



# The EU's failed attempt to innovate with Regulation 1026/2012



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## ABSTRACT

Cooperation is one of the cornerstones of the international fisheries regime. It requires States to work together for the conservation and management of the fisheries resources. This applies even stronger with respect to shared fisheries resources. However, negotiating a cooperative solution is not always easily achievable for the parties involved and the international regime does not provide for consequences in such cases. Faced with such a problem and seeking a new solution to it, the EU adopted Regulation 1026/2012, equipping itself with a framework for adopting measures against third countries. This innovative solution challenges certain aspects of the international duty to cooperate and its negotiations aspect. The EU's innovation has so far failed because it lacks clear international support and basis in the international regime. This failure exemplifies one of the limits of unilateralism for generating developments in international fisheries law.

## 1. Introduction

The global shared fish stocks regime, comprising the United Nations Convention on the Law of the Seas (UNCLOS) [1] and the United Nations Fish Stocks Agreement (UNFSA), [2] prescribes (regional) cooperation for shared (transboundary and straddling) stocks. However, it lacks explicit solutions where stocks alter their zonal attachment, *i.e.* their geographical distribution. In cases of changes in the geographical distribution (CGD) of shared stocks, important environmental and economic concerns are at stake and cooperation, expressed mainly in agreements on total allowable catch (TAC) and quota allocations, can become significantly harder to achieve. In order to address this growing problem, exemplified by the Mackerel War, the EU adopted Regulation 1026/2012 [3].

This paper will examine to what extent the solution the EU came up with in Regulation 1026/2012 represents an innovation, that is, a step forward, compared to the existing international regime. Then the paper will explain why this innovation should be seen as failed. These two issues will be examined in the following way. Section 2 will describe the Mackerel War as it provides the factual background of Regulation 1026/2012. Section 3 will examine the innovative aspect of Regulation 1026/2012 by, first, presenting the relevant parts of the international fisheries regime and, second, identifying the innovations in the Regulation. Section 4 will focus on why Regulation 1026/2012 failed as an innovation. Section 5 will conclude.

## 2. The factual background of Regulation 1026/2012

The Mackerel War is a fishing-quota disagreement that developed from 2008 involving the EU, Norway, the Faroe Islands, Iceland, and Greenland [4]. It arose out of the CGDs of both herring and mackerel, which are associated species that can be caught simultaneously in Faroese waters.<sup>1</sup> It all started, however, in Icelandic waters. After a long period of no reported mackerel catches, they rocketed in the late 2000s (108,000 t in 2008) [5]. On the basis of these catches, Iceland requested to be recognised as a Coastal State by the existing Coastal States for the mackerel fishery and be included in the management agreements. Iceland's quota and inclusion wishes proved unacceptable to the EU and Norway, mainly due to the size of the claimed quotas. Initially, Iceland was allocated only 2000 t and this offer increased to 26,000 t in 2010 but was rejected by Iceland [6]. In the meantime Iceland's mackerel catches kept growing and in 2010 Iceland unilaterally set its quota at 130,000 t [7]. A CGD of mackerel in Faroese waters led the Faroe Islands also to considerably increase its 2010 quota [8]. The unilateral allocations of high mackerel quotas by the Faroe Islands and Iceland continued in the following years, while trying to reach an agreement with the EU and Norway. Greenland's involvement further complicated the dispute. The appearance of herring and mackerel in Greenlandic waters was noticed by its fishermen and they quickly claimed what was found [9]. Norway's response in 2010 was a ban on mackerel landings in its ports by Faroese and Icelandic ships [10]. The EU warned of similar sanctions [11].

The dispute further escalated in January 2013 when it extended to

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<sup>1</sup> According to Article 2(b) of Regulation 1026/2012 associated species means “any fish that belongs to the same ecosystem as the stock of common interest and that preys upon that stock, is preyed on by it, competes with it for food and living space or co-occurs with it in the same fishing area, and that is exploited or accidentally taken in the same fishery or fisheries”.

the herring quotas. After another unsuccessful round of negotiations between the Coastal States on the herring TAC, the Faroe Islands was excluded from the 2013 quotas agreement [12]. In March 2013, the Faroe Islands unilaterally increased its quota from 5.16% to 17% of the recommended TAC, due to the increased presence of herring in its waters [13]. Shortly thereafter the Commission announced that trade sanctions were being considered against the Faroe Islands [14]. On 17 May 2013 the Commission formally expressed its intention to adopt sanctions [15]. The Faroe Islands responded that if the Commission proceeded with adopting the said measures it would reserve the right 'to take necessary measures to instigate appropriate compulsory conciliation proceedings' [16]. The Commission nevertheless proceeded, and on 31 July 2013 the Committee for Fisheries and Aquaculture backed the Commission's proposal to adopt sanctions against the Faroe Islands [17]. Notwithstanding the presence of a relevant RFMO, the Mackerel War developed beyond its auspices due to the intra-EEZ nature of the quota increases and its lack of a dispute settlement mechanism.<sup>2</sup>

On 16 August 2013, Denmark in respect of the Faroe Islands initiated arbitration against the EU, under Annex VII UNCLOS [18]. On 20 August 2013, the EU adopted measures against the Faroe Islands with respect to herring and mackerel (to the extent that they are caught together) [19], followed by Norway [20]. In response, Denmark in respect of the Faroe Islands requested consultations with the EU under Article 4 of the World Trade Organisation's (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes and Article XXIII:1 of the General Agreement on Tariffs and Trade (GATT) [21]. The negotiations continued, and on 12 March 2014 an agreement on the mackerel quotas was reached [22]. It resulted in a significant increase of the TAC and created sustainability doubts. Two months later an agreement on herring was also reached [23]. The Mackerel War officially ended after the EU removed the trade sanctions on 18 August 2014 [24], and the Faroes terminated both proceedings a few days later [25].

### 3. What is the innovation?

Regulation 1026/2012 was the framework instrument under which the EU adopted sanctions against the Faroe Islands. It was drafted and adopted during the Mackerel War with the aim to help resolving it (in the EU's favour) by 'encouraging' the Faroe Islands and Iceland to reach an agreement with the other mackerel and herring Coastal States [26]. The need for such an encouragement was created by two major deficiencies of the international regime for conservation and management of shared stocks – the lack of legal consequences to the failure to agree on the relevant measures and the wide jurisdictional limitations for international fisheries disputes. I will briefly examine each in turn and then will explore what I consider to be the EU's innovation.

#### 3.1. The deficiencies in the global fisheries regime

Article 63 UNCLOS deals with the conservation and management of shared stocks, both transboundary (paragraph one) and straddling (paragraph two). For transboundary stocks States shall seek to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks. For straddling stocks States shall seek to agree upon the measures necessary for the conservation of these stocks in the adjacent area (the high seas). This should happen either directly or through appropriate subregional or regional fisheries management organisations (RFMO). Article 63 UNCLOS provides a very general framework of cooperation between States in the management of

shared stocks giving a central role to the duty to negotiate the relevant measures. The duty to negotiate, as opposed to the duty to reach an agreement, is not result-oriented but conduct-oriented [27]. As the Permanent Court of International Justice (PCIJ) has stated and the International Court of Justice (ICJ) subsequently agreed, "an obligation to negotiate does not imply an obligation to reach an agreement" [28]. While the duty to negotiate has real legal content with a multitude of emanations, which, if not observed, can lead to its violation [29], it is still very inconsequential. If States negotiate in good faith and try to reach an agreement but fail, the duty to negotiate will not be violated. The UNFSA further elucidates the straddling stocks regime. It puts increased emphasis on management through RFMOs and spells out certain particularities of the States' duty to cooperate. Nevertheless, the UNFSA does not go as far as changing the nature of the duties in Article 63 UNCLOS.

Part XV UNCLOS sets out an elaborate dispute settlement mechanism with comprehensive compulsory procedures. They, however, are subject to wide jurisdictional limitations. The limitations cover mainly disputes concerning (1) the sovereign rights of a coastal State relating to living resources in the Exclusive Economic Zone (EEZ) and (2) the exercise of these sovereign rights such as determining allowable catch, harvesting capacity, surpluses allocation to other States, and the requirements in the conservation and management measures [30]. Further limitation may be applied with respect to disputes dealing with law enforcement activities concerning these sovereign rights [31]. Thus, in cases of straddling stocks disputes, only the part of the dispute concerning the high seas may be submitted to compulsory settlement, which is of little use due to its incomprehensiveness [32]. Such disputes may also develop in the context of RFMOs and/or stock-specific treaties having their own dispute settlement mechanisms. The UNFSA did not change those jurisdictional limitations and Part XV UNCLOS provisions apply *mutatis mutandis* to disputes on the interpretation and application of the UNFSA, including the jurisdictional limitations [33].

The UNCLOS nevertheless provides some possible (non-binding) solutions. First, with respect to disputes dealing with coastal State rights and duties within the EEZ, there is a compulsory conciliation commission under Annex V UNCLOS [34], which, however, does not entail a binding decision [35]. Such proceedings may be initiated only where it is alleged that a coastal State has (1) manifestly failed to ensure that living resources are not endangered in its EEZ; (2) arbitrarily refused to determine allowable catch and harvesting capacity; and (3) arbitrarily refused to allocate the surplus it has declared to exist in its EEZ [36]. Second, facts and scientific and technical matters are crucial for the international fisheries regime, and fisheries disputes can often revolve around such matters. The Mackerel War exemplified this through the continuous refusal of the EU and Norway to fully accept the factual basis for the Icelandic, Greenlandic, and Faroese claims.

Article 287(1)(d) UNCLOS provides a non-compulsory tool for solving such issues. It introduces "a special arbitral tribunal constituted in accordance with Annex VIII" UNCLOS. The mechanisms provided therein are subject-matter-oriented, including fisheries-related disputes, but again subject to the abovementioned jurisdictional limitations [37]. While the Annex VIII special tribunal generally also can decide on disputes concerning the interpretation and application of the UNCLOS provisions, its importance lies in (1) the fact that it is to be composed primarily by experts from the particular field and (2) the possibility for the parties to a fisheries dispute to request the tribunal to solve factual disputes only [38]. The tribunal could make conclusive finding of fact as between the parties, unless otherwise agreed [39]. If so requested, it may also formulate non-binding recommendations meant to serve as a basis for reviewing the disputed question by the parties [40].

These limitations show the intention of the UNCLOS drafters to exclude compulsory dispute settlement mechanisms where negotiations for conservation and management measures reach an *impasse* [41]. The relevant States are neither obliged to negotiate *ad infinitum*, nor are particular consequences spelled out should the negotiations fail [42].

<sup>2</sup> This is the North-East Atlantic Fisheries Commission. The EU proposed an amendment including a dispute settlement mechanism in 2003. It was adopted in 2004 but has not entered into force yet, due to Russia's subsequent objection.

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