1. Introduction: on the Law of the Sea and European integration

INTRODUCTION

Establishing the European Union (EU) as a sea-policy actor has been a gradual process, first based on the original Treaty of Rome establishing the European Economic Community (EEC) in 1957 (in force in 1958), which included provisions related to fisheries and maritime transport policy. Later reform treaties have added additional treaty bases, allowing for an expansion of the functional scope of what we might call the Blue Europe.¹ The treaties have also outlined the policy-making procedures for the different policies. The trend in these policy areas, as in other policies, has been towards developing more efficient decision-making procedures, for example, by moving from unanimous decision-making to qualified majority votes (QMV) in the Council of Ministers, and in parallel to increase the legitimacy of policies by empowering the European Parliament (EP). In addition to original treaty provisions and changes in these, the European Court of Justice (ECJ) – now Court of Justice of the European Union (CJEU) – has also contributed to the making of the Blue Europe by important judgements interpreting the treaties and secondary legislation (Best 2014; Hix and Høyland 2011; Ziller 2020).

The study will trace these developments over time, from the Common Fisheries Policy (CFP) developed in the 1970s and 1980s, followed by Common Maritime Transport Policy and common marine environmental and maritime safety policies, mostly developed in the 1980s and 1990s, to current naval missions to battle pirates off East African coasts and to efforts to try to deal with illegal immigrants crossing the Mediterranean Sea and pursuing the smugglers of these immigrants. All the early policies were based on the so-called Community method, where it was the European Commission which proposed legislation, the Council of Ministers which adopted it, sometimes by a QMV, and where the ECJ settled disputes by binding judgements. The more recent naval dimension, on the other hand, has been based on more traditional intergovernmental cooperation, with no majority voting or ECJ involvement (Jones et al. 2012; Kenealy et al. 2015; Laursen 2016; Cini and Pérez-Solórzano Borragán 2019).

Table 1.1 gives some key dates in the development of the EC/EU as a marine and maritime policy actor.

Table 1.1 Key dates in the European Community/European Union becoming a sea-policy actor

1958	The Treaty of Rome establishing the European Economic Community includes provisions to develop Common Fisheries and Common Maritime Transport policies
1970	Start of Common Fisheries Policy (CFP): Principle of Equal Access to Community waters
1973	First enlargement with UK, Ireland and Denmark increases importance of CFP and introduces derogations from equal access
1974	The European Court of Justice (ECJ) confirms applicability of general principles of EC law to maritime transport
1976	Introduction of 200-nautical mile fishing zone in the North Sea and the North Atlantic Ocean
1976	The Single European Act (SEA) includes provisions on a common environmental policy
1978	The <i>Amoco Cadiz</i> accident gives incentives to development of a maritime safety policy
1979	EEC joins UNCTAD Liner Code of Conduct with reservations (no application of cargo sharing among industrialized countries)
1983	CFP Conservation and management policy adopted
1985	ECJ concludes that the Council had failed to ensure freedom to provide transport services within the Community
1986	EEC adopts four maritime transport regulations: <ol style="list-style-type: none"> 1. freedom to provide services 2. rules for the application of Articles 85 and 86 of the Treaty dealing with competition policy (including block exemption for shipping liner conference) 3. unfair pricing practices 4. coordinated action to safeguard free access to cargoes in ocean trades
1992	EEC agrees to a phased liberalization of cabotage in maritime transport
1992	CFP reform to improve management
1993	Start of legislation to deal with ship standards and control of these
2002	CFP reform to improve management
2006	Repeal of block exemption from EU's competition policy for liner conferences (general enforcement regime from 2008, also including the tramp market and cabotage)
2008	EU launches Operation EUNAVFOR Atalanta against piracy off Somalia's coast
2009	Third Maritime Safety Package dealing with Classification Societies, Vessels Traffic Monitoring, Port State Control, Maritime Accident Investigation, Insurance for Maritime Claims, Ship-Source Pollution and Marine Equipment
2013	CFP reform introducing ecosystem approach, catch based on maximum sustainable yield (MSY) set on scientific advice
2015	EU launches Operation EUNAVFOR MED (Sophia) in the Mediterranean
2020	Discontinuation of Operation EUNAVFOR MED

Source: Compiled by the author.

THE LAW OF THE SEA: FROM *MARE LIBERUM* TO UNCLOS

The EU today borders not only the Atlantic Ocean and the North Sea, where the extension of coastal state sovereignty started, but also the Baltic Sea, the Black Sea and the Mediterranean Sea. The international development of the Law of the Sea (LOS) in recent decades has allowed the EU's coastal member states to extend their rights to resources in increasingly wider zones of ocean space.

It is the LOS, especially the outcome from the Third UN Convention on the Law of the Sea (UNCLOS III) in 1982, the UN Law of the Sea Convention (UNLOSC), which determines the competences of the coastal states over off-shore marine resources (Bernaerts 2006; Harrison 2013; Rothwell et al. 2015).

Coastal states can now claim territorial seas of up to 12 nautical miles from the coast (or baselines), where they extend their sovereignty to the adjacent belt of sea, including also the air space above and the seabed and subsoil below. Ships from other countries have a right of 'innocent passage' in the territorial sea. 'Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State' (Art. 19 UNLOSC). In straits used for international navigation, which are less wide than 24 nautical miles, thus having overlapping territorial seas, there is a right of 'transit passage', meaning 'the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait' (Art. 38.2 UNLOSC). Transit passage is more generous than innocent passage. It includes for instance the right of submerged passage by submarines, something considered important by big power navies, and strongly defended by the US and Soviet navies during UNCLOS III, 1973–82 (Laursen 1983).

Of central importance for the Blue Europe are the 'enclosures' that were accepted by UNCLOS III, creating coastal state competences in respect to continental shelf resources and the right to claim a 200-nautical mile Exclusive Economic Zone (EEZ). While continental shelf resources, including oil and natural gas, have largely remained a national 'sovereign right' within the EU, the living resources of the EEZs of the member states have become a common EU marine resource through the CFP (Laursen 1986).

In the EEZ, the coastal state has 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil' (Art. 56.1). This competence also includes 'the protection and preservation of the marine environment'. There is still freedom of navigation and overflight in the EEZs, and right to lay submarine cables (Art. 58 UNLOSC).

The continental shelf is the ‘natural prolongation ... of land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines ... where the outer edge of the continental margin does not extend up to that distance’ (Art. 76.1 UNLOSC). ‘The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources’ (Art. 77.1 UNLOSC). This includes mineral and other non-living resources as well as sedentary living species. The continental margin (including continental shelf, slope and rise) varies in width. It can be less than 200 nautical miles or more. If it is less than 200 nautical miles the coastal state still has the right to seabed resources beyond the outer edge of the continental rise out to a distance of 200 miles from the coast.

By giving the coastal state the sovereign rights to living and non-living resources in the EEZs and in the continental margins UNCLOS III confirmed the enclosure of a great part of ocean space by the coastal states, despite the idea that the oceans should be considered the Common Heritage of Mankind as suggested in a speech of the Maltese ambassador Arvid Pardo to the United Nations in 1967, subsequently adopted in the 1970 UN General Assembly Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (Taylor 2011).

However, in the bargaining process during UNCLOS III the coastal states had unilateral options and credible threats of veto, the land-locked states did not. This explains that the area ‘beyond the limits of national jurisdiction’ gradually shrank as coastal states enclosed wider areas of ocean space.

Beyond the EEZs and continental margins we find the ‘High Seas’ with the classical freedoms of navigation and overflight and, subject to conditions, other freedoms, including fishing (Art. 87 UNLOSC). On the High Seas there are specific duties of the flag states. There are duties to render assistance and to cooperate in the repression of piracy, which is relevant for the EU’s more recent naval activities. States are also required to cooperate in the conservation and management of living resources beyond the EEZs.

The delimitation of ocean spaces, including continental shelves, led to several conflicts, also between some EU member states, such as between Denmark, Germany and the Netherlands in the North Sea as well as between Denmark and Sweden in the Kattegat (Laursen 1993). There are still a number of delimitation conflicts in the world, including in the Mediterranean Sea, for instance between Slovenia and Croatia and between Cyprus and Turkey.

UNLOSC includes two guiding principles for delimitation, viz. the well-defined median or equidistance line as well as the less well-defined ‘equitable principles’, the latter also emphasized by the International Court of Justice (ICJ) in The Hague in the North Sea dispute.

The deep seabed beyond the continental margins and EEZs, known as the 'Area' in the convention, is governed by the International Seabed Authority (ISA).

The rather revolutionary changes that took place in the Law of the Sea in the 20th century affected the European integration process in various ways. These developments will be traced and analysed in this book.

OUTLINE OF THE BOOK CHAPTERS

The next chapter will discuss analytical issues: How do we study the initiation and development of the EU's marine and maritime policies? Which concepts and theoretical frameworks do we have, and how relevant do we expect them to be? How can we explain later reforms of these policies?

Chapter 3 will look at the treaty bases of the different sea-related policies that have been developed. In principle, the EC/EU can only develop common policies if there is a treaty base (principle of conferral), the treaties forming a kind of constitution for the EEC and now EU. However, as we shall see, there is a certain flexibility. The EEC started developing a common environmental policy before the Single European Act (SEA) included an explicit environmental chapter in the treaty from 1987.

Chapter 4 will look at the role played by the EEC at the Third United Nations Conference on the Law of the Sea (UNCLOS III), especially the efforts to get a provision in the convention, which would allow the EEC to become a party to the convention alongside the member states. Such EEC clause was eventually included in the convention. In this connection the EEC had to produce a list of legislation adopted with relevance for UNCLOS. One such list was produced upon signature in 1984 and another longer list was produced upon formal confirmation in 1998. In the meantime, the functional scope of the Blue Europe had enlarged considerably.

Chapters 5 and 6 will look at what many consider the most important sea-related policies of the EC/EU, namely the Common Fisheries Policy (CFP). Chapter 5 will look at the initiation of the CFP in the 1970s, focusing upon the adoption of the equal access principle in 1970, the changes brought by the first enlargement in 1973, and the decision to introduce the 200-nautical mile fishery zone in the North Sea and North Atlantic Ocean from 1977. Chapter 6 will study the conservation and management policy which was finally adopted in 1983 as well as its successive reforms until the latest in 2013.

Chapter 7 will deal with the Common Maritime Transport Policy (CMTP), which was slower to develop than the fisheries policy. It was partly some international developments that led to the start of a common maritime transport policy from the late 1970s, including demands for cargo sharing from developing countries. But it was speeded up in the mid-1980s in connection with

the completion of the internal market in the late 1980s up to the 1992 deadline and beyond. So, we see both external and internal forces propelling the EU's maritime transport policy.

Chapter 8 will study the general aspects of the common marine environmental policy, which started to develop without a clear treaty base from the 1970s, as well as the more special common maritime safety policy, which developed later in response to several environmental disasters due to oil spills resulting from the grounding and break-ups of tankers. Also sinking of ferries, resulting in huge numbers of passengers drowning, contributed to this policy. Adequate standards for vessels had to be introduced together with control mechanisms, which empowered coastal and port states vis-à-vis flag states. Environmental interests increased relative to the interests of the shipping companies, which used to dominate maritime policies.

Chapter 9 will look at the latest development, namely the initiation of maritime security and defence policy cooperation. This is voluntary inter-governmental cooperation between navies involved in fighting piracy in the Indian Ocean off Somalia's coast and trying to deal with illegal immigration across the Mediterranean Sea, the former mission being reasonably successful, the latter being rather controversial and problematic, bringing in the sensitive issues of immigration, asylum policies, human right and maritime border control. The NAVFOR MED had eventually been discontinued by the beginning of 2020, and it appears that the European Border and Coast Guard Agency (so renamed in 2016) is gradually stepping in.

Chapter 10 then looks at the EU as an international actor in the marine and maritime policy areas, where the EU has been particularly active in various fisheries organizations and actually plays an important role in the International Maritime Organization (IMO) through the member states without formally being a party to the founding agreement. This chapter also covers the EU's relations with other international organizations as well as bilateral fisheries agreements with non-member states.

Chapter 11 deals with implementation and enforcement, giving an overview of the different roles of the various institutions, the Commission, the Council, the European Parliament and the Court of Justice as well as a number of committees (Comitology) and agencies, which increasingly play important roles in the EU. It is argued that the member states still play the most important role in implementation and enforcement but that the Commission and Court have played and continue to play important facilitating and supervisory roles.

Chapter 12 finally revisits the theories and conceptual frameworks introduced in the second chapter and discusses the relative explanatory power of the different approaches. No single theory can explain the initiation and development of the Blue Europe. The timing and nature of the specific policies have affected the forces which have driven the developments, some endoge-

nous, some exogenous, in complex combinations. While rational models, with a focus on economic factors, may have been most relevant during the early years, other factors have become more important in recent years as the concern for the environment has increased, leading to a 'green' discourse about sustainability which has in some situations contributed to shaming the laggards, which looked narrowly at national economic interests. This new framing of the issues allowed for new reform efforts to bring down serious overfishing and depletion of fish stocks as well as efforts to bring down the number of environmental catastrophes, especially by increasing the respective roles of the coastal and port states vis-à-vis the flag states. The chapter also includes some concluding remarks, and asks the question whether the Blue Europe is getting greener.

NOTE

1. The Common Agricultural Policy (CAP), at least in the earlier years, was often referred to as the green Europe, while green today is sometimes used to mean environment-friendly, which the CAP arguably has not been.

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