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Fisheries

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(A) A FISHING MAJOR, BUT A FRAGILE GIANT

Spain, a world fishing major, ranks first among the EU Member States in total catch, aquaculture production, gross tonnage (for a modern and well-equipped fishing fleet), fishing industry employment, and fish and aquaculture product trade with third countries[1]. Spaniards, moreover, are among the world's most avid fish product consumers.

Spain is nonetheless a *géant fragile*[2], for, having no rich fishing grounds of its own, it has historically deployed and continues to deploy most of its effort in long-range fishing. For that reason, the establishment of national jurisdiction in areas of the sea has never been in its best interest[3]. In particular, Spain was very adversely affected by the consolidation of exclusive economic zone (EEZ) arrangements, which it (resignedly) accepted. In 1978, one year later than its European neighbours, Spain established an EEZ (although for its Atlantic coast only[4]) under the Act on Spanish Regulation of an Exclusive Economic Zone[5], undertaking what had become general practice and by then accepted as law. Prior to the country's 1986 accession to the European Communities, Spain had to conclude bilateral fishing agreements with third countries (such as Canada, United States, Norway, Portugal, Morocco, Mauritania or South Africa) and the European Economic Community itself to maintain its extractive capacity in other latitudes[6].

Spain's negotiating position on the EEZ during the Third United Nations Conference on the Law of the Sea was that any such zone should be contingent upon respect for the traditional fishing activities conducted by third countries in the fishing grounds affected[7]. Its position was reflected (as a

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1 European Commission, *Facts and figures on the Common Fisheries Policy. Basic statistical data* (2016 edition).

2 L. I. Sánchez Rodríguez, 'La pêche et les intérêts espagnols', in R. Casado Raigón (ed), *Europe and the Sea. Fisheries, Navigation and Marine Environment* (Bruylant, Brussels, 2005) 29, at 31.

3 Spain is a party to the four 1958 Geneva Conventions. Moreover, Spain was a negotiating State and party to the Fisheries Convention done at London on 9 March 1964 (581 *UNTS* 58), that contains a provision on the 6+6 proposal, which failed to pass at the Second United Nations Conference on the Law of the Sea by just one vote.

4 Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean (BOE No. 204, 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 (BOE No. 79, 1 April 2000). Subsequently Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean (BOE No. 92, 17 April 2013).

5 Law 15/1978, 20 February 1978, on the Economic Zone (BOE No. 46, 23 February 1978).

6 J. L. Meseguer Sánchez, *Acuerdos bilaterales de pesca suscritos por España* (Ministerio de Agricultura, Madrid, 1984).

7 J. D. González Campos, 'Las relaciones entre España y la CEE en materia de pesca', in F. Leita & T. Scovazzi, *Il regime della pesca nella Comunità Economica Europea* (Giuffrè, Milano, 1979), 131-169 at 139.

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last resort) in its declarations on the occasion of the LOSC signature, subsequently confirmed in its ratification instrument. Spain deemed that 'On the grounds of Articles 56, 61 and 62 of the Convention, the coastal State's powers to determine the allowable catch, the respective fishing effort and the allocation of surpluses to other States cannot be regarded as discretionary', and interpreted 'Articles 69 and 70 of the Convention to mean that access to fisheries in a third State's Exclusive Economic Zone by fleets of developed landlocked or geographically disadvantaged States is contingent upon the provision, by the coastal State at issue, of such access to the fleets of States that have traditionally fished in the Exclusive Economic Zone in question.' Its position, while understandable from the perspective of its interests, was not aligned with those of the other States or subsequent practice under the Convention[8].

(B) THE COMMON FISHERIES POLICY AND ITS REPERCUSSIONS FOR SPAIN

Spain's accession to the European Communities had a significant impact on the country's fishing industry, which, then as now, was much larger than any of the other member countries'. Spain adhered to the Common Fisheries Policy (CFP) upon accession in 1986, albeit under a transitory regime specified in the Act of Accession[9] whereby Spain was to receive differential and discriminatory treatment until its full integration in the CFP on 31 December 2002[10]. On the occasion of Austrian, Finnish and Swedish (and Norwegian) accession to the European Communities, however, Spain (and Portugal) negotiated full adherence to the CFP beginning in 1996, further to the terms of the aforementioned Act of Accession that empowered Council to adapt the transitory regime[11].

Today, the basic legislation on the subject is laid down in Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy[12], in effect since 1 January 2014. By virtue of its Article 1, the CFP shall cover: (a) the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources; [and] (b) in relation to measures on markets and financial measures in support of the implementation of the CFP: fresh water biological resources, aquaculture, and the processing and marketing of fisheries and aquaculture products. The CFP shall cover these activities where they are carried out: (a) on the territory of Member States to which the Treaty [TEU] applies; (b) in Union waters, including by fishing vessels flying the flag of, and registered in, third countries; (c) by Union fishing vessels outside Union waters; or (d) by nationals of Member States, without prejudice to the primary responsibility of the flag State. The CFP's primary objective is to ensure that fishing and aquaculture

8 See, for instance, G. Cataldi, 'La pêche dans les eaux soumises à la souveraineté ou à la juridiction des États côtiers', in D. Vignes, G. Cataldi and R. Casado Raigón, *Le droit international de la pêche maritime* (Bruylant, Brussels, 2000) 47, at 83-84 and 98.

9 OJ 1985 L 302/9 and BOE No. 1, 1 January 1986.

10 See, among others, L. I. Sánchez Rodríguez, 'El derecho de pesca en la CEE y el Acta de Adhesión de España', 15 *Revista de Instituciones Europeas* (1988) 9-43; G. Apollis, 'La règlementation des activités halieutiques dans l'acte d'adhésion de l'Espagne et du Portugal au traité CEE', *Annuaire français de droit international* (1985), 837-867.

11 Council Regulation (EC) nº 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal (OJ 1994 L 140/1).

12 OJ 2013 L 354/22.

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activities are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies. With respect to fisheries management specifically, the CFP shall apply the precautionary approach and the ecosystem-based approach[13]. One of the essential principles of this policy is equal access to waters and resources in all Union waters[14].

The marine areas under the jurisdiction of EU Member States are open to the Spanish fleet, subject, however, to the provisions of the conditions established in EU regulations and in particular to the allocation of fishing opportunities. That, in turn, entails application of the principle of (so-called) *relative stability*, which takes the particulars of the Spanish fishing industry into consideration. The necessary conservation measures call for limiting fishing opportunities and reducing the fishing fleet, which must be economically viable without overexploiting marine biological resources, a requirement that often constitutes a serious problem for Spanish politicians. Nonetheless, the rational and sustainable exploitation of those resources, both in waters under national jurisdiction and on the high seas, is essential for Spain to maintain its fishing expectations into the not-so-distant future[15].

(C) COMPETENCES OF THE EU AND OF SPAIN AS A MEMBER STATE

Further to the Treaty on the Functioning of the European Union (TFEU)[16], 'the conservation of marine biological resources under the common fisheries policy' is an area in which the Union has exclusive competence. In addition, it shares competence with the Member States in the area of 'agriculture and fisheries, excluding the conservation of marine biological resources'[17].

In all these areas, the EU is competent to conclude agreements with third countries and other subjects of international law. According to Article 216 (2) of the TFEU 'the agreements concluded by the Union are binding upon the institutions of the Union and on its Members States'. Two types of agreements can be defined: those that lie within the Union's exclusive competence (such as bilateral fishing agreements, to be discussed later, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas[18] or the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing[19]), and those in which it participates with all or some of its Member States. That is the case, for instance, of the LOSC, ratified by Spain in 1997 (along with its Community partners and the European Community itself) and the 1995 Agreement on straddling stocks and highly migratory fish stocks[20],

[13] Art. 2, Regulation 1380/2013. On these two approaches, see R. Casado Raigón, 'Nuevas tendencias en materia de conservación y gestión de los recursos marinos vivos', in J. M. Sobrino Heredia, *Mares y océanos en un mundo en cambio: Tendencias jurídicas, actores y factores* (Tirant lo Blanch, Valencia, 2007), 73-98, at 79-87.

[14] See the exceptions to this principle in Article 5, Regulation 1380/2013.

[15] See in this regard Sánchez Rodríguez, *supra* n. 2, at 37.

[16] OJ 2016 C 202/47.

[17] Articles 3 and 4.

[18] Adopted 24 November 1993, entered into force on 24 April 2003 (2221 *UNTS* 91).

[19] Entered into force on 5 June 2016. The Agreement was registered with the Secretariat of the United Nations on 26 January 2017 under No. I-54133, not yet officially published by *UNTS*.

[20] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10

ratified by Spain on 19 December 2003, the same day as the other EU countries[21] and the European Community itself. Such mixed agreements, which regulate matters whose competence is shared by the EU and its Member States or areas in which the EU has exclusive competence along with others for which the Member States are competent, consistently pose a practical problem that is not always readily solved. That problem affects not only the relationship between the Union and its Member States, but also their respective relationships with third countries and other international organisations[22].

The latter is an important issue, for it may affect a State's position on a proposal or emergent practice. In this regard, I sometimes feel that in the various (multilateral) fora in which both the EU and its Member States participate, Spain's voice (and that of other Member States with substantial fishing interests) in defence of its legitimate interest is barely audible or highly diluted in the European Commission's, a side effect of the ongoing debate on where competence lies. In such fora, the positions of Fiji and Cape Verde 'are reflected in the minutes'.

The declaration concerning competence included in the EC's (today the EU's) instrument of formal confirmation, provided for in Article 5 (1) of Annex IX of the LOSC, states that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. 'Hence in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organisations. This competence applies to waters under national fisheries jurisdiction and to the high seas'. The EU nonetheless acknowledges that 'in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States while respecting Community law'[23]. The EC's declaration concerning competence for all the matters governed under the aforementioned 1995 Agreement[24] is set out in similar terms.

In particular, on the occasion of its ratification of that Agreement, the EC reiterated that its competence did not cover measures relating to the exercise of jurisdiction by the flag State over its vessels on the high seas. The problems referred to earlier are illustrated by an incident involving the vessel *Estai* (1995), intercepted and boarded on the high seas by Canadian Government vessels and subsequently brought to a port in Canada. Broadly speaking, the dispute over this detention revolved around two issues[25]. One, relating to fishing in the NAFO regulatory area[26] and hence under the EU's

December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Adopted 4 August 1995, entered into force 11 December 2001 (2167 UNTS 3).

[21] With the exception of the United Kingdom, which had ratified it on 10 December 2001.

[22] R. Casado Raigón, 'La dimension internationale de la compétence de l'Union européenne en matière de pêche', in J. Crawford et al. (eds), *The International Legal Order: Current Needs and Possible Responses. Essays in Honour of Djamchid Momtaz* (Brill/Nijhoff, Leiden/Boston, 2017) 288, at 289-293.

[23] See declaration in Council Decision 98/392/EC of 23 March 1998, OJ 1998 L 179/1.

[24] See declaration in Council Decision 98/414/EC of 8 June 1998, OJ 1998 L 189/14.

[25] See R. Casado Raigón, 'La pêche en haute mer', in D. Vignes, G. Cataldi and R. Casado Raigón, *Le droit international de la pêche maritime* (Bruylant, Brussels, 2000), 117-242, at 139-147.

[26] North-West Atlantic Fisheries Organisation.

exclusive competence, was settled by Canada and the EU[27]. The other involved the exercise of jurisdiction on the high seas. In this second respect, Spain filed an application to institute proceedings against Canada with the ICJ Registry. In its Judgment of 4 December 1998, the Court found that it had no jurisdiction to adjudicate in the case because the dispute between Spain and Canada was within the terms of one of the reservations in a Canadian declaration made under Article 36 (2) of the Statute of the ICJ. That judgement, in my view, is not flawless, although Spain unquestionably adopted a mistaken approach in its application[28].

(D) HIGH SEAS FISHERIES

Given the country's substantial (present and future) interest in high seas fisheries, Spain should, in conjunction with the EU, seek to ensure rational and sustainable management of such fisheries within the framework of regional fisheries management organisations (RFMOs). The LOSC attributes an important role to institutionalised cooperation in this area, and the Agreement on straddling stocks and highly migratory fish stocks and other more recent multilateral regulatory instruments rightly place cooperation channelled through RFMOs at the hub of the conservation and management of marine biological resources. In light of the EU's exclusive competence in the area of fisheries, neither Spain nor any of the other Member States participates simultaneously in most of these organisations. At this time, the EU, represented by the Commission, plays an active role in six tuna organisations and eleven other RFMOs[29] Nonetheless, Spain and some other Member States participate in a few organisations together with the EU. These include the Convention on Conservation of Antartic Marine Living Resources (CCAMLR), the General Fisheries Commission for the Mediterranean (GFCM), the Western Central Atlantic Fisheries Commission (WECAFC) and the Fisheries Committee for the Eastern Central Atlantic (CECAF). However, the latter two (instituted under the provisions of Article VI of the FAO Constitution) have a merely advisory mission. CCAMLR, in turn, forms an integral part of the Antarctic Treaty[30], of which the EU is not a contracting party, even though Article XXIX of the CCAMLR provides that it 'shall be open for accession by regional economic integration organisations constituted by sovereign States which include among their members one or more States members of the Commission and to which the States members of the organisation have transferred, in whole or in part, competences with regard to the matters covered by this Convention'. Lastly, Council Decision of 16 June 1998 on the accession of the EC to the GFCM (instituted under the provisions of Article XIV of the FAO Constitution) contains a single declaration on the exercise of competence and voting rights[31]. Conversely, Spain and a few other Member States participate in other organisations in which the EU does not. One, the International

[27] See text of the Agreement in OJ 1995 C 239/8-19.

[28] *Fisheries Jurisdiction (Spain v. Canada). Jurisdiction of the Court, Judgment of 4 December 1998, ICJ Reports* 1998, p. 432. See the papers on this case authored by professors A. Fernández Tomás, F. J. Quel López, F. Jiménez García, R. Casado Raigón, J. Juste Ruiz y C. Fernández de Casadevante published in *REDI*, 1999-1, pp. 89 ss.

[29] https://ec.europa.eu/fisheries/cfp/international/rfmo_en.

[30] Adopted 1 December 1959, entered into force 23 June 1961 (402 *UNTS* 72).

[31] Decision 98/416/EC, OJ 1998 L 190/34.

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Whaling Commission (IWC), which is neither regional nor engages in whaling, has a foundational charter[32] that envisages accession by States only. Another, the International Council for the Exploration of the Sea (ICES), focuses essentially on scientific research and likewise provides for State participation only.

(E) BILATERAL FISHERIES AGREEMENTS

One of the main objectives of the latest reform of the CFP is to defend the principles of sustainable and responsible fishing and their extension across the globe, in both high seas fishing channelled through RFMOs and activities conducted by Union fishing vessels (and by nationals of Member States) in waters under third country jurisdiction[33]. The latter are primarily the outcome of agreements between the EU and those countries. Two types of such agreements are in effect at this time: the so-called 'northern agreements' for the joint management of shared stocks in the North Sea and Northwest Atlantic Ocean, concluded with Norway, Iceland and the Faeroe Islands, and the 'sustainable fisheries partnership agreements', concluded with African countries, Greenland and the Cook Islands, whereby Community vessels can fish surplus resources in the respective country's EEZ. The new CFP, committed to the effective application of the LOSC, provides that by virtue of such agreements Community vessels 'shall only catch surplus of the allowable catch as referred to in article 62 (2 and 3) of the [LOSC], and identified on the basis of the relevant information exchanged between the Union and the third country about the total fishing effort on the affected stocks by all fleets'[34].

The EU's bilateral relations clearly favour the Spanish fleet in seas located south of Community waters. Outside the northern and Greenland agreements, Spain has benefited far more than any other Member State (followed by France) from all tuna or multi-species fisheries partnership agreements in force or that have been in force until recently. Agreements of this nature have been concluded with Cape Verde, Comoros, Cook Islands, Côte d'Ivoire, Gabon, Liberia, Madagascar, Mauritius, Sao Tomé and Principe, Senegal, Seychelles, Guinea-Bissau, Mauritania and Morocco.

All the partnership agreements presently in force include a so-called exclusivity clause. Further to the new CFP[35], when a partnership agreement is in force, Union fishing vessels shall not operate in the waters of the third country unless they are in possession of a fishing authorisation which has been issued in accordance with that agreement. With this clause, the Union aims to encourage sustainable and responsible fishing in third country waters and prevent Community vessels from eluding CFP rules via private arrangements which, in practice, may lead to overfishing in waters where the sustainability of fish stocks is not ensured[36].

[32] The International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) (161 *UNTS* 74).

[33] Article 28, Regulation 1380/2013.

[34] Regulation 1380/2013, Art. 28.

[35] Regulation 1380/2013, Article 31(5) and (6)(b).

[36] See Casado Raigón, *supra* n. 22, at 306-307.

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(F) JOINT ENTERPRISES

One key element in Spain's fishing industry continues to be *joint enterprises*[37], defined under Regulation 3944/90 as a 'company incorporated under private law comprising one or more Community ship-owners and one or more partners from a third country with which the Community maintains relations, associated under a joint enterprise agreement set up for a purpose of exploiting and, where appropriate, using the fishery resources of waters falling within the sovereignty and/or jurisdiction of such third country, primary consideration being given to the supply of the Community market'[38]. As the CFP evolved, such arrangements came to be defined exclusively as an alternative instrument of structural fisheries policy to scrapping or exporting vessels[39] and since 31 December 2004, joint enterprises have practically disappeared from the EU's fisheries structural policy[40]. Today, as attested to by Regulation 1380/2013, they lie in a legal void. They are regarded simply as foreign companies in which EU partners are involved, with an engagement to prioritise EU supply and to transmit information regularly; their only protection is that provided by bilateral treaties for the mutual protection of investments between the source Member State and the beneficiary third country[41]. Irrespective of the suitability or otherwise of maintaining a specific policy for joint fisheries enterprises in the context of the CFP, arrangements involving Spanish capital are being actively implemented in over 20 coastal countries, where they are (or could be) contributing to economic and social development and can (or could) encourage responsible and sustainable fishing[42].

(G) SPANISH FISHERIES LAW

Since 2001, Spain, in the framework of EU competence (and today in particular, of Regulation 1380/2013[43]), has a State Law on Marine Fisheries: Act 3/2001 of 26 March has undergone a number of amendments, the most recent in December 2014[44]. Until that time, Spanish fisheries legislation was

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37 See J. M. Sobrino Heredia, "Hacia una pesca responsable y sostenible: el papel de las empresas mixtas pesqueras", in J. M. Sobrino Heredia (dir.), *La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación d las gentes del mar* (Bomarzo, Albacete, 2016), 479-495, and J. M. Sobrino Heredia & A. C. Bürgin, *La colaboración multi-actores en la cooperación al desarrollo en el sector pesquero* (Colección Derecho Europeo, no. 3, Instituto Universitario de Estudios Europeos "Salvador de Madariaga", A Coruña, 2016), at 144-153.

38 Council Regulation (EEC) 3944/90, of 20 December 1990, amending Regulation (EEC) 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture sector. OJ 1990 L 380/1. Article 21 (a).

39 Regulations (EEC) 2080/93 (OJ 1993 L 193/1) and 3699/93 (OJ 1993 L 346/1).

40 Council Regulation (EC) 2369/2002 (OJ 2002 L 258/49).

41 Opinion of the European Economic and Social Committee on Joint enterprises in the fisheries sector: current state of play and future prospects (JO 2006 C 65/46).

42 Spain's State Law on Marine Fisheries, discussed below, stresses the importance of joint enterprises as a policy tool for regulating the fishing industry. Further to its Article 41, that policy is implemented, among others, through measures to encourage the creation of joint enterprises and others for accessing third countries' fisheries resources. Pursuant to Article 64 of the law, such measures are to be adopted by the Central Government, after deliberating with the autonomous regions, with a view to accessing the aforementioned resources and improving EU market supply. The Ministry of Agriculture, Fishing and Food keeps a public registry of these enterprises

43 Regulation (EU) 1380/2013, like all EU regulations, is binding in its entirety and directly applicable in Spain (Article 288 TFUE).

44 Law 33/2014, 26 December 2014, amending Law 3/2001, 26 March 2001, on Marine Fisheries (BOE No. 313, 27

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insufficient, disperse, heterogeneous and informed not by strategic but merely circumstantial considerations[45]. It is at least surprising that a country with such a long tradition and such a significant interest in the industry had no such law until the 'third millennium of the common era'[46].

After the Spanish Constitution (CE) of 1978, the State has exclusive competence in 'sea fisheries, without prejudice to the competences attributed to the autonomous regions for regulation of the industry'[47]. The autonomous regions may assume competence in inland waters, shellfish fisheries and aquaculture[48]. On those grounds, Spain's fisheries law establishes a general regulatory framework for: marine fisheries in 'exterior waters'[49], fishing industry regulation, fish product trade and processing[50], fisheries and oceanographic research[51] and infringements and penalties. Obviously, whether or not the matters involved are covered by Spanish domestic laws, the provisions of the LOSC, the agreements concluded by Spain and the agreements concluded by EU[52] remain applicable insofar as they are also part of the law of that country[53].

December 2014).

45 L. I. Sánchez Rodríguez, *España y el régimen internacional de la pesca marítima* (Tecnos, Madrid, 1986) at 29.

46 J. Juste Ruiz, 'La Ley 3/2001, de 26 de marzo, de pesca marítima del Estado: Análisis y evaluación', 54 *REDI* (2002) at 95.

47 Article 149(1)(19) CE

48 Article 148(1)(11) CE.

49 The Law (Article 4) defines this term to include waters subject to Spanish sovereignty or jurisdiction, with the exception of internal waters, other EU Member States' and third countries' sovereign waters or waters under their jurisdiction and the high seas. Scantly aligned with the LOSC, in which it is not envisaged, the term 'exterior waters' was coined by Spain's Constitutional Court in its interpretation of the constitutional division of competence in marine and internal fisheries between the central and regional governments. See Juste Ruiz, *supra* n. 46, at 101.

50 Further to the provisions of Article 149(1)(13) and (1)(10) CE.

51 Further to the provisions of Article 149(1)(15) CE.

52 Article 216 (2) TFEU.

53 Article 96 (1) CE.

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