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CHAPTER 12

THE EUROPEAN UNION AND THE CONSERVATION AND MANAGEMENT OF DEEP-SEA FISHERIES

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RÉSUMÉ: *Ce chapitre abordera la question de la contribution de l'Union européenne (UE) à la conservation et à la gestion des pêches en eaux profondes, tant dans ses eaux que dans les zones marines situées au-delà de la juridiction nationale (ABNJ). Les activités de pêche menées par l'UE au cours des dix dernières années et la portée juridique des divers documents adoptés par celle-ci dans ce domaine ont révélé l'existence de problèmes graves et complexes en matière de pêche hauturière. Actuellement, la conservation et la gestion des pêcheries hauturières sont des questions d'actualité dans les agendas de pêche de l'UE et de plusieurs organisations régionales de gestion des pêches. Ce chapitre sera divisé en deux parties afin d'examiner la question de la contribution de l'UE à la conservation et à la gestion de la pêche en eau profonde à la fois dans ses eaux et dans les ZAJN.*

Mots-clés: *Union européenne; pêche en haute mer; préservation; gestion; organisations régionales de gestion des pêches.*

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ABSTRACT: *This chapter will address the issue of the European Union's (EU's) contribution to the conservation and management of deep-sea fisheries both in its waters and in marine areas beyond national jurisdiction (ABNJs). The fishing activities performed by the EU in the last ten years and the legal scope of various documents adopted by it in this field have revealed the existence of serious and complex problems in deep-sea fisheries. Currently, the conservation and management of deep-sea fisheries are highly topical issues on the fishing agendas of both the EU and several regional fisheries management organizations. This chapter will be divided into two parts in order to address the issue of the EU's contribution to the conservation and management of deep-sea fisheries both in its waters and in ABNJs.*

Keywords: *European union; deep-sea fisheries; conservation; management; regional fisheries management organizations.*

1. INTRODUCTION

The European Union (EU) is a maritime peninsula surrounded by two oceans (the Atlantic and the Arctic) and four seas (the Baltic Sea, North Sea, Mediterranean Sea and Black Sea). Its coastline, which spans 68,000 km across 23 of its 28 Member States, is the longest on the planet¹. European welfare and prosperity depend in large part on the state of these marine spaces and their natural resources.

The EU's fishing activity has significant biological, economic and social dimensions, which play a core role in many of its regions. A few figures may help to underscore the extent of its importance. The EU's fish market ranks first in the world; it is the largest consumer of fishing products of great economic value². The EU also has one of the world's largest fishing fleets. More than 86,000 fishing vessels fly the flag of an EU Member State, of which 74% pertain to the EU's small-scale coastal fleet, 25% to its large-scale fleet, and 1% to its distant-water fleet³. Some 260,000 fishermen work on board these vessels⁴.

Currently, approximately 25% of EU fishing catches are made in international waters or waters under the jurisdiction of third countries, approximately 8% are enabled by fisheries agreements with third countries, and approximately 20% are made in the high seas, basically in areas under the jurisdiction of regional fisheries management organizations or arrangements (RFMO/As). Some such organizations or arrangements refer to tuna stocks or mixed fish stocks, whilst others

¹ The EU's coastline is more than three times as long as that of the United States of America and almost twice as long as Russia's. See http://www.eea.europa.eu/themes/coast_sea/intro (accessed 1 October 2018).

² ASSEMBLÉE NATIONALE (2013), «Rapport d'information déposé par la Commission des Affaires Européennes sur la réforme de la politique commune de la pêche, et présenté par Mme Annick Girardin et M. Didier Quentin», Paris, Assemblée Nationale.

³ EUROPEAN COMMISSION (2018), «The EU Fishing Fleet: Facts & Figures», Brussels.

⁴ It is estimated that each fisherman generates between four and five jobs on land in different industries related to the fishing sector, such as: in the processing, packaging, transport and marketing industries, in shipyards, in the manufacture of fishing gear, in supply and maintenance companies of the fishing fleet, etc.

have certain competences in relation to demersal fish stocks. Unsurprisingly, the EU has a keen interest in participating in the conservation and management of fish stocks⁵.

One of the main difficulties in analysing deep-sea fisheries is the lack of a unanimously accepted definition of their scope. Several international organizations such as the United Nations (UN), the Food and Agriculture Organization (FAO), various RFMOs and the EU itself have placed different limits on the depth at which this economic activity can be carried out based on specific criteria and the available scientific data⁶. For instance, some FAO documents define deep-sea fishing as fishing conducted at depths of 500 metres or more⁷. Some RFMOs such as the North East Atlantic Fisheries Commission (NEAFC) use a minimum depth of 200 metres, as affirmed by the International Council for the Exploration of the Sea (ICES)⁸, and define a list of deep-sea species consisting of 27 fish species and 23 shark and ray species⁹. Still others, such as the Northwest Atlantic Fisheries Organization (NAFO), neither use nor define the concept of «deep-sea fisheries» at all¹⁰. The EU seems to have chosen to identify certain species¹¹ in order to define deep-sea fisheries activities based on a range of biological factors¹².

There are currently more than forty RFMO/As in the international arena¹³. The EU belongs to six tuna organizations and eleven non-tuna organiza-

⁵ For an overview of these issues, see ANTONOVA, A. (2015), «Reforming European Union Participation in Fisheries Management and Conservation on the High Seas», *Ocean Yearbook*, 29, 125-143; CHURCHILL, R., and OWEN, D. (2010), *The EC Common Fisheries Policy*, Oxford, Oxford University Press, especially 75-128 and 359-397.

⁶ For a detailed analysis of the role played by different international organizations in relation to the international and regional regulation of deep-sea fisheries, see OANTA, G. A. (2018), «International Organizations and Deep-Sea Fisheries: Current Status and Future Prospects», *Marine Policy*, 87, 51-59.

⁷ «FAO's Input to the UN Secretary-General's Comprehensive Report for the 2016 Resumed Review Conference on the UN Fish Stocks Agreement Food and Agriculture Organization of the United Nations» (2016), <http://www.un.org/>.

⁸ COOPERATIVA DE ARMADORES DE PESCA DEL PUERTO DE VIGO (2016), «Report on Fisheries Management in International Deep Sea Waters and Its Biodiversity Conservation», 8-9.

⁹ EUROPEAN COMMISSION. DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2014), «Deep-sea Fishing. In-depth Analysis», Brussels (IP/B/PECH/IC/2013-182), 13.

¹⁰ For example, cod and redfish are caught in the range between 200 and 600 metres, whilst Greenland halibut, which is considered the true deep-sea fishery in the NAFO, is caught at depths between 700 and 1,600 metres. In this regard, see «Deep-sea Fishing. In-depth Analysis», *doc. cit.*, 13.

¹¹ Such as, amongst others: alfonosinos, gulper sharks, black dogfish, mouse cats hark, velvet belly, deep-water red crab, large-eyed rabbit fish, round nose grenadier, orange roughly, blue ling, common mora, Greenland halibut, Arctic skate, greater eel pout, etc. See: Annex I of Regulation (EU) 2016/2336 of the European Parliament and of the Council of 14 December 2016 establishing specific conditions for fishing for deep-sea stocks in the north-east Atlantic and provisions for fishing in international waters of the north-east Atlantic and repealing Council Regulation (EC) n° 2347/2002, OJ L 354/1, 23.12.2016.

¹² Namely, maturation at relatively old ages, slow growth, long life expectancies, low natural mortality rates, intermittent recruitment of successful year classes and spawning that may occur every year. See Article 3(1) of Regulation (EU) n° 2016/2336.

¹³ There is currently no international legal text containing an internationally accepted definition of RFMO/A. However, an RFMO is considered to be an international intergovernmental organization or arrangement with a specific scope, created by means of an international treaty, and given powers to adopt measures for the conservation and management of certain areas of the high seas. For a more detailed analysis of the role of RFMO/As, see HINOJO ROJAS, M. (2016), «El acceso de terceros Estados a las Organizaciones internacionales

tions¹⁴. However, only eight have competences in the field of the conservation and management of deep-sea fisheries, of which the EU is party to seven. The measures adopted by these RFMOs are binding on their members. Hence, the EU must implement similar measures in its secondary law. However, every area of the high seas for which an RFMO has been established has unique characteristics that differentiate it from the rest. Their actions regarding deep-sea fisheries can thus vary considerably.

Against this backdrop, this chapter will first focus on current EU law on deep-sea fisheries in the waters under the jurisdiction of its Member States (Section 1). It will then examine the work the EU has done to date in the framework of various RFMOs with competences in the field of deep-sea fisheries (Section 2).

2. CURRENT EUROPEAN LAW ON DEEP-SEA FISHERIES IN WATERS UNDER THE JURISDICTION OF ITS MEMBER STATES

The conservation and management of deep-sea fisheries in the marine areas of the two oceans and four seas surrounding the EU's coast are governed, first, by the general rules of the Common Fisheries Policy (CFP) and, second, by the specific legal framework applied to EU fishing vessels involved in deep-sea fisheries.

Regarding the general rules of the CFP that apply to deep-sea fisheries, Article 3(1)(d) of the Treaty on Functioning of the European Union (TFEU) provides that the EU has exclusive competence in the area of the conservation of fisheries resources. However, Article 4(2)(d) TFEU provides for shared competence between the EU and its Member States in the other areas of fisheries. This has al-

de pesca: una cuestión a revisar», in SOBRINO HEREDIA, J. M. (ed.), *La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación de las gentes del mar*, Ed. Bomarzo, 167-189; ROCHETTE, J. et al. (2014), «The Regional Approach to the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction», *Marine Policy*, 49, 109-117; TAKEI, Y. (2013), *Filling Regulatory Gaps in High Seas Fisheries. Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems*, Martinus Nijhoff Publishers, 136-198; VÁZQUEZ GÓMEZ, E. M. (2002), *Las organizaciones internacionales de ordenación pesquera: la cooperación para la conservación y la gestión de los recursos vivos del alta mar*, Consejería de Agricultura y Pesca de la Junta de Andalucía.

¹⁴ The European Commission adopted two Communications regarding the EU's participation in RFMOs offering significant information on the EU's commitment to conservation and management of the high seas. See COM(2011) 424 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on External Dimension of the Common Fisheries Policy*, Brussels, 13.07.2011; COM(2009) 613, *Communication from the Commission to the European Parliament on the Community participation in Regional Fisheries Organisations (RFOs)*, Brussels, 8.12.1999. On the EU's participation in various RFMOs, see CHURCHILL, R., and OWEN, D., *op. cit.*, 359-368; FRANCKX, E., and VAN DEN BOSSCHE, K. (2010), «The Role of the European Union in Regional Fisheries Organizations», in RUSSELL, D. A., and VAN DER ZWAAG, D. L. (eds.) (2010), *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles. Canadian and International Perspectives*, Martinus Nijhoff Publishers, 419-448; MÜLLER, S. (2012), «The Legal Framework Governing the EU's Fisheries Activities in Western Africa», in CZYBULKA, D. (Hrsg.) (2012), *Marine Nature Conservation and Management at the Borders of the European Union*, Nomos, 49-55; PENAS LADO, E. (2016), *The Common Fisheries Policy. The Quest for Sustainability*, Wiley Blackwell, 152-161.

lowed it, internally, to equip itself with an extensive set of regulations under the umbrella of the CFP and, externally, to be present and defend its fisheries interests in all the international fora.

Under Article 1(2) of Regulation (EU) n° 1380/2013¹⁵, the current framework regulation for the CFP, the EU's competence in the area of the conservation of fisheries resources is not limited solely to the maritime waters under the sovereignty or jurisdiction of its Member States, but also includes the fisheries activities of EU fishermen and fishing vessels in the waters of third countries and in the high seas¹⁶. Regulation (EU) n° 1380/2013 is supplemented by Regulation (EC) n° 1224/2009 on the control system for ensuring compliance with the rules of the CFP¹⁷, as well as by the provisions of the EU's system to combat IUU fishing in accordance with Regulation (EC) n° 1005/2008¹⁸. In the last decade, this regulation was supplemented in particular by Regulation (EC) n° 1006/2008 concerning authorizations for fishing activities of Community fishing vessels outside Community waters and the access of third-country vessels to Community waters¹⁹, which has since been repealed by Regulation (EU) 2017/2403 on the sustainable management of external fishing fleets²⁰.

It is worth mentioning that Regulation (EC) n° 1224/2009 contains a specific article dedicated to demersal catches subject to multiannual plans. Specifically, Article 44 provides that, in the case of EU fishing vessels of 12 metres' length or more, deep-sea fisheries catches subject to a multiannual plan have to be placed in boxes, compartments or containers separately for each such stock. This obligation is ultimately intended to ensure proper identification of such catches. The Article also prohibits the retaining on board of demersal stocks subject to a multiannual plan mixed with other fish products. In addition, it establishes a specific obligation for the masters of the EU's fishing vessels regarding the stowage plan setting out the location of the different species in the holds.

¹⁵ Regulation (EU) n° 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) n° 1954/2003 and (EC) n° 1224/2009 and repealing Council Regulations (EC) n° 2371/2002 and (EC) n° 639/2004 and Council Decision 2004/585/EC, *OJ L 354/22*, 28.12.2013. For a detailed presentation of this act, see OANTA, G. A. (2016), «La Política Pesquera Común», in ORTEGA GÓMEZ M. (ed.), *Las políticas de la Unión Europea en el siglo XXI*, Bosch Editor, 132-149.

¹⁶ For a detailed analysis of the EU's competence in the field of the conservation and management of fisheries, see SOBRINO HEREDIA, J. M. (2009), «La politique communautaire de conservation et gestion des ressources halieutiques et quelques problèmes concernant l'application du droit de l'Union européenne», in CASADO RAIGÓN, R., et CATALDI, G. (eds.) (2009), *L'évolution et l'état actuel du droit international de la mer. Mélanges de droit de la mer offerts à Daniel Vignes*, Bruylant, 865-885.

¹⁷ *OJ L 343/1*, 22.1.2009. For an in-depth analysis of this regulation, see REY ANEIRO, A. (2011), «Compleja reforma integral del Sistema de control de la Política Pesquera Común», *Revista General de Derecho Europeo*, 23, 1-20.

¹⁸ *OJ L 286/1*, 29.10.2008.

¹⁹ *OJ L 286/33*, 29.10.2008.

²⁰ *OJ L 347/81*, 28.12.2017. For an overview of this act, see TEJO GARCÍA, C. (2017), «La dimensión externa de la política de pesca común y la protección de los recursos marinos vivos en aguas extracomunitarias», in PUEYO LOSA, J., y JORGE URBINA J. (coords.) (2017), *La reforma de la gobernanza pesquera internacional y europea*, Thomson Reuters-Aranzadi, 150-154.

Thus, the general legal framework applicable to the conservation and management of deep-sea fisheries is supplemented by specific, highly technical rules, which are applied to the fishing vessels for certain deep-sea species within the EU's waters. There are currently three main regulations in this field, namely: Council Regulation (EU) 2016/2285 of 12 December 2016 fixing for 2017 and 2018 the fishing opportunities for Union fishing vessels for certain deep-sea fish stocks and amending Council Regulation (EU) 2016/72²¹; Regulation (EU) 2016/2336 of the European Parliament and of the Council of 14 December 2016 establishing specific conditions for fishing for deep-sea stocks in the north-east Atlantic and provisions for fishing in international waters of the north-east Atlantic and repealing Council Regulation (EC) n° 2347/2002²²; and Council Regulation (EU) 2018/120 of 23 January 2018 fixing for 2018 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, and amending Regulation (EU) 2017/127²³.

Undoubtedly, the adoption of Regulation (EU) 2016/2336 establishing specific conditions for fishing for deep-sea stocks in the north-east Atlantic and provisions for fishing in international waters of the north-east Atlantic has been a very sensitive issue. Industry players maintain that there are currently not enough scientific data to support the legal innovations regarding deep-sea fisheries adopted by the EU, such as the prohibition of fishing activities with bottom trawls at a depth below 800 metres. Moreover, there are concerns that this ban on issuing authorizations for such fishing activities is merely a first step and that the EU will try to promote the new limit in other RFMOs to which it is party. Certainly, it seems unlikely that the EU wants to be seen as applying a double standard on this point. Special attention will be paid to this regulation in Section 2 of this chapter as it contains provisions that apply to those waters of the north-east Atlantic that are under the jurisdiction of the EU's Member States as well as to those waters from the north-east Atlantic, which are under NEAFC jurisdiction. Therefore, this paper will look at the most significant aspects of this secondary law when presenting the NEAFC's activity in relation to the conservation and management of deep-sea fisheries.

3. THE EUROPEAN UNION'S PARTICIPATION IN THE REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS WITH COMPETENCES IN THE FIELD OF DEEP-SEA FISHERIES

The EU is currently party to seven RFMOs involved into the conservation and management of deep-sea fisheries, namely: the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)²⁴, the General Fisheries Com-

²¹ OJ L 344/32, 17.12.2016.

²² Regulation (EU) 2016/2336, *doc. cit.*

²³ OJ L 27/1, 31.01.2018.

²⁴ Council Decision 81/691/EEC of 4 September 1981 on the conclusion of the Convention on the conservation of Antarctic marine living resources, OJ L 252/26, 5.09.1981.

mission for the Mediterranean (GFCM)²⁵, the NAFO²⁶, the NEAFC²⁷, the South East Atlantic Fisheries Organization (SEAFO)²⁸, the South Indian Ocean Fisheries Agreement (SIOFA)²⁹, and the South Pacific Regional Fisheries Management Organization (SPRFMO)³⁰. The North Pacific Fisheries Commission (NPFC) is the eighth RFMO with competences in the field of conservation and management of deep-sea fisheries; however, the EU is not amongst its members.

These international organizations have specific features that differentiate them from each other, and their actions vary considerably. This can be seen, for instance, in the collection of statistics on fisheries resources and deep-sea fishing, the assessment of fisheries resources in each RFMO's convention area, the adoption of measures related to deep-sea fisheries resources and the protection of marine biodiversity, etc. Against this background, this part of the chapter will first examine several institutional aspects of the EU's participation in the operations of these seven RFMOs in the field of deep-sea fisheries (Subsection 3.1), so as then to focus on the work these RFMOs have done to date in relation to the conservation and management of deep-sea fisheries (Subsection 3.2).

3.1. Institutional aspects of the EU's participation in the RFMOs with competences in the field of conservation and management of deep-sea fisheries

Three aspects in particular of the EU's participation in the operations of the RFMOs with competences in the field of conservation and management of deep-sea fisheries are especially significant for the purposes of this chapter. First, several regulations laying down certain provisions for fishing in several RFMO convention areas have been agreed. Second, the European Commission has published various proposals for decisions on the position to be adopted, on behalf of the EU, in each RFMO in recent years. Third, numerous actions have been brought before the Court of Justice of the European Union (CJEU) concerning regulations adopted by the EU on its fishing activities in the marine areas under the jurisdiction of different RFMOs.

²⁵ Council Decision 98/416/EC of 16 June 1998 on the accession of the European Community to the General Fisheries Commission for the Mediterranean, OJ L 190/34, 4.07.1998.

²⁶ Council Regulation (EEC) n° 3179/78 of 28 December 1978 concerning the conclusion by the European Economic Community of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, OJ L 378/1, 30.12.1978.

²⁷ Council Decision 81/608/EEC of 13 July 1981 concerning the conclusion of the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, OJ L 227/21, 12.08.1981.

²⁸ Council Decision 2002/738/EC of 22 July 2002 on the conclusion by the European Community of the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, OJ L 234/39, 31.08.2002.

²⁹ Council Decision 2008/780/EC of 20 September 2008 on the conclusion, on behalf of the European Community, of the Southern Indian Ocean Fisheries Agreement, OJ L 268/27, 9.10.2008.

³⁰ Council Decision 2012/130/EU of 3 October 2011 on the approval, on behalf of the European Union, of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, OJ L 67/1, 6.03.2012.

With regard to the adoption of regulations laying down provisions for fishing in RFMO convention areas, the EU has adopted secondary laws concerning the GFCM, the NEAFC and the SPRFMO. On 13 December 2011, the European Parliament and the Council adopted Regulation (EU) n° 1343/2011 on certain provisions for fishing in the GFCM Agreement area³¹, which amended Council Regulation (EC) n° 1967/2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea³². Articles 10 and 11 of Regulation (EU) n° 1343/2011 contain specific provisions regarding the fishing activity and protection of deep-sea sensitive habitats. European lawmakers opted to prohibit fishing with towed dredges and bottom trawl nets in three deep-sea fisheries restricted areas, namely, «Lophelia reef off Capo Santa Maria di Leuca», «The Nile delta area cold hydrocarbon seeps» and «The Eratosthenes Seamount» (Article 10). The regulation also establishes the obligation for the Union's Member States to ensure the protection of the deep-sea sensitive habitats in the aforementioned marine areas in particular from the impact of any activity that could jeopardize the conservation of any characteristic feature of those habitats (Article 11).

Additionally, in December 2016 the EU introduced a highly sensitive reform in relation to deep-sea fisheries in the north-east Atlantic waters, namely, Regulation (EU) 2016/2336, adopted by the European Parliament and the Council on 14 December 2016, which entered into force on 12 January 2017³³. The regulation affects deep-sea fishing activities whether they are conducted in waters under the jurisdiction of EU Member States or in international waters of this part of the Atlantic Ocean, where the NEAFC was established some years ago. Although only a handful of EU Member States engage in deep-sea fishing primarily, Portugal, France and Spain and it accounts for just 1% of all landings from the North Atlantic, the economy of certain regions of the Union depends on it to some degree.

The legislative process for the adoption of this secondary law by the EU began on 19 July 2012 with the publication, by the Commission, of a proposal for a regulation on this subject³⁴, intended to replace Regulation (EC) n° 2347/2002³⁵. Following long, arduous and intense negotiations, on 14 July 2016, the Commission, the Council and the European Parliament agreed the text of the Proposal for a regulation establishing specific conditions for fishing for deep-sea stocks in the North-East Atlantic and provisions for fishing in international waters of the North-

³¹ OJ L 347/44, 30.12.2011.

³² OJ L 409/11, 30.12.2006.

³³ Regulation (EU) n° 2016/2336, *doc. cit.* For a detailed analysis of this reform, see OANTA, G. A. (2017), «The European Union's Reform of Deep-Sea Fisheries in the North-East Atlantic», *The International Journal of Marine and Coastal Law*, 32, 589-600.

³⁴ COM(2012) 371 final, *Proposal for a Regulation of the European Parliament and of the Council establishing specific conditions to fishing for deep-sea stocks in the North-East Atlantic and provisions for fishing in international waters of the North-East Atlantic and repealing Regulation (EC) n° 2347/2002*, Brussels, 19.07.2012.

³⁵ Council Regulation (EC) n° 2347/2002 of 16 December 2002 establishing specific access requirements and associated conditions applicable to fishing for deep-sea stocks, OJ L 351/6, 28.12.2002.

East Atlantic and repealing Regulation (EC) n° 2347/2002. Shortly after, on 18 October 2016, the Council adopted its position and, one week later, the Commission sent the modified proposal for a regulation and communicated its opinion on the Council's position on the matter to the European Parliament.

The adoption of Regulation (EU) 2016/2336 was a watershed moment in the management of deep-sea fisheries in the north-east Atlantic. This is due not so much to the specific access requirements and conditions applicable to deep-sea fisheries (which were already provided for under Regulation (EC) n° 2347/2002) as to the fact that it provides that deep-sea fishing in the north-east Atlantic requires a specific authorization indicating the deep-sea fish species that each vessel is authorized to fish. The provision excludes vessels «for which the overall recording of deep-sea species in the calendar year concerned is less than 10 tonnes» (Article 5). Fishing vessels are deemed to target deep-sea species if their communications about their catches in a given calendar year contain «at least 8% of deep-sea species in any fishing trip» (Article 5). Furthermore, authorizations are not issued for «fishing with bottom trawls at a depth below 800 meters» [Article 8(4)]. Finally, Regulation (EU) 2016/2336 also requires vessels to report encounters with vulnerable marine ecosystems (VMEs) below a depth of 400 metres and to move to an alternative area at least five nautical miles away from the area of the encounter [Articles 9(1)-(3)]. In all, the regulation includes 21 articles and three annexes (regarding the list of deep-sea species, the specific data collection and reporting requirements, and the VME indicator species).

The introduction of two types of fishing authorizations is one of the most important innovations regarding the fishing of deep-sea stocks in the north-east Atlantic. This innovative legislation stemmed from a provision introduced by the Council and the European Parliament that differed from the Commission's proposal to phase out the use of bottom trawls targeting deep-sea fish³⁶. As noted, the first type of fishing authorization applies to vessels that land more than 8% of deep-sea species in any fishing trip and at least 10 tonnes in the calendar year concerned; the second type applies to vessels that have by-catches of deep-sea species. Such by-catch vessels are subject to a margin of 15% beyond the 10-tonne threshold³⁷.

Article 8(4) of the regulation, according to which authorizations will not be issued for fishing with bottom trawls at a depth below 800 meters in Atlantic waters, is therefore one of the most contested measures. Additionally, under Article 9(1), vessels shall report encounters with VMEs below a depth of 400 metres and reach «an alternative area at least five nautical miles from the area in which the encounter occurred» [Article 9(2)]. These new requirements have caused considerable alarm in the fisheries industries of EU Member States whose fleets have traditionally engaged in deep-sea fishing in the North Atlantic.

³⁶ See: COM(2016) 667 final, 4.

³⁷ Regulation (EU), 2016/2336, *doc. cit.*, Article 6(1).

The EU fears that deep-sea fishing with bottom trawls more than 800 metres below the water surface adversely impacts sea bottoms and, moreover, considers that VMEs are relatively scarce in the areas of the north-east Atlantic in which this type of fishing is usually performed³⁸. However, industry players argue that there are currently not enough scientific data to support these fears. They maintain that it would be more efficient to regulate deep-sea fishing in areas of the north-east Atlantic than to ban it outright at depths below 800 metres.

Since the publication of Regulation (EU) 2016/2336, various stakeholders have asked the European Commission to review it, arguing that it cannot use generalizations about bottom trawls and their impact on ecosystems and that such trawls actually had the smallest impact on deep-sea fisheries³⁹.

Interestingly, in the convention area of the NEAFC in which the Union does have Member status «deep-sea» is usually defined as depths of 400 metres or more. In contrast, the GFCM has banned bottom trawling activities at depths of over 1,000 metres, whilst, in 2015, the NAFO decided to ban all bottom fishing activities in areas with seamounts. Some fear that this regulation's ban on issuing authorizations for fishing activities with bottom trawls at depths of more than 800 metres is merely a first step and that the EU will try to promote the new limit in other RFMOs/As in which it has member status, too, as it seems unlikely to apply a double standard on this point⁴⁰.

These concerns have given rise to significant tension between those who advocate the regulation of deep-sea fisheries and those who support the ban on this type of fishing at depths of more than 800 metres. The main arguments advanced by the opponents of regulation are as follows: «The cure is worse than the disease», as banning this type of fishing at depths of more than 800 metres will simply lead to an increase in fishing at depths of between 200 and 800 metres, which is precisely where the VMEs are located; the adverse impacts of trawling have been exaggerated; there are contradictions between the EU's new position and those of the RFMOs in which it participates; there is no single solution for problems as complex as those related to the conservation and management of deep-sea fisheries; and there is a lack of alternative fishing gear. Meanwhile, the main arguments of the advocates of the new ban refer to: the vulnerability of the fish species; the risks posed by the use of bottom trawls; the existence of large by-catches of deep-sea species; the decline in profitability at depths of between 400 and 800 metres; the opportunity for the EU to change the rules of the game for deep-sea fisheries at the

³⁸ For more details on the divergent opinions on whether or not bottom trawling fishing is compatible with the protection of seabed, see R. Hilborn's interview (2016), *Pesca Internacional*, 174, 6-7.

³⁹ COOPERATIVA DE ARMADORES DE PESCA DO PORTO DE VIGO (ARVI) (2017), «ARVI Celebrates Rigorous Scientific Research. Scientists Shed Light on the Effects of bottom Trawl», 25 August. See also HIDDINK, J. G., JENNINGS, S. *et al.* (2017), «Global Analysis of Depletion and Recovery of Seabed Biota after Bottom Trawling Disturbance», *PNAS*, 114(31), 8301-8306, <http://www.pnas.org>.

⁴⁰ For an overview of the issue of bottom trawling in the high seas, see TETZLAFF, K. (2005), «Bottom Trawling on the High Seas Protection under International Law from Negative Effects?», *New Zealand Journal of Environmental Law*, 9, 239-285.

global level; and the fact that very few EU Member States (as noted, only Portugal, France and Spain) would be affected by the ban⁴¹.

Finally, in July 2018, the EU published Regulation (EU) n° 2018/975 on the management, conservation and control measures applicable in the SPRFMO Convention Area. This regulation refers to both pelagic and demersal fish stocks and prohibits the use of deep-water gillnets throughout the area under the SPRFMO's jurisdiction. Moreover, Articles 24-26 of Regulation (EU) n° 2018/975 focus on the transshipment of demersal species. They contain specific provisions regarding the notification of the transshipment of such fishing species caught in the SPRFMO Convention Area, the monitoring of transshipments, and the information to be reported after the transshipment.

Second, the EU has adopted specific regulations for six of the seven RFMOs with competences in the field of deep-sea fisheries to which it is Party; the GFCM is the sole exception in this regard. Thus, in recent years, the European Commission has published proposals regarding the position to be adopted, on behalf of the EU, in each organization. Under Article 218(9) TFEU, the European Council has to adopt a decision on behalf of the EU in RFMOs when they are called upon to adopt binding acts. These proposals have sought to incorporate the principles and orientations of the most recent reform of the CFP⁴², to take into account the objectives of the Commission Communication on the external dimension of the CFP⁴³, to adjust the EU's position to the Lisbon Treaty, and to align the EU with the specificities of the different RFMOs⁴⁴.

Third, numerous actions have been brought before the CJEU in relation to regulations adopted by the EU regarding its fishing activities carried out under the umbrella of various RFMOs with competences in the field of deep-sea fisheries. These actions have affected above all the CCAMLR, the NAFO and the NEAFC.

In relation to the CCAMLR, there are currently two pending actions for annulment before the CJEU (*European Commission v. Council of the EU*), which have

⁴¹ «Regulación vs. prohibición. El Triflago debate la prohibición del arrastre por debajo de los 800 metros en aguas de la UE y la industria reclama una regulación que haga compatible la pesca y la protección de los fondos» (2016), *Pesca Internacional*, 173, 6.

⁴² By virtue of Regulation (EU) n° 1380/2013.

⁴³ COM(2011) 424, *doc. cit.*

⁴⁴ COM(2014) 137 final, *Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the South East Atlantic Fisheries Organisation (SEAFO)*, Brussels, 10.03.2014; COM(2014) 129 final, *Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the Northwest Atlantic Fisheries Organisation (NAFO)*, Brussels, 11.03.2014; COM(2014) 133 final, *Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)*, Brussels, 11.03.2014; COM(2014) 132 final, *Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the North East Atlantic Fisheries Commission (NEAFC)*, Brussels, 11.03.2014; COM(2017) 214 final, *Proposal for a Council Decision establishing the position to be adopted, on behalf of the European Union, in the Meeting of the parties to the Southern Indian Ocean Fisheries Agreement (SIOFA) and repealing Decision 14404/12*, Brussels, 8.05.2017; and COM(2017) 216 final, *Proposal for a Council Decision establishing the position to be adopted, on behalf of the European Union, in the South Pacific Regional Fisheries Management Organisation (SPRFMO) and repealing Decision 14405/12*, Brussels, 8.05.2017.

been joined. On 31 May 2018, Advocate General Kokott published the Opinion⁴⁵. These cases concern measures to protect the Weddell Sea and the Ross Sea in the Antarctic. In particular, they concern the creation of various marine protected areas (MPAs) that have been discussed at several annual meetings of the CCAMLR. In this case, the European Commission is specifically challenging two decisions taken within the Council on action by the EU at the 34th and 35th annual meetings of the CCAMLR in 2015 and 2016.

From a procedural point of view, the Council and the Member States hold that marine protection measures should be classified under environmental policy and thus fall under the area of shared competences [Article 4(2)(e) TFEU]. They also argue that it is necessary for the EU and its Member States to act together on the international stage in this field. On the other hand, the European Commission considers that such measures pertain to the conservation of marine biological resources under the CFP [Article 3(1)(d) TFEU], where the EU has exclusive competences and that they thus do not allow for any external action by the Member States alongside the EU institutions. There is also controversy regarding whether the EU has an implicit exclusive external competence in this area in accordance with the ERTA principle [Article 3(2) TFEU] and the extent to which research policy, which is one of the EU's supplementary competences [Article 4(3) TFEU], is relevant in these joined cases.

These two cases clearly exemplify the difficult coexistence and organization between the EU and its Member States following the entrance into force of the Treaty of Lisbon. It will be for the CJEU to clarify whether a shared competence between the EU and its Member States requires a mixed action by them in international bodies or whether the EU may or even must undertake such external actions alone.

So far, the Advocate General has proposed that the Court annul both decisions regarding the position of the EU to be submitted to the CCAMLR as it should have been adopted on behalf of the EU and its Member States rather than on behalf of the EU alone. This legal position is based on the core idea that the EU has a shared competence with its Member States in the field of the marine environment as it poses several different complex aspects that cannot be reduced solely to fisheries and the need for their conservation and protection.

As for the CJEU case law concerning the NEAFC, mention should be made of the *Spain v. Council* case (C-128/15). That case concerned an action for annulment of Council Regulation n° 1367/2014 fixing for 2015 and 2016 the fishing opportunities for the EU's fishing vessels for certain deep-sea fisheries (including the roundnose grenadier and the roughhead grenadier) in the NEAFC area. Spain argued that, when adopting this regulation, the Council failed to take into account the principles of relative stability of fishing activities, proportionality, and equal

⁴⁵ Joined cases C-626/15 and C-659/16, ECLI:EU:C:2018:362.

treatment in relation to the two deep-sea fisheries species in two of the NEAFC's management zones. In its judgment of 11 January 2017, the CJEU ultimately decided to dismiss the action; further, both Spain and the European Commission had to bear their own costs⁴⁶.

Attention should likewise be called to various actions recently undertaken by Portugal in the international waters of the north-east Atlantic. In early 2018, this country was identified by the European Commission as not respecting the EU's exclusive internal and external competence for the conservation of marine biological resources in the international waters under the NEAFC's jurisdiction. Portugal was considered to be acting in the NEAFC waters in the context of an on-going process at the RFMO, initiated with the full support of the EU, aimed at preventing significant impacts of bottom-fishing activities on VMEs⁴⁷. The process is still on-going and the European Commission has not brought any action against Portugal to date before the CJEU in relation to this illegal situation.

The NAFO is, by far, the RFMO most often concerned by the cases brought before the CJEU. Most of the actions were brought by Spain against the Council, many years ago, in relation to several measures for the conservation of deep-sea fish stocks adopted by the NAFO that had to be introduced into EU secondary law. These measures concerned, for example, the scheme of joint international inspection of fishing vessels (*Spain v. Commission* case, C-179/97)⁴⁸ and the distribution of catch quotas amongst the Member States once Spain and/or Portugal joined the EU (*Spain v. Council* case, C-73/90⁴⁹; *Spain v. Council* case, C-71/90⁵⁰; *Spain v. Council* case, C-70/90⁵¹; *Portugal and Spain v. Council*, joined cases C-63/90 and C-67/90⁵²). The *Area Cova and others v. Council and Commission* case (T-196/99)⁵³ was also the subject of great interest amongst the Galician fishery community. It was an action for annulment of the Council Regulation (EC) n° 1761/95 of 29 June 1995, amending, for the second time, Regulation (EC) n° 3366/94 laying down for 1995 certain conservation and management measures for fishery resources in the NAFO Regulatory Area, insofar as it established the quota for Greenland halibut for the Community fleet⁵⁴. In both cases, the CJEU decided to dismiss the actions brought by States and fishing companies against the European Commission or/and the Council.

⁴⁶ ECLI:EU:C:2017:3.

⁴⁷ «Conservation of marine biological resources: Commission requests Portugal to respect the exclusive competence of the EU under the Common Fisheries Policy», 26.01.2018, <http://europa.eu>.

⁴⁸ Judgment of 2 March 1999, ECLI:EU:C:1999:109.

⁴⁹ Judgment of 13 October 1992, ECLI: EU:C:1992:384.

⁵⁰ Judgment of 13 October 1992, ECLI: EU:C:1992:383.

⁵¹ Judgment of 13 October 1992, ECLI: EU:C:1992:382.

⁵² Judgment of 13 October 1992, ECLI: EU:C:1992:381.

⁵³ Judgment of 6 December 2001, ECLI: EU:T:2001:281.

⁵⁴ OJ L 171/1, 21.07.1995.

3.2. The EU and the RFMOs' activities concerning the conservation and management of deep-sea fisheries

In recent decades, each of the seven RFMOs with competences in the field of conservation and management of deep-sea fisheries of which the EU is a member has adopted many diverse and complex measures in this field. These measures became more restrictive when these international organizations began to consider that greater conservation of deep-sea stocks required more limits on fishing activities.

A comprehensive in-depth analysis of the work done so far by the CCAMLR, GFCM, NAFO, NEAFC, SEAFO, SIOFA and SPRFMO regarding the conservation and management of deep-sea fisheries falls beyond the scope of this chapter. For the present purposes, it will suffice simply to mention some of them as an example. In this regard, a distinction could be made between the «old» RFMOs (the CCAMLR, the GFCM, the NAFO and the NEAFC), which have already done an outstanding job in this field over the last few decades, and the «new» RFMOs (*i. e.* those created in the 21st century, including the SEAFO, SIOFA and SPRFMO), which seek to align the fishing interests of their members to the need for conservation and management of deep-sea fisheries.

The CCAMLR has decided to close certain areas in its convention area to bottom fishing and hake trawling and has adopted special measures to protect VMEs. The creation of MPAs is another legal trend in the South Ocean, which is under the jurisdiction of this RFMO. For its part, the GFCM has established various criteria that fishing vessels' nets must meet to be authorized to fish in its convention area. It has also adopted specific measures to protect VMEs, prohibited the use of trawling nets at depths over 1000 metres, etc. The NAFO annually adopts total allowable catches for certain deep-sea fish species in many cases. It has also decided to create two deep-sea fisheries areas in which certain conservation and management measures are applied based on their characteristics, etc.⁵⁵. The NEAFC has taken numerous actions to protect VMEs and put a control and enforcement scheme into place containing numerous duties for deep-sea fishing vessels, as well as serious infringement proceedings in case of inspections, etc.⁵⁶.

⁵⁵ In this regard, see GIANNI, M. *et al.* (2016), «How Much Longer Will It Take? A Ten-Year Review of the Implementation of United Nations General Assembly Resolutions 61/105, 64/72 and 66/68 on the Management of Bottom Fisheries in Areas Beyond National Jurisdiction», Deep Sea Conservation Coalition; FAO (2009), «Worldwide Review of Bottom Fisheries in the High Seas».

⁵⁶ For a detailed overview of the activities of these RFMOs, see HARRISON, J.; LOBACH, T., and MORGANA, E. (2017), *Review and Analysis of International Legal and Policy Instruments Related to Deep-Sea Fisheries and Biodiversity Conservation in Areas Beyond National Jurisdiction*, FAO, 37-52; WRIGHT, G. *et al.* (2015), «Advancing Marine Biodiversity Protection Through Regional Fisheries Management: A Review of Bottom Fisheries Closures in Areas Beyond National Jurisdiction», *Marine Policy*, 61, 137-147. See also the official websites of the RFMOs, namely: www.ccamlr.org (CCAMLR), www.fao.org/gfcm/en (GFCM), www.nafo.int (NAFO), www.neafc.org (NEAFC), www.seafo.org (SEAFO), www.apsi.org (SIOFA), and www.sprfmo.int (SPRFMO).

The fight against Illegal, Unreported and Unregulated (IUU) fishing is one common action undertaken by both the aforementioned RFMOs and the EU. The EU is currently one of the largest and most active international legal subjects involved in the fight against IUU fishing. Over the last fifteen years or so, it has adopted and developed a complex and efficient system against such illicit fishing. The lists of vessels that engage in IUU fishing published by each of these organizations may be the best illustration of the excellent collaboration between them in this area. Since the adoption of Commission Regulation (EU) n° 468/2010 in May 2010⁵⁷, each year the EU has adopted an updated list of vessels engaged in IUU fishing, following receipt of the RFMOs' lists of fishing vessels presumed or confirmed to be involved in IUU fishing. Commission Implementing Regulation (EU) 2017/2178 of 22 November 2017 contains the EU's most recent list, with information provided by the CCAMLR, the GFCM, the NEAFC, the NAFO, the SEAFO and the SPRFMO⁵⁸.

The adoption, on 3 October 2018, of an international treaty to prevent unregulated high seas fisheries in the Central Arctic Ocean is an excellent example of the EU's commitment to tackling illicit fishing⁵⁹. This legal instrument was signed in Ilulissat by representatives of nine countries (Canada, China, Denmark on behalf of the Faroe Islands and Greenland, Iceland, Japan, Korea, Norway, Russia and the United States) plus the EU⁶⁰ and refers to an area around 2.8 million square kilometres in size. According to the treaty's provisions, commercial fishing in the Central Arctic Ocean will not be possible for at least the next sixteen years. This period is expected to give scientists enough time to study the size and health of the region's fish stocks.

This new treaty is clearly important for deep-sea fisheries as well and is a new form of cooperation for the EU with regard to the conservation and management of deep-sea fisheries in marine areas beyond the national jurisdiction of its Member States. Despite the lack of a RFMO in the Central Arctic Ocean, the relevant

⁵⁷ Commission Regulation (EU) n° 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, OJ L 131/22, 29.05.2010.

⁵⁸ Commission Implementing Regulation (EU) 2017/2178 of 22 November 2017 amending Regulation (EU) n° 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing OJ 307/14, 23.11.2017.

⁵⁹ «A new international deal protects the Central Arctic Ocean's fish stocks», *www.arctictoday.com*. For an overview of fisheries activity in the Central Arctic Ocean Fisheries, see MOLENAAR, E. J. (2013), «Arctic Fisheries Management», in MOLENAAR, E. J.; OUDE ELFERINK, A. G., and ROTHWELL, D. R. (eds.) (2013), *The Law of the Sea and the Polar Regions. Interactions Between Global and Regional Regimes*, Martinus Nijhoff Publishers, 263-264; MOLENAAR, E. J. (2016), «International Regulation of Central Arctic Ocean Fisheries», in *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries*, Brill Nijhoff, 429-463.

⁶⁰ Council Decision 2018/1257 of 18 September 2018 on the signing, on behalf of the European Union, of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, OJ L 238/1, 21.09.2018. See also COM(2018) 453 final, *Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Agreement to prevent unregulated high seas fisheries in the Central Arctic Ocean*, Brussels, 12.06.2018; COM(2018) 454 final, *Proposal for a Council Decision on the signing, on behalf of the European Union, of the Agreement to prevent unregulated high seas Fisheries in the Central Arctic Ocean*, Brussels, 12.06.2018.

players with interests in the area have managed to agree a general prohibition on commercial fishing in it.

4. FINAL REMARKS

The conservation and management of deep-sea fisheries are highly topical issues on the fishing agendas of both the EU and several RFMOs with competences in this field (CCAMLR, GFCM, NAFO, NEAFC, SEAFO, SIOFA and SPRFMO).

Today, these issues are at a crossroads, from both an international and a regional perspective. In the short term, the current legal regime will remain in force since the United Nations' Intergovernmental conference drafting a legally binding treaty under the United Nations Convention on the Law of the Sea governing marine biodiversity in ocean waters beyond national jurisdiction⁶¹ which started its work in New York in September 2018 does not specifically address deep-sea fisheries. Indeed, fisheries are not on this intergovernmental conference's agenda, although it makes indirect references to them, especially when referring to fish stocks used for genetic properties⁶². However, fisheries understood as a commodity are not on the new conference's agenda, which suggests that the current international and regional governance of deep-sea fisheries in the high seas is unlikely to see major changes in the coming years.

⁶¹ UNITED NATIONS GENERAL ASSEMBLY (2017), «Resolution adopted on 24 December 2017 72/249. International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction», A/RES/72/249.

⁶² UNITED NATIONS GENERAL ASSEMBLY (2018), «Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. First session. New York, 417 September 2018. President's aid to discussions», A/CONF.232/2018/3, para. 3.1 (c)(i).