Dispute Settlement Pertaining to Law of the Sea Issues in the EU and Its Implications for Japan and/or Asia

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Abstract

Reflecting the diversified usage of the oceans, many specific international and regional treaties have been developed to regulate problems pertaining to the oceans, such as fisheries, exploitation of non-living marine resources in the Area, or protection of the marine environment. Many of those specific ocean-related treaties also stipulate dispute settlement procedures. However, at the international level, dispute settlement systems among sovereign states do not necessarily solve problems. Since the EU consists of 27 Member States, it may be considered in some respects as analogous to a smaller form of the United Nations. There are certainly common issues to be resolved at the global level and at the EU level in terms of the oceans; however, there are also significant differences between the UN and the EU, beyond just the former being a global international organization and the latter a regional one. The purpose of this paper is to articulate how the EU and its Member States resolve disputes pertaining to the oceans and to clarify the characteristics of the EU's dispute settlements on Law of the Sea issues. Based on these considerations, moreover, it is possible to consider in what ways Japan and its neighboring states could potentially learn from EU practices.

1. Introduction

Human beings have long made use of the oceans as sources of food supply or as means of transport for goods and persons. In more recent times, many states have been promoting offshore renewable energy and/or seabed storage of carbon dioxide in order to combat climate change. The upshot of this trend is that ocean usage has diversified beyond traditional use patterns. Accordingly, the number of international rules pertaining to the oceans has been increasing, with multiple regulatory frameworks interacting with one another. As a sort of constitution for the ocean, international society adopted the United Nations Convention on the Law of the Sea (UNCLOS) in 1982,[1] which went on to be concluded by 170 states and the EU.[2] However, reflecting the diversified usage of the oceans, many specific international and regional treaties have been developed to regulate problems pertaining to the oceans, such as fisheries,[3] exploitation of non-living marine resources in the Area (referring to

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1 United Nations, Treaty Series, vol. 1833, p. 3.

2 Except where necessary from historical perspective, the term "EU" is used.

3 For instance, there are several regional fisheries management organizations for managing highly-migratory species like tuna, such as International Commission for the Conservation of Atlantic Tunas (ICCAT), or for managing fish stocks by geographical area such as North-East Atlantic Fisheries Commission (NEAFC) and Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).

the seabed, ocean floor, and subsoil thereof),[4] or protection of the marine environment.[5] Many of those specific ocean-related treaties also stipulate dispute settlement procedures.[6] However, at the international or global level, dispute settlement systems among sovereign states do not necessarily solve problems. To give but one example, the South China Sea Arbitration Award is one dispute that continues to remain unresolved.[7]

Since the EU consists of 27 Member States, it may be considered in some respects as analogous to a smaller form of the United Nations (UN), which is composed of almost 200 sovereign states and which has its own decision-making body (General Assembly), independent administrative body (Secretariat), and a judicial organization for dispute settlement (International Court of Justice). The structure of the EU is likewise similar to the UN, with decision-making institutions consisting of the European Council (Article 15 TEU[8]), the Council (Article 16 TEU), and the European Parliament (Article 14 TEU). The European Commission, meanwhile, is to be considered an independent legislative and administrative institution responsible for implementing EU laws and regulations, and proposing drafts of EU laws and regulations including the EU budget (Article 17 TEU). Finally, the Court of Justice of the European Union – comprised of the Court of Justice, the General Court, and specialized courts – serves as an independent judicial body of the EU (Article 19 TEU).

In terms of the use of the oceans, recently some EU Member States have been promoting offshore renewable energy, such as offshore wind or tidal energy, and for some Member States fishery represents one of the most important industries for their domestic economy and labor market.[9] This also reflects EU policies, in that the protection of the marine environment and the preservation of marine living resources such as fish stocks constitute significant interests for the EU. Furthermore, in the 1960s some Member States resolved maritime delimitation disputes before the International Court of Justice (ICJ). To sum up, there are certainly common issues to be resolved at the global level and at the EU level in terms of the oceans; however, there are also significant differences between the UN and the EU, beyond just the former being a global international organization and the latter a regional one. The purpose of this paper is to articulate how the EU and its Member States resolve disputes pertaining to the oceans and to clarify the characteristics of the EU's dispute settlements on Law of the Sea issues. Based on these considerations, moreover, it is possible to consider in what ways Japan and its neighboring states

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4 Article 1.1(1) UNCLOS. See for instance, Part XI of UNCLOS and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

5 For instance, in terms of land-based marine pollution, there are several regional treaties. See on this points, Y. Tanaka, *International Law of the Sea, fourth ed.*, Cambridge University Press, 2023, pp.369–371. In terms of protection of the marine biodiversity beyond national jurisdiction, the Agreement 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 (BBNJ Agreement) was adopted in August 2023 in the General Assembly of the United Nations (UNGA) by the Resolution A/RES/77/321.

6 For instance, Part XV of UNCLOS.

7 The territorial disputes in the South China Sea have not been agreed between Philippine and China and in that area, violent clashes between Chinese and Philippine vessels occurred several times. See for instance, CNN, *US blasts 'aggressive' China over South China Sea collision with Philippine ship*, 18 June 2024, available in: https://edition.cnn.com/2024/06/18/asia/us-condemns-china-scs-collision-philippines-intl-hnk/index.html (accessed on 28 October. 2024).

8 Treaty on European Union, OJ C 202/1, 7 June 2016.

9 See on this point, European Parliament, *European Fisheries in Figures*, available in https://www.europarl.europa.eu/factsheets/en/sheet/122/european-fisheries-in-figures (accessed on 28 October. 2024).

could potentially learn from EU practices.

To that end, the next part of this paper (The EU, Its Member States, and the Oceans) briefly sets out the framework of the EU legal system, while the third part (Dispute Settlement in the EU) covers how ocean disputes in the EU have been resolved. Three topics relating to the oceans are separately analyzed, namely, fishery, protection of the marine environment, and maritime delimitation. Finally, the last part (Implications of the EU Legal System for Japan and/or Asia) assesses whether the EU's experience has meaningful implications for Japan and its neighboring states.

2. The EU, Its Member States, and the Oceans

The number of EU Member States had continuously increased from the establishment of the EEC (European Economic Community) by six Western European states in 1958 until the withdrawal of the United Kingdom on 31 January 2020. The increase in the number of EU Member States means that the geographical scope of EU Law has also continuously expanded. However, a far more significant aspect of the EU's "expansion" pertains to its competence. In 1958, when the EEC started with just six Member States, its main purpose was to establish a common market based on a customs union (Article 3(a)(b) EEC Treaty); consequently, economic aspects were emphasized in both its policy and legislation (for instance, Article 2 EEC Treaty). In terms of policies and legislation relating to the oceans, for instance, the free movement of goods such as fish/fishery products can be identified as central interests of the Member States at that time (Article 38(1) EEC Treaty), and in the EEC Treaty there was no article clearly determining the EU's competence to regulate such matters as the protection of the environment, including the marine environment.

More recently, however, the EU's competence has come to significantly expand. The upshot of this is that nowadays EU law regulates not only economic issues, but also highly political issues that exercise severe influence over the domestic policies of individual Member States. This also encompasses EU laws and regulations on the oceans including the marine environment. The oldest element of EU competence relating to the ocean was that pertaining to fishery. For the first time, the EU began to introduce the Common Fisheries Policy (CFP) in the 1970s, when it became clear that the UK, Ireland and Denmark would join the EU.[10] Simultaneously, in the same decade the EU started to take into consideration environmental aspects such as water quality[11] or the protection of wild birds that fly over the oceans.[12] During the 1970s, fishery and the marine environment were two of the most important issues regulated by the EU at the EU level. The situation developed further in the 1980s. In 1982, UNCLOS was adopted, and in 1996 it entered into force. The EU and its Member States are contracting parties of UNCLOS, and when the EU concluded UNCLOS it declared its competence in accordance with Article 2 of Annex IX to UNCLOS.[13] That declaration asserts that "the conservation and management of sea fishing resources" is the exclusive competence of the EU. Accordingly, only the EU can adopt relevant laws and regulations which are legally binding upon the Member States, and negotiate relevant

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[10] See for instance, R. Churchill/D. Owen, *The EC Common Fisheries Policy*, Oxford University Press, 2010.

[11] For instance, Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life, OJ L 222/1, 14.8.1978; Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, OJ L 31/1, 5.2.1976.

[12] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103/1, 25.4.1979.

[13] Declaration Concerning the Competence of the European Community with regard to Matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the Implementation of Part XI of the Convention, OJ L 179/129, 23.6.1998.

issues with third states and international/regional organizations.[14]

In terms of the protection and preservation of the marine environment the EU's declaration is vague in comparison with that covering fishing resources. As a result, when it comes to the marine environment, the EU shares competences with its Member States.[15] Consequently, the EU concluded some international and regional treaties aimed at protecting/preserving the marine environment with its Member States (so-called "mixed agreements"). When the EU concluded UNCLOS and submitted its declaration, the EU also stated that its own competence in terms of the Law of the Sea was "subject to continuous development" and that consequently the EU "will complete or amend this declaration."[16] However, although the EU treaties relevant to the EU's competences have been modified several times since the EU's conclusion of UNCLOS,[17] the EU has yet to submit a new declaration on its competence relating to Law of the Sea issues. From the perspective of EU law, the competences relating to the Law of the Sea need to be carefully categorized, because competence is a decisive factor in determining which entity (i.e., the EU and/or the Member State[s] in question) is liable for adopting the relevant laws and regulations, and accordingly, moreover, which entity is responsible for such matters as monitoring the environmental status of the oceans, providing compensation in the event that any activities cause damage to the marine environment, or prosecuting offenders who breach relevant laws and regulations and cause damage to the marine environment.

Based on the Lisbon Treaty,[18] only the EU has competence to regulate fishery, which involves the management of fish stocks (Article 3(1)(d) TFEU, exclusive competence of the EU). This situation has persisted since the EU's declaration on the conclusion of UNCLOS. So long as the EU maintains an exclusive competence based on the EU Treaties, it is required to not only adopt relevant rules and regulations on the issues concerned (Article 2(1) TFEU) but also to undertake negotiations with third states (non-EU Member States) or international/regional organizations.[19] Regarding other marine resources, such as rare metals or marine living resources aside from fish stocks, the division of competence between the EU and its Member States is to be decided based on the principle of conferral (Article 5(1) TEU). So long as the Member States have conferred their competence upon the EU, the EU is to adopt legally binding laws and regulations (Article 5(2) TFEU).

Thus, in terms of the marine environment in general – such as with regards to the preservation/protection of marine living resources (aside from fish stocks) or the fauna and flora in the oceans, or with regards to controlling marine pollution in the oceans – the EU shares competence with its Member States (Article 4(2)(d)(e) TFEU, shared competence).[20] This

[14] *Ibid.*, 1. Matters for which the Community has exclusive competence.

[15] *Ibid.*, 2. Matters for which the Community shares competence with its Member States, Second paragraph.

[16] *Ibid.*

[17] In 2001, Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts was signed (OJ C 80/1, 10.3.2001) which entered into force in 2003. In 2007, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was signed (OJ C 306/1, 17.12.2007) which entered into force in 2009.

[18] Treaty on European Union (consolidated version), OJ C 202/15, 7.6.2016; Treaty on the Functioning of the European Union (consolidated version), OJ C 202/47, 7.6.2016.

[19] Accordingly, in the EU's declaration on UNCLOS the EU stated that "in the field of sea fishing it is for the Community ... to enter into external undertakings with third states or competent international organisations." See on this point, *supra* note 13.

[20] For instance, Article 4(2) TFEU stipulates (a) internal market, (b) social policy, (c) social and territorial cohesion ... (i) energy as shared competence.

means that Member States are able to adopt domestic laws and regulations on the protection of the marine environment; however, were the EU to adopt relevant EU laws/regulations on the same issues, then the EU Member States in question would be obliged to implement the EU laws/regulations instead of their domestic ones (Article 2(2) TFEU). The Lisbon Treaty has categorized the EU's competences into three different types,[21] and stipulated that the "scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area" (Article 2(6) TFEU).

One of the remaining Law of the Sea issues not stipulated in the Lisbon Treaty is the maritime delimitation. Although the EU expanded its competences, and the scope of implementing EU law has been expanding since 1958, the EU Member States retain their competence relating to maritime delimitation. Accordingly, in the field of the maritime delimitation the Member States obey the rules stipulated in UNCLOS, relevant international rules, and case law. In other words, there is no room for application of the EU law in this area.

Based on the EU legal system, disputes relating to EU law are to be resolved by the Court of Justice of the European Union (CJEU, Article 19(1) TEU). Therefore, in fields in which the EU exercises exclusive competence, namely fishery, only EU institutions including the CJEU are responsible for resolving disputes. As for fields in which the EU has shared competence, it depends on whether the EU has adopted laws or regulations relevant to the matters concerned. If there exist relevant EU laws and regulations, then in such cases relevant disputes are to be resolved by EU institutions including the CJEU, in the same manner as those disputes occurring in areas in which the EU has exclusive competence. However, if there exist no relevant EU laws and regulations on the issues concerned, then the Member States are free to choose the way in which to resolve said dispute, whether through purely domestic or international dispute settlement. The following section will briefly cover dispute settlement procedure relating to the Law of the Sea issues within the EU.

3. Dispute Settlement in the EU

(1) Fishery

For some EU Member States fishery is an extremely important industry, and they already participated in relevant global or regional fishery management organizations before they became EU Member States.[22] Since the start of the 1970s, in the context of the UK, Ireland and Denmark being set to become EU Member States in 1973, the original six Member States quickly decided to regulate fishery at the EU level,[23] in order that the three new Member States, which themselves had strong interests in fishery, would not interject regarding EU fishery rules if these had already been determined. This was the first step for the EU to determine fishery policy and

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21 Articles 2, 3, 4 and 6 TFEU.

22 For instance, France was a member of ICCAT already in 1968, before the EU became a member of that organization in 1997. Italy (1951), France (1952), Greece (1952), Spain (1953), Malta (1965), and Romania (1971) became members of the General Fisheries Commission for the Mediterranean, before the EU became its member in 1998.

23 Regulation (EEC) No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry, OJ L 236/1, 27.10.1970; Regulation (EEC) No 2142/70 of the Council of 20 October 1970 on the common organisation of the market in fishery products, OJ L 236/5, 27.10.1970.

rules.[24] Subsequently, the EU adopted the CFP,[25] which underwent periodical revision and with which EU Member States bear obligations to comply. The CFP stipulates the conservation of marine biological resources as well as the management of fisheries and fleets exploiting such resources (Article 1(1)(a) CFP 2013[26]). Within the framework of the CFP, the EU is to adopt multiannual plans to ensure the sustainable exploitation of fish stocks.[27] The most important role of the CFP is that it sets catch limits (total allowable catches, TAC) for each Member State in each sea basin (the Baltic Sea, North Sea, Celtic Seas, Bay of Biscay and the Iberian Coast, Mediterranean, Black Sea, etc.) on an annual basis.[28] The Member States are not to exceed the TAC set at the EU level.[29] If there are any disputes regarding fishery, moreover, they are to be resolved by the CJEU.[30] However, the CFP does not regulate all fish species,[31] and as a result there may occur between Member States disputes over fishery matters which are not regulated by the EU.

In addition to the CFP, as mentioned above the EU is a contracting party to UNCLOS,[32]

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[24] Regarding to the historical development of the CFP, see, for instance, Craig McLean/Tim Gray, Liberal Intergovernmentalism, Historical Institutionalism, and British and German perceptions of the EU's Common Fisheries Policy, *Marine Policy*, Vol. 33(3), 2009, pp. 458–465.

[25] The first EU law on the CFP regulated in the same manner as actual CFP was the Council Regulation (EEC) No170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources, OJ L 24/1, 27.1.1983.

[26] Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354/22, 28.12.2013.

[27] Articles 9, 10 and 16 CFP 2013. There are for instance a multiannual plan for the stocks of cod, herring and sprat in the Baltic Sea or a multiannual plan for the fisheries exploiting demersal stocks in the western Mediterranean Sea. See on this topic, European Commission, Multiannual plans, in: https://oceans-and-fisheries.ec.europa.eu/fisheries/rules/multiannual-plans_en (accessed on 7 October. 2024).

[28] See, Annexes of the Council Regulation (EU) 2023/194 of 30 January 2023 fixing for 2023 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, as well as fixing for 2023 and 2024 such fishing opportunities for certain deep-sea fish stocks, OJ L 28/1, 31.1.2023 and Annexes of the Council Regulation (EU) 2024/257 of 10 January 2024 fixing for 2024, 2025 and 2026 the fishing opportunities for certain fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, and amending Regulation (EU) 2023/194, OJ L 1/39, 11.1.2024.

[29] Article 51(1) of the Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006, OJ L 343/1, 22.12.2009.

[30] See for instance, on the TAC for Mediterranean swordfish based on the ICCAT negotiation, Case C-611/17, *Italy v Council*, ECLI:EU:C:2019:332.

[31] The target species regulated by the CFP are species which need "(M)easures for the conservation and sustainable exploitation of marine biological resources" (Article 7(1) CFP 2013).

[32] Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179/1, 23.6.1998.

and, pursuant to Council Decision 98/414/EC,[33] to the United Nations 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 of 4 December 1995 (UN Fish Stocks Agreement).[34] These international treaties aim to regulate fishery and conserve fish stocks at sustainable levels. The CFP also has to take into account the EU's implementation of the international obligations imposed by these international treaties. For instance, the EU is a contracting party of the Regional Fishery Management Organization (RFMO) such as ICCAT. The catch limits for the EU decided in the ICCAT are allocated among the relevant EU Member States as a part of TAC,[35] based on the CFP Regulation. This means that even if a Member State of the EU is a contracting party of a RFMO,[36] if the EU is also a contracting party of said RFMO then the EU will exercise representative power in said RFMO's meetings, due to the management of fish resources already having been determined to fall under the exclusive competence of the EU.

In terms of the EU's CFP, there were disputes over the procedure for adopting CFP regulations.[37] If a Member State fails to ban fishing activities when particular quotas are near exhaustion, with the result that the TAC set by the EU's CFP are to be exceeded, such a Member State is subject to the infringement procedure based on the Articles 258 or 259 TFEU.[38] Those disputes were treated as internal problems for the EU. Therefore, they were to be judged before the CJEU as a last resort. The other fishery disputes included the so-called "scallop wars" between France and the UK (Member State of the EU until January 2020), which occurred in 2012, 2018 and 2020. The CFP itself did not stipulate any rules on TAC for scallop, nor did it stipulate any other rules relevant to scallop fishing. In cases in which Member States have an interest in species for which the relevant EU laws and regulations make no stipulation, said states are required, if necessary, to coordinate fishery management among themselves. In the case of France, scallop fishing has been well managed based on a historical collaboration between scientists and fishery organizations.[39] Consequently, in France the scallop fishing season has been set to run from October 1 to 15 May, and is closed the rest of the year; specific fishing licenses are required for scallop fishing; and the minimum size for caught fish has been set at a more restrictive level than that set by the EU regulations stipulating particular measures for the

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[33] Council Decision 98/414/EC of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing 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 stocks and highly migratory fish stocks, OJ L 189/14, 3.7.1998.

[34] United Nations, Treaty Series, vol. 2167, p. 3.

[35] See for instance, Annex ID of the Council Regulation (EU) 2023/194, and, Annex VI of the Council Regulation (EU) 2024/257. *Supra* note 28.

[36] In some RFMOs such as ICCAT or the General Fisheries Commission for the Mediterranean, both Member State(s) and the EU are contracting parties.

[37] Case C-330/22, *Friends of the Irish Environment*, ECLI:EU:C:2024:19.

[38] See for instance, Case C-454/99, *Commission v United Kingdom*, ECLI:EU:C:2002:652.

[39] European Commission, *Case Study Scallop in the EU*, November 2023, p.21.

conservation of fish resources.[40] On the contrary, however, there were no such strict management measures for scallop fishing in place for UK fishermen. There was a UK-France industry agreement on Great Atlantic Scallop fishery in the English Channel, which barred scallop fishery for all vessels over 15 m; however, the fishing season closure restriction did not apply to smaller vessels from the UK,[41] which caused altercations between fishermen of the two states in the English Channel.

UK and French fishing boats clashed in the Bay of Seine, for instance, in the summer of 2018 when the French fishermen, in accordance with French scallop management regulations, were prohibited from fishing for scallop. The altercations between UK and French fishing boats occurred in a region known to be a scallop-rich area.[42] While the UK fishing boats were entitled to fish in the area, "their presence has angered the French, who accuse the British of depleting shellfish stocks."[43] The altercations occurred beyond the 12 nautical mile sea area and so were not within the territorial waters of France.

The conflict was significant because of the importance of scallop for both countries. According to the Case Study Report on Scallop, France is the largest producer of Great Atlantic Scallop (*Pecten Maximus*) both within the EU and globally.[44] At the same time France is also the main importer of scallop, with the UK being its main supplier.[45] Great Atlantic Scallop constitutes 93% of the scallop produced in the EU, and is traded as premium scallop.[46] Therefore, Great Atlantic Scallop fishing is of great importance for the fishery industry in both the UK[47] and France.[48] In terms of the "scallop wars" between the two countries, tensions between the fishermen in the English Channel seemed to settle down in 2018 when the scallop fishing season opened in France. When the UK exited from the EU in January 2020, the UK-France industry agreement ceased,[49] whereupon in October 2020 a conflict over scallop arose once again. After BREXIT, the UK introduced a scallop fishery closure itself, based on pursuing "a balanced approach between stock protection and economic impacts."[50]

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40 Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005, OJ L 198/105, 25.7.2019. According to the Annex V (North Sea) and Annex VI (North Western Water) the minimum size for scallop should be 100 mm. In France it is set 102 mm for the Bay of the Seine and 110 mm for the Bay of Saint Brieuc. See on this point, *Ibid.*

41 See on this point, for instance, Marine Management Organisation et. al, *Consultation on proposals for a king scallop fishery closure in ICES area 7d and Lyme Bay of area 7e in 2024*, p.6.

42 The other sea area for scallop fishing is Bay of Saint Brieuc. See on the scallop fishing area in France, *Supra* note 39, p.20. In the ICES maps this seems to be 7d area.

43 See on this "war," for instance, BBC, "Scallop war: French and British boats clash in Channel," 29.8.2018, available in: https://www.bbc.com/news/world-europe-45337091.

44 *Supra* note 39, p.5, p.14, and p.29.

45 *Ibid.* According to the Study Report, the UK Market for the scallop is not big and many scallop is exported to other states.

46 *Ibid.*, p.15.

47 *Ibid.*, p.6.

48 *Ibid.*, p.5.

49 *Supra* note 41.

50 *Ibid.* However, small vessels under 10 m fleet are excluded from this rule. Therefore, the possibility to occur conflicts between UK and France scallop fishermen still remains.

The "scallop wars" indicate that in the event that there are no relevant EU laws and regulations, the Member States involved in a dispute need to resolve the conflict on their own. In the case of the scallop in the English Channel, there developed a form of agreement between the French and British industries before BREXIT nullified it. Aside from formal arrangements, then, bilateral agreements like that seen on scallop fishery are an alternative way to settle conflicts.

(2) Marine Environment

Unlike the EU's CFP discussed earlier, environmental policy involving the protection of the marine environment falls under the "shared competence" of the EU (Article 4(2)(e) TFEU). The marine environment involves a wide range of issues. In earlier times, marine pollution caused by tanker accidents or offshore oil and gas exploitation were serious issues from the viewpoint of their transboundary impact.[51] Subsequently, when the United Nations Environment Programme (UNEP) was established by a UN General Assembly Resolution in 1972,[52] activities to protect the marine environment were undertaken at the regional level in the form of the UNEP regional seas programme.

In the case of Europe, various regional seas programmes were adopted. For instance, the Action Plan for the Mediterranean was adopted in 1975 for the protection of the Mediterranean Sea,[53] while for the North-east Atlantic two conventions were adopted in 1972, namely the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo Convention, 1972) and the Convention on the Prevention of Marine Pollution from Land-Based Sources (Paris Convention). These two Conventions were unified at the Ministerial Meeting of the Oslo and Paris Commissions held on 22 September 1992 and subsequently renamed the Convention for the Protection of the Marine Environment of the North-East Atlantic ("OSPAR Convention").[54] In terms of the Baltic Sea, in 1974 the Convention on the Protection of the Marine Environment of the Baltic Sea Area (the Helsinki Convention) was signed by all Baltic Sea coastal states to address environmental challenges in the Baltic Sea caused by industry and other human activities. The EU decided to participate in the Mediterranean Regional Sea Programme with its Member States, such as Italy and France.[55] However, it did not participate in any other regional seas programmes in the 1970s, because the effectiveness of the EU's participation in such programmes was considered questionable.[56]

At any rate, at the same time that the UNEP and regional seas programmes were being established, the EU's institutions began to raise the necessity of drawing up an environmental policy for the EU. Specifically, in 1972 the EU Council asked the Commission to draft a proposal for the EU's environmental policy, and one year later the European Commission published its first

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51 Y. Tanaka, *supra* note 5, p.352; M. D. Evans (ed), *International Law, Sixth ed.*, Oxford University Press, 2024, p.696.

52 UNGA Resolution 2997 (XXVII) 2112th plenary meeting 15 December 1972.

53 In 1976, the Convention for Protection of the Mediterranean Sea against Pollution was adopted which amended in 1995 and renamed the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention).

54 For the history of the OSPAR Convention, see the website of the OSPAR Commission, https://www.ospar.org/convention (accessed on 7 October 2024).

55 Council Decision of 25 July 1977 concluding the Convention for the protection of the Mediterranean Sea against pollution and the Protocol for the prevention of the pollution of the Mediterranean Sea by dumping from ships and aircraft, OJ L 240/1, 19.9.1977.

56 However, in 1992 the EU decided to conclude the amended Helsinki Convention, and in 1998 the OSPAR Convention. Recently the EU became the contracting parties of several regional seas conventions which aim to protect and preserve the marine environment.

Action Plan on the Environment.[57] Accordingly, the scope of the marine environment regulated by the EU came to expand from just pollution to other issues related to the marine environment. For instance, the EU adopted the Bird Directive[58] in order to protect wild birds characterized by transboundary movement, and that Directive came to also be applied to sea birds. In 1987, the Single European Act (SEA)[59] entered into force, which amended the original EEC-Treaty, and as a result the EU treaty stipulated for the first time environmental policy as an EU policy area in Articles 130r, 130s and 130t. Consequently, EU laws and regulations on the environment were adopted based on these provisions.

Since the 1990s the EU has adopted various environmental laws and regulations which aimed to protect/preserve not only specific target species, such as those stipulated in the Bird Directive,[60] but also more widely fauna and flora,[61] biodiversity,[62] or more recently climate change[63]; in other words, it has come to increasingly address the environment *per se*. Furthermore, the EU came to enact procedural laws which were necessary to secure EU environmental law, such as environmental impact assessment[64] or environmental criminal law[65] which are to be applied in EU waters.[66] In terms of the protection of the marine environment the EU also adopted in 2008 the Marine Strategic Framework Directive (MSFD)[67] in order to secure good environmental status (GES) in the European sea basins in 2020.[68]

Up to the present, there have existed several infringement procedures relating to EU

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57 Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112/1, 20.12.1973.

58 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103/1, 25.4.1979.

59 Single European Act, OJ L 169/1, 29.6.1987.

60 The newest version is the Annex I of the Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20/7, 26.1.2010.

61 See for instance, Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L 164/19, 25.6.2008; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206/7, 22.7.1992.

62 See for instance, Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet,' OJ L 354/171, 28.12.2013.

63 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243/1, 9.7.2021.

64 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26/1, 28.1.2012.

65 Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, OJ L 2024/1203, 30.4.2024.

66 According to the Article 3(1)(a) of the Directive 2008/56/EC, the geographical scope of the Directive is "waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the Unclos." Accordingly, the EU law is to be applied also to the EEZ of the Member States.

67 Directive 2008/56/EC, OJ L 164/19, 25.6.2008.

68 Article 1(1) of the Directive 2008/56/EC.

environmental law.[69] Thus, if a given EU Member State fails to implement EU laws within its territory, said Member State will face a formal infringement procedure launched by the European Commission and accusations before the CJEU by the European Commission (Article 258 TFEU) or by the other EU Member State[s] (Article 259 TFEU) as a last resort. However, the latter procedure is rarely undertaken.[70] If the European Commission brings the case against the Member States in question before the CJEU, the usual pattern in such cases is that the court recognizes the Member States as being at fault, and requires the Member States concerned to immediately take measures so as to comply with the judgment (Article 260(1) TFEU). If the Member States concerned do not comply with the CJEU's judgment, the European Commission can again bring the case before the CJEU.[71] During this judicial procedure, the European Commission "shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned," and the Court is able to impose a lump sum or penalty payment on the Member States concerned (Article 260(2) TFEU). The EU judicial system possesses greater enforcement power than that of the international courts or tribunals, and plays an important role in ensuring that EU law is uniformly applied within the EU.

What if the Member State involved still refuses to acquiesce? If, following the judicial process based on Article 260 TFEU, the Member State concerned fails to rectify its illegal situation (i.e., the Member State continues to not fulfill its obligations under EU law), then based on the EU Treaty (Article 7 TEU) the EU Council is able to prohibit said Member State from voting in the Council decision-making process. As of the present date this type of sanction has never been imposed; however, in recent years EU Member States have seriously considered the possibility of imposing this kind of sanction against Poland and/or Hungary.[72]

All EU Member States are contracting parties of UNCLOS, and furthermore every EU Member State facing an ocean (i.e., coastal states) is a party to one or more of the regional agreements to protect/preserve the marine environment, such as OSPAR or the Mediterranean (Barcelona) Convention. This triple-layer legal framework (EU law, UNCLOS, and Regional Sea Conventions) to protect the marine environment can at times result in debates on how to resolve marine environmental disputes for EU Member States. One famous example to consider

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69 The European Commission has been publishing annual reports on its actions to ensure compliance with EU law including EU environmental law. See for instance, European Commission, *Report from the Commission Monitoring the application of European Union law 2023 Annual Report*, Brussels, COM (2024) 358 final, 25.7.2024, p.20.

70 All infringement decisions taken by the European Commission have been published in the website of "European Commission at work." Based on that information, statistically, the European Commission sent 108 letters of formal notice based on the Article 258 TFEU in the year 2023. During the same year there were 13 infringement cases which the Commission referred before the CJEU. The results are similar for 2022.

71 *Ibid*. There were 4 infringement cases which were brought before the CJEU for the second time in the year 2023.

72 Infringement procedure against Poland taken on 20.12.2017 was closed on 24.5.2024 with the European Commission's Decision which stated that "The Commission believes that there is no longer a clear breach of the rule of law in Poland, so it has withdrawn its reasoned proposal that triggered this procedure in 2017." Infringement procedure against Hungary taken on 12.9.2018 has not closed yet. For both Member States the EU institutions and its Member States have seriously considered the possible application of the Article 7 TEU. See on this point, for instance, European Parliament resolution of 5 May 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary, OJ C 465/147, 6.12.2022.

is the *MOX Plant* Case.[73] In that case, Ireland claimed before the OSPAR Arbitral Tribunal that the UK violated UNCLOS by polluting the Irish Sea. The Tribunal decided that the UK had not violated the obligations imposed by the OSPAR Convention. In 2001, Ireland swapped tactics, and submitted to the UK "a Notification and Statement of Claim instituting arbitral proceedings as provided for in Annex VII to the Convention (UNCLOS) in the dispute concerning the MOX plant," and shortly after that date, Ireland submitted a Request for Provisional Measures to the ITLOS,[74] which recognized the obligation to cooperate to protect the marine environment (i) based on Part XII of UNCLOS, and (ii) based on the general international law,[75] and consequently ordered Ireland and the UK to exchange relevant information and so forth. In 2003, the ad hoc Arbitral Tribunal decided to suspend the case and wait to see whether the CJEU had jurisdiction in the case.[76] Finally, the CJEU delivered a judgment in 2006 which stated that Ireland had breached the obligation imposed by Article 344 TFEU, which stipulates that Member States are to submit a dispute concerning the interpretation or application of EU laws only to the CJEU.[77]

The decisive factor in resolving disputes relating to the marine environment before the CJEU is whether there exists relevant EU law applicable to the dispute concerned. For instance, Ireland had complained that the UK had failed to fulfill its obligation to conduct environmental impact assessments based on Article 206 UNCLOS, but the same matter was already regulated by EU law, namely, Directive 85/337.[78] In terms of the lack of cooperation on the part of the UK, Articles 123 and 197 UNCLOS were to be taken into account. However, here again the same points were stipulated in EU law, namely in Council Directive 90/313/EEC.[79] To sum up, if there already exist EU laws and regulations relevant to the matter at hand, then disputes pertaining to said matter must be submitted to the EU Court (CJEU), not to an international tribunal such as ITLOS. This privileging of EU laws and regulations points to the autonomy of the EU Court and the EU legal system.

(3) Maritime Delimitation

Two of the most famous disputes on maritime delimitation between European states are a pair of cases on the delimitation of the continental shelf of the North Sea, brought before the ICJ in 1969,[80] involving on the one hand Germany vs. the Netherlands (both EU Member States at the time) and on the other Germany vs. Denmark (which joined the EU four years later). After that judgment, there still remained various maritime delimitation issues within EU waters. In the Mediterranean Sea, several EU Member States have been negotiating for agreements

[73] There are many references on the MOX Plant Case. See for instance, N. Lavranos, The Epilogue in the MOX Plant Dispute, *European Energy and Environmental Law Review*, June 2009, pp. 180–184; F. Baetens, Muddling the Waters of Treaty Interpretation? Relevant Rules of International Law in the *MOX Plant* OSPAR Arbitration and EC – *Biotech* Case, *Nordic Journal of International Law*, Vol. 77 (2008), pp. 197–216; N. Lavranos, The MOX Plant judgment of the ECJ: How exclusive is the jurisdiction of the ECJ, *European Energy and Environmental Law Review*, October 2006, pp. 291–297.

[74] ITLOS, *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, available in: https://itlos.org/en/main/cases/list-of-cases/case-no-10/.

[75] *Ibid.*, paras. 82 and 84.

[76] Permanent Court of Arbitration, *The MOX Plant Case, Ireland v United Kingdom*, Order No3, Suspension of Proceedings on Jurisdiction and Merits, and Request for further provisional measures, 24 June 2003, paras. 24, 25 and 28.

[77] Case C-459/03, *Commission v Ireland*, ECLI:EU:C:2006:345.

[78] *Ibid.*, paras.111–115.

[79] *Ibid.*, para.117.

[80] ICJ, North Sea Continental Cases, Germany/Denmark; Germany/Netherlands, Judgment of 20 February 1969.

on maritime delimitations. In 2015 Italy and France agreed on the delimitation of their EEZs; however, this bilateral agreement has not yet entered into force because Italy could not proceed with the ratification process.[81] Based on this "bitter experience,"[82] on June 9, 2020, Italy made an agreement with Greece on maritime delimitation in the Ionian Sea.[83]

In both of these cases all of the states involved were EU Member States, but in spite of this EU institutions, such as the European Commission or CJEU, did not intervene. The Member States in question negotiated directly each other and concluded agreements on their own, because when it comes to maritime delimitation the EU has no competence. Without said competence, the EU is unable to exercise its power to regulate such issues, and consequently, EU law does not govern maritime delimitation issues. In this matter neither EU law nor the EU judicial system are able to regulate anything. Therefore, the EU Member States can, and moreover are expected to, resolve maritime delimitation disputes through negotiation or any other methods they may choose. Accordingly, the international laws and relevant dispute settlement procedures, such as diplomatic negotiation or international courts (ICJ, ITLOS, or Arbitral Tribunal set by relevant international/regional treaties), are important institutions for resolving disputes on maritime delimitations. In this regard, EU Member States employ the same methods to resolve maritime delimitation disputes as any other state in the world.

(4) Dispute Settlement Characteristics of the EU

So long as the EU has competence on disputed issues, all disputes among the EU Member States can be resolved within the EU legal system including the CJEU. However, in cases in which the EU does not have competence on the issues concerned, such disputes have to be resolved by the Member States themselves, in the same manner as any other conflict between sovereign states. In Law of the Sea matters, the EU possesses wide competence except when it comes to maritime delimitation. In consequence, most Law of the Sea disputes are resolved between the relevant states through infringement procedures taken by the European Commission, which can then put the judicial process before the CJEU, the judgments of which are legally binding for EU Member States. In cases of a breach of EU law, the EU Member States or the European Commission are able to sue the Member State(s) accused of breaching the law in question without the consent of the Member State concerned. This differs from international court systems, such as the International Court of Justice, which, in most cases, require all states concerned to agree to bring a dispute for arbitration.

4. Implications of the EU Legal System for Japan and/or Asia

EU Member States and Asian countries share some notable common elements. For one thing, all states are contracting states/parties of UNCLOS. Accordingly, Asian states bear obligations based on UNCLOS in the same manner that EU Member States do. However, the EU and its Member States appear to be more successful in the settlement of Law of the Sea disputes, even in areas where the EU does not have competence and therefore the Member States concerned are themselves required to negotiate and resolve the issue (for instance, as indicated above, disputes on maritime delimitations in the Mediterranean Sea). At least, there seem to be no situations in which one side simply ignores the other(s) and attempts to effectively control the area of interest

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81 On this point, see, for instance, A. Marghelis, The maritime delimitation agreement between Greece and Italy of 9 June 2020: An analysis in the light of International Law, national interest and regional politics, *Marine Policy* 126 (2021), p.4; I. Papanicolopulu, Maritime Boundaries after Delimitation, *Portuguese Yearbook of the Law of the Sea*, Vol. 1(2024), p.147.

82 *Ibid.*, A. Marghelis, p.4.

83 See on this agreement, for instance, *Ibid.*, A. Marghelis, pp.1–11.

itself.

There may be several reasons why this is the case. The first reason lies in the autonomy of EU law, which has been established by the case law of the CJEU and by institutional frameworks such as the infringement procedures based on Articles 258 and 259 TFEU. A second reason is likely the obligation to cooperate based on EU law. Even if there is no EU competence in a given area, necessitating the Member States to resolve disputes such as maritime delimitation on their own, it does not follow that the Member States concerned are fully free from the EU's laws and institutional framework. It is important to remember that Member States are required to take "any appropriate measures ... to fulfillment of the obligations arising from the EU laws," and they should moreover "refrain from any measure which could jeopardise the attainment of the Union's objectives" (Article 4(3) TEU, Principle of Sincere Cooperation). Accordingly, even in the event that, for instance, there is an unresolved maritime delimitation dispute, the relevant EU Member States are required to cooperate to achieve the purpose of the EU's CFP in the area where said dispute has occurred, and they similarly have to cooperate to achieve the purpose of the Marine Strategy Framework Directive aimed at ensuring Good Environmental Status in the ocean where they are still negotiating the dispute in question. These obligations do not disappear simply because a delimitation dispute has occurred over the waters in question. To sum up, regardless of the existence of unresolved disputes on maritime delimitation, the Member States concerned are required to cooperate to achieve the purposes of the relevant EU laws, such as those pertaining to fishery or the protection of the marine environment, and if the Member States refuse to cooperate with each other, then they are likely to stand accused before the CJEU of a breach of the obligations imposed by EU law or a breach of the obligation of sincere cooperation based on Article 4(3) TEU.

In the Asian region, however, there is nothing like the sort of solid legal system in the EU which could force states to cooperate in Law of the Sea issues. However, it is important to note that the success of the EU in the area of Law of the Sea dispute settlements is rooted not only in the EU's solid legal system, but also in the cooperation obligation imposed by Article 4(3) TEU. In the judgments of international courts and tribunals, the importance of the obligation to cooperate has been repeatedly emphasized, especially in environmental law disputes.[84] Recently, for instance, the ITLOS connected the obligation to protect the marine environment based on Article 192 UNCLOS with the obligation to reduce green-house gases based on the Paris Agreement (Climate Change) in its Advisory Opinion in May 2024.[85] This trend may lead to extending the general obligations to protect the marine environment, which involve an obligation to cooperate based on Article 192 UNCLOS.

Essentially, in an international context, the obligation to cooperate to protect the marine environment is becoming increasingly significant and complex (particular as actions taken to counteract climate change involve various activities which are pursued not only in the ocean, such as offshore wind farms, but also on land, such as emission controls). Consequently, even if Asian states have Law of the Sea disputes, they are required to cooperate in order to maintain not only the marine environment, but also the environment *per se* at the global level. This broad-level obligation to cooperate can be expected to play a significant role in resolving Law of the Sea disputes in Asia.

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[84] ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment of 20 April 2010, para.77; ITLOS, *MOX Plant (Ireland v United Kingdom), Provisional Measures*, Order of 3 December 2001, para.82; ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, para.210.

[85] ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 24 May 2024, paras. 297 and 299.