the Preamble to the Statute for the Kingdom of the Netherlands, of 28 October 1954 [*Statuut voor het Koninkrijk der Nederlanden*] *Stb.* 1954 No. 503, as amended.

10. Treaty establishing the European Economic Community, Rome, 25 March 1957. In force 1 January 1958, consolidated version at <europe.eu.int/eur-lex>. The EC Treaty has, *inter alia*, been amended by the 1986 Single European Act, the 1992 EU Treaty, the 1997 Amsterdam Treaty and the 2001 Treaty of Nice.

and Aruba.[11] Aspects of marine fisheries in the Netherlands Antilles and Aruba have been examined in more detail elsewhere.[12] However, section 7 will nevertheless address the issue of competence in fisheries within the Kingdom of the Netherlands in the context of the discussion of the participation of the Kingdom in RFOs. In general, however, references in this article to 'the Netherlands' are intended to refer to the Netherlands in Europe exclusively.

Secondly, although the focus on marine capture fisheries excludes aquaculture and fisheries in internal waters, this article also covers non-fish species like molluscs, crustaceans and marine mammals. Thirdly and lastly, as already alluded to above, the analysis of the residual competence of the Netherlands focuses predominantly on prescription in relation to the conservation and management of fisheries.[13] This is in fact where the fisheries competence of the EU is practically exclusive, whereas enforcement competence in this sphere rests primarily with the Member States.[14] However, the division of competence between the EU and its Member States is expected to be in a constant state of flux.[15]

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11. Art. 299(1) and Annex II to the EC Treaty. See also the definition of 'Community waters' in Art. 3(a) of Reg. No. 2371/2002, *infra* n. 49, reproduced in full at *infra* n. 52. Note that the new Netherlands coalition government's Statement of Policy [*Regeerakkoord*] of 16 May 2003 contains a commitment to ensure that the Netherlands Antilles and Aruba will obtain a status under Art. 299(2) of the EC Treaty (at p. 10).

12. See, *inter alia*, E.J. Molenaar, 'Marine Fisheries in the Netherlands Antilles and Aruba in the Context of International Law', 18 *International Journal of Marine and Coastal Law* (2003) pp. 127-144.

13. This implies that two other components of the CFP – the common structural policy and the common market organisation – are also not examined.

14. Cf., the EC declaration upon formal confirmation of the LOS Convention (available at <www.un.org/Depts/los>). For a discussion on enforcement see A. Berg, *Implementing and Enforcing European Fisheries Law. The Implementation and the Enforcement of the Common Fisheries Policy in the Netherlands and in the United Kingdom* (The Hague, Kluwer Law International 1999); and R.J. Long and P.A. Curran, *Enforcing the Common Fisheries Policy* (Oxford, Blackwell 2000).

15. Note for instance the differences between the declaration mentioned in n. 14 and the EC declaration upon signature of the 1995 Fish Stocks Agreement (available at <www.un.org/Depts/los>). See R.R. Churchill, 'The European Community and its Role in Some Issues of International Fisheries Law', in E. Hey, ed., *Developments in International Fisheries Law* (The Hague, Kluwer Law International 1999), pp. 533-573, at pp. 538-540 and 556-558 on disagreements on competence in relation to the 1995 Fish Stocks Agreement and the 1993 FAO Compliance Agreement (*infra* n. 121). See also Chapter V of Reg. No. 2371/2002, *infra* n. 49, which indicates that the enforcement competence of the EU is expanding.

2. NETHERLANDS MARITIME ZONES

2.1 **Maritime zones under the LOS Convention**

The LOS Convention recognizes every state's right to establish a territorial sea with a maximum breadth of 12 nautical miles (nm) from the baselines.[16] In 1985, when this right had in all likelihood become part of customary international law, the Netherlands extended the width of its territorial sea from 3 to 12 nm from the baselines.[17] That part of the Wadden Sea which lies between the Wadden Islands and the mainland, as well as the waters landward of the mouth of the Western Scheldt, have the status of internal waters.[18]

The LOS Convention also entitles coastal states to declare an EEZ in which they have certain sovereign rights, jurisdiction and other rights and duties.[19] As already pointed out above, these sovereign rights, *inter alia*, relate to all marine living resources in the EEZ. The EEZ cannot extend beyond 200 nm measured from the baselines.[20] In 1977 the Netherlands established a 200 nm fishery zone (FZ) in which it claimed exclusive jurisdiction in matters of fisheries.[21] This action was taken in concert with other EEC Member States pursuant to the EEC Council Resolution of 3 November 1976.[22] Whereas the LOS Convention does not embody the concept of an FZ or an exclusive fishery zone, the claims of the Netherlands and other (EEC Member) States were quite likely consistent with customary international law, which by that time already encompassed the broader concept of the EEZ.

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16. Art. 3 of the LOS Convention.

17. Arts. 1 and 2 of the Act on the Limits of the Netherlands Territorial Sea, of 9 January 1985 [*Wet grenzen Nederlandse territoriale zee*] *Stb.* 1985 No. 129. For more information on the Netherlands maritime zones and baselines see H.M. Dotinga and A.H.A. Soons, 'The Netherlands and the Law of the Sea', in T. Treves and L. Pineschi, eds., *The Law of the Sea. The European Union and its Member States*, (The Hague, Martinus Nijhoff Publishers 1997) pp. 365-426.

18. Art. 2(2) of the 1985 Act, *supra* n. 17. The dividing-line between the territorial sea and internal waters is a straight line. The Netherlands argues that these are not straight baselines within the meaning of Arts. 7, 9 or 10 of the LOS Convention as they have no effect on the outer limit of the territorial sea (cf., Dotinga and Soons, loc. cit. n. 17, at p. 368; see also Parliamentary Papers, Second Chamber, 1982-1983, 17654, Nos. 1-3, p. 9). It is nevertheless submitted that these straight lines are not inconsistent with the LOS Convention, if only because the Netherlands would also have been entitled to the more advantageous method of drawing straight baselines. See also *infra* n. 84.

19. Arts. 55, 56 and, in contradistinction, 77(3) of the LOS Convention.

20. Art. 57 of the LOS Convention.

21. Authorization Act Establishment Fishery Zone, of 8 June 1977 [*Machtigingswet instelling visserijzone*] *Stb.* 1977 No. 345. The FZ was effectively established on 25 December 1977; (Executive Decree pursuant to Article 1 Authorization Act Establishment Fishery Zone, of 23 November 1977 [*Uitvoeringsbesluit ex artikel 1 Machtigingswet instelling visserijzone*] *Stb.* 1977 No. 665).

22. *OJ* 1981, C 105/1.

The landward limit of the Netherlands FZ is formed by the baseline for the territorial sea.[23] The entire territorial sea therefore overlaps with the FZ. This differs from the LOS Convention pursuant to which the EEZ is 'an area beyond and adjacent to the territorial sea'.[24] However, the Netherlands situation does not seem inconsistent with the LOS Convention as it does not constitute a claim to broader rights or disregards related obligations than those incorporated in the relevant provisions of the LOS Convention.

After the Netherlands FZ was established in 1977, when a legal framework for offshore mining had already been in place for more than a decade, there was no pressing need for an EEZ. It took until the late 1980s before some steps were taken to examine the potential contribution of an EEZ to the protection and preservation of the marine environment in the North Sea, in particular with regard to vessel-source pollution and dumping. This finally led to the establishment of the Netherlands EEZ in 2000,[25] even though at the time of writing Netherlands legislation on vessel-source pollution and dumping was still not applicable in that area. The sovereign rights and jurisdiction which the Netherlands claims in its EEZ are identical to those listed in Article 56(1) of the LOS Convention. In accordance with Article 55 of the LOS Convention, the Netherlands EEZ commences seaward of the outer limit of the territorial sea.[26] As the establishment of an EEZ has not been accompanied by revoking the FZ, the two maritime zones exist alongside each other. The national legal framework for fisheries will continue to use only the FZ, if only because the current definitions imply that the spatial area of the FZ encompasses both the territorial sea and the EEZ. From the perspective of international law, however, the Netherlands should be treated as claiming an EEZ because this corresponds to a wider range of sovereign rights, jurisdiction and related rights and obligations in comparison with an FZ-claim.[27]

Finally, Article 77(1) of the LOS Convention provides that 'the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it

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23. Art. 2 of the 1977 Act, *supra* n. 21, in conjunction with Art. 1 of the 1977 Executive Decree, *supra* n. 21.

24. Art. 55 of the LOS Convention.

25. Art. 1(1) of the Kingdom Act Establishment Exclusive Economic Zone, of 27 May 1999 [*Rijkswet instelling exclusieve economische zone*] *Stb.* 1999 No. 281. The entry into force of this Act, and thereby the effective establishment of the Netherlands EEZ, took place on 28 April 2000 (Decree Limits Netherlands Exclusive Economic Zone, of 13 March 2000 [*Besluit grenzen Nederlandse exclusieve economische zone*] *Stb*. 2000 No. 167).

26. Art. 1(2) of the 1999 Kingdom Act, *supra* n. 25.

27. Cf., the depiction of the Netherlands in the *Table Containing the Summary of National Claims to Maritime Zones* at <www.un.org/Depts/los>. The Netherlands is not unique in this respect. For example, Australia has an EEZ but also an Australian Fishery Zone (AFZ), which it uses in the context of fisheries.

and exploiting its natural resources'. Pursuant to paragraph (4) of that provision, natural resources encompass 'living organisms belonging to sedentary species'. As Article 76 envisages the possibility of an outer (seaward) limit of the continental shelf beyond 200 nm, this could give coastal states additional relevant (for the purpose of this article) sovereign rights. However, the proximity of adjacent and opposite coastal states (Belgium, Germany and the United Kingdom) excludes a Netherlands outer continental shelf. In fact, as a consequences of the maritime boundary delimitations between the Netherlands and its neighbours,[27a] the Netherlands EEZ does not reach its maximum width of 188 nm anywhere.

2.2 Other relevant maritime zones

Whereas the Netherlands maritime zones discussed in section 2.1 are directly derived from the LOS Convention, the domestic regulatory framework for fisheries also uses other maritime zones. The cornerstone of this regulatory framework is the 1963 Fisheries Act.[28] The definition of the FZ in Article 1(4)(a) refers to the 1977 Act,[29] which is linked to the 1985 Act[30] for the baseline for the territorial sea. Subparagraphs (b), (c) and (d) of Article 1(4) of the 1963 Fisheries Act contain definitions of 'sea fishing', 'coastal fishing' and 'inland fishing'. 'Sea fishing' is defined as fishing in the FZ and 'sea areas'; 'coastal fishing' as fishing in 'coastal waters'; and 'inland fishing' as fishing in 'other waters'. 'Sea areas' and 'coastal waters' are designated in a separate Decree.[31] This complex web of definitions and enactments has created some areas that lie within the FZ and are also designated as 'coastal waters'. This renders the legislation in those cases internally inconsistent.[32]

A last zone which should be mentioned is the 'exclusive 12-mile zone', established in 1983.[33] This zone has been enacted as a consequence of the CFP and functions as one of the principal exceptions to the principle of equal access. This is discussed in greater detail in section 4.2.

27a. See info at <www.un.org/depts/los>.

28. Act of 30 May 1963, *Stb*. 1963 No. 312, as amended.

29. *Supra* n. 21.

30. *Supra* n. 17.

31. The 1970 Decree Designation Sea Area and Coastal Waters, of 21 April 1970 [*Besluit aanwijzing zeegebied en kustwateren 1970*] *Stb*. 1970 No. 176, as amended.

32. Cf., the Judgment of the Court of Appeal in The Hague (economic chamber for criminal cases), on 15 November 1996 (Roll No. 2200105495, Parket No. 1009338594). This concerns the Zeegat van Goeree, the Brouwershavense Gat and the Eastern Scheldt (Art. 2(3), (4) and (5) of the 1970 Decree, *supra* n. 31. See also E.J. Molenaar, 'Zeegat van Goeree. Rariteit binnen Nederlandse Visserijwetgeving', [Goeree Passage. Curiosity within Netherlands' Fisheries Legislation], 74 *NJB* (1999) pp. 550-553; 32 *NYIL* (2001) pp. 318-321.

33. Regulation Establishment 12-Mile Zone, of 23 August 1983 [*Regeling instelling 12-mijls-zone*]; *Stc*. 1983 No. 165).

3. RELEVANT SPECIES WITHIN THE NETHERLANDS MARITIME ZONES

As a whole, the maritime zones of the Netherlands cover an area of 57,065 square kilometres.[34] They lie predominantly within International Council for the Exploration of the Sea (ICES) Division IVc (Southern North Sea) and to a lesser extent within ICES Division IVb (Central North Sea). The North Sea is a semi-enclosed sea with a large influx of sediments, pollutants and nutrients by several major rivers (Elbe, Humber, Meuse, Rhine, Scheldt, Seine, Thames and Weser) and a significant cyclonic circulation of currents.[35] It has been identified as a large marine ecosystem (LME) in view of its distinct bathymetry, hydrography and trophically-dependent populations.[36]

Although approximately 230 fish species are known to inhabit the North Sea, diversity is lower in the shallow southern North Sea,[37] where the Netherlands maritime zones are. The main commercial demersal fish species caught in the Netherlands maritime zones are sole, plaice, cod, dab, haddock, lemon sole, turbot, saithe, and whiting. The main commercial pelagic species are blue whiting, herring, horse mackerel and mackerel. All these species are regulated by EU-quotas.[38] Pilchard is an unregulated species that was specifically targeted by Netherlands vessels at the time of writing. None of these species, and probably very few of their stocks, are discrete to the maritime zones of the Netherlands, in the sense that their range of distribution does not extend to the maritime zones of other coastal states. Most, if not all, of these stocks therefore have to be treated as joint or shared stocks within the meaning of Article 63(1) of the LOS Convention, for which coastal states are to cooperate with each other. This provision is only expressly applicable to the EEZ, but a (similar) duty to cooperate with respect to the territorial sea would also exist under customary international law, *inter alia*, through the duty to avoid transboundary harm. By means of its involvement in the CFP, the Netherlands gives effect to these international obligations. In case the range of distribution of these stocks extends to the maritime zones of coastal states that are not members of the EU, bilateral fisheries agreements are concluded between those states and the EU (see section 5.1). The bilateral agreements with Norway and the Faroe Islands

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34. Fifth Policy Document on Spatial Planning [*Vijfde Nota voor de Ruimtelijke Ordening*], Part 1: National Spatial Policy [*Nationaal ruimtelijk beleid*] (The Hague, Sdu 2000) at p. 129.

35. See *Quality Status Report 2000. Region II. Greater North Sea*; available at <www.ospar.org>.

36. See the info at <www.edc.uri.edu/lme>. The North Sea is listed as LME #22.

37. OSPAR QSR Greater North Sea 2000, *supra* n. 35, at p. 90.

38. See the info on 'TACs and quotas' at <europa.eu.int/comm/dgs/fisheries/index_en.htm> and <www.pvis.nl> (the latter in Dutch only).

are especially relevant in relation to fish stocks that also occur within the Netherlands maritime zones.[39]

The range of distribution of some of these (stocks of) demersal or pelagic fish species may even straddle into the high seas and thereby require cooperation between coastal states and high seas fishing states under Article 63(2) of the LOS Convention and the 1995 Fish Stocks Agreement (if applicable). This cooperation takes place within the framework of the North East Atlantic Fisheries Commission (NEAFC) (see section 7).

Besides fish, the commercial fisheries in the Netherlands maritime zones also target several mollusc species (cockles, ensis (*Ensis directus*), mussels and spisula (*Spisula subtruncata*)) and crustaceans (North Sea (brown) shrimp (*Crangon crangon*) and Norway lobster). Northern prawn is only caught as by-catch. The mussel fishery is not really a capture fishery as it involves collecting the mussel seed after which the mussels are allowed to grow on plots located inshore or in internal waters. Some of these species fall under the category of sedentary species for which the LOS Convention does not require states to cooperate.[40] This certainly concerns molluscs but usually not crustaceans.[41] The rationale is of course that the transboundary effects of exploitation are expected to be small. However, customary international law may nevertheless require a (similar) duty to cooperate where transboundary harm actually occurs or is likely to occur.

The Netherlands maritime zones are also frequented by some of the highly migratory species listed in Annex I to the LOS Convention, namely porpoises, dolphins and whales. The harbour porpoise is the most common species but sightings are occasionally also reported of whitebeaked dolphins, minke whales and sperm whales.[42] Other marine mammals present are the common/harbour seal and the grey seal.

4. ACCESS BY FOREIGN VESSELS TO THE NETHERLANDS MARITIME ZONES

4.1 **General**

The LOS Convention recognizes that a coastal state has sovereignty within its territorial sea, archipelagic waters and internal waters and resource-related sovereign

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39. See *Evaluation Fisheries Agreements concluded by the European Community*, IFREMER, August 1999, available at <europa.eu.int/comm/fisheries>, at p. 29.

40. See Arts. 68 and 77(4) of the LOS Convention.

41. Art. 77(4) of the LOS Convention defines sedentary species as 'organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil'.

42. For info see <home.planet.nl/~camphuys/Cetacea.html>.

rights within its EEZ and over its continental shelf.[43] This gives a coastal state broad discretion in regulating access to the exploitation of marine living resources in these zones,[44] both for national and foreign vessels. Whereas the CFP is by far the most significant basis for access by foreign vessels to the Netherlands maritime zones, the Netherlands also concluded agreements with Belgium and Germany that provide for foreign access that pre-date the CFP. Apart from these situations, foreign vessels are prohibited from engaging in fishing in the Netherlands FZ.[45] The following three subsections discuss the CFP and the agreements with Belgium and Germany.

4.2 **Common fisheries policy**

The origins of the CFP lie in the 1973 enlargement of the EEC with Denmark, Ireland and the United Kingdom, the trend of 'creeping coastal state jurisdiction' culminating in the adoption of the LOS Convention in 1982 and the failure of the predecessor to the NEAFC Convention[46] in managing the fish stocks within its regulatory area.[47] The first steps towards a CFP were taken by the 1976 'Hague Resolution',[48] which called for a coordinated extension of 200 nm zones, but the CFP only really took off in 1983 by the adoption of several specific EEC Council Regulations. The current framework regulation of the CFP is Council Regulation (EC) No. 2371/2002 of 20 December 2002 'on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy'.[49]

The way in which the CFP has dealt with the issue of fishing access has not significantly changed since its inception. Six general elements can be discerned. The first is the principle of equal access, which is based on the prohibition of discrimination on grounds of nationality and is consistent with the free movement of persons, goods, services and capital within the internal market of the EU.[50]

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43. Arts. 2(1), 56(1)(a) and 77 of the LOS Convention.

44. See Arts. 62 and 69-71 of the LOS Convention.

45. Art. 5(1) of the 1963 Fisheries Act. In the other maritime zones, fishing is only permitted under license, which could in theory be applied for by foreigners. See Arts. 7(2) and 10(2).

46. Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980. In force 17 March 1982, 1285 *UNTS* 129; <www.neafc.org>.

47. Cf., K.R. Simmonds, 'The European Economic Community and the New Law of the Sea', 218 *Recueil des Cours de l'Académie de Droit International* No. VI (1989) pp. 9-166, at 41-43.

48. See *supra* n. 22.

49. *OJ* 2002, L 358/59. See also COM(2002) 185 final, *Proposal for a Council Regulation on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy*. The previous two CFP framework regulations were EEC Council Regulation No. 170/83 and EEC Council Regulation No. 3760/92.

50. Arts. 3(1)(c) and 12 of the EC Treaty. See R.R. Churchill, *EEC Fisheries Law* (Dordrecht, Martinus Nijhoff Publishers 1987) at pp. 124-132.

Accordingly, fishing vessels flying the flag of EU Member States and registered in the Community (Community fishing vessels) are in principle permitted to engage in fishing activities in 'Community waters'.[51] 'Community waters' are defined as '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'.[52] Consequently, the maritime zones of the Netherlands Antilles and Aruba do not fall under 'Community waters'. Specific exceptions may exist. For instance, prior to 31 December 2002 vessels flying the flag of Finland, Portugal, Spain and Sweden did not have access to the North Sea pursuant to these states' Acts of Accession to the EEC/EC.[53]

The second element is that equal access does not apply within 12 nm from the baselines for the measurement of the territorial sea. In this coastal band, access is reserved to the coastal state's own fishing vessels and to fishing vessels with traditional fishing rights.[54] Access to internal waters is only possible through the national legal framework. Which states have access for which species and to which parts of the Netherlands territorial sea is schematically displayed in Table I below. The primary objective of the 12 nm zone was and is to support traditional and small-scale coastal fisheries and coastal communities. However, it was and is also seen as offering additional protection to inshore areas as these often harbour nurseries.[55] The special access regime for the 12 nm zone was initially regarded as a temporary derogation from the equal access regime,[56] but it is now firmly established as a general rule.[57] During the last review of the CFP, calls for an extension of the special access regime were regarded by the European Commission as unnecessary for the protection of fisheries resources.[58] Such calls may also have been perceived as potential threats to the multilateral nature of the CFP. The Netherlands supported the 12 nm regime but did not call for its extension.[59]

The third element provides for the establishment of special areas in which fishing access is prohibited or regulated. One of these, the so-called 'Shetland box', is

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51. Cf., Art. 17(1) of Reg. No. 2371/2002, *supra* n. 49.

52. Cf., Art. 3(a) of Reg. No. 2371/2002, *supra* n. 49.

53. *OJ* 1985, L 302/23 (Arts. 156-164 (Spain); Arts. 347-353 (Portugal)); *OJ* 1994, C 241/21 (Arts. 89-95 (Finland); Arts. 116-122 (Sweden)).

54. Cf., Art. 17(2) of Reg. No. 2371/2002, *supra* n. 49.

55. See COM(2002) 181 final, *Communication from the Commission on the reform of the Common Fisheries Policy ('Roadmap')* (text at <europa.eu.int/eur-lex>), at pp. 12-13.

56. See Simmonds, loc. cit. n. 47, at p. 45.

57. Art. 19(1) of COM(2002) 185 final, *supra* n. 49, stipulated that the review of access rules would not concern the 12 nm zone.

58. See COM(2001) 135 final, *Green Paper: On the Future of the Common Fisheries Policy*, (text at <europa.eu.int/eur-lex>), at p. 24.

59. Parliamentary Papers, Second Chamber 1998-1999, 26737, No. 1, p. 12.

actually anchored in the framework regulation of the CFP.[60] Other technical measures involving a combination of spatial, temporal, gear and vessel-type restrictions are also applicable to (part of) the Netherlands maritime zones.[61]

The fourth element concerns access to resources. EU Member States are allocated quotas for certain species in relation to certain ICES Divisions. These can be exchanged entirely or partly between them.[62] Even though a fishing vessel could therefore in principle rely on the equal access regime or the special access regime in the 12 nm zone, if it intends to target a species that is subject to EU quotas, it must in addition obtain from a EU Member State a quota for a given species in a given area. It should be noted that fishing for unregulated species often leads to by-catch and discards of quoted species.[63] The access to resources in the exclusive 12 nm zone of the Netherlands is (also) set out in Table 1.

It is up to each EU Member State to decide how fishing opportunities allocated to it by the EU should be further allocated to its own fishing vessels.[64] Since 1993 the Netherlands has pursued a system of co-management where fishermen cooperate within so-called 'Biesheuvelgroups', which are charged with managing individually transferable quotas (ITQs).[65] Consistent with the objectives of the EU internal market, nationals of EU Member States are allowed to obtain quotas from other EU Member States, even though it can only be used by a fishing vessel registered in that state.[66] A considerable Netherlands involvement exists in this respect.[67] The allocation of fishing opportunities between EU Member States aims to ensure each Member State relative stability of fishing activities. This relative stability is derived

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60. Art. 18(1) of Reg. No. 2371/2002, *supra* n. 49.

61. See Art. 29 of Council Regulation (EC) No. 850/1998, of 30 March 1998 'for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms', as corrected (consolidated text at <europa.eu.int/eur-lex>) which contains the so-called 'plaice-box'.

62. Art. 20(5) of Reg. No. 2371/2002, *supra* n. 49.

63. See also subsection 6.3.

64. Art. 20(3) of Reg. No. 2371/2002, *supra* n. 49.

65. On Netherlands practice see J.W. Van der Schans, *Governance of Marine Resources, Conceptual Clarifications and Two Case Studies* (Delft, Eburon 2001), in particular pp. 326-392. A 1997 European Parliament Report proposed that 'the distribution of TACs should be rationalised by allocating fishing rights amongst fishermen, taking the principle of relative stability as the point of departure' and 'the possible transferability of fishing rights should be examined' (*Report on the Common Fisheries Policy after the year 2002*, Committee on Fisheries, Doc. PE 220.887/fin, of 2 October 1997, at pp. 9 and 23-24).

66. On this topic and its relation with the notion of relative stability see, *inter alia*, M. Morin, 'The Fisheries Resources in the European Union. The Distribution of TACs: the Principle of Relative Stability and Quota-Hopping', 24 *Marine Policy* (2000) pp. 265-273. The *Factortame* case before the Court of Justice of the European Community is in this respect a landmark-decision (*The Queen* v. *Secretary of State for Transport, ex parte: Factortame e.a.*; case C-221/89, *ECR* 1991, p. 3905).

67. See subsection 5.1.

from historical catch records, as qualified by special conditions such as the so-called 'Hague preferences'.[68] In practice, relative stability means the allocation key agreed to in 1982, with the only main adjustments due to the accession of Portugal and Spain in 1986.[69] The new CFP framework regulation relies again on the principle of relative stability.[70] Whereas the Commission made a cautious call for a revision of this principle in the long term,[71] a commitment to do so does not appear in the regulation. Calls for such reform mirror developments in RFOs, such as the International Commission for the Conservation of Atlantic Tunas (ICCAT) which went through a comprehensive review of its allocation process.[72] It is not ruled out that these developments will nevertheless have their impact on the (annual) allocation processes within the EU Fisheries Council.

Fifthly, third states (non-EU Member States) may be given access to (parts of) Community waters.[73] In relation to the North Sea, fishing vessels flying the flag of Norway and those registered in the Faroe Islands have access to the Netherlands maritime zones beyond the 12 nm zone.[74] Access by third states to Community waters is on a reciprocal basis and not in return for monetary compensation or otherwise. A surplus of the total allowable catch (TAC) in Community waters was never established.[75]

Lastly, in view of the external competence of the EU, it is no longer possible for EU Member States to conclude agreements that give third states fishing access to their maritime zones (see subsection 5.3).

4.3 **Benelux Treaty**

Belgium derives a right of fishing access to the Netherlands territorial sea pursuant to the 1958 Treaty Instituting the Benelux Economic Union (Benelux Treaty).[76] By concluding this treaty, the three parties – Belgium, Luxembourg and the Netherlands

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68. See *supra* n. 22.

69. Cf., A. Hatcher, J. Frere, S. Pascoe and K. Robinson, '"Quota-hopping" and the Foreign Ownership of UK Fishing Vessels', 26 *Marine Policy* (2002) at p. 2.

70. Art. 20(1) of Reg. No. 2371/2002, *supra* n. 49.

71. See the CFP Roadmap, *supra* n. 55, at pp. 13 and 23 and COM(2002) 185 final, *supra* n. 49, p. 5. See also the proposal made in the 1997 European Parliament Report, *supra* n. 65.

72. The ICCAT Criteria for the Allocation of Fishing Possibilities were adopted in November 2001 (text available at <www.iccat.es>, under 'Management').

73. Art. 20(4) of Reg. No. 2371/2002, *supra* n. 49.

74. See Art. 12(i) of Council Regulation (EC) No. 2341/2002 of 20 December 2002 *fixing for 2003 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required* (*OJ* 2002, L 356/12).

75. See Churchill, op. cit. n. 50, at p. 177 and 180. An exception exists for the French Department of Guyana (see Art. 12(iv) of EC Council Regulation No. 2555/2001, *supra* n. 74).

76. The Hague, 3 February 1958. In force 1 November 1960, 381 *UNTS* 165; *Trb.* 1958 No. 18.

– *inter alia* intended to strengthen the economic ties between them by means of the free movement of persons, goods, capital and services. Accordingly, paragraph (1) of Article 2 gives the nationals of the Contracting Parties the right to 'freely enter' the territories of the Contracting Parties, whereas paragraph (2)(b) provides that a right to equal treatment exists with respect to the 'freedom to carry on a trade or occupation, including the rendering of services'. Article 61(1)(d) confirms that this provision also covers fishing as it entitles Contracting Parties to reserve, contrary to Article 2(2)(b), fisheries in internal waters for their own nationals.[77] Pursuant to these provisions, nationals of Belgium and the Netherlands have equal fishing rights in the territorial seas of the other state.[78] Table 1 below incorporates this. The right of Belgian nationals to fish in the Western Scheldt is not discussed here as these are internal waters of the Netherlands and therefore beyond the scope of this article.[79] Although the Treaty does not explicitly say so, Luxembourg nationals presumably have no fishing rights in the territorial seas of Belgium or the Netherlands.[80] As a land-locked state without a territorial sea, Luxembourg would be unable to offer reciprocity on this issue.

Geographical Area	State	Species	Basis
0 to 12 miles; whole coast	Belgium	All species	Art. 2 of the 1958 Benelux Treaty
3 to 12 miles; whole coast	Denmark	Demersal; sprat; sand-eel; horse-mackerel	Art. 17(2) and Annex I(8) to Reg. No. 2371/2002
	Germany	Cod; shrimps; prawns	
6 to 12 miles; whole coast	France	All species	
6 to 12 miles; Texel south point, west to the Netherlands/German frontier	United Kingdom	Demersal	

Table 1. Access by EU Member States to the Netherlands exclusive 12 nm-zone

77. The English translation of the Treaty referred to in *supra* n. 76 uses 'inland waterways' instead. The Dutch and the French texts, which use *binnenwateren* (*Trb*. 1958 No. 18) and *les eaux intérieures* respectively, indicate that 'internal waters' were meant.

78. The term 'territories' excludes areas in which coastal states have sovereign rights.

79. See *supra* n. 18. This right is based on the treaties ensuing from the separation of Belgium from the Netherlands in 1839, in particular on Art. IX(6) of the Annex to the Treaties of 1839 (*inter alia*, London, 19 April 1839; *British and Foreign State Papers* 1838-1839, p. 990) and on the 'Regulations on Fishing in the Scheldt attached to the Convention between the Netherlands and Belgium of 1843' (Antwerp, 20 May 1843 (*Reglement ter uitvoering van artikel 9 van het Traktaat van 19 April 1839, betreffende de uitoefening van het regt der visscherij en van den vischhandel*)). See, *inter alia*, L.J. Bouchez, 'The Netherlands and the Law of International Rivers', in Van Panhuys et al., op. cit. n. 7, pp. 215-288, at p. 258; and the info (in Dutch) at <www.scheldenet.nl>.

80. Koers, loc. cit. n. 7, at p. 319 does not mention Luxembourg nationals.

4.4 **Ems-Dollard Treaty**

Another basis for foreign fishing in the Netherlands FZ ensues from the 1960 Ems-Dollard Treaty.[81] The treaty establishes a cooperative framework for addressing issues that have arisen as a consequence of the inability of Germany and the Netherlands to agree on a (land) boundary in the estuary of the river Ems and, consequently, a lateral delimitation of the territorial sea.[82] Article 41(1) of the Treaty provides that German and Netherlands fishermen are entitled to engage in fishing in the 'common fishing area'. This area mainly consists of the 'Ems Estuary', which is defined in Annex B to the Treaty as an area enclosed by several lines. The most seaward of these is the outer limit of the territorial sea, which at the time of adoption was set at 3 nm from (territorial sea) baselines. The definition of 'Ems Estuary' has become unclear since both states have extended the breadth of their territorial seas to 12 nm.[83] The common fishing area encompasses waters that either have the status of internal waters or territorial sea.[84] Part of the common fishing area consists of undisputed German territory.[85] Commercial fisheries in the common fishing area target mainly mussels, seed mussels, cockles and brown shrimp.

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81. Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning Arrangements for Cooperation in the Ems Estuary, The Hague, 8 April 1960. In force 1 August 1963, 509 *UNTS* 64. The Dutch and German texts of the treaty are equally authentic (for both texts see *Trb*. 1960 No. 67).

82. While Germany claims the entire area on the basis of historic title, the Netherlands holds that the *thalweg* of the principal channels forms the boundary (see Dotinga and Soons, loc. cit. n. 17, at p. 403 and R. Wolfrum, 'Germany and the Law of the Sea', in Treves and Pineschi, eds., op. cit. n. 17, pp. 199-224, at pp. 205-208). For a map of the disputed area see the Annex to the Frontier Treaty, *infra* n. 213. Art. 46(1) of the Treaty provides that the Treaty does not affect the outstanding issue of the boundary. The 'line' established by Art. 1 of the Supplementary Agreement to the Ems-Dollard Treaty (Bennekom, 14 May 1962. In force 1 August 1963, 509 *UNTS* 140; *Trb.* 1962 No. 54) was only agreed to for the purpose of the exploitation of non-living resources. By way of the Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the Lateral Delimitation of the Continental Shelf in the Vicinity of the Coast (Bonn, 1 December 1964. In force 18 September 1965, 550 *UNTS* 128; *Trb.* 1964 No. 184), the two states agreed on a lateral delimitation of their continental shelves, by means of a seaward extension of the 'line' mentioned above (Art. 1). The 1964 Treaty does not affect the course of the international frontier in the Ems Estuary (Art. 2). Despite these instruments, agreement has yet to be reached on the lateral delimitation of the territorial sea.

83. See the Explanatory Note to the 1985 Act, *supra* n. 17; and Parliamentary Papers, Second Chamber, 1982-1983, 17654, Nos. 1-3, p. 9).

84. Art. 3(2) of the 1985 Act, *supra* n. 17, lays down a dividing-line for the Netherlands territorial sea and internal waters. This line 'crosses' the Ems Estuary, connecting the Islands of Rottumeroog (the Netherlands) and Borkum (Germany). This line is not intended as a straight baseline pursuant to Arts. 7, 9 or 10 of the LOS Convention. Whether the line would be consistent with these particular provisions or with international law in general, goes beyond the scope of this article. Wolfrum, op. cit. n. 82, at p. 206 takes the view that the line violates the historic title of Germany.

85. See, *inter alia*, Art. 41(3) of the Ems-Dollard Treaty.

5. ACCESS BY NETHERLANDS FISHING VESSELS

This section discusses access by Netherlands fishing vessels to the maritime zones of other states and the high seas. After an overview and some general observations in subsection 5.1, access by Netherlands fishing vessels to the maritime zones of third states (non-EU Member States) is examined in subsection 5.2. The next two subsections discuss the related issues of the external competence of the EU and obligations by non-coastal states with respect to the over-exploitation of marine living resources that are discrete to coastal maritime zones.

5.1 **General**

Fishing access by Netherlands fishing vessels mirrors to some extent the discussion in section 4. Accordingly, fishing vessels registered in the Kingdom of the Netherlands in Europe (Netherlands fishing vessels)[86] have in principle a right of access to Community waters. This effectively means the maritime zones of Belgium, Denmark, Finland, France, Germany, Ireland, Portugal, Spain, Sweden and, of course, the Netherlands FZ in Europe.[87] As France, Greece, Italy and Spain[87a] have not established EEZs or EFZs in the Mediterranean, access is more or less similar to high seas access.[88]

The special access regime within 12 nm would give Netherlands fishing vessels in principle general access to the Netherlands exclusive 12 nm-zone and limited access in the 12 nm zones of several other EU Member States.[89] In the Shetland box, no access exists for demersal species other than Norway pout and blue whiting.[90] In order to make use of these entitlements to access, however, Netherlands fishing vessels must comply with many requirements, including possession of a fishing license and a quotum (if it relates to species subject to quotas set by the EU or the Netherlands).

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86. See the 1998 Decree registration fishing vessels, 17 February 1998, [*Besluit registratie vissersvaartuigen*] *Stb*. 1998 No. 61).

87. See Arts. 299 and 300 and Annex II of the EC Treaty.

87a. Spain has nevertheless issued Royal Decree 1315/1977, of 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean Sea (text at <www.un.org/depts/los>).

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

89. Denmark (6-12 nm and 4-12 nm; specific species; specific locations), France (6-12 nm; all species, specific locations), Germany (3-12 nm; demersal species, shrimps and prawns; North Sea coast), Ireland (6-12 nm; herring, mackerel; specific locations) and the United Kingdom (6-12 nm; herring; specific locations). See Annex I to Reg. No. 2371/2002, *supra* n. 49.

90. Art. 18 and Annex II to Reg. No. 2371/2002, *supra* n. 49.

The Benelux Treaty and the Ems-Dollard Treaty also give fishing access to Netherlands fishing vessels. However, a Belgian Royal Decree of 1989 prohibits, in view of their perceived negative environmental impact: (1) all fishing with boats in excess of 70 gross tons within 3 nm of the Belgian territorial sea baselines; and (2) fishing for sedentary species in the territorial waters of Belgium.[91] The principle of equal treatment enshrined in the Benelux Treaty would in principle ensure that this prohibition applies to both Belgian and Netherlands vessels. Fishing by Netherlands fishing vessels in the common fishing area in the Ems-Dollard area is regulated by Netherlands law (see section 6.6).

Although Netherlands vessels have through Article 116 of the LOS Convention a right to fish on the high seas, high seas fishing is extensively regulated by other international instruments, the CFP, RFOs and other rules of international law. The transfer of competence from EU Member States to the EU is not confined to Community vessels fishing in Community waters but wherever these operate.[92] This is not to say that there are no situations where Netherlands fishing vessels can conduct high seas fishing for species or stocks for which neither the EU nor an RFO have yet prescribed catch-restrictions.[93] Regulation by the EU would in such cases be limited to conditions related to control, inspection and enforcement to ensure that the objectives of the CFP are met.[94]

The Netherlands fishing vessels that operate on the high seas and in the maritime zones of third states predominantly target pelagic species such as blue whiting, herring, horse mackerel, mackerel, and sardinelles.[95] Some of these vessels are the very large freezer-trawlers that are associated with the Pelagic Freezer-trawler Association (PFA).[96] The PFA fleet is composed of vessels flying the flag of France, Germany, the Netherlands and the United Kingdom. Netherlands companies have a considerable (ownership) interest in the non-Netherlands vessels of the PFA fleet.[97] Moreover, many of the vessels engaged in the North Sea beam trawl fishery for plaice and sole that are registered in the United Kingdom are (in part) owned or operated by Netherlands companies and individuals and land their catch in

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91. Arts. 6(1) and 6bis of the Royal Decree establishing Additional National Measures for the Conservation and Management of Fish Stocks and Control of Fishing Activities [*Koninklijk besluit tot vaststelling van aanvullende nationale maatregelen voor de instandhouding en het beheer van de visbestanden en voor controle op de visserijactiviteiten*]; 14 August 1989, as amended; consolidated version at <www.just.fgov.be> (in Dutch, French and German).

92. See Art. 1(1) of Reg. No. 2371/2002, *supra* n. 49.

93. This is, *inter alia*, evident in the words 'certain' and 'where catch limitations are required' in the title to Reg. No. 2341/2002, *supra* n. 74.

94. Chapter V of Reg. No. 2371/2002, *supra* n. 49.

95. See 'Facts and Figures on the CFP, 2001' and 'TACs and quotas 2003'; both at <europa.eu.int/comm/fisheries>.

96. See <www.pfa-frozenfish.com>.

97. Information kindly provided by R. Banning, PFA-secretariat, 23 September 2002.

Netherlands ports.[98] A less prominent Netherlands 'presence' in the Belgian and German fleets exists as well.[99]

5.2 **Maritime zones of third states**

As regards access by Netherlands fishing vessels to the maritime zones of third states (non-EU Member States), it is first of all important to distinguish access agreements concluded between the EU on behalf of its Member States and third states on the one hand (public access agreements) from access agreements concluded between private companies based in EU Member States and third states (private access agreements) on the other hand.[100] At the moment of writing, the first type of agreements gave Netherlands vessels access to the waters of Angola, the Faroe Islands, Mauritania and Norway. Whereas the agreements with the Faroe Islands and Norway are based on reciprocal access,[101] the agreements with Angola[102] and Mauritania[103] give Community vessels fisheries access in return for monetary compensation, development assistance and contributions to marine scientific research. At the time of writing, Netherlands companies did not operate under private access agreements with third states, although the PFA was engaged in relevant talks with Morocco.[104] In the past, PFA vessels operated under various private access agreements.[105]

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98. See Hatcher et al., loc. cit. n. 69, at pp. 1, 6 and 8.
99. Ibid., at p. 1.
100. The latter includes subsidised joint ventures that use vessels formerly flagged in EU Member States.
101. See Reg. No. 2341/2002, *supra* n. 74.
102. Agreement between the European Economic Community and the Government of the People's Republic of Angola on fishing off Angola, 30 April 1987 (*OJ* 1987, L 341/2) and the 2002 Protocol thereto (Council Decision 2002/1008/EC of 9 December 2002 (*OJ* 2002, L 351/90; see Art. 2) and Council Regulation (EC) No. 2345/2002 of 16 December 2002 (*OJ* 2002, L 351/1)).
103. Agreement on cooperation in the sea fisheries sector between the European Community and the Islamic Republic of Mauritania, 20 June 1996 (*OJ* 1996, L 334/20); and the 2001 Protocol thereto (Council Regulation (EC) No. 2528/2001, *OJ* 2001, L 341/1).
104. Information provided by R. Banning, PFA-secretariat, May 2003. If the access agreement would relate to the maritime zones off the coast of Western Sahara, and this seems likely in view of the type of fisheries that the PFA is generally engaged in, this may not be compatible with the principle that Non-Self-Governing Territories have permanent sovereignty over their natural resources (see UN Doc. S/2002/161, *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council*).
105. With the Falkland Islands from 1988-1990, with Morocco between 2000-2001, and with Namibia between 1994-1996. Information provided by R. Banning, PFA-secretariat, 23 September 2002. Worth observing is the European Commission's perception of the disadvantages of private access agreements in comparison with public access agreements (Cf., COM(2002) 637 final, *supra* n. 137, at pp. 5-6).

The agreements with the Faroe Islands and Norway are firmly established even though TACs are negotiated on a yearly basis. The PFA freezer-trawlers that operate in Mauritanian waters since 1996 fish for a stock of sardinella, whose range of distribution is confined to the maritime zones of Mauritania, Morocco and Senegal. The renewal of the EU/Angola bilateral fisheries agreement in July 2002 allowed for fishing activity by Netherlands vessels in Angola from 3 August 2002 onwards. Whereas no fishing activity had yet taken place at the time of writing, the original idea was that two freezer-trawlers of the PFA would engage in a 6-month experimental pelagic fishery for sardinella. This stock's range is probably confined to the coastal waters of Angola and Namibia.[106] The results of this fishery will subsequently be examined by the EU/Angola scientific committee, which will report to the EU/Angola joint committee for a decision on continuation. This procedure has been agreed on in view of the precautionary approach.[107] At the same time, this short-term review will also enable an assessment of the cost-effectiveness of the fishery.

5.3 External competence of the EU under the CFP

The implied treaty-making powers of the EC in the sphere of fisheries were accepted at an early stage by the European Court of Justice and subsequently confirmed by the EEC Council in its 1976 Hague Resolution.[108] The current framework regulation for the CFP explicitly mentions that the CFP encompasses international relations.[109] In cases where EU Member States retain (some) fisheries competence, for instance in the sphere of enforcement or development cooperation, they may still be involved in the negotiation of international agreements and/or participation in international organizations. More often than not, however, competence will be shared with the EU, which means that the EU will be involved in negotiation and participation alongside its Member States. Some examples of these so-called mixed agreements appear in section 7.

Public fishing access agreements are clearly within the exclusive external competence of the EU. According to the procedure set out in Article 300 of the EC Treaty, which also applies in case of implied powers,[110] the EU Council of Ministers provides the European Commission with a negotiation mandate.[111] Prior to the actual negotiations, the European Commission makes an inventory of those EU

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106. See the DG Fisheries Press Release of 4 July 2002 at <europa.eu.int/comm/fisheries>.
107. Ibid.
108. See *supra* n. 22 and Churchill, op. cit. n. 50, at p. 169. See also Art. 133(3) of the EC Treaty, which contains an express basis for treaty-making in relation to trade in fishery products.
109. See Art. 1(2)(h) of Reg. No. 2371/2002, *supra* n. 49.
110. Cf., Churchill, op. cit. n. 50, at p. 174.
111. Art. 300(1) of the EC Treaty.

Member States that are interested in gaining fishing access for their vessels. The EU Council of Ministers is charged with the signature and conclusion of the agreements, but only after the European Parliament has been consulted.[112]

The formal exclusive external competence of the EU does, however, not mean that EU Member States are never in one way or another informally involved in negotiating fisheries access agreements with third states. Member States can for instance include one or more of their representatives in the EU delegation, even though these do not actively participate in the negotiation. In practice it is also not unusual for EU Member States to be in direct contact with third states to further their interests, for instance by means of concluding bilateral arrangements relating to development cooperation in the sphere of fisheries. Worth mentioning in this context is the 2001 Memorandum of Understanding (MOU) between the Ministry of Fisheries and Marine Economy of Mauritania and the Ministry of Agriculture, Nature Conservation and Fisheries of the Netherlands, for Cooperation on Fishing.[113] This MOU reflects support for joint marine scientific research, the need for the development of a fishing harbor in Mauritania and the encouragement of a Mauritanian fishery for small pelagic species. These commitments are in line with the need to ensure coherence between policies relating to fisheries and development assistance.[114] Agreements like these are not necessarily problematic. However, there could be situations where third states would already have an entitlement to development assistance, but within a different framework.[115] It would not be consistent with the purpose of these entitlements if they were dependent on giving fisheries access. There is no indication that this has happened with the Netherlands-Mauritania MOU.

5.4 **Over-exploitation in the maritime zones of third states**

The risk of over-exploitation of the marine living resources in the maritime zones of many developing states is particularly serious due to inadequate management and conservation. Shortcomings relate to the full range of management aspects, and quite often include TACs that are not based on science, whether for political

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112. Art. 300(3) of the EC Treaty.

113. 22 May 2001, The Hague. On file with author. On 1 July 2003, the name of the Ministry of Agriculture, Nature Conservation and Fisheries was changed into Ministry of Agriculture, Nature and Food Quality.

114. See Arts. 2-4 of the 1996 EC-Mauritania Fisheries Agreement, *supra* n. 103, and Art. 177 of the EC Treaty. See also A. Acheampong, 'Coherence Between EU Fisheries Agreements and EU Development Cooperation: The Case of West Africa', *ECDPM Working Paper No. 52* (Maastricht, ECDPM 1997; also available at <www.oneworld.org/ecdpm/pubs/wp52_gb.htm>).

115. E.g., the 2000 Cotonou Agreement, *supra* n. 133.

reasons or due to a lack of capability.[116] Coastal states are legally required to meet such basic requirements pursuant to Article 61 of the LOS Convention and have made commitments to do so under Articles 6, 7 and 12 of the FAO Code of Conduct for Responsible Fisheries.[117] Short-term interests in obtaining foreign currency in exchange for fishing access frequently explain why TACs are maximised.[118] As fish stocks often straddle jurisdictional boundaries, such unilateral coastal state policy will thereby cause transboundary effects for its neighbouring (developing) coastal states. In the current global situation of decreased fishing opportunities and surplus fishing capacity, the interests of states seeking access to foreign waters often have a short-term nature as well. The development of a local fishing industry will often conflict with their long-term interests. That is: if these exist.

Successful management of transboundary stocks depends first of all on the cooperation between all the states that exercise fishing rights over the stocks. In order to avoid over-exploitation of the stocks, the first measure that will have to be agreed upon is the establishment of a TAC and the allocation of fishing opportunities. In case of the management of shared stocks,[119] over which only coastal states have (sovereign) rights, these states should subsequently decide whether their national allocation will be used entirely by their domestic fleets or if the surplus is made available (sold) to foreign vessels.[120] Another obvious but crucial component of management is ensuring compliance with regulation by means of monitoring, control and surveillance. The very limited capability of developing states in combating illegal and unreported fishing within their maritime zones is a huge problem.

In relation to shared stocks, it is clear that coastal states in whose maritime zones the stocks occur are the primary beneficiaries, even though third states may be allowed to fish in return for (monetary) compensation. The legal duty for these coastal states to cooperate with each other in the management and conservation of these stocks is consistent with a long-term interest in a maximum sustainable yield (MSY), as qualified by relevant environmental and economic factors. MSY is also an international community's interest and would moreover be consistent with the interests of third states seeking fishing access, provided their medium- or long-term access is ensured. An interesting question that can be raised in this context is if, and to what extent, international law imposes obligations on states or entities

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116. This is admitted in the European Commission Communication 2003/C 47/06, n. 140, at section 3.4.2.

117. Rome, 31 October 1995, <www.fao.org/fi>.

118. See e.g., V.M. Kaczynski and D.L. Fluharty, 'European Policies in West Africa: Who Benefits from Fisheries Agreements?', 26 *Marine Policy* (2002) pp. 75-93 at 77 and 89; and B. Gorez and B. O'Riordan, *A Report on the Future of the European Union-ACP Countries Fisheries Relations*, Final Report, February 2003 (on file with author), at p. 61.

119. Within the meaning of Art. 63(1) of the LOS Convention.

120. See Art. 62(2) of the LOS Convention.

other than the coastal state in relation to the management and conservation of shared stocks. For the purpose of this article, could this lead to such non-coastal states or entities incurring responsibility for over-exploitation or transboundary effects (to neighbouring coastal states)?

It is submitted that such responsibility could be regarded as a subsidiary one, distinct from the coastal states' primary responsibility. In the case of West Africa, for instance, subsidiary responsibility will often be shared by more than one third state, even though the extent of responsibility may not be identical. Few international instruments contain obligations that are directly relevant to third states with respect to shared stocks and if they do, these obligations are commonly not very specific. No relevant obligations are incorporated in the LOS Convention, the 1995 Fish Stocks Agreement or the 1993 FAO Compliance Agreement[121] . Only the non-legally binding FAO Code of Conduct contains various general (non-legally binding) obligations that would be applicable to flag states seeking fishing access in a third (developing) state's maritime zones.[122] Relevant but insufficiently specific flag state obligations can also be inferred from the objectives of the Charter of the United Nations,[123] the 1992 Rio Declaration,[124] the World Trade Organization[125] and the 2002 Plan of Implementation of the World Summit on Sustainable Development.[126]

As regards EU law, Article 177(1) of the EC Treaty stipulates that Community policy in the sphere of development cooperation shall, *inter alia*, foster the sustainable economic development of developing countries, thereby including sustainable fisheries as well. Article 178 contains the requirement that EU policies are 'coherent' with the objectives set out under Article 177. The very need for this requirement recognises that other EU policies, including fisheries, could pursue objectives that conflict with the objectives of development cooperation.[127]

At the time of writing, the efforts of the EU in achieving coherence between fisheries and development cooperation seemed in general to fall short of the

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121. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993. In force 24 April 2003, 33 *ILM* (1994) 969; <www.fao.org/legal>.

122. E.g., Arts. 5, 6.3 and 11.2.7-11.2.8. It is worth noting that the Preamble to the EC-Mauritania agreement refers to the FAO Code of Conduct.

123. San Francisco, 26 June 1945. In force 24 October 1945, 1 *UNTS* xvi. See Art. 55, *Trb*. 1945 No. F321.

124. Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992. 31 *ILM* (1992) p. 876; <www.unep.org>. See Principles 6-8.

125. See the 1st paragraph of the Preamble to the Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994. Text at <www.wto.org> ; *Trb*. 1996 No. 325.

126. Johannesburg, 4 September 2002. Doc. A/CONF.199/20; <www.johannesburgsummit.org>. See Arts. 30(g) and 31(a) and (g).

127. See Acheampong, op. cit. n. 114.

requirement laid down in Article 178.[128] The narrowing resource base in Community waters in relation to continuing over-capacity in fishing effort, a growing demand for fish in the EU market and employment concerns were all contributing factors. EU fishing activity in the maritime zones of developing states was repeatedly accused of being unsustainable, destroying the indigenous (small-scale) fishing industry and occasionally even affecting security and causing nutrition shortages.[129] As late as 1997, the EU Council of Ministers (Fisheries) decided there needed to be an assessment of bilateral fisheries access agreements.[130] It was to be predominantly a cost/benefit analysis, but account would also be taken of non-quantifiable elements, such as the contribution of the agreements to sustainable fishing globally.[131] Whereas the European Commission was charged with this task, it commissioned a study by a third party. The 1999 Summary Report of this study pays very little attention to the issue of sustainability.[132]

This notwithstanding, the bilateral fisheries agreements between the EU and third states usually contain provisions on development assistance as well as those supporting sustainable fisheries, *inter alia* by contributing to marine scientific research and ensuring compliance. The 2000 Cotonou Agreement[133] makes very little explicit reference to fisheries in comparison with its predecessor, the Lomé IV Convention. The cooperation in the sustainable utilisation of natural resources is nevertheless one of the three 'Thematic and Cross-cutting Issues'.[134] The linkages between fisheries and poverty reduction were once again recognized by the EU Council of Ministers in 2001.[135]

Despite the hopeful initiative of the EU Council of Ministers in 1997, progress has been very limited until the adoption of the new CFP framework regulation late

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128. Kaczynski and Fluharty, loc. cit. n. 118, at pp. 91-92.

129. See Gorez and O'Riordan, op. cit. n. 118, in general. On pp. 13-14 they also point to the current division of EU Member States in a southern European 'Friends of Fishing' camp and a northern European 'Friends of Fish' camp. Interestingly, the Netherlands is place in the latter camp despite its major stake in distant water fishing.

130. Conclusions of the Council of 30 October 1997 (Doc. 11784/97 of 4 November 1997).

131. Idem., para. 3.

132. *Evaluation of the Fishery Agreements concluded by the European Community. Summary Report*, (IFREMER: 1999), text at <europa.eu.int/comm/dgs/fisheries/index_en.htm>. Note, however, that the aspect of sustainable fishing does not feature prominently in the tender (No. 97/S 240-152919).

133. Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, Cotonou, 23 June 2000. In force 1 April 2003, text at *Trb*. 2001 No. 57; <europa.eu.int/comm/development>.

134. Art. 32 of the Agreement, *supra* n. 133. Arts. 23(d), 32(c)(i) and 53 relate directly to fisheries. The Lomé IV Convention still had a separate Title III (Development of fisheries; Arts. 58-68).

135. Council Resolution *on fisheries and poverty reduction*, of 8 November 2001 (Doc. No. 13938/01 of 14 November 2001).

in 2002. The scope and objectives of the regulation remove any doubt that the responsibility of the EU and thereby its Member States also extends to the sustainability of fisheries in the maritime zones of third states.[136] This has been confirmed by a Communication from the Commission,[137] which, *inter alia*, calls for a gradual move from fisheries access agreements towards fisheries partnership agreements (FPAs) that contribute to responsible fishing in the mutual interests of the parties concerned.[138]

The Commission moreover announced that it will issue an 'Action Plan, to improve, at the regional and sub-regional levels, the evaluation of stocks that are accessible to Community fishermen outside Community waters' in 2003.[139] The need for such an Action Plan recognises the existing shortcomings in stock assessments in particular and dedicated marine scientific research and data gathering outside Community waters in general. This Action Plan must furthermore be interpreted in light of the 2003 Communication from the Commission on 'Improving scientific and technical advice for Community fisheries management'.[140] The Commission takes the view that the CFP is insufficiently underpinned by science and that the EU should develop its own, independent capability.[141] The Commission recognises its responsibility for negotiating access agreements with third states and notes the frequent absence of relevant scientific advice, especially stock assessments, that should in fact be the basis of such negotiations. The Commission subsequently emphasises the responsibility of the EU and its Member States to develop scientific capacity,[142] which will be the object of the aforementioned Action Plan. Not surprisingly, if only in view of the scope and objective of this Communication, the European Commission does not dwell on the consequences of this lack of science for the TAC negotiated with third states, for instance in view of the precautionary approach.

Also worth mentioning are several relevant unilateral commitments of the EU, for example by stipulating conditions related to control, inspection and enforcement,[143] and its policy to ensure 'a stable and enduring balance between the capacity of [Community] fishing fleets and the fishing opportunities available

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136. See Arts. 1 and 2 of Reg. No. 2371/2002, *supra* n. 49. This was already proposed in a 1997 European Parliament Report, *supra* n. 65, at p. 9

137. COM(2002) 637 final, of 23 December 2002, *Communication from the Commission on an integrated framework for fisheries partnership agreements with third countries*.

138. See B. O'Riordan, 'Fisheries Partnership Agreements. Goodbye to Irresponsible Fishing?', 34 *Samudra* (2003) pp. 13-19; available at <www.icsf.net>.

139. Roadmap, *supra* n. 55, at p. 17.

140. 2003/C 47/06, *OJ* 2003, C 47/5.

141. See, *inter alia*, sections 6.2 and 7.

142. See sections 3.4, 3.4.2 and 4.2.4. section 3.4 also mentions the commitment under Art. 12.18 of the FAO Code of Conduct.

143. See *supra* n. 94.

to them in Community waters and outside Community waters.'[144] Moreover, the 'Community action plan for the eradication of illegal, unreported and unregulated fishing',[145] which implements the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA on IUU Fishing),[146] contains not only specific proposals for action to combat its own involvement in IUU fishing, but also a commitment to assist developing states in this respect, especially if the EU has concluded access agreements with them.[147]

An aspect of the negotiation process of fisheries access agreements between the EU and third states that deserves some attention are the concerns on the fairness of these processes for third states. In view of the negotiation experience of European Commission officials and the negotiation power inherent in threatening the termination of negotiations (and consequential loss of foreign currency) or withholding development assistance or access to the EU market, such concerns are understandable. But whether they are actually justified depends obviously on the specific circumstances of each case. In view of the current worldwide surplus in fishing capacity and limited fishing opportunities, the negotiation position of third states may not be all that bad. However, the EU should nevertheless consider the use of multilateral access agreements between the EU and a number of third states, which would enhance the negotiation strength of developing states and foster cooperating between them.[148] A laudable example is the multilateral tuna fishing access agreement between the United States and several pacific island states.[149] It has to be admitted, however, that this model is not necessarily suitable for North West Africa.[150] The broad range of relevant (mixed) fisheries and the limited experience and perhaps willingness of relevant coastal states to act as a block appear germane considerations.

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144. See preambular para. (4) of Council Regulation (EC) No. 2792/1999 *laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector*, as amended by Council Regulation (EC) No. 2369/2002 of 20 December 2002.

145. Communication from the Commission (COM(2002) 180 final, of 28 May 2002; available at <europe.eu.int/eur-lex>).

146. Adopted by consensus by FAO's Committee on Fisheries on 2 March 2001 and endorsed by the FAO Council on 23 June 2001; text available at <www.fao.org/fi>).

147. See Actions 1-4 and 15.

148. Cf., Kaczynski and Fluharty, loc. cit. n. 118, at p. 90.

149. The Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America (Port Moresby, 2 April 1987) has recently been extended with another ten year period, starting on 15 June 2003 (for info and text of the amended treaty see <www.affa.gov.au> and <www.ffa.int>).

150. Note, however, that Art. 10(3) of the 2001 Protocol on Fisheries (Blantyre, 14 August 2001. Not in force, <www.sadc.int>) to the SADC Treaty (Treaty establishing the Southern African Development Community, Windhoek, 17 August 1992. In force; <www.sadc.int>) contemplates the 'joint negotiation of foreign fishing access agreements with a regional or sub-regional dimension'.

While the recent efforts of the EU justify some optimism, it remains to be seen to what extent and within what timeframe the envisaged reforms will materialise. It seems likely that more specific and prescriptive Commission proposals and Council decisions will be needed. Improving the status of resources in Community waters and getting rid of over-capacity in the Community fishing fleet will help to release some pressure from access negotiations on a short-term but not more than that. The longer the Community fleet operates in the maritime zones of third states, the more difficult scaling down will be. In view of the slow pace of reforms, mention should be made of two commendable Netherlands initiatives. Whether or not fishing activity carried out by Netherlands vessels in the maritime zones of Mauritania actually conflicts with small-scale fisheries in those zones or, by means of transboundary effects, with fisheries in neighbouring coastal waters is not examined here.

Dissatisfaction with the outcome of the 1999 Summary Report,[151] led the Netherlands to draft a policy document,[152] in which, *inter alia*, new guidelines with respect to sustainability were proposed. These guidelines include support for more research on the status of stocks, status-evaluation by experts and adjusting TACs to the trends in status. Several ministries as well as several NGOs (including Greenpeace) were involved in the drafting process of the Netherlands policy document. Even though the policy document was never formally adopted and published, it seems to have nevertheless guided Netherlands policy, including within the EU.

The second initiative taken by the Netherlands together with Norway and FAO concerns the establishment of the FAO Working Group on the Assessment of Small Pelagic Fish off Northwest Africa in October 2000.[153] The Working Group's purpose is to carry out stock assessments and formulate management advice for various small pelagic fish species,[154] whose range of distribution does not extend beyond the maritime zones of Mauritania, Morocco and Senegal. The Working Group is a freestanding body and does not operate within the framework of any of the FAO fishery bodies established under Articles VI(1) or XIV(2) of the FAO Constitution.[155]

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151. See *supra* n. 132.

152. Evaluation EU Fisheries Agreements; Netherlands View with regard to New Guidelines [*Evaluatie EU Visserijovereenkomsten; Nederlandse Visie met betrekking tot Nieuwe Beleidsrichtlijnen*]; Version 4, 6 October 2000.

153. The first meeting of the FAO Working Group took place in March 2001 and the second in April 2002.

154. The main groups of species defined as sardine, sardinellas, horse mackerels and mackerel.

155. Opened for signature and entered into force on 16 October 1945; *Stb.* 1945 No. I 77; <www.fao.org/Legal>. As a consequence of its signature on 16 October 1945 and pursuant to Art. XXI of the constitution the Kingdom became a party to the FAO Constitution on behalf of the Netherlands exclusively. This adherence was formally confirmed on 13 October 1947 (*Trb*. 1964 No. 103). The Working Group is funded by Norway (50%), Netherlands (25%) and FAO (25%).

This also means that the Working Group's advice is momentarily not directed to a specific management body with competence to set a global TAC and determine national allocations for the coastal states. In April/May 2002, a 'Workshop on the Management of Shared Small Pelagic Fishery Resources in Northwest Africa' was convened in The Gambia to address this situation.[156] The Netherlands was not involved in this initiative. At the time of writing, the establishment of such a management body was not expected to take place in the near future.

6. RESIDUAL REGULATORY COMPETENCE OF THE NETHERLANDS

6.1 **General**

In view of the very extensive legislative competence of the EU under the CFP that is of relevance in the context of this article, there remains only very limited relevant residual competence with the Member States. Subsection 6.2 examines the exceptions that are explicitly recognized within the CFP. The following four subsections examine the extent of residual competence with respect to unregulated species and marine mammals and within the frameworks of the Benelux Treaty and the Ems-Dollard Treaty.

6.2 **Residual competence explicitly recognized within the CFP**

There are three explicit instances where the CFP framework regulation refers to Member State measures.[157] The first, laid down in Article 8, entitles a Member State to take emergency measures relating to its maritime zones for a period of three months. However, this right is very carefully defined and the Commission is charged with confirming, cancelling or amending the measures.

The second instance relates to Article 9 which entitles a Member State to prescribe measures within its 12 nm zone, provided, *inter alia*, that these are non-discriminatory and that no relevant EU enactments are already in place. Moreover, if these measures 'are liable to affect the vessels of another Member State',

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156. *Report of the Workshop on the Management of Shared Small Pelagic Fishery Resources in Northwest Africa* (FAO Fisheries Reports No. R675; FAO, Rome: 2002). See pp. 7 and 13 and Appendix III.

157. These instances are intended (Cf., COM (2002) 185 final, *supra* n. 49, at p. 4) to replace the more or less similar ones in Arts. 45 and 46 of Reg. No. 850/98, *supra* n. 61, even though the latter could at the time of writing still be invoked. In case a regional advisory council would be established for the North Sea pursuant to Art. 31 of Reg. No. 2371/2002, *supra* n. 49, this will, in view of its composition (see paras. (2) and (3)) and its functions, in principle not increase the residual competence of the Netherlands.

confirmation by the Commission is again required pursuant to the same procedure as in Article 8.

Thirdly, Article 10 allows a Member States to prescribe measures within its maritime zones that apply to vessels flying its own flag, provided they are compatible with the objectives of the CFP and more stringent than existing EU legislation. Presumably, Article 10 would implicitly allow a Member State to prescribe similar measures for its vessels beyond its own maritime zones, wherever they are, provided the same conditions are met.

The residual role of Member States in these three instances is obviously not only carefully defined but the Commission's role in the first and second instance diminishes its unilateral character considerably. Intensive recourse to the third exception will in practice be limited by considerations of competitiveness.

6.3 **Unregulated species**

The substantive scope of the CFP is, *inter alia*, limited to 'living aquatic resources',[158] which is meant to encompass fish, crustaceans and molluscs.[159] As was already noted above,[160] however, this does not mean that the EU always regulates these resources by means of catch limitations and allocating fishing opportunities to its Member States. These are for the purposes of this article referred to as 'unregulated species', despite the fact that certain forms of regulation will nevertheless be in place, for instance for the purpose of food hygiene. It is worth pointing out that fishing for unregulated species is not the same as 'unregulated fishing' pursuant to the IPOA on IUU Fishing.[161] However, it must be clear that fisheries for unregulated species run a high risk of not being sustainable in view of the slow pace of (international) regulation. Deep-sea fisheries are a sad example in case.[162] The targeted fishery for pilchards in the English Channel and the Southern and Central North Sea, which is also conducted by Netherlands vessels, may raise sustainability concerns as well, *inter alia*, due to by-catch and discards of species that *are* subject to quotas. The fishing activity of Netherlands vessels is nevertheless constrained by the Netherlands system of limiting fishing effort by means of fixing the maximum number of fishing days for vessels.[163]

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158. Arts. 1(1) and 3(b) of Reg. No. 2371/2002, *supra* n. 49.
159. See COM (2002) 185 final, *supra* n. 49, at p. 2.
160. See *supra* n. 93 and accompanying text.
161. See paras. 3.3 and 3.4.
162. See, *inter alia*, E.J. Molenaar, 'The South Tasman Rise Arrangement of 2000 and Other Initiatives on Management and Conservation of Orange Roughy', 16 *International Journal of Marine and Coastal Law* (2001) pp. 77-124.
163. This is the Sea Days Regulation [*Zeedagenregeling*].

All molluscs (including therefore mussels and cockles) and brown shrimp are among the unregulated species in the context of the CFP. As section 3 already pointed out, these species are quite significant to the Netherlands fishing industry. There may be various reasons why these species are not more comprehensively regulated at EU level. For instance: the fact that exploitation of these species has relative minor transboundary effects; the fact that for (some of) these species catch restrictions are regarded as unnecessary for maintaining a sufficient population size; or the fact that as these species mainly occur within 12 nm from the coast, which is excepted from the equal access regime, the relevant coastal state will act responsibly in view of its own long-term interest. This situation may of course change if fisheries and/or the regulation by individual Member States prove unsustainable. This may also arise as a consequence of ecosystem effects.

In addition to using a license-regime for all fisheries, including for molluscs, the Netherlands imposes area closures and TAC restrictions on fisheries for cockles and mussels in order to reserve food and habitats for oystercatchers and eider ducks.[164] A policy to respond to the growing interest in the shellfisheries was still in preparation at the time of writing.[165] With respect to brown shrimp, the Netherlands does not impose catch limitations. Up until the very recent past, however, the Netherlands fishing industry has used self-imposed catch restrictions to ensure a more favourable market price. This arrangement was recently held to be in violation of Netherlands and EU competition law.[166]

6.4 **Marine mammals**

As the scope of the CFP is limited to fish, crustaceans and molluscs,[167] marine mammals are beyond its scope. Even though the EU has passed enactments in the

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164. See the Policy Decree Shell Fishery Coastal Waters 1999-2003 [*Beleidsbesluit Schelpdiervisserij Kustwateren 1999-2003*] at <www.minlnv.nl> (in Dutch), at p. 6, which formulates as policy objectives for the coastal fishery in the Wadden Sea and Eastern Scheldt: (a) conservation and recovery of natural biotopes and (b) avoidance of food shortage for birds as a consequence of shellfisheries. See also the Decision Determination Food Reservation Eastern Scheldt [*Besluit vaststellen voedselreservering Oosterschelde*] TRC 2000/10817, of 16 November 2000 (at <www.minlnv.nl> (Dutch).

165. Policy Shellfisheries North Sea Coastal Zone [*Beleidslijn schelpdiervisserij Noordzee kustzone*] of 20 December 2002; No. TRC 2002/10920; at <www.minlnv.nl> (Dutch)).

166. See the Decision of the Netherlands Competition Authority [*Nederlandse Mededingingsautoriteit*] of 14 January 2003 in case 2269 (No. 2269/326; text at <www.minlnv.nl> (Dutch)).

167. See *supra* n. 159 and accompanying text.

sphere of marine mammals, *inter alia*, related to aspects of trade and import,[168] its competence is shared/mixed but not exclusive. The LOS Convention recognizes the right of coastal states to prohibit the exploitation of marine mammals within their maritime zones.[169]

The 1960 Whaling Act[170] of the Netherlands prohibits the catching, killing or processing of baleen or sperm whales on board of Netherlands vessels, unless a license has been obtained. Such licenses can be subject to conditions, some of which are specified in the Act.[171] Moreover, all mammals that occur by nature in the Netherlands are designated as protected indigenous animal species under the Flora and Fauna Act of 1998.[172] This legislation, *inter alia*, prohibits the catching or killing of designated species.[173] Whereas the designation applies to 'the Netherlands', as it is not explicitly stipulated that the spatial scope of application extends beyond the territorial sea, this cannot be presumed.[174] Article 5(1) of the 1963 Fisheries Act contains a general prohibition on fishing by foreign vessels in the Netherlands FZ. However, the term 'fishing' does not encompass marine mammals.[175] Netherlands law does therefore not explicitly prohibit foreign vessels from hunting marine mammals in the Netherlands FZ, even though such a prohibition would be in accordance with general international law. As the existence of this competence is widely known, it is unlikely that foreign vessels will try to take advantage of this grey area in Netherlands law.

This grey area could, in theory and to some extent, be just as relevant for Netherlands vessels and persons with Netherlands nationality. However, in this context the international preservationist obligations currently incumbent upon one or more of the constituent parts of the Kingdom of the Netherlands under the IWC

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168. See Reg. No. 348/81 (import of whales), Reg. No. 338/97 (trade in endangered species), 338/97/EC and Council Directive No. 83/129 (import skins of certain seal pups); all amended. See, however, Council Directive 92/43/EEC of 21 May 1992 *on the conservation of natural habitats and of wild fauna and flora*, as amended (consolidated version at <europa.eu.int/eur-lex>) which, *inter alia*, applies to whales (see Annex IV) and COM (2003) 451 final, of 24 July 2003, *Proposal for a Council Regulation laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No. 88/98*.

169. Arts. 56(1)(a) and 65. Such competence is presumed to exist within areas under its sovereignty.

170. Act of 28 September 1960 [*Wet op de Walvisvangst*] *Stb.* 1960 No. 410, as amended.

171. Art. 2(3).

172. *Sb*. 1998 No. 402. See Art. 4(1)(a).

173. See Arts. 9-18.

174. For some general comments on the scope of application of Netherlands law see *supra* n. 199 and accompanying text.

175. See the Regulation Designating Fish, Crustaceans and Shellfish, of 29 December 1982 [*Regeling aanwijzing vissen, schaal- en schelpdieren*] *Sbt*. 1982 No. 253, as amended).

Convention,[176] CITES[177], the Berne Convention[178] and the Bonn Convention[179] and two of the treaties there under – ASCOBANS[180] and the Wadden Sea Seals Agreement[181] – are of particular significance. Moreover, the aversion to hunting for marine mammals that currently exists in Netherlands society is likely to play an important role in situations where such grey areas become relevant in practice.

It is in this context worth noting that prior to May 2002, the prosperous development of the seal population in the Wadden Sea revealed 'that ethical considerations, legislation, as well as management practices differ' in Denmark, Germany and the Netherlands.[182] Whereas in particular Denmark not only ceased rehabilitation and release of seals but also seemed to move towards allowing the intentional taking (culling) of individual seals that interfere with fishing, this would be virtually unthinkable in the Netherlands today. However, between May 2002 and June 2003 an outbreak of the *phocine distemper virus* (pdv) in North West Europe left around 10,500 common seals dead in the Wadden Sea alone.[183] In view of this new reality, it may take some time before such ethical differences and their management implications once again acquire more significance.

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176. International Convention for the Regulation of Whaling, Washington DC, 2 December 1946. In force 10 November 1948, 161 *UNTS* 72; *Stb.* I 534; <www.iwcoffice.org>. The Kingdom acceded to the Convention on behalf of the Netherlands on 14 June 1977 (*Trb*. 1977 No. 103), on behalf of the Netherlands Antilles on 16 February 1982 (*Trb*. 1982 No. 30 and 90) and on behalf of Aruba on 1 January 1986 (*Trb*. 1986 No. 71 or 1987 No. 70).

177. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, DC, 3 March 1973. In force 1 July 1975, 993 *UNTS* 243; *Trb*. 1975 No. 23 <www.cites.org>. The Kingdom became a party on behalf of the entire Kingdom on 19 April 1984 (*Trb*. 1984 No. 47 and 1986 No. 1).

178. Convention on the Conservation of European Wildlife and Natural Habitats, Berne, 19 September 1979. In force 1 June 1982, *Trb*. 1979 No. 175; <www.nature.coe.int>. The Kingdom ratified on behalf of the Netherlands on 28 October 1980 (*Trb*. 1980 No. 60).

179. Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979. In force 1 November 1983, *Trb*. 1980 No. 145; <www.wcms.uk/cms>. The Convention was ratified for the entire Kingdom on 5 June 1981 (*Trb.* 1983 No. 151).

180. Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, New York, 17 March 1992. In force 29 March 1994, *UNTS* Reg. No. 30865; *Trb*. 1992 No. 137; <www.ascobans.org>. The Kingdom ratified on behalf of the Netherlands on 29 December 1992 (*Trb.* 1994 No. 114).

181. Agreement on the Conservation of Seals in the Wadden Sea, Bonn, 16 October 1990. In force 1 October 1991, *Trb*. 1990 No. 174; <http://cwss.www.de>. The Kingdom ratified on behalf of the Netherlands on 11 July 1991 (*Trb*. 1991 No. 136).

182. Cf., Seal Management Plan 2002-2006, at section 4, text at <http://cwss.www.de>. See also §§ 56-61 of the 1994 Leeuwarden Declaration, text at <http://cwss.www.de>.

183. Info at <http://cwss.www.de>.

6.5 **Benelux Treaty**

As the Benelux Treaty merely establishes fisheries access and equal treatment for the contracting parties' nationals, the obvious restriction on the regulatory competence of the contracting parties is to avoid direct or indirect discrimination of the other state's nationals. This does not mean that the right to engage in fishing is unconditional. Compliance with the broad range of EU enactments is at all times required. In case of fisheries that fall within the residual competence of the Netherlands under the CFP, however, the entitlement to equal treatment under the Benelux Treaty implies that Belgian nationals must in principle abide by the legislation that applies to the Netherlands territorial sea in the same manner as Netherlands nationals, and vice versa.[184] This means that licenses may be required or, when a fishery is effectively closed to 'new entrants', Belgian nationals or fishing vessels will not be able to fish at all. But the same applies of course to Netherlands nationals.[185] In practice, there seems to be no Belgian interest in these fisheries.[186]

The problems of 'new entrants' that wish to share in the exploitation of marine living resources also exist within RFOs which manage stocks that occur partly or entirely on the high seas. Fishing opportunities are often based on historical catch records and fully allocated.[187] Significant differences between the national and the international sphere nevertheless exist. Whereas international law accords states (qualified) rights over the exploitation of marine living resources,[188] their domestic legal framework may give their nationals nothing more than opportunities to engage in exploitation. It is also inherent in the nature of the respective legal orders that states do not, in general, have to accept limitations of their rights against their will, whereas individuals will, in general, have to accept state regulation, subject perhaps to a right of compensation.

The Benelux Treaty does not contain provisions with direct or indirect relevance for cooperation in the conservation and management or marine living resources. An obligation to do so exists at any rate under the customary international duty to avoid transboundary harm. Cooperation between the Netherlands and Belgium in this field is not formalized and problems are dealt with on an *ad hoc* basis. In the

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184. Cf., the position taken in Parliamentary Papers, Second Chamber, 1999-2000, 27205, No. 3, pp. 5-6.

185. In view of the growing interest in shell fisheries, future licenses will only be granted if commercial fishing activity can be proven to have taken place before 1 January 1999 (Policy Decree Shell Fishery Coastal Waters 1999-2003, *supra* n. 164, at p. 13). See also *infra* n. 198.

186. Info kindly provided by Mr. J.M.M. Kouwenhoven, Ministry of Agriculture, Nature Management and Fisheries, July 2002. See also *supra* n. 91.

187. See E.J. Molenaar, 'The Concept of "Real Interest' and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms', 15 *International Journal of Marine and Coastal Law* (2000) pp. 475-531.

188. See Arts. 2(1), 49, 56(1)(a) and 116 of the LOS Convention.

framework of the Netherlands monitoring program for shellfisheries, Netherlands research vessels conduct surveys in the Belgian maritime zones.[189]

6.6 **Ems-Dollard Treaty**

The right to fish in the common fishing area pursuant to the Ems-Dollard Treaty is, similar to the situation under the Benelux Treaty, not unconditional either. The Ems-Dollard Treaty stipulates that a written permission is required, which, except in special cases, is only granted to local fishermen.[190] Moreover, nothing in the Treaty suggests that the contracting parties are otherwise restrained from regulating fisheries.[191] That is: if this is within their residual competence under EU law and in particular the CFP. In view of the territorial dispute, however, German fishermen will in general not have to abide by Netherlands legislation if they want to fish in the common fishing area, and *vice versa*.[192] As a consequence, regulation cannot be simply based on the principle of territoriality but should be rather based on the principle of nationality, if necessary linked to a specific geographical area. Whereas the former type of prescription applies in principle to everything and everyone in all or part of a state's territory, the latter type of prescription applies in principle to certain of a state's nationals (e.g., natural persons, ships, aircraft and legal persons such as companies) wherever they are. The situation is at a fundamental level not really different from that in Antarctica and its surrounding waters where territorial sovereignty disputes were frozen by means of an 'agreement to disagree' in the Antarctic Treaty.[193] In the Antarctic context, jurisdiction under the nationality

189. See Art. 6(2) of the 1989 Royal Decree, *supra* n. 91, which contains an exception for such vessels.

190. Art. 41(4) of the Ems-Dollard Treaty. Para. (3) stipulates that the right to fish shall cover fishing of every kind, except for mussel-fishing east of the eastern limit of the main fairway, which is reserved for German fishermen.

191. Cf., the Judgments rendered by the District Court of Groningen, on 2 March 2001 (case No. AWB 01/102 BESLU V03; text also at <www.rechtspraak.nl>, LJN No. AB0387 (in Dutch)) and on 17 May 2001 (case No. AWB 01/352 BESLU V06, AWB 01/353; text also at <www.rechtspraak.nl>, LJN No. AB1990 (in Dutch); see also *JB* (2001) No. 186).

192. Cf., *inter alia*, Art. 32(1) of the Ems-Dollard Treaty which determines that 'with respect to the Ems Estuary' a state's vessels 'shall be deemed to be within' that state's territory. Art. 35(1) stipulates that supervision in the common fishing area shall be exercised jointly, but that the inspectors of each state shall only be competent with respect to their own fishermen. An exception is made for certain enforcement measures where offenders are caught in the act (Art. 35(1) is a *lex specialis* to Art. 33(3); see also Art. 32(1) for vessels of third states). Although 'fishermen' is used instead of 'vessels', it seems logical to assume that the distribution of jurisdiction concerns both, even though enforcement at sea will first of all be guided by the vessel's flag.

193. The Antarctic Treaty, Washington DC, 1 December 1959. In force 23 June 1961, 402 *UNTS* 71; *Trb.* 1965 No. 148; <www.antdiv.gov.au>. See Art. IV. The Kingdom of the Netherlands acceded on behalf of the entire Kingdom on 30 March 1967 (*Trb.* 1967 No. 63 and 1968 No. 21). The Kingdom became an Antarctic Treaty Consultative Party on 19 November 1990.

principle has emerged as the predominant basis of jurisdiction for the reason that it does not conflict with the agreement to disagree.[194]

The fact that the Ems-Dollard Treaty could also be seen as an agreement to disagree, should be taken into account when interpreting the legislation of the two states. The Netherlands has designated part of the common fishing area as 'coastal water' within its fisheries legislation. The formula chosen is 'the Netherlands part of the Dollard and Ems within the following limits', after which the local dividing-line of the territorial sea and internal waters is reproduced.[195] The context indicates that the word 'within' is intended to mean 'landward'. The words 'the Netherlands part' encompasses both undisputed Netherlands territory and the entire disputed territory between Germany and the Netherlands.[196] This disputed territory forms part of the common fishing area under the Ems-Dollard Treaty. Netherlands law provides that in order to engage in fishing in this coastal water, licenses are required[197] and these are reserved for those with a historical fishing record.[198]

It cannot be denied that the words 'Netherlands part' imply that the enactment has a geographical scope. As a general rule, Netherlands legislation is presumed to apply to everyone within Netherlands territory, regardless of nationality, unless specifically stated otherwise.[199] Several saving-clauses nevertheless exist to ensure that the application of Netherlands (criminal) law and its adjudication do not violate international law.[200] As the designation as 'coastal water' referred to above contains no special provision, it applies in principle to German fishermen. Although this in

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194. Cf., F. Orrego Vicuña 'Port State Jurisdiction in Antarctica: A New Approach to Inspection, Control and Enforcement' in D. Vidas, ed. *Implementing the Environmental Protection Regime for the Antarctic* (Dordrecht, Kluwer Academic Publishers 2000) pp. 45-69, at p. 48.

195. Art. 2(1) of the 1970 Decree, *supra* n. 31. For the dividing-line see *supra* n. 84.

196. Cf., Art. 1(a) of the Decree Limitation Free Fishery Coastal Waters, of 28 December 1993 [*Besluit beperking vrije visserij kustwateren*] *Stb*. 1994 No. 43, which ensures that an obligation applies to 'the Netherlands part of the Dollard and Ems' (Cf., Art. 2(1) of the 1970 Decree, *supra* n. 31), but only 'as far as designated as common fishing area pursuant to the Ems-Dollard Treaty'. This view is also supported by Judge Vermeulen in the Judgment of 2 March 2001, *supra* n. 191.

197. See Art. 4 and 11 of the Ministerial Decree Fishing Fishery Zone, Sea Area and Coastal Waters, of 29 December 1977 [*Beschikking visserij visserijzone, zeegebied en kustwateren*] *Stb*. 1977 No. 255, as amended and Art. 7(2)(a) of the 1963 Fisheries Act, *supra* n. 45.

198. Based on a policy laid down in the letter of 21 May 1992 (No. Viss. 924356) by the Ministry of Agriculture, Nature Conservation and Fisheries to the Permanent Commission on Fisheries of the Second Chamber of Parliament. This policy was upheld in a procedure before the section Administrative Adjudication of the Council of State (Judgment of 24 February 1997, No. H01.95.0214).

199. This presumption ensues directly from international law. Arts. 8 and 9 of the 1829 Act on General Provisions, of 15 May 1829 [*Wet Algemene Bepalingen*] *Stb*. 1829 No. 28, as amended and Art. 2 of the 1881 Penal Code, of 3 March 1881 [*Wetboek van Strafrecht*] *Stb*. 1881 No. 35, as amended are consistent therewith.

200. Art. 8 of the 1881 Act, *supra* n. 199, and Art. 13a of the 1829 Act, ibid.

itself already amounts to inconsistency with the Ems-Dollard Treaty,[201] a violation would only arise where the Netherlands legislation would actually be applied in disregard of these general saving-clauses. This is unlikely to happen as the relevance of these saving-clauses to the present situation has already been noted.[202] It would nevertheless have been better if enactments like these explicitly acknowledge, in one way another, the disputed status of the area and thereby the agreement to disagree in the Ems-Dollard Treaty.[203]

The main limitation on the states' competence to regulate fishing by their own nationals in the common fishing area ensues from Article 41(5) of the Ems-Dollard Treaty, which requires the states to exercise this competence 'by agreement'. The general obligation to cooperate 'in a spirit of good-neighbourliness' under Article 1 and the need to ensure that the nationals of the two states exercise the right of fishing 'on equal terms' pursuant to Article 41(1) are relevant in this context as well. However, incidents have shown cooperation to be inadequate. For instance in May 2001 when three German vessels fished for mussels on the tidal flat *Hond/Paap* in the common fishing area whereas this was prohibited for Netherlands vessels under Netherlands law.[204] Awareness of the differences in regulation by the two states existed at least since 1997.[205] The German decision to grant the licenses was, *inter alia*, criticized in view of the EU Habitats Directive[206] and Germany's commitments within the framework of Trilateral Cooperation on the Protection of the Wadden Sea.[207] Inadequate cooperation therefore led to a situation where the right to fish was not exercised 'on equal terms' as stipulated by Article 41(1) of the Ems-Dollard Treaty.

Although the permanent Netherlands-German Ems Commission established under Article 29 of the Ems-Dollard Treaty was not specifically charged with the management and conservation of fisheries, its competence would in principle extend

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201. In particular Art. 32(1) (see *supra* n. 192 and accompanying text).

202. See e.g., Parliamentary Papers, Second Chamber 1985-1986, 19343, No. 9, p. 8.

203. See in this context the solution incorporated in Art. 6(2) of the 1996 Protocol, *infra* n. 209. Note also the apparent discontent of the German representatives to Sub-Commission 'G' (see below in main text) in relation to another but similar Netherlands enactment (Report of the 11th Meeting of Sub-Commission 'G' (April 2001), at section 8 (text at <www.waddenzee.nl> (in Dutch and German)).

204. The event was noted in *NRC Handelsblad* (23 May 2001). The prohibition for Netherlands vessels is based on the Structuurnota Zee- en Kustvisserij [*Structural Policy Document Marine and Coastal Fisheries*] 1993. This happened despite a letter dated 26 April 2001 from G.H. Faber, Deputy Minister for Agriculture, Nature Management and Fisheries of the Netherlands, to U. Bartels, Minister of *Ernährung, Landwirtschaft und Forsten* of Lower Saxon.

205. Cf., the Report of the 4th Meeting of Sub-Commission 'G' (see below in main text; up until 1998 known as 'H') (November 1997), section 6.

206. See *supra* n. 168.

207. For info see <http://cwss.www.de> (also in English); in particular pars 4.1.17-4.1.18 of the 1997 Trilateral Wadden Sea Plan.

thereto.[208] In practice the Commission seems to have done little in this field, perhaps due to the absence of major problems and/or the insubstantial size of the fisheries. With the adoption of the 1996 Environmental Protocol to the Ems-Dollard Treaty,[209] however, fisheries were placed in a wider ecosystem context. The 1996 Protocol extends cooperation between Germany and the Netherlands to water and nature management, which would be guided by several principles, including good neighbourliness, precaution and sustainable development.[210] Article 2 provides that cooperation shall take place within the Permanent Commission on Boundary Watercourses (PCBW) established under Article 64 of the Frontier Treaty.[211] Article 4 of the 1996 Protocol reflects the contracting parties' concern for the ecosystem in the Ems Estuary, including its ecological functions and its special significance as a nursing area for fish. Of particular importance is Article 5(5)(b) which calls for proposals to align 'use' with the objectives of nature management. The strong commitment to conservation, which this reflects, has been confirmed by the work of Sub-Commission 'G' Ems-Dollard of the PCBW. The Ems Commission has agreed that shell fisheries, which are the most important fisheries in the common fishing area, will be dealt with by Sub-Commission 'G' in view of the need to balance this type of fisheries with the interest of nature conservation.[212]

Bilateral cooperation in fisheries has improved since the incident in May 2001 referred to above. For instance, the tidal flat *Hond/Paap* will be designated by both states as a nature conservation area, where a stringent fishing regime will apply.[213] In October 2001 Germany announced that it intended to begin consultations with

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208. See the functions of the Commission in Art. 30 and note that Art. 41 on fisheries is incorporated in Chapter 9 'Special Provisions'. See Art. 30(e).

209. Supplementary Protocol to the Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning Arrangements for Cooperation in the Ems Estuary (Ems-Dollard Treaty), concerning Arrangements for Cooperation on Water and Nature Management in the Ems Estuary, signed aboard the *MS Warsteiner Admiral*, 22 August 1996. In force 29 April 1998, *Trb.* 1996 No. 258.

210. Art. 1.

211. Treaty concerning the Course of the Common Frontier, the Boundary Waters, Real Property Situated Near the Frontier, Traffic Crossing the Frontier on Land and Via Inland Waters, and Other Frontier Questions, The Hague, 8 April 1960. In force 1 August 1963, 508 *UNTS* 148; *Trb.* 1960 No. 68. The Frontier Treaty and the Ems-Dollard Treaty are part of the General Treaty for the Settlement of Frontier Questions and Other Problems Outstanding Between the Two Countries, The Hague, 8 April 1960. In force 1 August 1963, 508 *UNTS* 20; *Trb.* 1960 No. 67.

212. Cf., the Report of the 13th Meeting of Sub-Commission 'G' (March 2002), at section 4 (text at <www.waddenzee.nl> (in Dutch and German)).

213. See the Report of the 14th Meeting of Sub-Commission 'G' (October 2002), at section 6 (text at <www.waddenzee.nl> (in Dutch and German)). The *Hond/Paap* was designated by the Netherlands within the context of the Habitats Directive by 20 May 2003. On 8 July 2003 the European Commission approved the designation of this area and the other areas designated by the Netherlands (info at <www.minlnv.nl/natura2000>).

the Netherlands to arrive at a new arrangement for fishing in the common fishing area.[214] The extent of progress that had been made at the time of writing, if any, was unclear. It was also insufficiently clear if cooperation between the two states had advanced to the extent that Sub-Commission 'G' was effectively accorded an approval role for fishing activities in view of the need for 'agreement' under Article 41(5) of the Ems-Dollard Treaty.

7. PARTICIPATION IN REGIONAL FISHERIES ORGANIZATIONS

7.1 **Implications of the Kingdom of the Netherlands as a subject of international law**

Before examining the participation of the Netherlands as an EU Member State within RFOs in light of the EU competence in fisheries, it is necessary to provide some background information on the constitutional structure of the Kingdom of the Netherlands. As already mentioned in the introduction, the Kingdom is currently composed of three countries: the Netherlands, the Netherlands Antilles and Aruba. In the context of the global process of de-colonisation that took mainly place in the second half of the 20th century, the constitutional structure of the Kingdom of the Netherlands was reformed in order to create greater autonomy for its constituent parts. By means of the 1954 Statute for the Kingdom of the Netherlands,[215] the Netherlands, Suriname and the Netherlands Antilles agreed on a new constitutional order. Subsequently, Suriname became an independent state in 1975 and Aruba seceded from the Netherlands Antilles in 1986. Although Aruba was at that time keen on full independence, it chose to remain part of the Kingdom as a separate country in 1995.

The constitutional order in the 1954 Statute recognises the constituent countries' autonomy in their internal affairs and the need to conduct common interests on the basis of equality.[216] The division of competence between the Kingdom on the one hand and its constituent countries on the other is dealt with in Article 3 of the Statute. This provision contains an exhaustive list of so-called 'matters of the Kingdom' for which the Kingdom has competence instead of the individual countries. Matters not listed must be presumed to be within the competence of the countries. Subparagraphs (a), (b) and (e) of Article 3(1) list as 'matters of the Kingdom':

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214. See the Report of the 12th Meeting of Sub-Commission 'G' (October 2001) at section 5 (text at <www.waddenzee.nl> (in Dutch and German)).

215. See *supra* n. 9.

216. See, *inter alia*, the Preamble and Arts. 6(1) and 41.

(a) the maintenance of the independence and the defence of the Kingdom;
(b) the foreign relations;
(...)
(e) the regulation of the nationality of ships and the setting of conditions with respect to the safety and the navigation of seagoing ships, flying the flag of the Kingdom, with the exception of sailing ships;[217]

As the list does not contain anything related to the management and conservation of (marine) fisheries and the establishment of shipping registers, competence lies with the individual countries. This, *inter alia*, means that the legislative process is confined to the constituent parts and does not involve the so-called 'Organs of the Kingdom', which consist of the organs of the Netherlands complemented with representatives of the Netherlands Antilles and Aruba.[218] It is also worth emphasising that even though ships may register in the Netherlands Antilles or Aruba, they have the nationality of the Kingdom of the Netherlands.[219]

As Article 3(1)(b) of the Statute stipulates that foreign relations are a matter of the Kingdom, these shall be conducted jointly whenever the interests of the Netherlands Antilles and Aruba are also involved.[220] This does not prevent the Netherlands Antilles and Aruba from furthering their interests abroad, provided these remain within the realm of their internal autonomy.[221] In practice, the Netherlands Ministry of Foreign Affairs is commonly involved in one way or another to, *inter alia*, ensure that their endeavours do not conflict with the interests of other countries and that of the Kingdom.

This notwithstanding, the 1954 Statute makes it clear that only the Kingdom of the Netherlands has international legal personality and is as such capable of concluding treaties with other states, becoming a member of an inter-governmental organization (on behalf of one or more of its constituent countries) or incurring state responsibility for violations for applicable rules of international law.[222] Whereas the Netherlands Antilles was at the time of writing repeatedly criticised for having become a flag of convenience for fishing vessels,[223] from the perspective of

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217. Translation by the author.
218. See, *inter alia*, Arts. 7 and 13.
219. Cf., A.H.A. Soons, 'Comments', in I.F. Dekker and H.H.G. Post, eds., *On the Foundations and Sources of International Law* (The Hague, T.M.C. Asser Press 2003) pp. 65-71, at p. 70.
220. Cf., Art. 11(3).
221. Cf., Art. 6(2).
222. In particular Arts. 3(1)(a) and (b) and 24-28. See also Art. 4(1) of the Draft articles on the Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission in 2001. For text and commentaries see <www.un.org/law/ilc>).
223. See Molenaar, *supra* n. 12, at pp. 127-128. See also the 'IUU Vessel Red List' of April 2003 of the Antarctic and Southern Ocean Coalition (ASOC) which features two fishing vessels registered in the Netherlands Antilles (info at <www.asoc.org>).

international law such criticism should in fact (also) be aimed at the Kingdom of the Netherlands. In fact, only the latter can incur state responsibility. Articles 50 and 51 of the 1954 Statute empower the Kingdom to take the necessary measures in case the Netherlands Antilles or Aruba act inconsistent with applicable rules of international law.

When the Kingdom becomes a party to a treaty or a member of an inter-governmental organization, it does not automatically do so on behalf of all three countries. Where treaties do not by their nature apply to the entire territory of a subject of international law[224] and do not explicitly deal with their territorial scope, a well-established international practice exists by which a state indicates by signature, ratification or accession whether the treaty applies to its metropolitan territory and/or (one of) its overseas territories.[225] This practice applies in principle also to treaties that establish inter-governmental organizations, even though some treaties may diverge to a greater or lesser extent from this practice.[226] The 1954 Statute and practice of the Kingdom are consistent with international practice in this respect.

Whereas the participation by the Kingdom on behalf of one or more of its constituent countries in RFOs will be discussed in the ensuing subsections, here some observations on relevant global treaties that do not establish RFOs. At the time of writing, the Kingdom of the Netherlands was a party to the LOS Convention on behalf of the Netherlands but not on behalf of the Netherlands Antilles and Aruba.[227] Moreover, even though the 1995 Fish Stocks Agreement had been approved by the Kingdom on behalf of the entire Kingdom,[228] the Netherlands Antilles and Aruba may still not authorise the Kingdom to ratify the Agreement on their behalf.[229] As the EU Member States agreed to treat the 1995 Fish Stocks Agreement as a mixed agreement, the Kingdom will deposit an instrument of ratification on behalf of the Netherlands jointly with the other EU Member States.[230] By contrast, the 1993 FAO Compliance Agreement was seen to be within exclusive EU competence. As a consequence, the Kingdom of the Netherlands is not allowed

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224. E.g., the Charter of the United Nations.

225. Cf., A. Aust, *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press 2000) pp. 165-166 and 168.

226. Some treaties may for instance allow dependent territories to be a separate (associated) member (e.g., the Netherlands Antilles and Aruba with respect to the World Meteorological Organization (info at <www.wmo.ch>).

227. The Netherlands deposited its instrument of ratification, in relation to the Kingdom in Europe exclusively, on 28 June 1996 (*Stb.* 1996 No. 357; <www.un.org/Depts/los>).

228. Act of 18 October 2001 (*Stb.* 2001 No. 535).

229. See Explanatory Note to the 2001 Act, *infra* n. 228, at p. 21 (Parliamentary Papers, Second Chamber 2000-2001, 27892 (R 1693) No. 3).

230. Pursuant to EU Council of Ministers Decision 10176/97 of 8 June 1998 and the EU. Since July 2003 all EU Member States and the EU were in a position to ratify the 1995 Fish Stocks Agreement simultaneously. However, when this was attempted, the depositary (the Secretary-General of the UN) took the view that the procedures in Art. 47(2) of the Agreement had not been fulfilled. At the time of writing, these procedures were in the process of being fulfilled.

to become a party to the Agreement on behalf of the Netherlands, but is directly bound as a consequence of the EU's acceptance of the Agreement.[231] At the time of writing, the Kingdom of the Netherlands had not deposited an instrument of acceptance on behalf of the Netherlands Antilles or Aruba.

Despite the fact that several key treaties related to the law of the sea and international fisheries are not legally binding on the Netherlands Antilles and Aruba, basic duties like effective control and jurisdiction over a state's vessels and cooperation on transboundary stocks of marine living resources are part of the body of customary international law Moreover, even though only the Netherlands (and not the Netherlands Antilles and Aruba)[231a] committed itself to the non-legally binding obligations laid down in the 1993 FAO Code of Conduct and its international plans of action, most importantly the IPOA on IUU Fishing, the participation of government officials of the Netherlands Antilles and Aruba in FAO activities[232] could arguably be interpreted as a recognition of at least the general principles laid down in these instruments.

Where the ensuing subsections mention 'the Netherlands', this is meant to refer to the Netherlands in Europe exclusively. Where the term 'Kingdom of the Netherlands' is used, it refers to the whole Kingdom. Subsection 7.2 deals more in general with the issue of participation within RFOs by EU Member States, with a focus on the Netherlands. Subsections 7.3, 7.4 and 7.5 deal with the some of the main exceptions to the general rule that the EU replaces its Member States in RFOs: overseas countries and territories, marine mammals and Antarctic marine living resources.

7.2 Participation within RFOs by EU Member States

Due to the exclusive external competence of the EU in fisheries, it is in general not possible for the Netherlands to participate as a separate member in regional fisheries management organizations (RFMOs). Since the inception of the CFP, the EU has therefore gradually replaced its Member States in most RFMOs. Whether or not the maritime zones of a Member State fall within the regulatory area of an RFMO is of no consequence to that general rule. The Netherlands maritime zones fall within the regulatory areas of the NASCO Convention,[233] the NEAFC Convention,[234] and the ICCAT Convention[235] . Prior to the concerted extension of fishing limits by EEC Member States in 1977, the Netherlands was a contracting party to the

231. The EU deposited its instrument of acceptance on 6 August 1996.

231a. As a consequence of the Kingdom's membership to the FAO (see n. 157) and the absence of objections to relevant FAO instruments.

232. See *supra* n. 255b and accompanying text.

233. Convention for the Conservation of Salmon in the North Atlantic Ocean, Reykjavik, 2 March 1982. In force 1 October 1983, 1338 *UNTS* 33; <www.nasco.int>. See Art. 1(1).

234. Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, *supra* n. 46. See Art. 1.

235. International Convention for the Conservation of Atlantic Tunas, Rio de Janeiro, 14 May 1966. In force 21 March 1969, *UNTS* No. 9587 (1969); <www.iccat.es>. See Art. I.

predecessor of the NEAFC Convention.[236] The Netherlands and the other EEC Member States subsequently withdrew from this predecessor and the EEC became a party to the (new) NEAFC Convention on their behalf.[237] Fisheries regulation within the NEAFC Commission is dominated by coastal states, *inter alia*, because the regulatory area composed of the high seas is considerably smaller than the combined adjacent areas under national jurisdiction.[238] The EU delegation to the various NEAFC meetings often has representatives of the Netherlands.

As tuna or tuna-like species do not occur in the Netherlands maritime zones and Netherlands fishing vessels do not target these species elsewhere or plan to do so in the near future,[239] the Netherlands has never been a party to the ICCAT Convention.[240] The same more or less applies to the NASCO Convention.

The EU has also replaced its Member States in various other RFMOs, none of which the Netherlands was ever a party to.[241] Following the entry into force of the SEAFO Convention,[242] the EU will represent its Member States there. If pelagic fishing by Netherlands fishing vessels in the maritime zones of Angola would acquire a permanent character, EU delegations to SEAFO meetings may have representatives of the Netherlands.

Despite the external competence of the EU, there are various situations in which EU Member States are allowed to continue their membership of RFMOs. For instance where other States Parties to RFMOs are not favourable disposed towards EU Membership.[243] Another situation concerns fisheries advisory bodies established under Article VI of the FAO Constitution, such as CECAF[244] and WECAFC[245]. The rationale for the continued participation of EU Member States within these bodies seems to lie predominantly with the development cooperation objectives of

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236. See Koers, op. cit n. 7, at p. 324.

237. See Churchill, op. cit. n. 50, at pp. 187-188. Denmark nevertheless became a Party on behalf of the Faroe Islands, and later also on behalf of Greenland (see below in main text).

238. Art. 1 of the NEAFC Convention. See also the 'Coastal state process' and the 'two pillars' as for example referred to in the Report of the 19th Annual NEAFC Meeting (2000), at pp. 9-12 and Annexes D and H (text at <www.neafc.org>).

239. The Netherlands firm Jaczon (info at <www.jaczon.nl>) has nevertheless a financial interest in some fishing vessels registered in the Seychelles that target tuna.

240. But see subsection 7.3 with regard to the Netherlands Antilles.

241. The concerns IBSFC (International Baltic Sea Fishery Commission), IOTC (Indian Ocean Tuna Commission) and NAFO (Northwest Atlantic Fisheries Organization). Note that the Netherlands has a small quota of redfish that can be caught in the NAFO Regulatory Area (see Reg. No. 2341/2002, *supra* n. 74, at p. 44).

242. Convention on the Conservation and Management of the Fishery Resources in the South East Atlantic Ocean, Windhoek, 20 April 2001. In force 13 April 2003; <www.oceanlaw.net> or <www.mfmr.gov.na/seafo/seafo.htm>.

243. E.g., in relation to the IATTC (Inter-American Tropical Tuna Commission). See info at <www.iattc.org>.

244. Fishery Committee for the Eastern Central Atlantic, Instituted by FAO Council Resolution 1/48 (June 1967).

245. Western Central Atlantic Fishery Commission. Established by FAO Council Resolution 4/61 (November 1973).

these bodies, which is an area in which the EU and its members share competence.[246] The Kingdom of the Netherlands is party to both bodies alongside the EU. As the Kingdom's FAO membership is exclusively on behalf of the Netherlands,[247] participation within these bodies, and, in view of its spatial scope, in particular WECAFC, can in principle not occur on behalf of the Netherlands Antilles or Aruba. However, the FAO does not pursue a strictly formal approach in this matter (see Section 7.3). The Kingdom of the Netherlands presumably became a party to CECAF in view of its fishing activities off North West Africa and was keen to contribute towards improving the scientific basis of the pelagic fisheries in which it participated. However, CECAF did not appear to be a suitable forum for that purpose (see section 5.4).

At the time of writing, CECAF and WECAFC were still in the process of reforming towards bodies with management functions.[248] Until this has been achieved, the EU is not really concerned by the participation of EU Member States as independent contracting parties. In recent years this participation was quite minimal and hardly infringed upon the exclusive competence of the EU in fisheries. Once CECAF and WECAFC are reformed, however, the EU may reconsider the issue of participation. The situation in the GFCM[249] nevertheless illustrates that the EU does not always insist on replacing its Member States. The input of delegations from EU Member States at GFCM meetings tends to be focused on administrative and scientific issues and therefore not incompatible with exclusive EU competence.[250]

Scientific research in fisheries is another issue where competence is shared.[251] Consequently, the Kingdom of the Netherlands continues its membership of ICES.[252] Netherlands researchers participate in various ICES committees and working groups and therefore share responsibility for scientific advice that is, *inter alia*, provided to the EU and NEAFC.

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246. See e.g., the EC declaration upon formal confirmation of the LOS Convention (available at <www.un.org/Depts/los>). Spain and France also participate in WECAFC, even though they have no territories within its regulatory area. Note also that the 2000 Cotonou Agreement, *supra* n. 133, has been ratified by the EU as well as by the individual Member States.

247. Cf., FAO Doc. WECAFC/IX/99/5E, para. 2 of which does not refer to Aruba.

248. This is part of a broader review of FAO regional fishery bodies, as decided by the FAO Committee of Fisheries (COFI) at its Twenty-Second Session in 1997 (see FAO Fishery Report No. 562, par. 31).

249. General Fisheries Commission for the Mediterranean. See Art. II of the 1997 Agreement for the Establishment of the General Fisheries Commission for the Mediterranean (adopted by the FAO Council at its 113th Session in November 1997 but not yet in force at the time of writing (text at <www.oceanlaw.net>)) which provides for voting procedures that take account of the situation in which either the EU or its Member States or both have competence.

250. Information kindly provided by J. Spencer, European Commission, October 2002.

251. See e.g., the EC declaration upon formal confirmation of the LOS Convention (available at <www.un.org/Depts/los>).

252. The ICES Convention (Convention for the International Council for the Exploration of the Sea, Copenhagen, 12 September 1964. In force 22 July 1968, 7 *ILM* (1968) p. 302; *Trb.* 1966 No. 193; <www.ices.dk>) was ratified by the Kingdom on behalf of the Netherlands on 13 February 1967 (*Trb.* 1968 No. 43) and on behalf of Aruba on 1 January 1986 (*Trb.* 1989 No. 143).

7.3 Participation on behalf of the Netherlands Antilles and Aruba

The maritime zones of the Netherlands Antilles and Aruba fall within the regulatory areas of WECAFC and the ICCAT Convention. Their maritime zones would furthermore fall within the spatial scope (if so defined) of the Caribbean Regional Fisheries Mechanism (CRFM), which was initiated in September 2001 and launched in March 2003.[253] The Netherlands Antilles and Aruba would be allowed to obtain Associate Membership of the CRFM if such a request would be made by the Kingdom of the Netherlands.[254] This would be particularly relevant if the CRFM develops a formal regional management arrangement or RFMO for (coastal) large pelagics, which would collaborate closely with ICCAT.[255]

As was already pointed out above, the Kingdom of the Netherlands' membership of WECAFC must be presumed to be exclusive on behalf of the Netherlands. In practice however, WECAFC meetings are primarily attended by government representatives of the Netherlands Antilles and to a lesser extend by government representatives of Aruba[255a]. Even if WECAFC would be reformed into a modern RFMO, the Kingdom of the Netherlands would still be allowed to become a party on behalf of the Netherlands Antilles and/or Aruba. The justification for this exception is that the Netherlands Antilles and Aruba are among the overseas countries and territories (OCTs) to which the EC Treaty does not apply.[256] Other EU Member States also use this basis to participate on behalf of their OCTs in RFMOs.[257]

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253. Text at <www.caricom-fisheries.com>. See also S. Singh-Renton, R. Mahon and P. McConney, 'Small Caribbean (CARICOM) states get involved in management of shared large pelagic species', 27 *Marine Policy* (2003) pp. 39-46.

254. See the CRFM text at 'Membership'.

255. See 'Preparation for Expansion of Domestic Fisheries for Large Pelagic Species by CARICOM Countries', (FAO TCP Project RLA/0070) *Report of the First Workshop* (2002), in particular at pp. 4 and 14-15. The Draft Report of the Second Workshop (held in February 2003) still showed uncertainty as to the most appropriate way forward (on file with author). This uncertainty remained after the First CRFM Forum Meeting in March 2003 (information provided by S. Singh-Renton, August 2003).

255a. See e.g. *WECAFC – Report of the tenth session of the Western Central Atlantic Fishery Commission and of the seventh session of the Committee for the Development and Management of Fisheries in the Lesser Antilles,* Bridgetown, Barbados, 24-27 October 2001 (FAO Fisheries Reports -R660), at Table 1(E), Appendix E and *WECAFC – Report of the ninth session of the Western Central Atlantic Fishery Commission and of the sixth session of the Committee for the Development and Management of Fisheries in the Lesser Antilles,* Castries, Saint Lucia, 27-30 September 1999 (FAO Fisheries Reports – R612; WECAFC/IX/99/5^{E}), at par. 2, which both refer to the Netherlands Antilles on a similar footing as WECAFC members. Over the years the WECAFC Secretariat has established a pragmatic working relationship with the Netherlands Antilles and Aruba. For instance, certain technical communications or invitations to technical meetings or to WECAFC Commission meetings are sent directly to the appropriate government officials in the Netherlands Antilles and Aruba. This procedure was also followed for the Eleventh Session of the Commission which is scheduled to be held in Grenada from 21-24 October 2003 (information kindly provided by Mr. B. Chakalall, Secretary of WECAFC, on 12 August 2003).

256. See *supra* n. 11.

257. E.g., in relation to the ICCAT Convention by France on behalf of St-Pierre et Miquelon and by the United Kingdom on behalf of some or all of its overseas territories and dependencies.

It seems that in particular Spanish individuals and companies are involved in (beneficial) ownership and operation of many of the Netherlands Antilles fishing vessels that engage in high seas or 'international' fisheries.[258] Netherlands Antilles vessels have been fishing for species that are within ICCAT's competence for a number of years, even though not all of these are regulated, for instance by means of a TAC. The Netherlands Antilles has to some extent also cooperated with ICCAT by occasionally participating as an observer in ICCAT meetings and by providing ICCAT with information on relevant fishing activities, upon ICCAT's request. To some extent, therefore, the Netherlands Antilles has lived up to its obligations under customary international law and its presumed commitments under relevant non-legally binding instruments. It is not unlikely that the practice of ICCAT to impose trade-related measures on non-cooperating states played a role as well.[259]

The Netherlands Antilles has up until now not indicated that the Kingdom of the Netherlands should become a party to the ICCAT Convention on its behalf. However, as pressure to take a more cooperative and responsible attitude started mounting in 2002, partly due to the arrest of the Netherlands Antilles-flagged *Eternal* in the Southern Ocean,[260] the Kingdom of the Netherlands applied, on behalf of the Netherlands Antilles, for the status of 'cooperating non-contracting party' with ICCAT prior to the 2002 Annual ICCAT Meeting. As the application was made too late, ICCAT did not rule on the issue at the 2002 meeting. The application will be reviewed during the 2003 Annual ICCAT Meeting unless it is withdrawn.[261] The choice for the status of cooperating non-contracting party[262] instead of 'regular' contracting party status may be motivated by several reasons, one of them perhaps the lower financial implications. As other EU Member States opted for contracting party status with respect to their territories,[263] the current membership of ICCAT may take the view that the Kingdom of the Netherlands should follow established practice. However, nothing in the relevant ICCAT Resolutions[264] suggests that the Netherlands application is inappropriate.

Fishing vessels registered in the Netherlands Antilles have in the recent past not just been active in the regulatory areas of ICCAT and WECAFC but also in the regulatory areas of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR; see further below), the Inter-American Tropical Tuna Commission (IATTC) and the Indian Ocean Tuna Commission (IOTC) and may be so at the time of writing.[265] The Netherlands Antilles fishing fleet is therefore at

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258. See Molenaar, loc. cit. n. 12, at pp. 127-128.

259. See e.g., ICCAT Recommendation 02-17 which imposes bans on the import of Atlantic bigeye tuna and its products in any form from Bolivia.

260. See Press release (PR/12/02) of 8 July 2002, from the French Embassy in Canberra, Australia (text at <www.ambafrance-au.org>) and Molenaar, loc. cit. n. 12.

261. ICCAT Report of the biennial period 2002-03, Part I (2002), Vol. 1, p. 246.

262. See ICCAT Resolutions 94-6 and 01-17.

263. See *supra* n. 257.

264. See *supra* n. 262.

265. See Molenaar, loc. cit. n. 12, at pp. 140-142.

least in part a distant-water fleet. The question therefore arises whether the Kingdom of the Netherlands could become a party on behalf of the Netherlands Antilles and/or Aruba to RFMOs whose regulatory areas do not overlap or border with the maritime zones of the Netherlands Antilles and Aruba. In view of every state's right to fish on the high seas under general international law, even if subject to an expanding range of obligations, and the fact that the EC Treaty and the CFP do not apply to the Netherlands Antilles and Aruba, an affirmative answer to this question seems inevitable.

Moreover, precedents already exist. Denmark is a party to the NAFO Convention[266] on behalf of both Greenland and the Faroe Islands, even though the latter's maritime zones lie beyond the NAFO Convention Area.[267] Whereas the status of the Faroe Islands within Denmark is different from the status of the Netherlands Antilles and Aruba in the Netherlands, as, *inter alia*, illustrated by the difference in their status under the EC Treaty,[268] this does not mean this distinction is decisive.

Another precedent relates in fact specifically to the Netherlands Antilles and Aruba. The Kingdom of the Netherlands became a party to the CCAMLR Convention[269] in 1990, on behalf of the entire Kingdom, including therefore the Netherlands Antilles and Aruba.[270] It is admitted that this precedent differs from the previous one in the sense that participation is not sought exclusively for an overseas country or territory. Moreover, at the time of the Kingdom's accession there was little, if any, interest in engaging in exploitation activities that would be relevant to CCAMLR. This explains in part why the Kingdom merely acceded to the CCAMLR Convention, but did not become a member of its Commission (see further subsection 7.5).[271] It is probably even more unlikely that the Netherlands Antilles or Aruba had fishing activities in mind when they authorised the Kingdom to accede to the CCAMLR Convention on their behalf. In fact, it appears quite likely that the relevant authorities in the Netherlands Antilles were unaware of the

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266. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Ottawa, 24 October 1978. In force 1 January 1979, 1135 *UNTS* 369; <www.nafo.ca>.

267. As Denmark (on behalf of the Faroe Islands) was identified as a non-Contracting Party to the CCAMLR Convention with an interest in fishing or trade in Patagonian toothfish, it was invited to attend the 18th Meeting of CCAMLR in 1999 (see Doc. CCAMLR-XVIII, pars. 1.5, 2.10 and 16.2). Denmark did not attend the subsequent (19th) meeting, presumably because it was no longer engaged in relevant fishing or trade and/or no longer had an interest in becoming involved in the CCAMLR Convention.

268. Art. 299(6)(a) of the EC Treaty stipulates that the EC Treaty does not apply to the Faroe Islands.

269. Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, 19 *ILM* 837 (1980); *Trb.* 1985 No. 78; <www.ccamlr.org>. See Arts. I(2), II(1) and (2) and VI.

270. The Kingdom acceded on 23 February 1990. The CCAMLR Convention entered into force for the entire Kingdom on 25 March 1990, in accordance with Article XXVIII(2) (*Trb.* 1990 No. 73).

271. The exclusive EU competence in fisheries is nevertheless mentioned as the main reason why the Netherlands is not a member of the 'Krill-commission' (Parliamentary Papers, Second Chamber, 1996-1997, 25211, No. 3, p. 15).

status of the Netherlands Antilles under the CCAMLR Convention during the 2002 incident with the *Eternal* and the 2003 incident with the *Virgin of Carmen* (see further subsection 7.5).[272]

While these precedents confirm the correctness of the more fundamental position, any further expansion of the distant-water fishing fleet registered in the Netherlands Antilles would depend first of all on significant improvements in its exercise of effective control over these ships. The Kingdom of the Netherlands and probably also the EU are likely to intervene if such improvements would not be forthcoming.[273] In practice, an expansion would be constrained by the costs of exercising effective control over ships registered in the Netherlands Antilles and those relating to cooperating with RFMOs. Other constraining factors are the current and future prospects of marine capture fisheries worldwide, which also means that only limited allocations of fishing opportunities are expected to be made available to new entrants, whether or not that is deemed equitable.

7.4 **Marine mammals**

Section 6.4 already pointed out that the scope of the CFP does not extend to marine mammals and that competence in relation to the management and conservation of marine mammals is shared between the EU and its Member States. This implies that EU Member States are in principle allowed to remain or become contracting parties to international treaties that relate to the management and conservation of marine mammals.

Although historically the Netherlands used to be actively involved in whaling, after the Second World War this became a marginal activity and by the early 1960s it ended altogether. The Kingdom of the Netherlands first became a party to the IWC Convention on 10 November 1948. Since then the Kingdom has withdrawn and rejoined the Convention twice.[274] The Kingdom currently participates on behalf of the entire Kingdom.[275] A 1979 Commission proposal for the EEC to replace its Member States within the IWC did not secure sufficient support, mainly because some Member States contested the Community's competence in matters of

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272. This also caused confusion within the CCAMLR Secretariat, which contacted the Embassy of the Kingdom of the Netherlands in Yarralumla, Australia for clarification (see CCAMLR Comm. Circ. 03/47 of 24 June 2003). While a representative of the Netherlands Antilles was sent an invitation to attend the XXIInd Annual CCAMLR Meeting (2003), no representative attended.

273. In view of Declaration No. 25 to the 1992 EU Treaty (Maastricht), the EU may interfere where the position or behaviour of an OCT jeopardises vital EU positions or interests, for instance those on combating IUU fishing.

274. Cf., Koers, loc. cit. n. 7, at pp. 326-328.

275. See *supra* n. 176.

276. Cf., Churchill, op. cit. n. 50, at p. 189.

whaling.[276] A similar 1992 Commission proposal is still formally on the table in the Council but has not been discussed for years.[277] Even though the more fundamental arguments that existed back in 1979 may no longer be so strictly adhered to today (*inter alia*, due to EU enactments in the field),[278] there may be other, more pragmatic, reasons to maintain the status quo. For instance voting power within the IWC or keeping a sensitive political issue like whaling beyond the realm of the EU.

The Kingdom of the Netherlands is party on behalf of the Netherlands to ASCOBANS and the Wadden Sea Seals Agreement.[279] Unlike the IWC Convention, these instruments focus mainly or exclusively on conservation and preservation rather than also envisaging sustainable use.[280] The EU is not a party to either agreement, even though ASCOBANS explicitly allows regional economic integration organizations like the EU to do so.[281] The EU has nevertheless signed ASCOBANS[282] and the European Commission participates in ASCOBANS meetings as an observer.[283] The more fundamental views on the division of competence between the EU and its Member States would seem to explain this current situation. Whereas the Wadden Sea Seals Agreement does not establish an organization, ASCOBANS established an Advisory Committee and meetings of the parties.

7.5 **Antarctic marine living resources**

The conservation and rational use of marine living resources in the seas surrounding Antarctica takes place within the framework of the CCAMLR Convention[284] within the broader framework of the Antarctic Treaty System (ATS). The main instruments within the ATS are the Antarctic Treaty,[285] the Convention for the Conservation of Antarctic Seals (CCAS Convention)[286] and the CCAMLR Convention. The Kingdom of the Netherlands is party on behalf of the entire Kingdom to the Antarctic Treaty

277. See COM(92) 316 final, of 15 July 1992, *Communication from the Commission to the Council concerning the conservation of whales within the framework of the International whaling Commission*, which contains a draft Council Decision to give the Commission a negotiation mandate.
278. See *supra* n. 168.
279. See *supra* nn. 180 and 181.
280. Cf., Art. 2 of ASCOBANS and Arts. III and VI(1) of the Wadden Sea Seals Agreement.
281. See, *inter alia*, Arts. 1.2(d), 6.2.1, 8.3.1, 8.3.2, 8.4 and 8.6.
282. Information obtained from <www.wcms.uk/cms>.
283. Information provided by R. Strempel, ASCOBANS on 24 July 2003.
284. See *supra* nn. 269 and 270.
285. See *supra* n. 193.
286. London, 1 June 1972. In force 11 March 1978, 11 *ILM* 251.
287. See *supra* n. 193.

(including its 1991 Environmental Protocol)[287] and the CCAMLR Convention (see subsection 7.3) but not to the CCAS Convention.

The EU is a Member of the CCAMLR Commission, the convention's regulatory body, alongside several EU Member States (some of which have relevant overseas countries or territories). The EU and its Member States share competence due to the broad scope and conservationist objective of the CCAMLR Convention and because it is part of the ATS and therefore subject to the sensitive 'agreement to disagree' on the sovereignty situation.[288] In view of this complicated division of competence, the European Commission and EU Member States frequently meet before and during the annual meetings to coordinate their positions, where necessary in view of the division of competence. Other members of the CCAMLR Commission may sometimes observe this coordination with a mixture of bewilderment and frustration.

At the 18th Annual CCAMLR Meeting (1999), the division of competence between the EU and its Member States was implicitly challenged by means of a notification by the European Commission to engage in an exploratory fishery for Patagonian toothfish (*Dissostichus eleginoides*) on behalf of the Portuguese vessel *Lugalpesca*, even though Portugal was then not a party to the CCAMLR Convention. Whereas strong pressure by the EU ensured that this notification was accepted by consensus at the very end of the meeting, strong objections during the meeting and afterwards, both by EU Member States and third states, compelled the European Commission to inform the CCAMLR Executive Secretary that the intended exploratory fishery by the *Lugalpesca* was suspended for technical reasons.[289] The issue has not seriously been resurfaced since.[289a]

Whereas the Kingdom of the Netherlands is a party to the CCAMLR Convention on behalf of all its constituent parts, it is not a member of the CCAMLR Commission.[290] As an 'acceding party', the Kingdom may be invited to attend Commission meetings as an observer,[291] and such invitations have in fact always been made. Occasionally, Netherlands researchers or representatives also participate in the meetings of the CCAMLR Scientific Committee or take part in relevant research projects.

Article VII(2)(b) of the CCAMLR Convention provides that an acceding party 'shall be entitled to be a Member of the Commission during such time as that acceding Party is engaged in research or harvesting activities in relation to the marine living resources to which this Convention applies'. Whereas the phrase

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288. See E.J. Molenaar, 'CCAMLR and Southern Ocean Fisheries', 16 *International Journal of Marine and Coastal Law* (2001) pp. 465-499 at pp. 490-497.

289. Ibid.

289a. At the XXIInd Annual CCAMLR Meeting (2003), however, the treatment of the Portuguese vessel *Santo Antero* (Doc. CCAMLR-XXII (Preliminary Version of 12 November 2003), paras. 8.20(i) and 8.23-8.26) was questioned by several CCAMLR members along the same lines as in 1999 in relation to the *Lugalpesca*. The 1999 debate was not re-opened, however.

290. See *supra* n. 270.

291. See Part VI of the Rules of Procedure of the Commission (text at <www.ccamlr.org>).

'shall be entitled' suggests that only a right to become member is involved, non-parties and acceding parties engaged in research or harvesting activities are in fact expected to become a member or cease these activities.[292] Discussions at CCAMLR and Antarctic Treaty Consultative Meetings (ATCMs) on such (planned) activities by Bulgaria and Canada support this.[293] The illegal fishing activity of the Netherlands Antilles-registered *Eternal* in 2002 did not raise the issue of membership to the Commission as it was seen as a mere incident. However, in April 2003 the Netherlands Antilles-registered *Virgin of Carmen* attempted to offload 250 tons of Patagonian toothfish in Walvis Bay, Namibia, without the proper catch documentation.[294] The refusal of the Namibian authorities to land the catch led to communications between the CCAMLR Secretariat and officials from the Netherlands Antilles, who in the end agreed to participate in CCAMLR's catch documentation scheme.[295] Shortly before the XXIInd Annual CCAMLR Meeting (2003), the *Virgin of Carmen* was de-registered from the Netherlands Antilles.[295a] The IUU Vessels List adopted at that meeting includes the *Eternal* but not the *Virgin of Carmen*.[295b]

In the case the Netherlands Antilles decides to continue fishing for species regulated by CCAMLR and to do so within the CCAMLR Convention Area, the issue of membership to the Commission will certainly be raised at future CCAMLR Meetings. In any event, it should be noted that although acceding parties are not directly bound to CCAMLR's Conservation Measures, it appears reasonable to argue that the general obligations to which they *are* bound under the CCAMLR[296] would extend to the main elements or the object and purpose of Conservation Measures, certainly if they are engaged in research or harvesting activities.[297]

As there are currently no clear indications that the Netherlands in Europe intend to engage in relevant harvesting or research activities,[298] the Kingdom of the

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292. This is also the rationale behind Art. 8(3) of the 1995 Fish Stocks Agreement.

293. See Docs. CCAMLR-XVI (1997), par. 11.5; Final Report of the XXI ATCM (1997), par. 161; CCAMLR-XVII (1998), par. 11.3 and CCAMLR-XXI (2002), par. 7.4.

294. See Doc. CCAMLR COMM CIRC 03/27, of 9 April 2003.

295. See Doc. CCAMLR COMM CIRC 03/31, of 24 April 2003. This document incorrectly refers to the Netherlands Antilles as a non-contracting party.

295a. See Doc. SCIC-03/16, 'Provisional IUU Vessel List. Information from the Netherlands'.

295b. See Doc. CCAMLR-XXII, n. 289a, at paras 6.30, 8.20(ii) and 8.64.

296. These are Arts. XXI and XXII (as opposed to Art. IX(6)).

297. As CCAMLR found it necessary to adopt Resolution 14/XIX 'Catch Documentation Scheme: Implementation by Acceding States and Non-Contracting Parties', not all acceding parties share this view or act in accordance with it. Note that Bulgaria intended to 'accept the conservation measures in force under CCAMLR and become a member of CCAMLR, should it resume harvesting activity' (Doc. CCAMLR-XVII (1998), par. 11.3). Note also that although the first operative paragraph of ATCM Resolution 3(2002), which deals with cooperation by acceding parties, was mostly aimed at Canada, it would also be relevant to the Kingdom of the Netherlands.

298. In 2002 the Netherlands Ministry of Agriculture, Nature Conservation and Fisheries received a request from a Netherlands fishing company to explore fishing possibilities for krill in the CCAMLR Convention Area. The Ministry decided it was not politically opportune to submit this

Netherlands could perhaps even apply for membership to the Commission on behalf of the Netherlands Antilles. The fact that the near-exclusive competence of the EU in fisheries would preclude the Netherlands from an independent role in that respect may give rise to such a course of action. But as the gradual shift in emphasis from management towards conservation and preservation within the IWC Convention shows, there are other reasons for becoming more actively involved in the CCAMLR Convention. An important one is the 'boom and bust cycle' of discovery, intensive exploitation and depletion that has so often occurred in Antarctica.[299] Membership of the Commission would give the Netherlands the opportunity to help break that cycle.

8. CONCLUSIONS

Marine capture fisheries are likely to have a significant international component. This is inherent in the fundamental characteristics of marine fish, namely that they are a common property and renewable natural resource that is incapable of being spatially confined. Even though the Netherlands involvement in marine capture fisheries is mainly significant in a European context, this involvement is not a purely domestic affair. This article offers an overview of the international (legal) dimension of Netherlands fisheries and examines in this context the following four main issues: (1) fisheries access by foreign vessels to the Netherlands maritime zones; (2) access by Netherlands fishing vessels to the maritime zones of other states and the high seas; (3) residual regulatory (prescriptive) competence of Member States of the European Union (EU) in the conservation and management of fisheries in the context of the Common Fisheries Policy (CFP); and (4) participation by the Kingdom of the Netherlands in regional fisheries organizations (RFOs).

The main features of the fisheries access regime of the CFP within EU (Community) waters are equal access for Member States to each others maritime zones and exclusive access for the coastal state within a 12 nm coastal zone subject to limited access by Member States based on historic fishing rights or on prior bilateral arrangements. The bilateral arrangements relevant to the Netherlands are the 1958 Benelux Treaty in relation to Belgium and the 1960 Ems-Dollard Treaty in relation to Germany. The recent review of the CFP firmly upholds the equal access regime in EU waters, despite calls for an extension of the exclusive access regime. This makes it quite unique in a global context as coastal states commonly

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request to the European Commission as this would conflict with EU policy on fishing capacity (see also *supra* n. 144).

299. Cf., *CCAMLR's Management of the Antarctic*, in the Introduction section (text at <www.ccamlr.org>).

either reserve access to their maritime zones to their own vessels or grant (non-neighbouring) states access in return for (monetary) compensation.

Vessels flying the flag of the Netherlands also operate on the high seas and in the maritime zones of states that are not EU Members. In the latter case, this happens either by way of public access agreements between the EU (on behalf of its Member States) and the third state or by way of private access agreements between Netherlands companies and third states. An issue that arises in the maritime zones of developing states such as those in West Africa, where Netherlands fishing vessels operate as well, is whether states or entities other than the coastal state have a subsidiary responsibility for the over-exploitation of shared (coastal) stocks. As both EU law and the CFP now explicitly recognise that such a responsibility exists, the behaviour of the EU and its Member States will hopefully soon be aligned accordingly. The Netherlands has already taken some commendable initiatives in this respect.

Although the inception of the CFP meant that much of the legislative competence in marine capture fisheries was transferred to the EU, the Netherlands still retains a measure of residual competence. Some of this relates to the Netherlands Antilles and Aruba, which are part of the Kingdom of the Netherlands but not subject to the CFP. In addition, the main framework regulation for the CFP recognises that EU Member States have some residual competence in certain strictly defined circumstances. Even then, however, the European Commission may interfere. Other cases in which some residual competence is retained relate to marine mammals and unregulated species. Neither the 1958 Benelux Treaty nor the 1960 Ems-Dollard Treaty can be regarded as independent bases for residual competence but rather establish (very) basic regulatory frameworks that are allowed to co-exist alongside the CFP, provided they are compatible therewith.

The CFP also had a considerable impact on the participation of the Kingdom of the Netherlands in RFOs. As a general rule, the Kingdom of the Netherlands discontinued its membership of RFOs in order to be replaced by the EU, which would represent its Member States from then on. The main exceptions to this general rule relate to overseas countries or territories (OCTs) such as the Netherlands Antilles and Aruba, marine mammals (not covered by the CFP) and Antarctic marine living resources.

The article makes it clear that the Kingdom of the Netherlands is in part still an independent player in global fisheries. This brings along both opportunities and responsibilities. Financial opportunities that may come with an expansion of fishing activity should take account of a broad range of considerations. These are not confined to a risk assessment in view of the fishing opportunities in the medium and long term, but also extend to making sure that financial gains are not made at the cost of the interests of other states, peoples or the international community in sustainable use of marine living resources and safeguarding biodiversity. The long-

term overarching objective for the Kingdom of the Netherlands should continue to be that all the necessary measures are taken to maintain its reputation as a state that is committed to responsible fisheries and that acts in accordance with its obligations under international law.