

The Fisheries Issues of the 2004 Second European Union Accession Treaty: A Comparison with the 1994 First Accession Treaty

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ABSTRACT

The 1994 and 2004 Accession Treaty and Act of Accession require that the Applicant Member States adopt EU legislation and policy. The goal of the Accession Treaty is to phase out Applicant Member State legislation and institute the pre-emptive role of EU law. The EU fisheries *acquis* directly affects natural and juridical persons. Member states maintain legislative competence within 12 nautical miles during the transitional period, which ends in 2012. With the exception of specific areas *delegated* to Member States, national provisions will then be terminated. The “relative stability” and national quota regulations remain in effect and deter direct fishing by other Member States’ vessels. Quota hopping, on the other hand, opens the door to foreign fishing interests. A new system of individual transferable quotas will further contribute to the decline of the inherent discrimination amongst EU citizens within fisheries sector.

I. INTRODUCTION

On 16 April 2003, the Second Accession Treaty to the European Union (EU)—effective from 1 May 2004—was signed by the 15 EU Member States on one side and the 10 Applicant Member States on the other.¹ This article

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¹ Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (members of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovakia, the Republic of Slovenia. Concerning the Accession of the Czech Republic, etc. Negotiations on Accession by the Czech Republic, etc. to the European Union. Brussels, 3 April 2003 (AA2003/TR/en)—hereinafter the

focuses on the legal results of the Accession Treaty, or to be more precise, the Act of Accession on the fisheries sector, and particularly emphasises the division of competence between the EU and its Member States.² In reviewing these issues it should be borne in mind that the substantive agreements reached in the Accession Treaty in the fisheries area are of particular significance because the Treaty is an instrument of international law—requiring the agreement of the parties before changes can be made. EU legislative acts, which regulate the substance of the Common Fisheries Policy (CFP), bind all Member States but can be changed by a variety of methods—including majority voting.³

The aim of this paper is to examine the fisheries provisions of the 2004 Treaty of Accession with special reference to the legislative competence of the Member States. How far-reaching is the EU exclusive competence⁴ under the Common Fisheries Policy (CFP)? Do Applicant Member States enjoy residual rights under the present EU fisheries legal regime, the so-called “fisheries *acquis*”? Because the 2004 Agreement is not very specific, resort has to be made to the 1994 Agreement.

The current task is not to describe the political benefits or drawbacks of the CFP. As a rule, EU membership implies loss of Member States’ prescriptive competence. Within the 12 nautical mile zone the residual competences may not contradict EU provisions (see Part II of this article).⁵ This, in turn, does away with each state’s competence to decide unilaterally with the issue of whether its national waters should be reserved for local fishermen,⁶ or whether a takeover by foreign fleets⁷ might be in its national interest. Under the EU

cont.

Second Accession Treaty of the European Union, or the 2004 Accession Treaty. By referendum—the latest in Latvia, 20 September 2003—the Treaty is now acknowledged in all Applicant Member States. The Treaty will become effective for all Member States by 1 May 2004 at the latest.

² For a general discussion on EU exclusive competence, see P. Ørbech, “The EU Competency Confusion: Limits, ‘Extension Mechanism’, Split Power, Subsidiarity and ‘Institutional Clashes’”, (2003) 13 *J. Transitional L. & Pol’y*.

³ This technique, brought into play in all instances of EEC, EC or EU accession during the years, places new Member States under a supranational scheme, not an ordinary intrastate connection. This fact is overlooked in T.C. Hartley, “The Constitutional Foundations of the EU” in P. Craig and R. Rawlings, *Law and Administration in Europe. Essays in Honour of Carol Harlow* (Oxford University Press, 2003), p. 175 *ff*.

⁴ See *ibid.*, Part II C2.

⁵ See, for instance, the 2003 EU-Sweden controversy on local cod regulations in the Swedish region of Skagerak. Swedish Ministry of Agriculture, 21 December 2002, at http://www.regeringen.se/galactica/service=irnews/owner=sys/action=obj_show?c_obj_id=48092 (visited 1 September 2003).

⁶ Council Reg. (EC) No. 2371/2002 of 20 December 2002, Art. 17(1) and (2).

⁷ I.e. the residual national competence within the 12 nautical mile zone is non-discriminatory, cf. Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Art. 9, para. 1. Member States have thus departed from national seas reserved for their coastal populations.

regime, resource rent is often allocated to foreign fishermen, ultimately ending up in financial centres and not in local communities. One assumed advantage of the CFP is the transboundary management of straddling and highly migratory species,⁸ an achievement that would otherwise require effective regional fisheries bodies.⁹ The EU water allows for a scientifically planned conservation policy that includes important species in its entire distribution area. The success of EU conservation and management principles depends, however, upon the scientifically based determination of total allowable catches and allocation practices and implementations on both EU and national levels. The EU considers its policy a failure.¹⁰ “A system of tradable fishing rights” and “payment for the right to fish” should be introduced to remedy the policy.¹¹

EU fisheries legislation illustrates the competence division within the EU. The issue is how Member State competence relates to pre-emptive EU competence in an area covered by common policies and exclusive EU autonomy.¹² This legislative endeavour can be seen as part of the efforts of the Nice and Laken Declarations to “reform the attainment of a clearer delimitation of EU powers”.¹³

While fisheries jurisdiction clearly embraces all issues of legislation, enforcement and adjudication, this paper is limited to legislative competence because law-making is the key competence instrument. It will focus on fisheries aspects under the EC pillar of “the four freedoms” (the internal market) and not on those aspects covered by the other EU pillars, such as immigration and co-operation in criminal matters, foreign and security policy, or monetary union.

⁸ R.R. Churchill, *EEC Fisheries Law* (Martinus Nijhoff, Dordrecht/Boston/Lancaster, 1987).

⁹ See e.g., P. Ørebech, K. Sigurjonsson and T.L. McDorman, “The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement”, (1998) IJMCL 119. See also P. Ørebech, “The ‘Repetitive Players Game’ Illustrated by the Regional Fisheries Organization of North East Atlantic Convention (NEAFC)” in Trond Bjørndal *et al.* (eds.), *Proceedings from the Conference on the Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and the UN Agreement* (Bergen, Norwegian College of Business and Management, 1999).

¹⁰ The EU is confident that the “first shortcoming of the CFP is the alarming state of many fish stock that are outside safe biological limits . . . The debate on the future CFP revealed more clearly . . . the shortcomings and systematic weakness . . . such as poor enforcement, the lack of a multi-annual management perspective, fleet over-capacity and insufficient stakeholder involvement . . . It also showed a broad consensus that the current policy is incapable of reversing the increasing threats to important fish stocks and providing economic sustainability to the fisheries sector.” See Commission of European Communities, “Communication from the Commission on the reform of the Common Fisheries Policy” (“Roadmap”), Brussels 28.5.2002, COM (2002) 181 final, pp. 3–4.

¹¹ Commission of European Communities, “Roadmap”, note 10 above, p. 23.

¹² For a similar approach but at the general, principal and *de lege ferenda* level, see Anna Vergés Bausili, “Rethinking the Methods of Dividing and Exercising Powers in EU: Reforming Subsidiarity and National Parliaments” (Jean Monnet Working Paper 9/02, NYU School of Law, 2002).

¹³ *Ibid.*, p. 1. For the Nice Treaty provision, see Declaration 23.

The established body of Community Law—the *acquis communautaire*—is the primary source setting forth the legal situation of Applicant Member States. The *acquis communautaire* must be read in connection with the Second EU Accession Treaty (hereinafter the 2004 Act of Accession),¹⁴ as interpreted by the “Enlargement of European Union: Guide to the Negotiations”¹⁵ and compared with the solutions offered in the First EU Accession Treaty of 1994.¹⁶ This paper does not deal with the 1972 (Denmark, Ireland and UK) or the 1986 (Iberian) accessions. These accessions relate to the European *Communities*, and not to the 1992 European *Union*. Since the Common Fisheries Policy (CFP) is developed in stages, it is, however, important to review the earlier acts.

The two nations receiving the greatest attention under the fisheries chapters of the 1994 and 2004 accession processes, Norway and Latvia, exemplify the competence issues resulting from the new members’ accession.¹⁷ As distinct from the Latvian situation, however, Norway was an applicant country in 1994, but it never became a Member State due to a referendum that voted against accession negatively, largely because of the fisheries issues. The Norway-EU connection is dealt with by the European Economic Area (EEA) Agreement, which basically excludes Norway from being influenced by the Common Fisheries Policy (CFP).

The following instruments provide further guidance to these competence issues: the 1998 Council Regulation on Assistance to Applicant States Within the Framework of the Pre-Accession Strategy;¹⁸ the establishment of Accession Partnerships;¹⁹ the Council Decision on Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnerships with Applicant Members;²⁰ and secondary legislation under the CFP.²¹ Since Applicant Mem-

¹⁴ Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovakia, the Republic of Slovenia and the Adjustments to the Treaties on which the European Union is Founded (AA2003/ACT/en).

¹⁵ European Commission, Directorate-General (December 2002).

¹⁶ Negotiations on Accession of Austria, Finland, Norway and Sweden to the European Union, Accession Treaty of 12 April 1994, with Annexes (hereinafter 1994 Act of Accession).

¹⁷ Data for the Norway failing 1994 Accession are found in the Norwegian Position Paper on Fisheries (12 November 1993), and for 2004, that which concerns Latvia in the European Commission, Enlargement D-G, “Accessions Negotiations: State of Play” Document (20 December 2002) and European Commission, Enlargement D-G, “Enlargement of European Union. Guide to the Negotiations” (December 2002).

¹⁸ (EC) No. 622/98 of March 1998.

¹⁹ OJ No. L85, 20.3.1998.

²⁰ Since the texts under the fisheries sections are identical in all the partnership agreements, the author has stuck to one of the decisions—in this case, the text found in the Accession Partnership with Latvia. It was the first text developed and served as a pattern for the following 11 partnership decisions. The author also takes into consideration the “Explanatory Memorandum” and Annex to the Latvian Accession Partnership.

²¹ See note 16.

ber States did not achieve any beneficial position compared with present Member States, the overall question is whether Member States maintain legislative autonomy under the CFP of 2004.

Before discussing the fisheries positions of the 2004 Member States, it should be noted that the “Fisheries Chapter” under the Negotiations Agenda only covers a subset of the relevant fisheries measures. Fisheries resources management and market regulation issues fall under Title II of the EC Treaty Part III. Employment, services and capital movement questions are found in Title III, and are discussed in Parts V through VIII of this article. The 1994 First Accession Treaty to the EU and the 1992 EEA agreement²² also illustrate this structural division of relevant fisheries issues.

Part II of this article reviews the main principles of fisheries *acquis*, with a special emphasis on shared competence under the transitional measures. Do Member States retain any residual rights?

Part III examines the results of the accession negotiations. Part IV focuses in greater detail on the division of competence between EU and Member States with regard to the regulation of (a) access to waters and resources; (b) surveillance authority; (c) management of international agreements outside the CFP; (d) access to ports; and (e) transit. Part V relates to the marketing arrangements such as (a) the establishment of producers’ organisations (PO); (b) on-board processing—factory ships; (c) customs; and (d) quantity regulations. Parts VI through VIII cover investment, establishment and free movement of peoples, all of which are under exclusive EU autonomy. The purpose is to present the basic changes to Member States’ national fishing policies caused by these provisions.

II. THE FISHERIES *ACQUIS* PLATFORM—GENERAL COMPETENCE ISSUES

This part explains the general legal and legislative background for the implementation of fisheries *acquis*. Unless explicit exceptions are made, Applicant Member States are under general EU authority. Member States’ competence results *in toto* from EU delegation.

The Legislative Background of the Common Fisheries Policy

Under the 1957 Treaty of Rome Common Agricultural Policy, which includes fisheries, all national prescriptive competences were in principle handed over to the EEC. The implementation of this common policy took place in stages during the 1970s and 1980s.²³ The Member States’ remaining power is not derived from residual rights, but is, instead, delegated by secondary EU provisions.

²² Agreement on the European Economic Area of 2 May 1992, as developed by the 2003 EEA Enlargement Agreement between EC and EFTA and Member States and Applicant Member States to the EU.

²³ Churchill, note 8 above, pp. 11–16.

Articles 32 through 38 of the EC Treaty are named after the titles of EU fisheries regulations implemented in subsequent secondary law²⁴ and case law. The first two judgments of the European Court of Justice (ECJ) in the *Factortame cases* (see below under the headings “The Inferior Status of National Law: Direct Applicability, etc.” and “The Inferior Status of National Law: Delegated Power, etc.”) are particularly critical to understand the fisheries competence division between the EU and its Member States. The 1957 Rome Treaty transferred the fisheries competence of the original six Member States. More recent accession treaties have transferred the competence of later Member States.²⁵ The EC and the EU have developed a common fisheries legislation (fisheries *acquis*) that embraces most conservation and management issues. Due to disagreement over the momentum of implementation of the CFP in the entire EU waters—especially within the 12 nautical miles coastal zone—the original 10-year transition periods provided by the 1972 Denmark, Ireland and UK Accession Treaty have now been extended until the end of 2012.²⁶ These 40 years of transition show just how problematic the common EU fisheries policy has become within the coastal zone.

Before discussing the negotiation results, it is time for a brief presentation on EU exclusive competence within the fisheries. This will compare the current positions of the EU, before the start of the section post-transitional period of the Common Fisheries Policy,²⁷ with the positions taken under the First EU Accession Treaty of 1994,²⁸ when the CFP had just finished its mid-term review of

²⁴ Council Reg. (EEC) No. 3760/92 establishing a Community System for Fisheries and Aquaculture (no longer in force); Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy; Council Reg. (EC) No. 88/98 of 18 December 1997 laying down Certain Technical Measures for the Conservation of Fishery Resources in the Waters of the Baltic Sea, the Belts and the Sound; Council Reg. (EC) No. 1626/94 of 27 June 1994 laying down Certain Technical Measures for the Conservation of Fishery Resources in the Mediterranean; Council Reg. (EC) No. 1239/98 of June 1998 amending Reg. (EC) No. 894/97 laying down Certain Technical Measures for the Conservation of Fishery Resources; and Council Reg. No. 104/2000 of 17 December 1999 on the Common Organisation of the Markets in Fishery and Aquaculture Products.

²⁵ While the 1972 (UK, Ireland and Denmark), 1979 (Greece) and 1985 (Spain and Portugal) accession treaties relate to the EEC, the 1994 and 2003 treaties relate to membership in the EU.

²⁶ Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Preamble, para. 14.

²⁷ National rules restricting access to resources within the 12 nautical mile zones of Member States are now scheduled to end on 1 January 2013. See Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Preamble, para. 14. For the political considerations of a prolonged transitional period, see Commission of European Communities, “Green Paper on the Future of the Common Fisheries Policy”, COM (2001) 135 final, Brussels, 20.3.2001, esp. Chapter 1, note 1, cf. Chapter 5.1.4.

²⁸ Negotiations on Accession of Austria, Finland, Norway and Sweden to the European Union, Accession Treaty of 12 April 1994. Norway failed to ratify because membership was voted down in the referendum of September 1994.

the transitional period's achievements. Here we get a glance of the changing EU positions on shared competence from the era of pre-permanent CFP.

The Fisheries *Acquis*—Main Legal Principles

Before discussing the outcome of the negotiations on Applicant Member States, there are some key legal issues to consider. Unless otherwise provided in the Accession Treaty, the applicant Member States must fully adhere to the *acquis communautaire*.

Initially the discussion will focus on legislative power and on the division between exclusive and shared competence, i.e. exclusive to the EU or shared between the EU and its Members States.²⁹ Since the fisheries *acquis* is under exclusive EU legislation, there are some instances of possible Member State “partnership” within the law-making process. One such instance is Member State competence by delegation. Another possibility is *de facto* competence in legal *lacunae*.

Secondly, we focus on integration as an interpretative factor for the European Court. Considering the impact of this court practice, negotiators and Applicant Member States must learn to express their vital concerns in treaty texts.

The Common Fisheries Policy and the Transitional Period

The time limit for the derogation regime was originally outlined in the 1972 Act of Accession, Article 100, as implemented in the Management Resolution (EEC No. 170/83, the Preamble). The interim period was scheduled to end in 1992. If undecided, however, it would automatically run for 10 more years, and terminate in 2002. This view was confirmed by the ECJ: “Whereas this [1992] regime, after *possible* adjustment is applicable for a further period of 10 years.”³⁰ In order to continue the interim period, a qualified majority vote was required before the end of 2002.³¹ This vote was actually obtained on 20 December 2002. The transitional period—relevant only to the national “[r]ules in place restricting access to resources within the 12 nautical mile zones of Member States”—now terminates on 31 December 2012.³² Whether this is the final postponement before arriving at the permanent CFP regime remains to be seen. A permanent derogation regime cannot be sustained within the framework of the EC Treaty, but may, instead, require a change in the EC Treaty

²⁹ See Draft Treaty Establishing a Constitution for Europe of 18 July 2003, Part One, Arts. 11–13.

³⁰ Case 216/87, *R v Ministry of Agriculture, Fisheries and Food ex p. Jaderow* (14 December 1989) [1989] ECR 4509 and Case 804/79, *Kommisjonen v UK* (5 May 1981) [1981] ECR 1045, para. 27. In that direction, see Churchill, note 8 above, p. 107.

³¹ Also made clear in Council Reg. No. 101/76 of 19 January 1976 on the Establishment of a Common Fishery Structural Policy.

³² See Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Preamble, para. 14.

itself. Article 308 of the EC Treaty prohibits such a change without an actual treaty amendment.³³

The Common Policy and Exclusive Competence

Fisheries are part of EU common policies.³⁴ Under the Common Fisheries Policy, the EU enjoys exclusive jurisdiction, which means that Member State legislative power has been abolished both in practice and in principle. EU law has pre-emptive force. Since there is no residual Member State competence within the substantial area of law covered by the CFP, EU exclusive prescriptive competence implies that Member States are precluded from any law-making. Member States may not act validly unless treaties or secondary provisions say so. EC Treaty, Article 134(2), the Member States' "urgency clause" permitting action in cases of "crisis management", found under the common commercial policy, exemplifies this issue.

Materially speaking, which fishery issues are embraced by the CFP? According to Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy:

[T]he scope of Common Fisheries Policy extends to conservation, management and exploitation of living aquatic resources and aquaculture, as well as to the processing and marketing of fishery and aquaculture products, where such activities are practised on the territory of Member States or in Community waters or by Community fishing vessels or nationals of Member States.

Article 1 provides specific details about these areas and includes provisions covering everything from (a) conservation, management, and exploitation; (b) limitation of the environmental impact of fishing; (c) conditions of access to waters and resources; (d) structural policy and the management of the fleet capacity; (e) control and enforcement; (f) aquaculture; (g) common organisation of the markets; and (h) international relations. As indicated, all areas of fisheries participation and conduct directed towards resource utilisation, regardless of geographic area, as well as all market arrangements, are under EU auspices (2003 Draft Constitution, Article 12.1).³⁵ The only limitation mentioned is the 1982 UN Convention on the Law of the Sea (LOSC), Article 117, which gives each EU Member State, as flag state, the "primary responsibility" for fishing activity on the high seas to the flag state.³⁶ The EC Declaration made on accession to the 1995 Fish Stocks Agreement sets forth the

³³ Human Rights and Fundamental Freedoms Opinion 2/94, para. 35, [1996] ECR I-1759. See also P. Ørebeck, note 2 above.

³⁴ Cf. EC Treaty, Art. 3(1)(e).

³⁵ Draft Treaty Establishing a Constitution for Europe of 18 July 2003.

³⁶ Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, OJ No. L381, 31.12.2002, pp. 59–80, Preamble, para. 2.

details of this sharing of responsibility along with the division of competence between the EC and its Member States with respect to fisheries.³⁷ This means that while the EU and Member States have shared competence for high seas fishing activity, fishing regulations within the EU waters belong exclusively to the EU.

In areas of exclusive EU autonomy, national prescriptive power is replaced by EU jurisdiction and *acquis communautaire*. Thus *acquis communautaire* has become the one and only legal basis for Member States, Member States' courts, and natural and juridical persons in all common policy areas. This includes sectors such as commercial policy, common customs tariffs and fisheries. Management and conservation issues under fisheries policy *in toto* are such an example.³⁸

No EC Treaty provision bans the EU from delegating power to Member States within its exclusive power. In fact, the EU delegates power to Member States to fill *lacunae* and to implement or direct EU provisions. (See further below at Part III of this article.) Thus in practice Member States and EU *divide powers* within areas of common policies for local regulations.³⁹ This delegated power is only valid as long as the EU does not take action, and as long as it remains in conformity with EU framework laws.⁴⁰

Outside the common policy area, *divided competence* is the main rule. To the extent required for the purpose of approximation of laws (EC Treaty, Article 3(1)(h)), the EU may direct Member State laws. Fisheries management and conservation rules, however, do not belong to this category. Neither do rules applicable to investment, establishment or free movement of workers. Difficulties sometimes arise in distinguishing the areas that belong to exclusive power from those that belong to split powers.

In the *Opinion on the Convention No. 170 of the International Labour Organization Concerning Safety in the Use of Chemicals at Work* (ILO Opinion), the ECJ ruled that:

The exclusive or non-exclusive nature of the Community's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member

³⁷ 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 No. L189, 3.7.1998, pp. 14-15.

³⁸ Commission of European Communities, "Roadmap", note 10 above, esp. p. 23.

³⁹ See e.g., Council Reg. (EC) No. 88/98 of 18 December 1997 laying down Certain Technical Measures for the Conservation of Fishery Resources in the Waters of the Baltic Sea, the Belts and the Sound, Art. 13(1).

⁴⁰ This system is now being proposed on a broad level, see Commission of European Communities, "Green Paper on the Future of the Common Fisheries Policy", note 27 above, Chapter 5.5.2, p. 30.

States of an area of competence which they were able to exercise previously on a transitional basis.⁴¹

The groundbreaking question for any EU legislation, therefore, is whether it deprives Member States of competences previously held. Since there are no general characteristics applicable to this question, each case must be justified on a discretionary basis. As a general approach, one question to ask is whether Member States' involvement would take an area of law out of EU exclusive competence.⁴²

In all areas of shared or divided competence, EU law is *lex superior*.⁴³ Member States are obliged to adopt EU law solutions when so provided and to adapt to *acquis communautaire*. Where laws conflict, Member State law must concede to EU law.⁴⁴

Decision-Making Power

EU common policies typify areas held absolutely by exclusive EU legislative competence. Stated briefly, under its exclusive autonomy, EU legislation sets forth pre-emptive norms. Thus, Member States may no longer take valid action within the common policy area without explicit delegation from the EU. The basic principle is outlined in the *European Agreement on Road Transport (ERTA)* case:

Each time the Community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the Member State no longer has the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.⁴⁵

The common policies and pre-emptive status of EU legislation are only indirectly connected. As stressed by the ECJ, the EU adopts "common rules" according to common policy competences. The substance of these rules, however, determines whether Member States are excluded from law-making activity. Sometimes the EU refrains from applying its autonomy to the fullest extent legally possible. The possible exclusivity of EU legislative competence is premised on the formulations made in the proclaimed community rules. More precisely, the ECJ clarifies possible Member States' residual rights by justifying subsidiary fishery legislation. Several court decisions provide guidance here.

⁴¹ Opinion 2/91, [1993] ECR I-1061, at § 9.

⁴² On these issues, see P. Ørebech, note 2 above, esp. para. 4.

⁴³ Now codified in Draft Treaty Establishing a Constitution for Europe of 18 July 2003, Part One, Art. 10.

⁴⁴ See P. Ørebech, note 2 above.

⁴⁵ Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263, para. 17.

The EU's position in fisheries matters, as stated in the *acquis communautaire*, places exclusive decision-making power under EU authority. In the cases *Cornelis Kramer and others*, the ECJ ruled that:

It should be stated first that this authority which the Member States have is only of a transitional nature . . . it follows from the foregoing considerations that this authority will come to an end 'from the sixth year after accession at the latest' since the Council must by then have adopted . . . measures for the conservation of the resources of the sea.⁴⁶

The EU Act of Accession has scheduled the termination date for Member States' legislation. The Member States' remaining rights cannot be revoked once the transition period has ended. The *Regina v Kirk* case made this clear:

It follows from . . . Articles 100 and 103 of the 1972 Act of Accession that the measures derogating from a fundamental principle of community law, namely non-discrimination, were limited to the transitional period and that the power to bring into force any provisions thereafter was entrusted to the Community Authorities . . .

It cannot be concluded from the fact that the Council failed to adopt such provisions within the period provided for in Article 103 that the Member States had the power to act in the place of the Council, in particular by extending the derogation beyond the prescribed time-limits.⁴⁷

Thus, two things can be taken away from reading this. First of all, internal EU legislation outlines Member State national competence; the accession treaties do not. Therefore, the EU may change the substance of the Member State derogation competence.⁴⁸ Secondly, by the time the transition period is over, the EU will have brought the decision-making power under its exclusive jurisdiction.⁴⁹ This power includes all items pertaining to fisheries, as presently listed in Council Regulation (EC) No. 2371/2002 of 20 December 2002, Article 1. As indicated (under heading "The Common Policy and Exclusive Competence"), vessel registration and flag state control under the 1982 LOS Convention are the only areas of fishing vessel regulations that are explicitly exempt from EU exclusive autonomy. Because the Applicant Member States do not have any explicit exceptions to the 2004 Accession Treaty, their decision-making power is handed over to the EU from day one of membership. This view derives from the interpretation practice of the ECJ discussed below.

ECJ Interpretation Practice

In order to appreciate the EU Accession Treaties, it is necessary to be aware of the interpretive approach of the ECJ. As European Court decisions are

⁴⁶ Joined Cases 3, 4 and 6/76, *Cornelis Kramer and others* [1976] ECR 1279, paras. 40 and 41.

⁴⁷ Case 63/83, *Regina v Kirk* (10 July 1984) [1984] ECR 2689, paras. 14 and 15.

⁴⁸ Which is the case, since national regulations in the 12 nautical mile zone may no longer be discriminatory (see Council Reg. (EC) No. 2371/2002, Art. 9(1)).

⁴⁹ Churchill, note 8 above, p. 169.

highly policy-oriented, and promote the interests of the Union,⁵⁰ the intentions of the Treaty's draftsmen are heavily downplayed. The Court's main agenda is the "pursuit of integration through law".⁵¹ This simply launches a principle of "extended interpretation"—that is, *l'effet utile* for all issues. It forces existing members to make their request for exceptions joint and explicit; otherwise, the European Court will refuse to give effect to the exceptions.⁵² Such a situation sometimes leads to unpleasant surprises, as Robin Churchill relates was the case for the UK in 1979 in the European Court in the second case of *Commission v United Kingdom* (Case 804/79).

Mr Rippon, the United Kingdom's chief negotiator, speaking immediately after agreement had been reached on the fisheries articles of the Act of Accession, stated in the House of Commons that the United Kingdom would 'retain full jurisdiction' in its then 12-mile fishing zone, including the power to enact conservation regulations . . . The Court's ruling [in Case 804/79] thus illustrates how little weight it puts, in interpreting Community Law, on the intention of the draftsmen, and how much it adopts a dynamic, policy-oriented approach to promote the interests of the Community and the further integration of its Member States.⁵³

All new Member States and negotiators should remember these words. Main rules are interpreted and applied broadly: exceptions are always narrowly construed. Parties to an accession treaty must be very clear and definite about their requirements. An omission, exemption or other deviation from *acquis communautaire* that is not expressly addressed, is not granted.

The Division of Legislative Power

Regulations under the 2004 Act of Accession acknowledge the validity of "the provisions of the original Treaties and the acts adopted by the institutions".⁵⁴ The division of power applicable to the existing Member States will be the same for newcomers within all areas of *acquis communautaire*. To get a better understanding of the post-membership positions of non-members, it is useful to consult the 1994 Act of Accession.

Without doubt, the EU has long enjoyed exclusive legislative power over fisheries. However, until the year 2003,⁵⁵ Member States could retain national legislative power over their national quota allocation and the limitation of fishing within their territorial waters. Since the transitional period has been extended until the end of 2013, an interim fisheries *acquis* system identical to

⁵⁰ *Ibid.*, p. 89.

⁵¹ Jo Shaw, *Law of European Union* (Palgrave, Houndsmill UK and New York, 2000), p. 27.

⁵² P. Ørebech, *GATT-rett, EØS-rett eller EF-rett? (GATT law, EEA law or EU law?)* (Oslo, Osmundsson, 1992), p. 139.

⁵³ Churchill, note 8 above, p. 89.

⁵⁴ 2004 Act of Accession, Art. 2.

⁵⁵ 1994 Act of Accession, Art. 37; and 2002 CFP Framework Reg. No. 3760/92, Art. 14(2). See Ørebech, note 52 above, p. 219.

the one found in the 1994 Act of Accession now governs the 10 new Member States.

Geographically speaking, the transfer of decision-making power to the EU relates to Applicant Member States' waters (within internal waters, territorial seas, fishing zones and EEZs). EU jurisdiction is valid inside as well as outside the EEZ, that is, both on the open sea and within territorial waters.⁵⁶

Member State legislative power, although not formally abolished until 1983,⁵⁷ had in effect already been handed over in 1979.⁵⁸ Unless otherwise agreed by negotiating parties, new Member States have fully and unconditionally accepted EU fisheries legislation as dictated by the Common Fisheries Policy (CFP).

The question then is whether new Member States gained any exclusive legislative rights under the 1994 or 2004 Acts of Accession. Using Norway as an example, it can be seen that although Norway accepted EU legislation in principle, Norway reserved its right to set the total allowable catch (TAC) for the most important species (cod, haddock, redfish, Pollock, etc.);⁵⁹ to adopt technical measures;⁶⁰ and to maintain control north of 62°N.⁶¹ Like the Latvians in 2003, the Norwegians requested that these measures belong to Applicant Member States' legislative powers.⁶² What was the outcome of the negotiations?

Clearly, the attempt to retain exclusive legislative power was a "no go" in both 1994 and 2003. The EU firmly rejected the Norwegian position. "[T]here is no question of agreeing to Applicant Member States managing access to waters and resources . . . outside the CFP."⁶³ Obviously there was no way around the matter. Norway had to agree to transfer all its national legislative powers to the EU. An example is the statement under Article 49 of the 1994 Act of Accession (concerning the TAC): "[t]he full integration of the management of those resources into the Common Fisheries Policy". And under the Joint Declaration on Management of Fisheries Resources in Waters North of 62°N: "[T]he contracting Parties . . . agree . . . upon the integration of these waters into the common fisheries policy (CFP)."⁶⁴

Jurisdiction transfer was clearly a foregone conclusion, as seen from the 2002 negotiations with the new Member States. The situation was similar to the position of potential Accession Member States in 1994. The EU was to take over legislative power from day one. As was made equally evident by the

⁵⁶ Churchill, note 8 above, p. 85, and again at p. 90. Cf. Cases 3, 4 and 6/76, *Officier van Justitie v Kramer*.

⁵⁷ Cf. the Preamble in 2002 CFP Framework Reg. No. 170/83.

⁵⁸ Churchill, note 8 above, p. 110.

⁵⁹ Norwegian Position Paper on Fisheries (12 November 1993, Section 2.2.6).

⁶⁰ *Ibid.*, Chapter 3.2.1, cf. Annex I.

⁶¹ *Ibid.*, Chapter 3.2.2, cf. Annex II.

⁶² *Ibid.*, Chapter 4.4, p. 20.

⁶³ *Eurofish Report*, 20 January 1994, BB1.

⁶⁴ Negotiations on Accession of Austria, Finland, Norway and Sweden to the European Union, Brussels, 12 April 1994 (AA-AFNS6, final), p. 11.

1994 Accession Treaty, the sole question open to negotiation was the duration and content of the transitional period. EU exclusive competence is not open to debate. The only negotiable issue is the length of the interim period.

EU *De Facto* Incorporation

In 1994, the Act of Accession brought no relief to Member States' ambitions to remain in charge of the regulation of fisheries. The sole exception was the delegated competences. The only concession the EU offered the Member States was an interim period during which they would enjoy legislative rights. In order to effect a successful transfer of Norwegian legislative competence to EU legislative competence, Article 50 of the 1994 Act of Accession provided that the EU should "take a decision on the technical measures applicable [in Norwegian waters] with a view to maintaining or developing existing measures". In other words, the EU guaranteed Norway that it would *consider* allowing Norway to maintain its regulatory system: no more, no less. And, in 2003, the EU obligation was limited to incorporation of the Applicant Member States' regulations according to some jointly acknowledged guidelines: "with a view to adopting the necessary conservation measures relating to Malta according to the following guidelines".⁶⁵ Part IV of this article investigates whether the EU takes this vague legal undertaking seriously.

Are Member States' Prescriptive Rights Transferred by Delegation?

Since fisheries are among areas of exclusive EU legislative competence, Member States may only obtain competence through delegation. In those cases where Member States and the EU divide power, the EU competence is greater, and Member State provisions must adapt to the *acquis communautaire*.⁶⁶

During the period of interim measures ending on 31 December 2002, Member States enjoyed limited law-making power. This power derives from explicit delegation: "If there is evidence of a serious and unforeseen threat to the conservation . . . that Member State may take emergency measures."⁶⁷ Although Member State limited legislative power is still an option during the interim period ending 31 December 2012, competence is now split between "Member States (and the) Commission". However, the applicable Regulation provides that "[t]he conditions for the power to act are similarly strengthened, questioning the need for immediate action".⁶⁸

⁶⁵ AA2003/ACT/Annex III/en 2489. Identical formulation is used in the case of Latvia, at p. 2491.

⁶⁶ EC Treaty, Art. 10.

⁶⁷ Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Art. 8(1).

⁶⁸ Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Preamble, para. 10.

There is therefore a question as to whether this gives rise to a duty to co-operate that binds both the Member States and the EU under their shared power to “ensure close co-operation”.⁶⁹ Such co-operation includes an *ex ante* obligation to notify. At any point the “Commission may require the cancellation of any measures which are not in conformity with Community law”.⁷⁰ Clearly, the fisheries 2002 CFP Framework Regulation is not shared power since it belongs to the exclusive autonomy of the EU. The competence delegated to Member States is to “meet local management needs and emergency situations”.⁷¹ This competence is also limited “to all vessels within their 12-mile zones and to vessels flying their flag within waters under their jurisdiction”.⁷²

To fully understand the situation of Member State prescriptive rights during the interim periods, it is necessary to go back to the 1970s: to EEC Council Regulation 101/76 and Articles 100 and 102 in the UK Act of Accession. The starting point is the ECJ decision in *Officier van Justitie v van Dam*.⁷³ The French government intervened in this case to claim that “[t]he Council cannot, without disregarding the provisions of Article 102 of the Act of Accession, restore to the Member States a power which they have definitively lost”.⁷⁴ The European Court, however, found that the Council might, if it so decided, let Member States make regulations at the national level. Thus the French received little support from either the 1980 decision or from later ones. In the *Jaderow* case of 4 December 1989, the Court clearly supported a continuous derogation regime:

The Community rules establish the principle of equal conditions of access to fishery resources for any fishing vessel flying the flag of, or registered in, a Member State . . . except with regard to the area encompassed by the 12 nautical mile limit calculated from the base lines of Member States, in respect of which Member States may, until 31 December 1992, derogate from the equal access rule (p. 7).⁷⁵

The derogation regime was valid for national fisheries regimes within 12 nautical miles, according to Article 102 of the 1972 Act of Accession. The regime also supported Member State national quota allocation systems, which have been characterised as a derogation regime. According to *Jaderow*:

[T]he system of national quotas . . . adopted in order to enable the measures for the conservation of fishery resources provided for by Article 102 of the 1972 Act of

⁶⁹ Opinion 1/94 of the Court of Justice of 15 November 1994, [1994] ECR I-5267, at 5420, para. 128.

⁷⁰ Commission of European Communities, “Roadmap”, note 10 above, p. 24.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Case 124/80, *Officier van Justitie v J. van Dam & Zonen* (Reference for a preliminary ruling: Arrondissementsrechtbank Rotterdam, Netherlands) [1981] ECR 1447, of 2 June 1981.

⁷⁴ Para. 7.

⁷⁵ Case 216/87, *Jaderow* [1989] ECR 4509.

Accession to be implemented in the shortest possible time . . . The quota system constitutes nonetheless a derogation from the general rule of equal conditions of access to fishery resources laid down in Article 2(1) of Regulation No. 101/76.⁷⁶

ECJ President Ole Due has taken the same position:⁷⁷

. . . [I]t must be observed that the system of national quotas established by Council Regulation 170/83 constitutes, as the United Kingdom contends, a derogation from the principle of equal access for Community fishermen to fishing grounds and to the exploitation thereof in waters coming within the jurisdiction of the Member States.

Thus, according to Article 102 of the 1972 Act of Accession, the EU was entitled to authorise the derogative competence of the Member State to maintain national systems, even where this might contravene the EC Treaty prohibitions on national discrimination in Article 12. The derogation regime does not, however, entitle Member States to close national shipping registries to foreigners as the UK did in the famous *Factortame* cases,⁷⁸ despite the fact that entry into the registry is the necessary condition for quota rights.

Do EU *Lacunae* Open Prescriptive Rights to Member States?

The fisheries *acquis* provide the EU with exclusive prescription power. For the first time in EC/EU history, this is made clear in the fisheries regulation texts.⁷⁹ Thus all national law must be formulated within the framework of this *acquis*. Conflicts of law, therefore, are ruled by the principle of *lex superior*.⁸⁰ During the transitional CFP period that was scheduled to end 1 January 2003,⁸¹ it was argued that Member States might legislate in the *lacunae* of EU law. Robin Churchill has pointed out that the “Court has also recognized that on occasion national legislative measures are permissible, and indeed necessary, in order to fill various *lacunae* in Community law”.⁸² It is not easy to advocate this position because there is no positive law to support it. Since the CFP is still in transition, the pro and con arguments for tacit Member State competence are of interest.

⁷⁶ [1989] ECR 4509, para. 24.

⁷⁷ Case C-246/89, R. Order regarding *Nationality of Fishermen: Commission v UK* (10 October 1989) [1989] ECR 3125.

⁷⁸ The investment issues are discussed in Part VI of this article.

⁷⁹ See e.g., Council Reg. (EC) No. 2371/2002, which explicitly states that regulation is made “under the Common Fisheries Policy”.

⁸⁰ This principle is established case law, see Case 6/64 of 15 July 1964, *Flaminio Costa v ENEL* (Reference for a preliminary ruling: Giudice conciliatore di Milano, Italy), [1964] ECR 585 and Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125. See also the (private) 1994 Draft Union Constitution, Art. 1(6). J.P. Bonde and F. Herman, *Udkast til ny Unions Grundlov (A Draft EU Constitution)* (Notat, Allingåbro, Denmark, 1994), p. 23.

⁸¹ Transitional measures are, however, still effective. See Commission of European Communities, “Green Paper on the Future of the Common Fisheries Policy”, note 27 above, Chapter 5, §1.

⁸² See Churchill, note 8 above, pp. 93–94.

Robin Churchill mentions *Rogers v Darthenay* (Case 87/82). However, this case does not appear to illustrate *Member State* competence in loopholes of law, but rather the *Court's* power to find and apply whatever rule the court deems fit.⁸³ It seems that the position is that under the CFP, the EU could not possibly endure a *non liquet* position. When the *acquis communautaire* does not provide a clear solution, "it is for the competent courts to fill the resulting *lacuna* in a manner which is consistent with the aim of protecting fishing stocks and which also takes into account the fact that protection of fishing nets should be permitted".⁸⁴ The Court does not mention any Member State legislation in particular.

Another possible source for Member State competence in CFP *lacunae* is the *van Bout* case (86–87/84).⁸⁵ The Court held that: "in the absence of Community regulations it is for Member States to determine the calculation method to be followed" (p. 221). It may appear that the Court here found Member State competence could validly fill in the *lacunae* of EU law. To this writer it is not however a convincing argument. The current regime is the CFP interim period, whereas the *van Bout* case is premised upon the interim measures codified in Council Regulation 171/83 of 25 January 1983 on Technical Management Measures. The last paragraph of the Preamble to this provides: "[W]here conservation is seriously threatened, Member States should be permitted to take appropriate provisional measures." Since we are in the interim period now, and since the calculation method is not within the same legal domain as threat to conservation, the *van Bout* case does not show that Member States enjoy prescriptive rights in such *lacunae*.

Nor does the Court's *ratio decidendi* in Case 804/79 (5 May 1981) *Commission v UK*,⁸⁶ as referred to in Case 124/80, *Officier van Justitie v van Dam*, support Member State legislative power in *lacunae*. This is made clear by the Court's phrase stating that Member States "may henceforth act only as trustees of the common interest".⁸⁷ This does not include tacit or implied powers. See the ECJ analysis of the validity of national fisheries regulation in the 1979 case: "[A]s this is a field reserved to the powers of the community . . . a Member State cannot therefore, in the absence of appropriate action on the part of the council, bring into force any interim conservation measures which may be required by the situation." A similar position is taken in Case 124/80, *Officier van Justitie v van Dam*.⁸⁸

⁸³ As reflected by Ørebech, note 52 above, at Chapter 3, § 6, para. 3.

⁸⁴ See [1983] ECR 1573.

⁸⁵ Joined Cases 86–87/84, *van Bout* [1985] ECR 941. Churchill, note 8 above, p. 94.

⁸⁶ [1981] ECR 1045.

⁸⁷ [1981] ECR 1045, para. 30.

⁸⁸ See especially Case 124/80, *Officier van Justitie v J. van Dam & Zonen* (Reference for a preliminary ruling: Arrondissementsrechtbank Rotterdam, Netherlands), [1981] ECR 1447, paras. 10–11.

Thus, Member State action is prohibited here, not due to any principle of colliding norms of supremacy, but simply because of the pre-emptive force of EU legislative power. Clearly, “national action is impermissible”.⁸⁹ It can be concluded then that Member State legislative power is based entirely upon explicit EU delegation. The one and only possibility for Member State competence is delegation of provisional law-making power, as open under the 1983 provision. (See below: Part 3).

The Inferior Status of National Law: Direct Applicability and Pre-emptive Force

Council Regulations are directly applicable to legal subjects in all Member States. The pre-emptive force of EU *acquis* renders conflicting national legislation inapplicable in all respects.

The *Factortame* cases contain important statements of the ECJ. Briefly, these cases relate to the termination of the UK 1893 Merchant Shipping Act upon the introduction of the new 1988 Act. In order to control the Spanish flagging of vessels in the British registry, the UK introduced strict requirements that vessels incorporated under this Act operate from the UK and have a close connection with Britain in such a way as to disqualify citizens from other EU countries. Not only did an owner have to be a UK citizen, he also had to be a resident of the UK. For corporations, the requirement was that the corporate headquarters be in the UK. The obvious purpose of the regulation was to prevent “quota hopping” into the British registry. The case (“*Factortame*” is the name of one of the Spanish fishing companies) was presented to the ECJ in two rounds: first, as an interlocutory (intermediate) order; and later in full as a contentious case.

The first *Factortame* case clarifies the precedence of EU competence. The Court quoted its previous ruling in the *Simmenthal* case⁹⁰ that directly applicable rules of Community law “must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force” (paragraph 14) and that:

in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures . . . by their entry into force render automatically inapplicable any conflicting provision of . . . national law (paragraph 17).⁹¹

⁸⁹ S. Weatherhill, *Law and the Integration in European Union* (Oxford University Press, Oxford, 1995), p. 137.

⁹⁰ Case 106/77, *Amministrazione delle finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

⁹¹ Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*. Judgment of the Court of 19 June 1990, [1990] ECR I-2433, para. 18.

Thus, EU law pre-empts all national provisions at whatever level. No national court may apply, directly or indirectly, any national law provision that contravenes EU law.

The Inferior Status of National Law: Delegated Power—EU Lex Superior

Unless otherwise provided, derogative powers granted to Member States, that is to say, the delegated national competence derived from *acquis communautaire*, is still inferior to EU law. Council Regulation (EC) No. 2371/2002, for example, makes this clear. Article 9 of that Regulation gives each Member State competence to take measures to conserve and manage fisheries in its 12 nautical mile zone. As set forth in Paragraph 1 of Article 9, all national measures shall be compatible with the EU fishing policy objectives, and no less stringent than existing Community legislation. Member States emergency measures granted in Article 8 are under the auspices of the EU and must yield if the EU so decides (paragraph 6).

The Inferior Status of National Law: Residual Rights under EU Lex Superior

As held in the second *Factortame* case, residual rights under domestic law, whether derived directly from national sovereignty or from international law, must conform to the superior EU law. Clearly, the right to determine conditions for the registry of vessels is a residual right for Member States. However, under monist as well as dualist legislative systems, all international law obligations—hereinafter EU commitments—must prevail when interpreting domestic provisions.

- 13) It must be observed in the first place that, as Community law stands at present, competence to determine the conditions for the registration of vessels is vested in the Member States. As far as fishing vessels in particular are concerned, the Court held in the judgment in Case 223/86 (*Pesca Valentia v Minister for Fisheries and Forestry* [1988] ECR 83, at paragraph 13) that the provisions of Council Regulation No. 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976 No. L20, p. 19) referred to fishing vessels ‘flying the flag’ of a Member State or ‘registered’ there but left those terms to be defined in the legislation of the Member States.
- 14) Nevertheless, powers which are retained by the Member States must be exercised consistently with Community law (see most recently the judgments in Case 57/86 *Hellenic Republic v Commission* [1988] ECR 2855, at paragraph 9, and in Case 127/87 *Commission v Hellenic Republic* [1988] ECR 3333, at paragraph 7).
- 15) The United Kingdom, the Kingdom of Belgium and the Hellenic Republic argue, however, that the position is different when it comes to the competence of each State under public international law to define as it thinks fit the conditions upon which it grants to a vessel the right to fly its flag. They refer in

that connection to Article 5(1) of the Geneva Convention of 29 April 1958 on the High Seas (United Nations Treaty Series 450, No. 6465) . . .

- 16) That argument might have some merit only if the requirements laid down by Community law with regard to the exercise by the Member States of the powers which they retain with regard to the registration of vessels conflicted with the rules of international law.⁹²

Whereas EU legislation must conform to international law, Member States law must conform to international law, hereinafter EU law. For one of the new Member States, Latvia, the 1996 Bilateral Fisheries Agreement⁹³ opened up (pursuant to the 1997 joint venture addendum) the Latvian registry to older EU vessels. Included thereunder was the right to operate via EU-Latvian joint ventures, which were consequently re-flagged as Latvian vessels, and the right to fish in Latvian waters.

III. THE 2004 NEGOTIATION RESULTS—IN GENERAL

As is seen in the 2004 Act of Accession, the EU accepted no permanent exceptions to the CFP, which means that the 10 new Member States must adjust to the EU fisheries *acquis*. The main goal of the fisheries part of the 2004 Accession Treaty was thus to bring Applicant Member States in line with present Member States. Since the fisheries *acquis* is equally binding upon all Member States, the existing EU Member States are subject to the same regime. New Member States are unconditionally required to implement the *acquis communautaire* and are excluded from any legislative competencies in fisheries matters. Consequently, the subsidiarity principle⁹⁴ is not applicable in fisheries matters. Member States possess no derogative rights, with the exception of those that the EU may delegate to them. Member States' waters are, with some minor exceptions, transformed into EU waters. Whether fisheries in the EU are managed on a sustainable scale is entirely in the hands of the EU.⁹⁵

Before examining the fisheries solutions under the two EU Accession Treaties, the next section ("Post-Treaty Derogative or Transitional Measures") outlines the general CFP competence system. This Part will scrutinise whether Applicant Member States have fully transformed this system. Parties to the 2004 Accession Treaty have agreed to incorporate *acquis communautaire* ("made necessary by accession"—Article 21) and to become bound by it "[f]rom the date of accession" (Article 2). The ratification process takes place

⁹² Case C-221/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others*. Reference for a preliminary ruling, [1991] ECR I-3905, paras. 13–16.

⁹³ Agreement on Fisheries Relation with the Republic of Latvia, OJ No. L332, 20.12.1996.

⁹⁴ EC Treaty, Art. 5.

⁹⁵ EU policy documents in general; here the Communication from the Commission on the Precautionary Principle (COM (2000) 1 final, Brussels, 2.2.2000); Commission of European Communities, "Green Paper on the Future of the Common Fisheries Policy", note 27 above, esp. Chapter 4; and Commission of European Communities, "Roadmap", note 10 above, p. 23.

“in accordance with their respective constitutional requirements” (Article 2.1). The ratification has to take place before 30 April 2004 (Article 2.2). Consequently, Applicant Member States are not bound by fisheries *acquis* or by the prescriptive force of the EU before 1 May 2004. Parties agreed upon the retroactive application of “acts of the institutions” that should have been in place, but were not yet adopted prior to 1 May (Article 57).

The task next is to outline the concrete details of the adaptation to the EU CFP.

Pre-Treaty Transitional Measures

Before negotiations started at the 1997 European Council meeting in Luxembourg, the EU “stressed that incorporation of the *acquis* into legislation is necessary, but not in itself sufficient; it is necessary to ensure that it is actually applied”.⁹⁶ The European Council 2000 in Feira and the 2001 Gothenburg meeting, held during these negotiations, further confirmed the “vital importance” of *acquis* incorporation. Clearly all Applicant Member States shall transform, implement, institutionalise and enforce appropriate EU legislation under national jurisdiction before the Second Accession Treaty can be signed and ratified.

Applicant Member States are required to make yearly reports on their legal adaptations to the EU.⁹⁷ The Commission supervises the national developments.⁹⁸

The Accession Partnership to Applicant Member States is a new “institution-building measure” in the EU landscape. Prior to the First Accession Agreement, no surveillance or monitoring of national adaptations to EU provisions or politics had taken place. The reason was simply that the Applicant States—at that time Austria, Finland, Norway and Sweden—had already adopted the *acquis communautaire* with the exception of fisheries *acquis* under the still-valid European Economic Area Agreement (EEA).⁹⁹ There was simply no need for either a carrot or a stick.

Post-Treaty Derogative or Transitional Measures?

From the Pre-Agreement Positions

Turning to the Accession Treaty fisheries negotiations, the chapters on movement of persons, services, capital and fisheries were finalised in 2002.¹⁰⁰ Latvia

⁹⁶ Commission Explanatory Memorandum of 13 November 2001 to Proposal for a Council Decision on the Principles, Priorities and Intermediate Objectives contained in the Accession Partnership with Latvia, p. 5.

⁹⁷ National Programme for the Adoption of the Acquis (NPAA). Available at <http://europa.eu.int/comm/enlargement/report2002/index.htm>.

⁹⁸ See Commission’s (2001) *Regular Report on Progress Made by AMS Towards Priorities and Intermediate Objectives Identified in the Accession Partnership*.

⁹⁹ Agreement between the EU and its then 12 Member States, and the EFTA and its then seven Member States of 2 May 1992 (Oporto).

¹⁰⁰ European Commission, Enlargement D-G, “Accessions Negotiations: State of Play” Docu-

and Malta requested tough derogative arrangements with respect to fisheries. These two countries, therefore, exemplify the overall fisheries solutions, given the special emphasis that was put on its fishing industries (see below under heading “Concluding Remarks: EU Political Obligations”).

The first question is whether new Member States obtained permanent exemptions from the Common Fisheries Policy. Such perpetual exceptions are often called “derogative regimes”, but are listed as “transitional arrangements under the Second Accessions negotiations”.¹⁰¹

The Applicant Member States agreed to or obtained transitional measures. Latvia, however, was the only one of them who preserved its request for a derogative fisheries management regime until the very end. Poland withdrew its request for exclusive jurisdiction over the entire Polish exclusive economic zone (EEZ) during the negotiations.¹⁰²

Malta requested “a specific management regime within 25 nautical miles”, but since this forces the EU to geographically limit its *acquis communautaire*, no derogation issue is at stake with such a request. That specific regime illustrates a situation of EU Treaty obligations with third states: “EU underlines that such a regime should be established within the Community framework . . . The adaptation to Regulation (EC) 1626/94 shall be . . . specified in the relevant Annex to the Accession Treaty.” If that is the outcome of negotiations, the EU—and not Applicant Member States—is forced by the Accession Treaty to reform its own CFP by reason of new member requirements.¹⁰³

To meet the new Member States “halfway”, the EU made Latvia a similar proposal. The relevant provision, Regulation (EC) 88/98, shall be drawn up during the interim period with some closely described “guidelines to be specified in the relevant Annex to the Accession Treaty”.¹⁰⁴ Thus, the Second Accession Treaty will direct the future prescriptive power of the EU.

Since the length of the interim period is not set forth, the EU is free to implement such a regime when it pleases. However, if the Annex to the 2004 Act of Accession does not provide any time limit, the question is whether these regulatory instruments can only be terminated by a new Accession Treaty Conference under which Latvia abandons that condition.¹⁰⁵ Regardless of the answer to that question, the phase-out of Latvian fisheries legislation clearly indicates that Latvia is well aware of the EU position on its offshore territories as common waters, and that Latvia has acknowledged this idea.

cont.

ment (20 December 2002). The only exception was Romania. Since both Romania and Bulgaria dropped out in the final rounds, no further attention is paid to these two applicants in this article.

¹⁰¹ See the Status Information on Latvia, *id.*, p. 28.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Council Reg. No. 3760/92, Art. 18, s. 2d.

The proposed Latvian derogation regime included the Gulf of Riga, which claims the special status of “historic bay” under international law.¹⁰⁶ One puzzle is the geographic configuration of the claimed zone. Another is the competence of the EU as regards the bay. Has the EU adhered to Latvia’s claim that the Gulf of Riga is an historic bay and thus that the 12-mile limit reserved to local fishermen will be measured from the closing line of the Gulf? Since the Gulf of Riga is scheduled for transfer to EU jurisdiction by the end of 2012, the EU will most likely support the historic bay perspective.

Irrespective of this status, Latvia may freely transfer national jurisdiction over the Gulf of Riga, which was under the Union of Soviet Socialist Republics until 1991, to the EU. No international law provisions prevent Latvia from transferring sovereignty over the Gulf of Riga to the EU. The international law status of historic bays does not require any particular type of ruling state. During negotiations, Latvia requested a conservation regime granting it exclusive rights in fisheries management. The EU maintained that the Gulf of Riga should be under its own jurisdiction, embodying “the general principle of relative stability and exclusive EU jurisdictional competence”,¹⁰⁷ which is the *acquis communautaire* solution. Consequently, Latvia enjoys no exclusivity within the 12-mile zone, but is under the absolute regime of EU legislation. This is made clear by Council Regulation (EC) No. 2371/2002, Preamble, paragraph 11. Neither this Regulation nor the negotiation results, however, solve the historic bay puzzle.

In the next Part (IV) of this article, the implication of the EU and new Member States positions are scrutinised in greater detail by comparing them to the final solution under the fisheries *acquis*, which had been offered to the Applicant Member States in 1994. Since the fisheries *acquis* is pre-ordained and not subject to negotiations, it is highly likely that similar solutions await the Applicant Member States.

No specific timeframe is set forth under the proposed interim transitional arrangements. In this respect, the fisheries chapter differs from the capital provisions chapter (Chapter 4) under the Consolidated Negotiated Text, where a five to seven-year interim period is specified. This does not mean that transition measures will go on forever. On the contrary, since all negotiations—with the exception of the Gulf of Riga—confirm the adaptation to *acquis communautaire*, any desired special arrangements must be stated explicitly in all respects: substantively, diachronically and geographically.

If Applicant Member States are entitled to a specific transitional period, the requested timeframe must be written into the Accession Treaty. Otherwise, the

¹⁰⁶ See 1982 LOSC, Art. 10(6), referring such bays to general principles of law or customary international law, [1992] ICJ Rep 351. See also Erik Franckx, “Two More Maritime Boundary Agreements Concluded in the Eastern Baltic Sea in 1997”, (1998) 13 IJML 274.

¹⁰⁷ European Commission, Enlargement D-G, “Enlargement of European Union. Guide to the Negotiations” (December 2002), p. 28.

EU is free to execute its exclusive autonomy according to its already established EC Treaty base, the new Constitution for Europe,¹⁰⁸ and secondary legislation. The EU could then use its prescriptive power to terminate transitional arrangements whenever it deems necessary.

The EU present position is quite restrictive compared with the 1972 Accession Treaty (of Denmark, Ireland and UK), which both instituted the Shetland Box and limited access for foreign boats within the 6–12 nautical mile zone. (See below under heading “Access to Waters”). The comparison between the EU present position and the EU 1994 position is not analogous, however, because the EU 1994 stance was already restrictive. During the opening negotiations to the First Accession Treaty, the EU made it clear that no applicant would be granted a permanent exemption from *acquis communautaire*.¹⁰⁹ It is now worth considering the final solutions to these delicate problems as provided in the 2004 Accession Treaty.

The Negotiation Results—An Overview

Whereas the Second Treaty of Accession to EU is a minute document, containing only three Articles, the 2004 Act of Accession is a comprehensive document with 62 Articles, 18 Annexes, and 10 Protocols totaling 4,805 pages. The Final Act adds another 48 pages. These documents refer to secondary legislation that governs Member States. This reception of foreign law is quantitatively and qualitatively equal to the Great German Reception of the entire body of Roman law by the Deutsche Reichskammergericht in 1495.¹¹⁰

Of course, fisheries issues take up relatively limited space in the documents. The primary rule is that Applicant Member States must fully adapt to EU fisheries *acquis* unless otherwise agreed upon by the EU and Applicant Member States. Since fisheries exceptions and transitional rights are very limited, only a few pages relate directly to fisheries. In order to convey the correct impression of the actual impact of the 2004 Agreement, it will be compared with the extensive fisheries agreement under the 1994 Accession Treaty and the basic EU fisheries regulations. Because most issues of free movement of goods, capital, services and labour touch fishing industries, the number of pages directly dedicated to fisheries issues does not give a true picture of the impact of *acquis communautaire* upon fisheries.

The first issue for consideration is whether the new Member States have obtained *permanent* exceptions to the fisheries *acquis*. The question here is whether the 2004 Act of Accession, Part III (Article 20 or 21) lists amendments or amending power that new Member States may rely upon in the future. The exceptions listed in Part IV, Article 24, which relate to every new

¹⁰⁸ Draft Treaty Establishing a Constitution for Europe, OJ No. C169, 18.7.2003, pp. 1–105.

¹⁰⁹ Report to European Council, 7328/1/93, 16 June 1993.

¹¹⁰ See O. Fenger, *Romerret i Norden (Roman Law in the Nordic Countries)* (Copenhagen, Berlingske forlag, 1977), p. 113, and see esp. p. 166.

Member State, are *temporary* provisions that include transitional measures only. (See later in this section.)

The adaptations of permanent provisions under Part III relate to acts adopted by the EU, which are listed in Annex II or Annex III of the Act of Accession. As decided in Article 20, relating to fisheries, the implementations provided are specified in Annex IX. Article 21, which also includes fisheries regulations, prescribes that “adaptations to the acts listed in Annex III . . . made necessary by accession shall be drawn up in conformity with the guidelines set out in that Annex and in accordance with the procedure and under the conditions laid down in Article 57”.

- a) The basic adaptations under Annex II are related to the simple fact that the EC internal market now serves 25 countries instead of 15, and that some new fish species or fish sizes should be added to lists and tables resulting from extended EU waters. None of the amendments have been caused by political claims raised as a result of negotiations.¹¹¹
- b) Annex III, however, provides for amendments resulting from the outcome of the negotiations.¹¹² The EU claims that the fisheries *acquis* has been changed to benefit both Malta and Latvia. However, “the owls are not what they seem”.¹¹³ Despite their position under the permanent regime of Part III, these provisions do *not* grant derogative power to new Member States. Decision-making power belongs to the EU. The Act of Accession does not guarantee that changes stated in Annex III be implemented prior to the accession. Nor does it state that the changes are permanent, nor whether they can be repealed by international agreement. The last sentence of Article 21 makes this clear.¹¹⁴ The amendment procedure necessary in cases where planned amendments are not carried through prior to accession, as stated in the Act, must follow the prerequisites of Article 57, which may also involve the procedure provided in paragraph 2. (See later in this section.)

Diachronic mismatch does not affect the validity of the 2004 Act of Accession. According to Article 2, “from the date of accession the provisions of the original Treaties and the acts adopted by the institutions and European Central Bank before accession shall be binding on the new Member States”. Accordingly, provisions not adopted before accession, which, of course, is the normal situation, are not binding. Nonetheless, this rule has an important exception that relates to fisheries. Article 57, which sets up the conditions of and procedure for adaptation under Annex III, clearly dictates a retroactive effect. If

¹¹¹ AA2003/ACT/Annex II/EN, pp. 1519–1531.

¹¹² AA2003/ACT/Annex II/EN, pp. 2488–2492.

¹¹³ To use one of David Lynch’s expressions from his TV movie, *Twin Peaks*.

¹¹⁴ “The adaptations to the acts listed in Annex III to this Act made necessary by accession shall be drawn up in conformity with the guidelines set out in that Annex and in accordance with the procedure and under the conditions laid down in Article 57.”

adaptations necessary to incorporate new Member States' economic life into EU *acquis* are unsuccessful or not made until after 1 May 2004, those adaptations shall still "enter into force as from accession" (see Article 57(1)). Retroactive legislation that "frustrates the legitimate expectations" of the parties will hardly make it through an adjudication process.¹¹⁵ If changes are made clear by the Annexes to the 2004 Act of Accession, but have failed to pass the legislative institutions, such retroactivity will probably be judged valid. This includes needs that were unforeseen during negotiations, but which are proven necessary at a later stage. See the general prerequisite: "where acts of the institutions prior to accession require . . .". This includes the entire *acquis communautaire*. Providing such decisions with effects *ex tunc* would easily frustrate these legitimate expectations.

c) Malta's requested "specific management regime within 25 nautical miles" is provided for in paragraph 3 of the 2004 Act Annex III: "The Council shall amend Regulation (EC) 1626/94 before the date of accession of Malta."¹¹⁶ What appears to be a legal obligation, however, relates only to amendment implementation, and not to the substantive law. All negotiated text functions solely as "guidelines" and does not legally bind or direct the Council. Clearly none of the provisions mentioned in relation to the exclusive rights of "small-scale coastal fishing" within the "25-mile management zone", the rights of small trawlers with engine power not exceeding 185kW (250HP) in this zone, and the limited entry scheme in the dolphin-fish fishery are more than recommendations. This means that the Council may opt for other solutions as well.

As clarified, all regulations in the 25-mile management zone "are non-discriminatory". Paragraph 3 also states that the "above solution is without prejudice to the evolution of secondary law in this field",¹¹⁷ which simply means that the EU is free to use its discretionary power to alter whatever regulation within Malta's 25-mile zone it wants, in whatever direction it wants. The Act of Accession does not restrict EU legislative power in any way. Consequently, the Act of Accession is not an international or intergovernmental agreement subject to change only by consensus.

As has been demonstrated, the preliminary conclusion from a previous paragraph—that the EU is forced by Accession Treaty to reform its own CFP by reason of new member requirements—is not the case. Instead, the EU makes its own changes as it pleases. Is the situation similar for Latvia?

d) Latvia's concern related to the Gulf of Riga. Regulation (EC) 88/98 shall be amended before the "date of accession" according to "guidelines" which

¹¹⁵ See Case 98/78, *Racke* [1979] ECR 69; Case 99/78, *Decker* [1979] ECR 101; Case 337/88, *SAFA* [1990] ECR I-1; and Case 331/88, *Fedesa* [1990] ECR I-4023.

¹¹⁶ AA 2003/ACT/Annex II/EN, p. 2489.

¹¹⁷ AA 2003/ACT/Annex II/EN, p. 2491.

primarily install limited entry fishing in the Gulf for vessels not exceeding 221kW. Nevertheless, Latvian law neither determined the beneficiaries nor adopted the monitoring system. Instead, it was EU legislative processes, as set forth in Article 18 of Regulation (EEC) No. 3760/91—the now repealed “management regulation”—that formulated all these provisions. (See later in this section.)¹¹⁸ Despite the legal potential for a Member State initiative, in actual fact the draft usually comes from the Commission. While a regulatory committee (Scientific, Technical and Economic Committee for Fisheries, Article 16) shall be consulted, its opinion is advisory only. The Council, acting by a qualified majority, may make a different decision (Article 18 *i.f.*).

The EU has regulatory power according to qualified majority decisions. As stated, “technical measures for conservation” in the Gulf of Riga are “non-discriminatory”. The guidelines, however, have no legal implications since, similar to the Maltese solution, the “above solution is without prejudice to the evolution of secondary law in this field”.¹¹⁹ Accordingly, the EU is free to use its discretionary power to alter regulations in any direction. The decisions are internal according to ordinary law-making procedures. Clearly, none of the negotiation assurances resulted in mechanisms that gave either Malta or Latvia any influence on future regulations. Bringing obligations that normally belong to the domain of international agreements into the Act of Accession has clearly undermined the new Member States’ ability to influence the intended subject matter of these future regulations.

e) What is the situation if changes stated in the 2004 Act of Accession are not implemented before the date of accession, i.e. 1 May 2004? Would this event delay or even postpone the entire Accession Treaty?

Under Article 21 of the 2004 Act of Accession, all amendments to the acts listed in Annex III shall follow the rules of procedure laid down in the Article 57, paragraph 2: “The Council, acting by a qualified majority on a proposal from the Commission, or the Commission, according to which of these two institutions adopted the original acts, shall to this end draw up the necessary texts.”

Accordingly, the EU institutions hold exclusive text-making competence. New Member States may not influence the formulations of proposed amendments, simply because of the guideline form of the Act of Accession and because of their non-membership status until 1 May 2004. Once the provisions are complete, Applicant Member States do not possess any right to review or ratify them. The new Member States enjoy no exclusive descriptive power

¹¹⁸ See Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy.

¹¹⁹ AA2003/ACT/Annex II/EN, p. 2492.

within fisheries issues according to the 2004 Accession Treaty. These Member States have fully adapted to the *acquis communautaire* in general, and to fisheries *acquis* in particular, and enjoy no specific competencies beyond those already delegated to current Member States.

In its opinion on the Second Accession, the Commission said:

In joining the European Union, the applicant States accept, without reserve, the Treaty on European Union and all its objectives, all decisions taken since the entry into force of the Treaties establishing the European Communities and the Treaty on European Union and the options taken in respect of the development and strengthening of those Communities and of the Union.¹²⁰

The implication of this unconditional adaptation to the EU law is discussed below.

- f) The next issue for discussion is whether interim measures have softened this unrestricted acknowledgment. Transitional measures are specified in Article 24 of the 2004 Act of Accession, which relates to Latvia. These intermediate measures cover areas of free movement of persons, freedom to provide service, free movement of capital, agriculture, fisheries, transport policy, taxation, social policy and employment, energy and environment (Annex VIII, paragraphs 1–10). The transitional measures are almost identical for the other new Member States.

Here it is worth discussing the conditions for the Latvian fisheries sector, including not only conservation and management schemes, but also free movement of persons, capital and services. Since these measures are transitional, each one is valid only for the period of time explicitly mentioned.

It was decided that the (now repealed) CFP Framework Regulation 3760/92 of 20 December 1992 would govern the percentage of fish allocated to Latvia for the following species: herring, sprat, salmon and cod. These are the rates to be used for the first allocation of fishing opportunities to Latvia. Since it is transitional and explicitly limited to the first allocation after the date of accession, it clearly does not implement any guaranteed fixed rate for the future. The provision carries no international law obligation, which also follows from the decision-making procedure chosen (see CFP Framework Regulation, Article 8(4)). For the implications of this condition, see Part IV below.

Since the international relations aspects of fisheries is in the hands of the EU (see Part IV), no competence to negotiate or conclude international fisheries agreements is left to the new Member States. For distant water fleet

¹²⁰ The Commission Opinion of 19 February 2003 on the Applications for Accession to the European Union by the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic (COM (2003) 79 final, para. 9, Brussels, 19.2.2003).

fishing, these states may obtain fishing possibilities in the North Atlantic Fisheries Organization (NAFO), part of the Atlantic Ocean, by a *possible* EU allocation. Again, new Member States acquired no guarantees, whether for participation rights or for quotas, as this is a question for the Council “acting by a qualified majority” to decide.¹²¹

g) The EU and the Applicant Member States have agreed to follow Council Regulation (EEC) No. 3760/91 of 20 December 1992—the now repealed, frequently cited “management regulation”¹²²—in establishing a Community system for fisheries and aquaculture, but only with regard to specific articles.

Concluding Remarks: EU Political Obligations¹²³

The solution discussed above begs the question: is the EU under a political obligation to integrate existing new Member States regulations into *acquis communautaire*? The Latvian case is instructive since the EU has proposed that, as compensation for the loss of regulatory power over the Gulf of Riga, the EU should take care of Latvian special needs within the fisheries *acquis*.¹²⁴

Latvia’s only hope is that the EU sticks to the 2004 Accession Treaty guidelines when incorporating secondary EU law. In this sense Latvia can learn something from Norway’s experience under the 1994 Joint Declaration on the Management of Fisheries Resources in Waters North of 62°N. This bilateral agreement required the EU to integrate “the existing management regime in order to continue and improve current technical, control and enforcement standards”. The last sentence of the Declaration implies, however, that this obligation is limited: “During these transitional periods, the Union will examine how best these regulatory mechanisms can be integrated into the common fisheries policy.”

Since this position is equivalent to the one offered Latvia and Malta, further study of the Norwegian case may predict the effective extent of the Latvian and Maltese rights and the EU obligations. As was made clear by Norway’s experience, there is only a non-legal obligation to follow. The EU is merely required to *consider* the possibility of adopting the present Applicant Member State’s measures. One conceivable and legally valid solution would be for the EU to refuse to make any amendment at all. The duty of the EU, as stated in

¹²¹ See AA2003/ACT/Annex VIII/en, p. 2762.

¹²² See Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy.

¹²³ In 1994, pro-EU Norwegians claimed that because of Norway’s international position within the fisheries trade, Norwegian pre-EU legislation would carry everything before it under the post-EU era. According to this position, Norwegian fisheries legislation would have become new EU law!

¹²⁴ European Commission, Enlargement D-G, “Enlargement of European Union. Guide to the Negotiations” (December 2002), p. 28.

the 1994 Act of Accession, is to examine the possibilities. A negative conclusion is sufficient to fulfill the EU Accession Treaties obligation.

IV. THE 2004 ACCESSION TREATY—DETAILS: FISHING RIGHTS

Here the 2004 Accession Treaty is compared with the 1994 First Accession Treaty, or more precisely, on the 2004 and 1994 Acts of Accession which are annexed to these Treaties. Clearly no Member State may retain regulatory power over its own waters (in the sense of excluding foreign fishermen) without claiming those rights at the outset. Since new Member States must adapt to fisheries *acquis*, solutions for the new Member States' fisheries sector are more or less identical to the ones that govern present members. CFP is the fundamental, comprehensive principle of EU fisheries management. If an Applicant Member State disagrees with this principle, it must clarify its position in the Act of Accession, at the latest. Reservations must be made and recognised. Otherwise, no new member to the EU enjoys any exception to the *acquis communautaire*.

A good reason for looking to the First EU Accession Treaty (1994) is that Member States to the Second Treaty (2003) are under the same transitional regime as Member States to the 1994 Treaty. The 1994 transitional regime was originally scheduled to end on 1 January 2003, but has since been extended, in part, to 2013.¹²⁵ As indicated in Part III, the fisheries law conditions that greet Applicant Member States such as Latvia, Poland and Malta do not differ from those provided for Sweden, Finland and Norway in 1994. The next section looks into the 1994 Act of Accession, which is far more specific than the 2004 Agreement. Investigating the more detailed categories of fisheries regulations as listed in the 1994 texts neatly illustrates issues which are applicable to the 2004 Accession and relevant for those states that are about to become EU members.

Generally speaking, it should be stated that as each of the now 10 Applicant States joins the EU, they relinquish their rights to restrict access to their waters and transfer jurisdiction to the EU. Private market forces within the fishing industry as a whole will also gain momentum as these states become EU members.¹²⁶ What does the EU fisheries law system look like?

¹²⁵ Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Preamble, para. 14.

¹²⁶ See R. Churchill and P. Ørebech, "The European Economic Area and Fisheries," (1993) 8 *IJMCL* 453-470, wherein the authors predicted that the EEA Agreement would lead to just such an accelerated development.

Resources Management

Does EU membership abolish the current exclusive rights of Applicant Member States' fishermen to harvest their own waters and thus reverse the effects of the exclusive economic zones (EEZ)? This question is closely related to the division of legislative competence between the EU and Applicant Member States (see Part II). Who will lay down the law? The Act of Accession limits Member States' legislative power (sub-section 1(a)–(e)), surveillance authority (sub-section 2) and international treaty-power jurisdiction (sub-section 3).

According to the fisheries *acquis*, EU waters are open to vessels from all Member States, with the exception of quota-based fishing or fisheries specially regulated in the Act of Accession. Applicant Member States' waters change from restricted national seas to open access areas for all EU fishing vessels.¹²⁷

As discussed in Part II (under the heading “The Common Policy and Exclusive Competence”), the new Member States did not obtain any assurance of either exclusive waters or continuous national legislative power. National zones and exclusive prescription rights are rejected. National legislative power ends as of the first day of EU membership.

In the pre-membership situation, coastal Applicant Member States enjoy exclusive fishing rights within their EEZs.¹²⁸ Due to existing bilateral agreements between the EU and Applicant Member States,¹²⁹ EU vessels already enjoy access to Applicant Member States' waters. Under the *acquis communautaire*, these waters will become EU waters unless the Accession Treaty provides otherwise. As it now stands, this suggests not only that all vessels will have equal rights of access to the waters formerly held by Applicant Member States,¹³⁰ but also that existing national legislative powers will be transferred to the EU.

Technical versus Management Measures

What is the situation under the 2004 Act of Accession? Who should regulate fisheries efforts and conduct? Does the EU enjoy exclusive competence? Reference needs to be made to the 1994 Act of Accession in order to answer these questions.

The 1994 Act of Accession severed the competence to regulate technical matters from the regulation of conservation and management measures. This delimitation was “a non-issue” in 2003, however, since all the fisheries *acquis* was already in the hands of the EU from day one. This means all kinds of

¹²⁷ Churchill, note 8 above, p. 123, and Ørebech, note 52 above, p. 259.

¹²⁸ The LOS Convention of 30 April 1982 (in force 16 November 1994), Art. 56. While the EU has signed the treaty, ratification has not yet taken place.

¹²⁹ See as illustration, the Agreement on Fisheries Relations with the Republic of Latvia, OJ No. L332, 20.12.1996.

¹³⁰ Ørebech, note 52 above, p. 259. Cf. Churchill, note 8 above, p. 123.

“technical regulations”¹³¹ concerning nets and conditions for their use, the sampling of catches for the purpose of determining the percentage of target species and protected species, the use of small nets, the supply and installation of all types of fishing machinery, the inspection of the mesh size of fishing nets¹³² and the registration of fishing vessels.¹³³ Thus, in relation to the second accession to the EU, it is irrelevant whether a regulation is “technical”¹³⁴ or is a conservation and management measure.¹³⁵ Since the Applicant Member States are granted no permanent exemption from CFP, this secondary legislation fully defines Member States’ legislative rights.

Access to Waters

Who enjoys the right to fish?

The issue for discussion here is new Member States’ access to *existing* Member States’ waters, and vice versa, for the purpose of fishing. “Waters” include EEZ, possible fishing zones, territorial sea and internal waters. “Community waters” are defined as “waters under the sovereignty of jurisdiction of the Member States”, with some minor exceptions.¹³⁶ Do Member States still enjoy some part of the sea that is non-accessible to foreigners? What is the situation for fisheries not affected by quota regulations?

EU secondary legislation determines any limits on EU jurisdiction during the CFP transitional period. Thus, the new Member States’ position derives from fisheries *acquis*, and not from the negotiating strength of Applicant Member States.

Before examining the new Member States’ *acquis* solution, an attempt is made to analyse whether the Latvian, Polish and Maltese outcomes, in particular, resulted from poor negotiating techniques or simply from a non-derogative Common Fisheries Policy. What are the best possible results that Applicant States can expect when claiming national EEZs as their own regulatory zones?

¹³¹ Norwegian Position Paper, Annex I, p. 21.

¹³² See, as illustration, Council Reg. (EC) No. 973/2001 of 14 May 2001 laying down Certain Technical Measures for the Conservation of Certain Stocks of Highly Migratory Species, OJ No. L137, 19.05.2001, pp. 1-9 and Commission Reg. (EC) No. 500/2001 of 14 March 2001 laying down Detailed Rules for the Application of Council Reg. (EEC) No. 2847/93 on the Monitoring of Catches Taken by Community Fishing Vessels in Third Country Waters and on the High Seas, OJ No. L73, 15.3.2001, pp. 8-12.

¹³³ Commission Reg. (EC) No. 2090/98 of 30 September 1998 Concerning the Fishing Vessel Register of the Community, OJ No. L266, 1.10.1998, pp. 27-35.

¹³⁴ Council Reg. (EC) No. 88/98 of 18 December 1997 laying down Certain Technical Measures for the Conservation of Fishery Resources in the Waters of the Baltic Sea, the Belts and the Sound.

¹³⁵ See, for instance, Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Preamble § 11.

¹³⁶ Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, Art. 3(a).

In 1994, Norway proposed that fishing vessels from other Member States continue to be classified as third-country participants despite their EU membership status. As such, these vessels would be subject to fishing rights only if Norway so decided. They would be bound by allocated quota rights, similar to the post-membership situation, when only quota-allocated vessels enjoyed access to national waters.¹³⁷ The Norwegian Position was candidly rejected: “Norway’s demands that there be no increase in fishing effort for non-quota stocks cannot be accepted.”¹³⁸ In practice this would have meant that all EU vessels could enter Norway’s EEZ in search of non-quota regulated species. Thus Norway was forced to accept the CFP solution: “As from the date of accession and until the date of application of the Community fishing permit system, all provisions concerning fishing . . . shall be identical to those applicable immediately prior to entry into force of the Accession Treaty.”¹³⁹ Accordingly, the EU common fisheries solution came into play and ended the third-country status of EU vessels, opening all national seas to foreign EU Member States’ fleets at the end of the transitional period. As the 2004 Accession Treaty solution does not differ from this one, new Member States’ waters—having become EU waters—are open to all other EU fishing vessels.

What do the fisheries reciprocal rights look like?

The 2004 Act of Accession does not describe the Member States’ reciprocal rights to fish in each other’s waters in any great detail. Distant fleet access to the Norwegian EEZ was a hot topic in 1994, however. To understand the new Member States’ post-membership position, it is necessary to examine the intended 1995-98 transitional period of Norway in greater detail. The way it was set up, the EU would control each vessel as constituted on the date of entry into membership. Vessels were to fish “under the conditions identical to those applicable immediately prior to entry into force of the Accession Treaty.”¹⁴⁰ Consequently—due to the 1994 Act of Accession—no party could exceed traditional fishing patterns during the three-year interim period. The EU held this position solely under the 1994 Act of Accession Treaty, however. The EU is not under a similar obligation in relation to the 2004 Act of Accession, which does not contain any such provision, thereby indicating that traditional fishing efforts may increase in the future.

The limitations set by the 1994 Accession Treaty on EU fishing efforts in the Applicant Member States’ EEZ, however, were supposed to be discontinued at the end of the three-year period. From that date on, the rule is a “non-discriminatory equal participation right” in all EU waters beyond 12 nautical miles of the baseline. That is to say, all vessels may catch their quotas in any

¹³⁷ Norwegian Position Paper on Fisheries, p. 5.

¹³⁸ *Eurofish Report*, 20 January 1994, BB1.

¹³⁹ 1994 Act of Accession, Art. 45.

¹⁴⁰ 1994 Act of Accession, Art. 46.

ICES statistical area,¹⁴¹ unless otherwise dictated by the EU. These specifications govern Latvia, for instance, with respect to those fisheries regulated by a catch limit.¹⁴² Based on the fisheries annex to the 2004 Act of Accession, it can be seen that Latvian fishing for herring, sprat, salmon and cod is to take place in the ICES Area IIIb, c or d.

Looking at the 1994 Applicant Member States' situation, the system to license Member States' fishing rights was postponed until the proposed EU fishing permit system came into force. This postponement did not restrict EU jurisdiction over prohibited waters, however. Even during the transitional period, there were never any restrictions on the number of vessels given access to Norway's waters.

It is worth referring to Article 45 which provides that: "all provisions . . . shall be identical". From this the conclusion can be drawn that Norway, like the EU,¹⁴³ did not set a ceiling on the number of participants, and thus, according to the CFP, the EU has had the sole responsibility for doing so.

EU jurisdiction is limited as far as the number of participants and fisheries patterns are concerned. The way the ceiling system was set up, the EU was supposed to issue licences directly to vessels. Since this EU centralised permit system never materialised, it is still up to each Member State to decide how many vessels flying its flag may fish in EU waters, within the quotas allocated to each state.¹⁴⁴ The resulting over-capacity has increased to such an extent that the system is now being reconsidered.

The 2003 structural regulations implement the system of scrapping superfluous vessels.¹⁴⁵ The Member States handle the scrapping programmes on a discretionary basis. Breach of a recommendation does not result *per se* in any legal action. Nonetheless, if a Member State either disregards the recommendation, or imposes a less restrictive scrapping system than the one proposed by the EU, the EU may enact a binding provision that makes it an offence not to implement the scrapping programme.

What will be the improved access of Portuguese and Spanish fishing vessels?

The new system of open access seems particularly advantageous to Spanish and Portuguese fishing companies. Without quota rights in the North Sea and the Baltic Sea, Iberian fishing companies would have had few possibilities to

¹⁴¹ International Council for the Exploration of the Seas.

¹⁴² AA2003/ACT/AnnexVIII/en, p. 2761.

¹⁴³ Cf. 1994 Act of Accession, Art. 38, the number: 441 vessels.

¹⁴⁴ As stated in Commission of European Communities, "Roadmap", note 10 above, pp. 10–12, this policy has failed. To reduce over-capacity, EU policies cover withdrawal of financial aid, scrapping premiums, and finally, regulatory measures forcing Member States to reduce their fleets.

¹⁴⁵ Proposal for a Council Regulation amending Reg. (EC) No. 2792/1999 laying down the Detailed Rules and Arrangements Regarding Community Structural Assistance in the Fisheries Sector (COM (2003) 658 final).

fish in these waters, despite the fact that bans were lifted on 1 January 2003.¹⁴⁶ Thus, no restrictions have been placed on the nationality of vessels given access to Applicant Member States' waters. This non-discriminatory scheme is also made clear by the 1994 Act of Accession phrase, "all the vessels of the Union". Under Article 50(5), "all the vessels of the Union" encompass new Member State vessels as well as vessels from all existing Member States (Article 45). Since Spain and Portugal were guaranteed unrestricted access to all EU waters, this means that Spanish and Portuguese vessels have gained free access to the Baltic Sea due to full integration into CFP.

Le Conseil s'est engagé à prendre avant le 1er juin 1995 la décision d'intégrer pleinement, au plus tard le 1er janvier 1996, l'Espagne et le Portugal dans la Politique Commune de la Pêche (PCP), mettant ainsi fin au régime spécifique de ces deux Etats membres en matière de pêche. L'accès aux saux dans toute l'Union se fera sur une base non discriminatoire pour tous les membres de l'Union.¹⁴⁷

Despite the fact that the EU failed to meet the required deadline of 1 January 1996, in principle, all EU vessels enjoy equal participation rights in Applicant Member States' waters as of 1 January 2003. Apart from quota-regulated fisheries (see the section below), neither Portuguese nor Spanish vessels are restricted from access to Applicant Member States' waters.

Latvia, Malta and Poland should have made specific reservations to prevent distant fishing fleets from accessing their zones. Poland, as mentioned earlier, withdrew its request for an exclusive jurisdictional right to the entire Polish EEZ.¹⁴⁸ The Baltic States and Poland have no means of preventing southern European participation in "their" formerly exclusive waters.

Allocation of Quotas

Before the proposed "system of tradable fishing rights" is implemented,¹⁴⁹ the EU operates within the quota system of "relative stability". Since the 2004 accessions do not provide any details about this system, it is necessary to refer to the 1994 Act of Accession.

First of all, fishing opportunities managed jointly by the Union and Applicant Member States, and subject to catch limits, are fixed.¹⁵⁰ Fishing opportunities not managed jointly by the Union and Applicant Member States are

¹⁴⁶ The Iberian Accession Treaty of 20 June 1985, Arts. 156–165 and Arts. 347–352. Implementation is confirmed in Commission of European Communities, "Green Paper on the Future of the Common Fisheries Policy", note 27 above, Chapter 5.1.4.3, p. 25.

¹⁴⁷ Note Bio aux Bureaux Nationaux cc. aux Membres de Service du Porte-Parole, BIO/94/75, le 16 mars 1994.

¹⁴⁸ European Commission, Enlargement D-G, "Accessions Negotiations: State of Play" Document (20 December 2002), p. 28.

¹⁴⁹ Commission of European Communities, "Roadmap", note 10 above, p. 23, Brussels, 28.5.2002.

¹⁵⁰ See 1994 Act of Accession, Art. 44.

from day one subject to EU exclusive catch limits and allocation procedures.¹⁵¹ Those species not subject to limits on exploitation rates in the form of catch limits are shared according to the estimated tonnage.¹⁵² Species that are *neither* subject to catch limitations *nor* governed by the TAC, are regulated under Article 44(4). Under this Article, until the date of implementation of the Community fishing permit system (currently the system of tradable quotas), Union vessels are not allowed to exceed the fishing efforts reached immediately before the entry into force of the Accession Treaty (cf. the phrase, “non-regulated and non-allocated species”).¹⁵³ Species not subject to catch or TAC limits, as, for example, prawn in the North Sea, are outside the regulation of Article 47. Accordingly, prawn fisheries are not subject to any catch limitations. In this case, fishermen without historic rights, such as Spaniards and Portuguese, now enjoy participation access.

Clearly the Applicant Member States’ share of catch-limited stocks is fixed. The Act of Accession further allocates Applicant Member States’ shares of species not subject to TAC limits on rates of exploitation.

The TAC

Latvia took Norway’s position and requested that it “be authorized to set the levels of the rates of exploitation in the form of catch limitations for resources located in the waters falling under its sovereignty”.¹⁵⁴ Just like Norway, Latvia was unable to realise its ambition.¹⁵⁵ After the interim period, the EU has exclusive responsibility for fixing TAC levels for all species. Both the migratory species that are co-managed with neighbouring countries, such as cod, haddock, herring, etc., and the domestic, non-migratory species are the sole responsibility of the EU.¹⁵⁶

Allocation

Two issues are discussed here. First, does the EU allocation regime limit EU power to change quota regimes from Member State allocation to, for instance, market-based transferable quotas? Secondly, may the EU deviate from the Act of Accession’s fixed percentages?

Although Applicant Member States retain TAC jurisdiction during the interim period, only the EU has the power to allocate quotas to Member States

¹⁵¹ Art. 47(1).

¹⁵² Art. 47(3).

¹⁵³ Art. 44(4), cf. the phrase in Art. 44(3).

¹⁵⁴ Art. 49.

¹⁵⁵ According to the Joint Declaration on Management of Fisheries Resources in Waters North of 62°N, Norway’s right to manage TAC levels is ensured only during the transitional period, and then “in close association with the Commission”.

¹⁵⁶ Further details are set forth in the 1994 Act of Accession, Art. 44 (quota-allocated species managed jointly by EU and Applicant Member States should be shared according to the percentages here fixed). Other species at present unilaterally regulated by Applicant Member States are shared according to Art. 47(1) and non-quota regulated species according to Art. 47(3).

(cf. the 1994 solution: “The share of Community fishing opportunities . . . to be allocated to Norway.”).¹⁵⁷ This illustrates that fisheries accepted as “coastal state . . . sovereign rights” under Article 56(1) of the 1982 Convention on the Law of the Sea are transformed into “Community fishing opportunities” upon joining the EU. According to Article 44(2) of the 1994 Accession Treaty, these opportunities shall “be set in accordance with Article 8(4) of Regulation (EEC) No. 3760/92”,¹⁵⁸ under which the EU Council, with a qualified majority (at least 63 of 87 votes), allocates national quotas.

At present, quotas are allocated to the Member States. Towards the end of the transitional period set by the 1972 Act of Accession (Article 102),¹⁵⁹ however, a new system will have to be put in place. The new allocation system is still riddled with uncertainties. Due to the transferable quota system advocated in the Commission White Book (“Roadmap”),¹⁶⁰ it is the writer’s understanding that the idea of an *EU direct allocation system* to fishing vessels has been buried. Since Applicant Member States have neither negotiated nor proposed any limitations, the EU seems free to choose whatever allocation system it wants. As things stand now, the relative stability system will be replaced by the end of 2004.¹⁶¹ The advertised system of individual transferable quotas (ITQ) will supposedly replace the relative stability scheme.

The Applicant Member States’ shares are allocated on the basis of species and ICES fishing sectors. These species and sectors are, in turn, allocated according to the principle of “relative stability”.¹⁶² The question is whether the allotted quantity of shares, stated by percentage or in tons, is legally binding on the EU.¹⁶³ Does the EU guarantee Applicant Member States a permanent legal right to the stated quantities?

In Norway’s case, the Norwegians requested that the shares fixed in the tables of the 1994 Act of Accession, Article 44, be made permanent in order to institute legal rights which may not be revoked without the Applicant Member State’s consent. Norway argued that Article 44 has no time limit, that it is “a transitional measure without termination”.¹⁶⁴ The 1994 Act of Accession,

¹⁵⁷ 1994 Act of Accession, Art. 44(1).

¹⁵⁸ Now repealed by Council Reg. (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy.

¹⁵⁹ Preamble to the 2002 CFP Framework Regulation No. 170/83.

¹⁶⁰ Commission of European Communities, “Roadmap”, note 10 above, esp. pp. 12–13.

¹⁶¹ Council Reg. (EC) No. 2371/2002 of 20 December 2002, Art. 19(2).

¹⁶² The allocation until 2003 was set forth in Reg. (EEC) No. 3760/92, Art. 8(4), para. (ii). From 2003 on, the allocation procedure is set forth in Council Reg. (EC) No. 2371/2002 of 20 December 2002, Art. 20(1).

¹⁶³ See e.g., the 1994 Act of Accession, Art. 44.

¹⁶⁴ See H. Stemshaug, *Felleserklæringer i Tiltredelsesakter. Den rettslige betydning av Felleserklæringer innen fiskerisektoren i Norges tiltredelsestraktat med EU (The Legal Importance of the Joint Declarations in the Norwegian Act of Accession to the EU in relation to the Fisheries Sector)* (Oslo, 1994), p. 23.

Article 7, provides: "The provisions of this Act may not, unless otherwise provided herein, be suspended, amended or repealed other than by means of the procedure laid down in the original Treaties enabling those Treaties to be revised."

Norway's position was that amendments are subject to unanimous decision,¹⁶⁵ a clearly disputable stance. The official Norwegian *opinio juris* envisions two tiers of Member States: those who fall under absolute EU legislation (at that time the 12 existing Member States), and the then new Member States (Austria, Finland, Sweden and Norway), who should have rights guaranteed by treaty and not be subject to Council resolutions. Such a position creates a rather confusing and unreasonable situation, the success of which would clearly fail Norway in the case of dispute.¹⁶⁶ Clearly, in this negotiation round, a similar position on the part of the new Member States was doomed to failure. No applicant even tried to put forth such a position, whether at the beginning of or during the negotiations. Therefore, Applicant Member States are part of the Common Fisheries Policy (CFP); recognise the Union's total and undivided CFP jurisdiction; and accept being part of the *acquis communautaire* as it evolves towards the end of the transitional period. Applicant Member States have agreed with the transitional nature of the fisheries articles. They have further agreed that the Council, in accordance with Article 8(4) of Regulation (EEC) No. 3760/92, has the authority to allocate quotas to Member States, i.e. that Applicant Member States' vessels are not allowed to fish without a Council resolution. If the EU chooses to replace the Member State quota-allocation system with transferable quotas,¹⁶⁷ Applicant Member States, just like other Member States, are obliged to accept such a change as a part of the *acquis communautaire*. Arguing that new accession negotiations should take place is not a tenable position.

Through negotiation, of course, parties are able to establish new arrangements not previously agreed upon and confirmed by the Act of Accession. However, such arrangements are not available unless properly set forth in Article 7: "[T]he provisions of this Act may not, unless otherwise provided herein, be suspended, amended or repealed other than by means of the procedure laid down in the original Treaties enabling those Treaties to be revised." In other words, amendments require unanimous decision. The procedure described

¹⁶⁵ *Ibid.*

¹⁶⁶ The legal argument goes as follows: Art. 44 is part of Title II of the 1994 Act of Accession, "Transitional Measures Concerning Norway", and Chapter 3, "Fisheries". According to the principles laid down in Art. 10, the "application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogation provided for in this Act. Therein it is stated that arrangements in the Act of Accession, which deviate from the *acquis communautaire*, are transitional measures." According to Art. 36(1), this provision includes the fisheries chapter: "Unless any provision of this Chapter stipulates otherwise, the rules laid down by this Act shall apply to the fisheries sector."

¹⁶⁷ As stated in the White Paper. See Commission of European Communities, "Roadmap", note 10 above, p. 24.

in Article 7 is only adequate where the matter at hand concerns the suspension, amendment or annulment of the Act of Accession or Accession Treaty. Since we find no trace of opposition from Applicant Member States in relation to how quotas will be allocated in the future, the new potential Member States have to live with EU solutions picked from within the autonomous Common Fisheries Policy.

The advocated tradable quotas

Once the scrapping programme has been carried out, the remaining EU vessels will be granted licences that may soon become tradable. The ultimate solution to over-investment, over-fishing and non-discriminatory participation rights is the “system of tradable fishing rights”. Discussions on the system’s design were reported to the Council in 2003. The Commission has clarified that:

the proposals now put forward . . . will gradually create a climate that is more favourable to the introduction of more normal economic conditions and the elimination of such barriers to normal economic activities [such] as national allocations of fishing possibilities and the principle of relative stability.¹⁶⁸

Under this likely regime, the principle of relative stability will come to an end. Quotas handed out after the fleet reduction plan is implemented are subject to market transfer. Fishermen’s rights are not restricted to any particular field, whether traditional or not. Furthermore, there is clearly no guarantee that fishermen belonging to coastal districts enjoy special rights to fish there.

The Power to Establish a New Allocation System

Do the 1994 and 2004 Acts of Accession require the EU to maintain the Member State allocation system? The following example will clarify this matter. Assume the Union requests the abolition of the Member State quota allocation regime in favour of transferable quota rights.¹⁶⁹ Does the 1994 Act of Accession restrict the EU from adopting such a policy? Is the Treaty amendment procedure necessary? It would be if the Union wished to annul, amend or suspend the provisions of the Act of Accession.

As previously mentioned, Article 44 of the 1994 Act of Accession is part of Title II, Chapter 3: “Transitional Measures Concerning Norway”. There are no provisions either in Chapter 3, Title II, or in Part Four compelling the EU to uphold quota allocation to Member States. Article 44 states that Applicant Member States are entitled to quoted shares of quoted stocks during the transitional period. However, since there is no provision permitting the EU to terminate the transitional arrangements, no treaty obligation exists. Accordingly, a

¹⁶⁸ Commission on European Communities, “Roadmap”, note 10 above, p. 23.

¹⁶⁹ As did the White Paper on Fisheries. See Commission of European Communities, “Roadmap”, note 10 above, see esp. pp. 12–13.

unanimous decision with regard to Article 7 is not necessary to eliminate or to modify the Member State allocation system. As a result, the Council has the authority to change the existing position by qualified majority, as mentioned. The conclusion therefore is that unless explicitly stated otherwise, the provisions of Article 44 are in force until the end of the transitional period. The EU has legislative authority over the CFP, and so Applicant Member States have no legally binding guarantee that their share allocation is permanent.

The EU, therefore, enjoyed total autonomy under the now repealed Regulation No. 3760/92, Article 8, and now enjoys this under the current Council Regulation (EC) No. 2371/2002 of 20 December 2002. Accordingly, the EU is free to alter the principle of relative stability and its implementation (under Article 8). The EU can also change the time when the transitional period comes to a close as well as the tonnage and percentage estimates (in Article 44). Consequently, the EU does not suffer from any obligation to allocate certain percentages of each species to Applicant Member States for an indefinite period of time.

More Quota Issues: EU Jurisdiction Subsequent to the Interim Period

Following the transitional period, the EU is responsible for setting the rates of exploitation, including fishing reduction efforts, i.e. quota arrangements. Without any treaty provisions to the contrary, new Member States are under the general, unmodified EU obligations, which means that jurisdiction is to be transferred within the framework of the agreement. "The full integration of the management of those resources into the Common Fisheries Policy . . . shall be based upon the existing management regime as reflected in the Joint Declaration on the management of fisheries resources in waters north of 62°N."¹⁷⁰ The EU is required to base its subsequent management system upon the existing one *as reflected in the Joint Declaration*. Thus, EU jurisdiction seems limited. These limitations are discussed below. The appropriate question in this respect seems to be whether the EU is required to change fisheries legislation in a way that would parallel Applicant Member States' present systems.

The 1994 Joint Declaration Article 49 established the following solution. At first glance it might seem that the EU had to base its regulations on Applicant Member States' legislation. Note particularly the phrase, "shall be based upon". However, the opening phrase mentioning the Applicant Member States' regulations starts off: "[A]s reflected in the Joint Declaration . . .".¹⁷¹

Does this condition loosen the ties between the required Applicant Member States' legal foundation and the ensuing EU legislation? The writer believes this to be the case, as the Joint Declaration says nothing about an EU commitment to "continue and improve" the Applicant Member States' quota allocation system. Where integration is concerned, the commitment includes "current

¹⁷⁰ 1994 Act of Accession, Art. 49.

¹⁷¹ *Op. cit.*

technical, control and enforcement standards” (Joint Declaration, second paragraph). The fixing of the TAC and the allocation of quotas are not amongst these aforementioned standards. Consequently, the EU is under no obligation to carry on the Applicant Member States’ access restrictions or quota policies.

Whether the EU will opt for a similar provision *vis-à-vis* the present Applicant Member States, we do not yet know. If relative stability is vital for these new Member States, they should be aware of the risk that lies concealed under these seemingly custodial provisions.

Still, the EU is not totally free to choose its own policy. The 1994 Joint Declaration states that “when fixing the TAC for a stock, due account should be taken of the conservation of the spawning stock to ensure sufficient recruitment”. It further says “that due account be taken of the interrelationship between stocks in a multi-species, management perspective . . . [and] that optimal and stable outtake of the stocks should be ensured, in the long term”. The key terms here are “due account”, “take into account”, and “to ensure”. Of course, the EU has agreed to take hard scientific evidence into consideration. Nonetheless, the advice of scientists is not the deciding factor when fixing TAC. Moreover, no declaration guarantees the continuation of Applicant Member States’ fisheries policy or the adoption of the Applicant Member States’ quota management systems. In this case, are there any other limitations?

More than scientific evidence alone must be taken into consideration. The contracting parties agreed to “take into account” the “special interests of Norway as the coastal state in waters North of 62°N, and of all parties concerned”.¹⁷² So, it is clearly stated that Applicant Member States’ interests are to be taken into account, yet no veto provision exists to safeguard these interests. Furthermore, the coastal interests of Applicant Member States are not the only ones to be considered. In fact to the contrary, for the interests of all parties concerned must be considered. Interests for EU consideration are not limited to the concerns of parties in their own coastal waters, but extend to the concerns raised by foreign fleets present in Applicant Member States’ waters.

The conclusion is that this passage does not guarantee the continuation of the existing Applicant Member States’ quota management system. How could it? If all 25 Member States were allowed to follow their own system, the EU would have to apply 25 different systems within one comprehensive realm of EU waters.

The Coastal Zone within 12 Nautical Miles

All 10 new Applicant Member States, with the exception of Latvia, accepted that areas within 12 nautical miles become part of EU waters. The best Latvia could hope for was a position similar to Norway’s: “Norway notes the special status of the 12-mile coastal band, which is already part of Community policy.” The special status refers to the *transitional derogation system* of national

¹⁷² Joint Declaration, para. 7.

waters and quota allocation under the First Act of Accession (1972), Article 100. Until the end of year 2012, Member States will have their own jurisdiction over vessel participation according to the principle of historical rights.¹⁷³ Norway insisted “that it is of vital importance that the 12-mile coastal band around the Norwegian coast from the Swedish border to the Russian border be ensured for the future”. It is important to note, however, that the 1994 Applicant Member States did not ask for a joint declaration or any other legally binding concessions on the future management system. Obviously such lax formulations do not in any way produce a binding derogation system that will remain intact in the future.¹⁷⁴ The agreed EU autonomy over the 12-mile national water obscures any hope Latvia may have for a special status for the Riga Bay.

According to Article 227 of the 1994 Act of Accession, the EU considers waters within Member State baselines (internal waters) and territorial seas to be part of Member State national territory, and, therefore, part of EU waters.¹⁷⁵ The EU responded to the Norwegian proposal as follows: “[T]he 12-mile arrangements in place until 2002 should cover Norwegian demands relating to Norwegian coastal waters. No guarantees can be given beyond that date, however.”¹⁷⁶ The final agreement was worded as follows:

[T]he Contracting Parties recognise the major importance to Norway of the maintenance of viable fishing communities in coastal regions. When reviewing the present arrangements on access to waters within the 12 miles limit in order to decide on future arrangements, the institutions of the Union will pay special attention to the interests of such communities in the Member States.¹⁷⁷

The EU will attach importance to the interests of coastal societies in general. That is all. The EU will not base its evaluation on any one particular Applicant Member State’s coastal population, but on coastal communities all over Europe. This may well confirm the need for Spanish communities to have a fishing fleet in distant waters. Consequently, neither the national 12-mile zone nor exclusive national fishing rights are guaranteed. The EU is authorised to formulate any policy it likes at the end of the year 2002, now extended to the end of 2012. Council Regulation (EC) No. 2371/2002 determines whether the 12-mile zone will be continued. The proposed system of individual transferable quotas may significantly reduce the importance of national zones in any case, as is established in the 2002 “Roadmap”.¹⁷⁸

¹⁷³ The 1972 Act of Accession, Art. 100. See Reg. No. 170/83—cf. Ørebech, note 52 above, pp. 219–220. Now extended to 2013 by Council Reg. (EC) No. 2371/2002.

¹⁷⁴ Ørebech, note 52 above, p. 220.

¹⁷⁵ See Art. 227 of the 1994 Act of Accession.

¹⁷⁶ *Eurofish Report*, 20 January 1994, BB1.

¹⁷⁷ Joint Declaration on the 12-mile limit (No. 11).

¹⁷⁸ Commission of European Communities, “Roadmap”, note 10 above, see esp. pp. 12–13.

International Agreements Competence

As demonstrated, Applicant Member States have advocated for national fisheries regulations without success. What are these states' positions with regard to abandoning their own treaty-making power? Latvia's declaration on the North-East Atlantic Fisheries Commission (NEAFC) says that: "Latvia . . . respecting all the decisions and regulations set by this Commission, expects that its interests will be duly taken into account when allocating the fishing opportunities to Latvia and other new Member States."¹⁷⁹ Latvia also acknowledges that the EU plays an international role in the North Atlantic Fisheries Commission (NAFO), and says that Latvia's share of the Community's fishing possibilities in the NAFO Regulatory Area "will be determined by the Council".¹⁸⁰ Latvia thus adheres to the "parallelism competence"¹⁸¹ under the Common Policies.¹⁸²

Of course, we know very little about what was actually debated during these accession negotiations. Parties supposedly raised some concerns in 1993–94 and again in 2001–02 when the Accession Treaties were negotiated. To avoid speculation, this article will stick to the documented Norwegian concerns brought up in the 1994 round. The writer assumes that any concerns the new 2004 Member States may have raised were similar to those raised by Norway a decade earlier.

The 1994 Norwegian position reserved treaty management power over the Russia-Norway Barents Sea joint stocks co-management for Norway.¹⁸³ Not surprisingly, the EU response to this reservation was decidedly negative: "There is no question of agreeing to Norway managing . . . international agreements outside the CFP."¹⁸⁴ Norway was totally defeated here, as Article 52(1) of the Accession Treaty indicates. All foreign affairs with respect to fisheries are in the hands of the EU from day one of membership. The transfer involves bilateral as well as multilateral agreements. Fisheries sections in broader international agreements, such as the 1982 Law of the Sea Convention, are also involved. The EU granted Norway a small concession, however, with regard to the important Russia-Norway mutual fishing relations on cod management. Norway was supposed to manage these relations in close association with the EU until the end of June 1998. After that date, treaty management power would have been solely in the hands of the EU.

¹⁷⁹ Negotiation on Accession by the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union (AA2003/OR/en), Text of the Final Act, Declaration No. 32, p. 33, Brussels, 3 April 2003.

¹⁸⁰ 2004 Act of Accession, Annex VIII, para. 5, p. 2762.

¹⁸¹ See Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263, Opinion [1975] ECR I-1355, *Local Cost Standard* case, [1993] ECR I-1061, Opinion, *ILO Convention and the Development Treaty with India* [1996] ECR I-6177.

¹⁸² As made evident in Council Reg. (EC) No. 2371/2002.

¹⁸³ Norwegian Position Paper, s. 4.3, pp. 19–20.

¹⁸⁴ *Eurofish Report*, 20 January 1994, BB1.

The procedural rules for handling transitions are governed by Article 52(3) of the 1994 Act of Accession. Before each transition period expires, the EU decides whether or not to extend the agreement, or at least whether to make the necessary resolution for continued fishing in foreign fisheries zones. These extensions may not exceed one year. At the end of these periods, the intention is for the EU to negotiate new agreements with relevant third countries. Alternatively, the EU will incorporate the previous Applicant Member States' fishing opportunities into existing EU agreements with third countries.¹⁸⁵ Even though Article 52(3) does not explicitly state it, one must assume that the EU will allocate the fishing rights in that third state to Member States in accordance with the principle of relative stability.

Consequently, in the future, the EU will regulate all the international fisheries agreements that had been administered by its Member States. Thus, international responsibilities for fisheries matters now fully belongs to the EU and not to the Member States.

Applicant Member States' Surveillance Authority

Since none of the Applicant States requested exceptions to the CFP, future EU legislation—of whatever content—will govern the new Member States' situation. Council Regulation (EEC) No. 2847/93 of 12 October 1993 ruled out the basic system of control, enforcement and surveillance, and established a control system applicable to the Common Fisheries Policy in its stead (Article 2).¹⁸⁶ As a result, Member States play a vital role in fisheries enforcement. As a starting point, "each Member State shall, within its territory and within maritime waters subject to its sovereignty or jurisdiction, monitor fishing activity and related activities". While intra-national enforcement relates to all Community vessels, control beyond Community waters is reserved to the individual Member State solely for the purpose of monitoring the activities of vessels flying its own flag. On the high seas and in third country waters, the EU applies a surveillance policy similar to pre-membership systems.¹⁸⁷ While these latter competencies are unilateral, the EU encourages Member States to coordinate their control activities by setting up joint inspection programmes to allow the inspection of Community fishing vessels within as well as beyond each state's maritime waters.

When it comes to division of competence between Member States, we see that national state measures for the conservation and management of stocks in

¹⁸⁵ Ørebech, note 52 above, p. 308 *et seq.*

¹⁸⁶ Council Reg. (EEC) No. 2847/93 of 12 October 1993 Establishing a Control System Applicable to the Common Fisheries Policy, OJ No. L261, 20.10.1993, pp. 1–16.

¹⁸⁷ Commission Reg. (EC) No. 500/2001 of 14 March 2001, laying down Detailed Rules for the Application of Council Reg. (EEC) No 2847/93 on the Monitoring of Catches Taken by Community Fishing Vessels in Third Country Waters and on the High Seas, OJ No. L73, 15.3.2001, pp. 8–12.

waters under their sovereignty or jurisdiction “apply solely to fishing vessels flying the flag of the Member State concerned and registered in the Community”.¹⁸⁸ Having “equal access to waters and resources in all Community waters” in mind,¹⁸⁹ and the “primary responsibility of the flag State of their nationals”,¹⁹⁰ we find that the formerly exclusive autonomy of coastal states as it exists under the 1982 LOSC (Article 56, c.f. Article 73) is clearly modified in the EU context.

Member States are primarily responsible for the control and enforcement of the CFP. The Commission is responsible for monitoring and enforcing correct application of Community law by the Member States. For example, when the quota of a Member State is exhausted, or when the TAC itself is exhausted, it is the Commission that prohibits further fishing.

One can observe two tendencies under the CFP. The first is the growth in harmonised Member States’ surveillance activity (see next section). The second is the rise of independent EU-based fisheries supervisory bodies. In the future, the Commission intends that Member States monitor the quantities of fish landed on their territory. To this end, fishing vessels registered in other Member States will be required to notify the Member State of landing of their intention to land fish on its territory.

According to Regulation (EEC) No. 2847/93, the Commission may determine which fisheries involving two or more Member States will be subject to specific monitoring programmes. Since the CFP is now being negotiated, we do not know for sure what regime the new Member States will encounter as EU members in May 2004.¹⁹¹ The plan is to encourage permanent co-operation in inspection and enforcement between Member States and the Commission within the framework of a Joint Inspection Structure administered by the new Community Fisheries Control Agency (CFCA).¹⁹²

The Commission stated that the existing Applicant Member States’ inspection procedures were not unduly onerous, but that they had to be applied uniformly. This enforcement procedure would require all vessels, including Applicant Member States’ vessels, to seek out inspection stations. This system was tried on a pilot basis in the late 1990s. It proved impractical, and was never fully implemented. Personally, this author does not think it has much chance of success this time around either.

¹⁸⁸ Council Reg. (EC) No. 2371/2002 of 20 December 2002, Art. 10(a).

¹⁸⁹ *Id.*, Art. 17(1).

¹⁹⁰ *Id.*, Art. 23(2).

¹⁹¹ Communication from the Commission to the Council and the European Parliament. Towards Uniform and Effective Implementation of the Common Fisheries Policy, COM (2003) 130 final, Brussels, 21.3.2003.

¹⁹² *Id.*, para. 4.2.1.

Access to Ports

EU case law restricts Member States from banning raw fish processing outside of domestic industries. Whereas the EU recognises the general importance of maintaining a genuine economic link between the vessel and the Member State in order to secure the functioning of “relative stability”, the ECJ has considered nation state discretion, as regards this matter, in more precise terms. See the ECJ’s view in the *Jaderow* case:

[T]hat aim may in fact justify conditions designed to ensure that there is a real economic link between the vessel and the Member State in question if the purpose of such conditions is that the populations dependent on fisheries and related industries should benefit from the quotas. On the other hand, any requirement of an economic link which exceeds those limits cannot be justified by the system of national quotas.

Consequently, the answer to Question I (a) must be that Community law as it now stands does not preclude a Member State, in authorizing one of its vessels to fish against national quotas, from laying down conditions designed to ensure that the vessel has a real economic link with that State if that link concerns only the relations between that vessel’s fishing operations and the populations dependent on fisheries and related industries.¹⁹³

The question is thus whether Member States may restrict the shipowner’s choice of landing location as a condition for allocating quotas.

As far as the landing of a proportion of catches in national ports is concerned, it must be observed that Article 6(1) of Regulation No. 2057/82 requires the skipper of a vessel to submit ‘to the authorities of the Member State whose landing places he uses a declaration’ indicating in particular the quantities landed and the location of catches and that Article 9(1) of that regulation, as amended by Regulation No. 4027/86, provides that ‘Member States shall ensure that all landings by fishing vessels flying the flag of, or registered in, a Member State of stocks or groups of stocks subject to TACs or quotas are recorded’. It follows from those provisions that it is possible for each fishing vessel to land its catches directly in any Member State.

It follows that in determining, in accordance with Article 5(2) of Regulation No. 170/83, the detailed rules for the utilization of the quotas allocated to it, a Member State may not require catches or a proportion of them to be landed in its own ports.

That finding means that the evidence to be admitted of the vessel’s operation from national ports may not be confined to the landing of catches or a proportion of them in those ports.¹⁹⁴

The Member State’s only out is for the flag state’s landing to qualify as evidence of the necessary economic link. But then competence is clearly restricted:

¹⁹³ Case 216/87, *R v Ministry of Agriculture, Fisheries and Food ex p. Jaderow* [1991] ECR 4509; [1991] 2 CMLR 556, paras. 26–27.

¹⁹⁴ *Id.*, paras. 35–37.

The landing of catches may be accepted as one means of proof amongst others, provided, however, that the other evidence admitted does not impose, directly or indirectly, an obligation to land catches in national ports. That would be the case if, in order to provide the other evidence, the operator in question were actually compelled to land the vessel's catches in national ports or if it were so difficult in practice to provide that evidence that it left the operator no choice but to produce evidence of the landing of catches in national ports.¹⁹⁵

These freedoms are applicable under the EEA agreement as well. According to the EEA Agreement, Article 5 of Protocol 9, all fishing vessels flying the flag of other contracting parties enjoy equal access to ports and first-stage marketing installations together with all associated equipment and technical installations.¹⁹⁶

Since the present Applicant Member States did not request any exceptions in this matter, they are entirely under the power of the Fisheries Market Regulation. At the time of negotiations, the Fisheries Market Regulation was EC Regulation No. 3759/92 on the Common Organization of the Market in Fishery Products.¹⁹⁷ Council Regulation No. 104/2000 of 17 December 1999 on the Common Organization of the Markets in Fishery and Aquaculture Products has since repealed the Fisheries Market Regulation. This means that EU and Applicant Member States' vessels enjoy equal rights to land fish abroad.¹⁹⁸

Transit

Since the EU constitutes one contiguous customs union, EU fishing vessels may land their catch in every harbour of the Community. The landing place does not impact subsequent acquisition, processing, auction, etc. of fish. Catches landed in the harbour of Hanstholm, Denmark, for instance, may be directly transported overland to the fishing market in Amsterdam unless otherwise decided by the producer organisation system under the EU Market Regulation.¹⁹⁹ Under the 2004 Act of Accession, no provisions grant new Member States any legislative competence to prohibit landed fish from being shipped directly into a third state. There are no exceptions to the principle of free transit. EU fishing vessels may land their catches in any of the Applicant Member States and have them transported overland for processing elsewhere.

In principle, the free transit right is also part of the EEA Agreement. This means that all the states who are members by 1 May 2004 enjoy—in principle—the freedom to land and transit fish in Norway. Although the EEA

¹⁹⁵ *Id.*, para. 38.

¹⁹⁶ Churchill and Ørebech, note 126 above, p. 464.

¹⁹⁷ See 2004 Act of Accession, Annex II, para. 7 at AA2003/ACT/ANNEX II/en, p. 1519.

¹⁹⁸ For further consequences of the mutual right of Access to Ports, see R. Churchill and P. Ørebech, note 126 above.

¹⁹⁹ Which, at the time of the Accession Negotiations, was EC Reg. No. 3759/92 on the Common Organization of the Market in Fishery Products, Art. 26. See OJ 1992 No. L388/1. This has since been repealed by Council Reg. No. 104/2000 of 17 December 1999 on the Common Organization of the Markets in Fishery and Aquaculture Products.

Agreement provides for free transit of fishery products within the EU,²⁰⁰ the fact is that even after the EEA Enlargement Agreement,²⁰¹ free transit is still not in place since the agreement has still not been implemented. Finding a solution to these problems has been put on the agenda since “the settlement of the issue of allowing for transit of fish and fisheries products, landed in Norway by Community vessels, through Norway to the Community”²⁰² should now be decided.

V. THE 2004 ACCESSION TREATY—DETAILS: FISHING INDUSTRY AND TRADE

The fishing sector also includes fishing industry and trade. This section focuses on the changed conditions of national industries due to EU membership.

As a primary rule, all remnants of the Eastern European sales monopoly or co-operative system²⁰³ must come to an end from day one of EU membership. The EU system of semi-free trade under the auspices of private, member-owned producers’ organisations takes over upon entry. As regards market measures, new Member States have not asked for any exceptions to the market *acquis*. Consequently, they must adopt it fully and unconditionally. Accordingly, the common marketing organisation in fishery and aquaculture products takes effect from day one of membership. EU law is pre-emptive, and thus Applicant Member States’ marketing regulations are no longer valid.

If problems arise in the new Member States, the EU is authorised to establish transitional measures “to facilitate the transition”.²⁰⁴ These measures are under the exclusive autonomy of the EU.

The Establishment of Producers’ Organisations (PO)

This matter is a special issue under the right of enterprise. The Market Regulation organises fisheries trades in the common markets in fishery and aquaculture products which belong to the common agriculture and fisheries policy.²⁰⁵

²⁰⁰ Cf. Churchill and Ørebech, note 126 above, p. 465.

²⁰¹ See the 2004 Agreement, note 22 above.

²⁰² See Additional Protocol in Annex on Special Provisions referred to in the 2003 Enlargement Agreement, Art. 2, para. 3.

²⁰³ For a general overview of the “socialist era” systems, see J.M. van Brabant, *The Political Economy of Transition. Opportunities and Limits of Transformation* in *Routledge Studies of Societies in Transition* (London-New York, Routledge, 1998); see also V. Bunce, “Subversive Institutions: The Design and the Destruction of Socialism and the State” in *Cambridge Studies in Comparative Politics* (Cambridge University Press, 1999). For the Baltic States in particular, see T. Haavisto, *The Transition to a Market Economy: Transformation and Reform in the Baltic States* (Cheltenham, E. Elgar, 1997).

²⁰⁴ See Reg. No. 136/66/EEC of the Council of 22 September 1966 on the Establishment of a Common Organisation of the Market in Oils and Fats, Art. 43: “Should transitional measures be necessary to facilitate the transition from the system in force in the Member States to that established by this Regulation, in particular if the introduction of this system on the dates provided for would give rise to substantial difficulties in respect of certain products, such measures shall be adopted in accordance with the procedure laid down in Article 38.” See also 1994 Act of Accession, Art. 149.

New Member States must abide by the trade rules unless other arrangements have been made in the Accession Treaty. Such exceptions must be explicitly set forth.²⁰⁶ Since neither the Act of Accession nor the Market Regulation settles these issues, they follow the investment and establishment provisions (see Parts VI and VII of this article).

The EU system is based on a network of producers' organisations that any fisherman is free to join.²⁰⁷ PO members are required to deliver fish to their own PO, but since membership is free, fishermen may opt out of that PO. "Free agents", however, are sometimes forced by Member State provisions to comply with PO production and marketing rules, and prohibited from under-selling at prices below those fixed by the PO.²⁰⁸ Alternatively, direct sales to consumers, corporations, or by auction are permitted. No PO may enjoy the privilege of monopoly or any other dominant position unless otherwise stated in Article 33 of the Amsterdam Treaty. To counteract a monopoly position, a Member State is empowered to grant subsidies enabling fishermen to establish new POs.²⁰⁹ If an authorised PO establishes a monopoly position, its licence may be withdrawn.²¹⁰ Since fishermen and fish traders are the only permitted owners of a PO, a Member State is not allowed to establish a state-owned PO in its domain. In the same vein, it cannot protect a certain PO against competition, nor can it prohibit non-nationals from establishing a PO in its territory.

Neither the 1994 nor the 2004 Act of Accession authorises Applicant Member States to maintain a legal monopoly system.²¹¹ Any group of fishermen may set up a PO in Applicant Member States to compete with former trade monopolies (see Chapter VII).

The POs are authorised to set withdrawal prices, that is, reserve prices below which they may not sell fishery products. In practice, withdrawn fish have been destroyed. The purpose of the new Market Regulation is primarily to store these fish for later human consumption.²¹² The price level is determined according to the price guide set by the Council.²¹³ This regulation has a direct effect on Applicant States because the withdrawal price is directed at the PO members. However, a Member State may require producers who are

²⁰⁵ Which, at the time of the Latvian negotiations, were Reg. (EC) No. 3759/92 and Reg. No. 671/84. See "Negotiations on Accession", AA2003/ACT/Annex II/EN, p. 1519 (Brussels, 3 April 2003).

²⁰⁶ For an illustration of legally binding exceptions to the EU fisheries trade system, see the EEA Agreement of 2 May 1992, Protocol 9, para. 4.

²⁰⁷ EC Reg. No. 104/2000, Preamble § 9.

²⁰⁸ EC Reg. No. 104/2000, Preamble § 11 and Art. 7.

²⁰⁹ EC Reg. No. 104/2000, Preamble § 16 and Art. 5. Cf. Council Reg. No. 2792/1999 of 17 December 1999 laying down the Detailed Rules and Arrangements Regarding Community Structural Assistance in the Fisheries Sector, OJ No. L337, 30.12.1999, p. 10.

²¹⁰ See the original provision in EEC Reg. No. 105/76, Art. 4, now repealed by EC Regulation No. 104/2000, Preamble § 13 and Art. 5(3).

²¹¹ As stated in (the unpublished) EU Position Paper on Fisheries (1994).

²¹² EC Reg. No. 104/2000, Preamble § 26 and Art. 25.

²¹³ EC Reg. No. 104/2000, Art. 18(3).

not PO members to comply with the marketing and production rules as well as the withdrawal rules. The conditions for Member State jurisdiction under Article 7 are that the PO is representative; the fishermen concerned are not members of any PO; the actual products are listed in some parts of Annex I; and the withdrawal price is equal to the guide price. So, no undercutting of the PO sales price is allowed.

The 1994 Accession Treaty demand made by Norway exemplifies the situation today. Norway insisted that services rendered and regulations implemented by Norwegian monopoly trades include all landings in Norway, whether or not the fishermen concerned were Norwegian, and whether or not they were members of the organisation.²¹⁴ Since this demand was inconsistent with the freedom to establish a PO, it was impossible to grant, and was turned down on day one of membership negotiations. The purpose of regulating the PO system is to protect the industry against “pirates”, not to prevent “freedom of enterprise”.

Since, like Norway, Latvia did not opt for a trade monopoly, it relinquishes any competence to determine non-market prices upon entry into EU membership.

On-Board Processing—Factory Ships

The Act of Accession does not deal, directly or indirectly, with EU citizens’ right to operate factory ships with on-board fish processing along any Member States’ coasts. Nevertheless, there are several provisions of the Agreement that have a considerable bearing on these matters. Relevant provisions are those regarding the movement of capital, enterprise and free movement of workers, that is, non-discrimination by reason of nationality. These issues are discussed below. If Latvian legislation prevents this kind of foreign activity, its legislation is void and must be repealed.

Customs

As EU members, fishing exports of new Member States are under the common customs tariffs system. Consequently, EU customs tariffs do not impact any of these countries’ fish or fish products.²¹⁵ Because of the expansion of EU membership in 2004, imports from third party countries to former non-Member States now face increased tariffs. This is because free trade agreements have been terminated, and new import customs regimes have been developed under the EU.²¹⁶

Since Norway remains a non-Member State, new Member States’ imports are subject to contingent custom tariffs arranged for under the (amended) EEA

²¹⁴ The Norwegian Position Paper, The Marketing Section, p. 7.

²¹⁵ See EC Treaty, Art. 18.

²¹⁶ In particular, Poland has raised concerns in relation to herring and mackerel importation from Norway.

Agreement of 2 May 1992, Protocol 9, Articles 1 and 2, Annex I (cf. GATT legislation).²¹⁷ However, since GATT Article XXIV(9) guarantees that previous free trade arrangements remain intact, only increased importation to the EU falls under EU-bound GATT tariffs and autonomous customs schemes.²¹⁸ All tariffs establish ceilings, but are otherwise autonomous. Therefore, the EU is free to forego duties whenever raw fish is needed for industrial purposes.²¹⁹ As Robin Churchill documents, this autonomy is frequently invoked.²²⁰

Quantity Regulations

Article 30 of the EU Treaty prohibits quantitative restrictions aimed at protecting domestic production. From day one of membership, fish and fishery products have free entry to Member States' internal markets, unless otherwise decided in the Accession Treaty. Unlike the 1994 Act of Accession, the 2004 Act of Accession does not provide for special conditions that deviate from or give exception to open access fisheries exportation. The fishery products of new Member States will enjoy unrestricted, tariff-free access to the entire EU market as of their first day of membership, 1 May 2004.²²¹

If disturbances are anticipated in "any sector of the economy", any present Member State can—for a period of up to three years—apply to the EU for authorisation to take protective measures with regard to the new Member States.²²² This includes, for instance, imbalances in the production and marketing of fish.

VI. THE 2004 ACCESSION TREATY—DETAILS: MOVEMENT OF CAPITAL

Movement of liberalised capital already falls under association agreements. Articles 40 *et seq.* of the EEA Agreement provides for the free movement of capital between EU and EFTA states. Therefore, an EU or EFTA corporation may invest in the fishing industry of any other EU or EFTA state. A similar deregulation process took place during the transitional process of the Applicant Member States.²²³

²¹⁷ From 1 January 1987: "Harmonized Commodity Description and Coding System and Harmonized Tariff Schedule."

²¹⁸ Ørebech, note 52 above, Chapter 1, § 53, para. 5.

²¹⁹ Council Reg. No. 104/2000 of 17 December 1999 on the Common Organization of the Markets in Fishery and Aquaculture Products, Preamble §§ 32–33.

²²⁰ Churchill, note 8 above, p. 262.

²²¹ Latvian conditions differ from the 1994 Act of Accession, which, according to Art. 53(1), placed salmon, herring, mackerel, shrimps, scallops, lobster, redfish and trout under a trade monitoring system for a four-year period. The Commission was, under Art. 53(2), authorised to stipulate indicative ceilings which Applicant Member States' fish exporters are not allowed to exceed. The Commission alone might fix the level of imports. If new Member States' exporters exceed this level or they cause a "serious market disturbance", the EU is authorised to implement "measures".

²²² AA2003/ACT/en 48.

²²³ See National Programme for the Adoption of the Acquis (NPAA). Available at <http://europa>.

Transitional and/or permanent exceptions to the Act of Accession determine whether the free flow of capital became a permanent regime for new Member States. One illustration of a waterproof exception to the EU free investment rules is found in the EEA Agreement, Annex XII, paragraph 1(h). It provides for wide-ranging exceptions to the free movement of capital for investment in Norway, and restricts foreign investment in vessels and companies that are directly engaged in fishing operations. There are no exceptions to the rules on investment in fish-processing activities or fishery export, however. Applicant Member States were allowed to maintain national legislation “as is” on the day they signed the EEA Agreement.²²⁴

Investment *acquis* regulates the position of the new Member States as of 16 April 2003. Possible exceptions to investment *acquis* may be interpreted into fisheries *acquis*.²²⁵ Because they did not negotiate any exceptions to the freedom of investment rules, however, new Member States fall under the EU investment regime from day one.²²⁶ The following provisions govern EU members:

- 1) EU citizens may from day one buy new Member States’ vessels to bring to their home port for fisheries in any EU waters. Because they did not negotiate any exceptions under the 2004 Accession Treaty, these new Member States may not apply any national provisions that prevent “vessel hopping” from taking place.²²⁷ The provisions of the EC Treaty regarding investments apply fully.
- 2) The next question relates to the procurement of vessel and quota rights. For example, a Latvian ship owner can sell his vessel to a German, with the allocated quota rights attached to the vessel.²²⁸ This allows each Member State to create its own national regime of quota allocation to “vessels flying its flag”. If the vessel is out-flagged from the Latvian registry and into the German registry, Latvia may withdraw quotas already allocated and refuse to make later allocations. However, if so desired, Latvia and Germany may agree that Germany acquire that fishing opportunity in exchange for money or alternative fishing opportunities for Latvian vessels in German waters.²²⁹
- 3) Another, more likely option is that German investors buy a Latvian vessel without changing its registry.²³⁰ Is such a transfer of quota rights possible?

cont.

eu.int/comm/enlargement/report2002/index.htm. See also Commission Explanatory Memorandum of 13 November 2001 on the Proposal for a Council Decision on the Principles, Priorities and Intermediate Objectives Contained in the Accession Partnership with Latvia.

²²⁴ For details, see Churchill and Ørebeck, note 126 above, p. 468.

²²⁵ See especially 2002 CFP Framework Regulation 2371/2002.

²²⁶ See European Commission, Enlargement D-G, “Accessions Negotiations: State of Play” Document (20 December 2002).

²²⁷ See 2002 CFP Framework Regulation 2371/2002, which does not provide Member States with any derogation competence for the acquisition of vessels.

²²⁸ This situation falls under the auspices of 2002 CFP Framework Regulation 2371/2002, Art. 20(3).

²²⁹ *Id.*, Art. 20(5).

²³⁰ Which is one scenario covered by the EU Agreement on Fisheries Relation with the Republic of Latvia, OJ No. L332, 20.12.1996.

If the vessel is registered in Ventspils, and the owning company is still incorporated there, but is now under the ownership of a German company, would this ship still be afforded Latvian quotas? In other words, may Latvia refuse to allocate quota rights because of the changed nationality of owners? Here we must consider investment *acquis*.²³¹ Clearly no discrimination based on nationality is allowed.

The purchase of quota-rights (“quota hopping”) is legal under EU fisheries law.²³² Before analysing the new Member States’ situation, a quick look into the Norwegian position under the First Accession Treaty to the EU is of interest.

- 4) Norway, when negotiating for EU membership in 1994, did not demand a perpetual exemption from the *acquis communautaire*. Transitional measures were the only arrangements negotiated. Norway was permitted to maintain national restrictions on ownership of Norwegian vessels by non-nationals for a three-year period.²³³ Accordingly, Norway gave up the chance to institute measures to prevent *Factortame* case-like situations²³⁴ from occurring in the Norwegian fishing fleet.
- 5) None of the new Member States opted for interim measures to prevent “quota hopping”. As stated above, EU fisheries law does allow quota hopping. Thus, the situation of the new Member States is identical to the one Norway would have endured had it ultimately joined the EU. The ramifications of this are difficult to predict. Still, the UK’s experiences can provide us with some worst case scenarios.²³⁵ By January of 1994, quota hopping had resulted in foreign ownership (mostly Spanish and Dutch) of over 10 per cent of UK fishing vessels. What effect the Accession Treaty will have on the levels of foreign investment in the fishing industries of Applicant Member States is dependent upon a variety of factors, the most important of which is the strength of resources available to new Member States’ fleets.

VII. THE 2004 ACCESSION TREATY—DETAILS: ENTERPRISE

Another important aspect of the free flow of capital is the right to establish businesses within the new Member State. There are no restrictions on this right unless other arrangements have been negotiated under the Accession Treaty. Article 43 of the EEA Agreement provides for freedom of enterprise and illustrates what the new Member States might have hoped for, at best.

²³¹ This situation is still ruled by Art. 20(3): “in accordance with Community law”.

²³² See here the *Factortame* cases referred to at note 237 below.

²³³ 1994 Act of Accession, Art. 35.

²³⁴ Case 221/89, *R v Secretary of State for Transport ex p. Factortame* (1991) 3 CMLR 589; (1991) 2 All ER 769. See also Case 246/89, *Commission v United Kingdom* (1991) 3 CMLR 706.

²³⁵ R. Churchill, “‘Quota Hopping’: The Common Fisheries Policy Wrongfooted?”, (1990) 27 *Common Market Law Review* 209, and also R. Churchill, “Case Note on the *Factortame* and Related Cases”, (1992) 29 *Common Market Law Review* 405.

Article 43 of the EEA guarantees that a “self-employed national of a Member State or companies registered therein” may set up a business or establish new companies or subsidiaries in another Member State. The regime of the EEA Agreement, paragraph 10 of Annex VIII, however, does set some limits on this guarantee. Under this regime, Applicant Member States may maintain restrictions existing at the date of signature of the Agreement both on fishing operations held by non-national enterprises, and on foreign companies that own or operate fishing vessels.²³⁶ This provision does not have a timeframe, so it lasts until the EFTA countries of Norway, Iceland and Liechtenstein and the EU renegotiate the Agreement.

This is not the new Member States’ position, however, since none of them negotiated exceptions to the freedom of establishment rule. Therefore, Article 40 of the EC Treaty binds them from day one. The treaty text, together with case law, *in casu* the *Factortame*²³⁷ and *Commission v UK*²³⁸ cases, illustrates the implications of the new Member States’ position. The President of the Court, Ole Due, gave the following Order on the nationality of fishermen requirement found in section 14 of the new Merchant Shipping Act of 1988:

[H]owever there is nothing which would *prima facie* warrant the conclusion that such requirement [the nationality requirements to ensure that there is a genuine link] may derogate from the prohibition of discrimination on grounds of nationality contained in Articles 52 and 221 EEC regarding, respectively, the right of establishment and the right to participate in the capital of companies or firms within the meaning of Article 58.²³⁹

The British wished to derogate from the establishment rules on the non-discrimination on the grounds of nationality in capital matters; these rules ensure that capital flows freely throughout the EU. The Court ruled that the transitional period did not affect these rules, and consequently, did not allow the British to derogate from them. These issues were later debated in full in Case C-221/89, *Factortame*:

[I]t must be observed in the first place that, as Community Law stands at present, competence to determine the conditions for the registration of vessels is vested in the Member States. As far as fishing vessels in particular are concerned, the Court held in Case 223/86 (*Pesca Valentia*) that the provisions of Council Regulation No. 101/76 . . . laying down a common structural policy for the fishing industry . . . referred to fishing vessels ‘flying the flag’ of a Member State or ‘registered’ there but left those terms to be defined in the legislation of the Member States (§ 13).

²³⁶ For details, see Churchill and Ørebech, note 126 above, p. 466.

²³⁷ Case 213 and 221/89, *R v Secretary of State for Transport ex p. Factortame* (1991) 3 CMLR 589; (1991) 2 All ER 769. For the background of these cases, see Part II of this article.

²³⁸ Case 246/89, *Commission v United Kingdom* (1991) 3 CMLR 706.

²³⁹ Case C-246/89, *Nationality of Fishermen: Commission v UK* (10 October 1989) (§ 29), [1989] R. ECR 3125.

Nevertheless, powers which are retained by the Member States must be exercised consistently with Community law (§ 14).

This clearly indicates that fisheries regulations that still belong to Member States must be formulated in accordance with general EU law. Since EU law prohibits discrimination on the basis of nationality, Member States' regulations must prohibit it as well. As newborn EU Member States, Latvia, Malta, Poland *et al.* are deprived of discriminatory capacity, since they did not request or obtain exceptions to freedom of enterprise. Thus, when the Act of Accession enters into force, legislation restricting foreign ownership of fishing vessels must cease to exist. It is conceivable that this new legal situation will bring quota hopping to Applicant Member States, and that this quota hopping will be limited solely by the interests of investors from the other EU Member States.

VIII. THE 2004 ACCESSION TREATY—DETAILS: FREE MOVEMENT OF WORKERS

According to the EC Treaty, Article 39(2), all discrimination based on the nationality of workers of the Member States with respect to employment, remuneration and other conditions of work and employment, shall be abolished. No distinction between land-based or offshore-based industries has been made. This anti-discrimination provision applies to sailors, crews and fishermen, and not just to individuals employed in land-based industries.

The primary interest here is the position of sailors, crews and fishermen who take appointments on board trawlers, purse seines and fishing-boats flying the flag of another Member State, before the end of the transition period. Fishermen who invest in such ships to obtain possessors' rights have intentionally been excluded from this discussion.²⁴⁰ Whether self-employed fishermen face any restrictions is considered in Part VI. Since there is general freedom of movement of workers at the end of the transition period, this section will concentrate on the regulations applied during the interim period.

As demonstrated by the 1985 Iberian Accession Treaty, Article 55, which derogates from the EEC Treaty, Article 48 (now Article 39), there are mechanisms that challenge the unrestricted movement of Portuguese and Spanish workers. For a transitional period, the group of old Member States may continue to invoke existing restrictions against Applicant and new Member States' nationals. As seen in *Peskeloglou v Bundesanstalt für Arbeit*,²⁴¹ these derogative measures imply a system of strict interpretation and simultaneously prohibit either party from initiating new regulatory measures.

It is clear from that judgment that that provision, being a derogation from the principle of the free movement of workers laid down in Article 48 of the EEC Treaty,

²⁴⁰ See Part V.

²⁴¹ Case 77/82, Judgment of 23 March 1983, [1983] ECR 1085.

must be interpreted restrictively and that consequently, whilst the old Member States and those which acceded to the Community are authorized to maintain existing restrictions, they may not in any circumstances during the taking up of employment by their respective nationals by introducing new restrictive measures.²⁴²

The Accession Treaties define Member States' competence to derogate. These treaties are the exclusive source of this power. Consequently, Member States may not extend derogative measures outside the authorisation explicitly granted. Moreover, no Member State may undo free movement benefits that workers from Applicant Member States already enjoy.

[T]here was no ground for refusing Portuguese workers already employed in the territory of one of the old Member States the benefit of the provisions of Title II of Regulation No. 1612/68 relating to employment and equality of treatment. It follows from that judgment that although under Article 216(1) of the 1985 Act of Accession the old Member States are authorized to maintain existing restrictions with regard to Portuguese nationals, they may not maintain such restrictions with regard to those of them who, since a date prior to the accession of Portugal, have been pursuing an activity as employed persons on board a vessel flying the flag of another Member State and who have not been given a residence document entitling them to pursue such an activity in the territory of that State, if the employment relationship displays a sufficiently close link with the territory of the said Member State.²⁴³

Such interim measures are part of the 2004 Act of Accession. The Latvian position is fully integrated into the Act of Accession, Annex III, section 1, and reflects the above-referenced case law.²⁴⁴ As indicated in Directive 96/71/EC, paragraphs 2 through 14, the free movement of workers is filled with extensive exceptions. The transitional period lasts five years and begins from the date of accession. During this period, national measures may apply. Beneficiary positions already granted foreign workers may not be reversed if that right has been enjoyed for an "uninterrupted period of 12 months". However, such rights are restricted to the particular guest worker's Member State. Other Member States that apply national measures restricting guest workers may retain these regulations, barring new Member States' workers from their internal markets (paragraph 2). These national discriminatory regulations may continue in force until the end of the seven-year period following the date of accession (paragraph 5). These provisions do not exclude Member States from granting migrant workers greater freedom of movement, hereunder unrestricted access to the national labour market (paragraph 12).

What are the legal consequences of being subject to the EU general freedom of movement of workers? Clearly, during the interim period, Applicant

²⁴² Citation is taken from Case C-3/87, *Agegate Ltd v UK* (14 December 1989), [1989] ECR 4459, para. 39, dealing with questions identical to the *Peskeloglou* case.

²⁴³ Case C-3/87, *Agegate Ltd v UK* (14 December 1989), [1989] ECR 4459, para. 40.

²⁴⁴ AA2003/ACT/Annex VIII/en 2740.

Member States' workers may move to the present Member States, and apply for and hold employment positions as long as that state does not impose its own restrictions and guest workers are allowed by the Act of Accession.

Member States must refrain from restrictions on the nationality of crew members. According to the ECJ, a fisherman may work on a fishing vessel registered in another Member State without being a resident of that state.

Community law precludes a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must reside ashore in that Member State.²⁴⁵

There are no exceptions to this rule. Even when the purpose of Member State legislation is to set up a functioning "relative stability system", the national laws may not include elements that limit the free flow of fishing-vessel workers. Other than competencies allowed by the transitional provisions, Member States may not regulate a fisherman's freedom to take an appointment on board a foreign ship.

IX. CONCLUSION

The 2004 Accession Treaty and Act of Accession require that the Applicant Member States adopt EU legislation and policy. No fisheries are exempt from the *acquis communautaire*. The goal of the Accession Treaty is to phase out Applicant Member State legislation and institute the pre-emptive role of EU law. The EU fisheries *acquis* directly affects natural and juridical persons.

The Accession Treaty allows new Member States to keep former legislation for a limited period of time. Member States may also enact new legislation that eases constraints on the free movement of workers. At the end of the transitional period, jurisdictional competence is transferred to the EU. All Applicant Member States' fisheries legislation will then be terminated, with the exception of specific areas *delegated* to Member States.

Through the Agreement, Applicant Member States' waters become EU waters. This includes internal waters, territorial seas, and EEZs. Applicant Member States' fisheries in international waters also become part of the EU exclusive autonomy. Unlike the agreement provided by the 1972 Act of Accession, the 2004 Act of Accession does not reserve any part of the sea to the historic fisheries of Applicant Member States' domestic fleets. This would have excluded foreign participation in the fisheries by fleets that had no historic presence in these waters.

According to secondary EU legislation, all formerly national waters, including national territorial seas and the 12 nautical mile fishing zones, belong to

²⁴⁵ Case C-3/87, *Agegate Ltd v UK* (14 December 1989), [1989] ECR 4459, para. 26. See also Case 216/87, *R v Ministry of Agriculture, Fisheries and Food ex p. Jaderow* [1991] ECR 4509; 2 CMLR 556, which refers to the first case in this question.

the EU exclusive competence. National rules already in place for the 12 nautical mile zone along the coast may continue until 31 December 2012. EU legislation will eventually fully regulate these national zones. What will happen beyond 31 December 2012 will be decided by qualified majority vote. If no decision is made before the end of 2012, existing national legislation restricting access to resources in the zone will cease to exist. This implies that national provisions related to the territorial sea will no longer be valid.