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FROM RESOURCE CONSERVATION TO SUSTAINABILITY: AN ASSESSMENT OF TWO DECADES OF THE EUROPEAN UNION'S COMMON FISHERIES POLICY

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The European Union (EU) is today the world's third largest fishing entity (surpassed only by China and Peru), with over seven million tons of fish landed in 2001.¹ Denmark and Spain, the two main fishing countries in the EU, land about one million tons of fish annually and employ more than one-quarter of the sector's workforce (more than 150,000 persons).² Furthermore, the EU fishing fleet had more than 90,000 ships in 2002 and the number of people employed in its fishing industry (including aquaculture, fish processing, marketing, supply, and shipbuilding) in 1997 was over half a million persons. The fishing industry is therefore essential for the socio-economic life of coastal regions in the EU. Regulating fishing activity in order to maintain fishery resources at a bio-sustainable level while at the same time ensuring that fishing continues to be an economically viable enterprise for coastal populations is a major issue confronting the European Union, especially in light of the fact that the EU lacks abundant fishery resources.

The Common Fisheries Policy of the European Union was adopted in 1983,³ although its major principles had been in place since 1970.⁴

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1. OFFICE OF OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITY, LA PCP EN CHIFFRES: DONNÉES DE BASE SUR LA POLITIQUE COMMUNE DE LA PÊCHE I (Office of Official Publications of the European Community 2004).

2. *Id.* at 5, 10-11, 14.

3. Regulations instituting the common fisheries policy were published on January 27, 1983. The basic regulation is Council Regulation 170/83, Establishing the European Economic Community System for the Conservation and Management of Fishery Resources, 1983 O.J. (L 24) 1.

4. Council Regulation 2141/70, Laying Down a Common Structural Policy for the Fishing Industry, 1970 O.J. (L 236) 1; Council Regulation 2142/70, Common Organization of the Market in Fishery Products, 1970 O.J. (L 236) 5.

According to the ideas prevailing at that time, the depletion of fish stocks necessitated the introduction of a fisheries management system in order to determine conditions for access to fisheries and the rights to be accorded to those granted access. Despite this perceived necessity, EU member states needed an additional thirteen years to accept a transfer, to the EU, of their powers regarding the conservation and management of the resources within waters previously subject to their national jurisdiction. The EU also needed this time to figure out how to deal with the disruption of international fisheries law (*e.g.*, the displacement of the traditional regime of fishing on the high seas with the concept of the Exclusive Economic Zone) and the impact of EU enlargement to northern European countries (the United Kingdom, Ireland, and Denmark became EU members in 1973). Particular thorny problems related to EU enlargement involved conflicts concerning access to particular waters, raising questions of historic rights.

The development and implementation of a common fisheries policy was not the result of unanimous agreement on a particular approach. What is now regarded as a community asset only came to be so regarded after ceaseless diplomatic efforts, made necessary by numerous and important economic and political changes. At first these efforts were not successful. The complex and laborious compromises that marked the first two decades of the Common Fisheries Policy failed to achieve the dual goals of bio-sustainability and economic viability. It appears, however, that meaningful reform finally occurred in 2002, and that the Common Fisheries Policy has attained a maturity that will allow it to manage effectively the challenges faced by EU fisheries and the EU fishing industry.

I. THE ABSENCE OF COHERENT REGULATION FROM 1983 TO 1993: FROM RESOURCE PROTECTION TO CONTROL OF FISHING ACTIVITIES

EU Fisheries regulation measures enacted in 1983 relied principally on limiting the volume of fish taken by establishing total allowable catches (TAC) and quotas, in conjunction with technical measures pertaining to fishing equipment. Conceived as a policy designed to assure a minimum income to fishermen as well as allowing a continuous supply of fishery products to the market, this policy took no account of environmental or ecosystem factors. In 1991, a European Commission report to the European Parliament clearly highlighted these insufficiencies and called attention to the then-current low level of fish stocks.

Not only had stock levels not increased, the situation had grown worse for most species. Even more worrisome, in light of the growing shortage of fishery resources, was the fact that the application of TAC and quotas

had led to an equipment race that generated a substantial overcapacity in the fishing industry. In 1991, the EU fleet was oversized in relation to existing resources, making difficult, if not impossible, the achievement of the resource management and conservation objectives of Regulation 170/83. Fishing activity was simply in excess of acceptable exploitation levels. In the face of this failure, the 1991 Commission report included a number of proposals laying out new directions for the Common Fisheries Policy for the next ten years: implementation of a resource access regulatory system by means of fishing licenses; introduction of a multi-year, multi-species TAC system; introduction of segmentation in structural policy (in particular in the multi-year general plans that control fleet evolution in order to better regulate fishery effort in terms of fishing equipment, ship design, and the establishment and regulation of fishing zones).

These proposals were generally followed in Regulation 3760/92 of 1992 that replaced Regulation 170/83, which instituted a community-wide system for both fishing and aquaculture and established a new system for management and conservation.⁵ The aim of the 1992 Regulation was to establish a system for the management of exploitation activities that would result in a sustainable equilibrium between resources and the exploitation of different fishing zones, while at the same time assuring more coordination between the various aspects of the Common Fisheries Policy. With these goals in view, the Regulation adopted most of the measures already contained in the 1983 Regulation (TAC, quotas, technical measures), but also provided for the possibility that the Council could establish for each fishery (defined by zone, species, and/or type of ship or fishing equipment) a limit on exploitation levels based on biological, technical or socioeconomic considerations. The Council was also empowered, on receipt of a proposal from the Commission, to choose to limit catches by TAC or quotas, or to limit fishing efforts by establishing a permissible total authorized effort (*e.g.*, by limiting the number of ships or days at sea).

Regulation 170/83 was only concerned with the conservation of resources. Regulation 3760/92, however, went one step further in the control of fishing activities by providing for the management of exploitation activities. Nevertheless, despite this evolution, the findings of an evaluation of fisheries regulation done in 2001 was only marginally better

5. Council Regulation 3760/92, Establishing a Community System for Fisheries and Aquaculture, 1992 O.J. (L 389) 1.

than the one done in 1991.⁶ The period from 1992-2002, which was expected to introduce and implement multi-year management plans, had mediocre outcomes and suffered from the same deficiencies as observed in the prior study. These deficiencies included overfishing (despite fishing quotas, which were often understood by fishing industry professionals to be minimum quantities to be taken rather than as maximum quantities not to be exceeded), false statements, and excessive discharge. The new regulatory tools had not only been misused during the past ten years,⁷ but the Council had also persisted, just as it had in the period from 1983-1991, to systematically establish TACs and quotas in excess of ones suggested to the Commission on the basis of scientific evidence. It seems that this decision-making mechanism was leading inevitably to overexploitation at the very time when fisheries professionals were raising more and more questions about the reliability of scientific opinion. These two developments cast serious doubt on the utility of TACs and quotas.

Furthermore, the Common Fisheries Policy was faced with obstacles stemming directly from the diversity of the policies of member states concerning implementation of EU policies and lack of national enforcement. This produced both structural and operational problems. The measures put in place to restrain the fishing capacity of the EU fleet so that it did not exceed a sustainable catch,⁸ and/or to ensure the enforcement of the Common Fisheries Policy, produced strong opposition from the fishing industry and a reluctance on the part of member states, who were concerned with the integrity of their fishing fleets and with retaining national control of fishery activities.

Indeed, in these early years, many difficulties arose in establishing a collaboration between member states and the Commission. This situation encouraged the development of a systemic culture of fraud in compliance and enforcement. This development can be explained by both the promise of high profits in a difficult economic environment and also by feelings of unfairness occasioned by differing levels of enforcement and sanctions

6. *Communication from the Commission to the Council and the Parliament with Respect to the Application of the Precautionary Principle and the Multi-Year Mechanism of Fixing the TAC*. COM (2000) 803 final (Jan. 12, 2000).

7. *Green Paper on the Future of the Common Fisheries Policy*, 9 COM (2001) 135 final (Mar. 20, 2001).

8. Council Regulation 2908/83, Common Measure for Restructuring and Developing the Fishing Industry and for Developing Aquaculture, 1983 O.J. (L 290) 1; Council Regulation 4028/86, Community Measures to Improve and Adapt Structures in the Fisheries and Aquaculture Sector, 1986 O.J. (L 376) 7. These were the first measures relative to the restructuring of the fleet.

which varied from state to state. The revisions of 1992⁹ sought to establish an integrated enforcement system for the various aspects of the Common Fisheries Policy (resources, structures, markets).¹⁰ Such a system requires more enforcement efforts, calling for more expenditures (for satellite-based vessel monitoring systems, for example), and harsher penalties.¹¹ During this second decade, surveillance actions remained insufficient according to the Commission and discriminatory in the opinion of fishermen. In addition to the introduction of fishing quotas and the elimination of excess fleet capacity, efforts to introduce transparency with respect to fishing activities also contributed to the rejection of the Common Fisheries Policy by fishermen, who thereby became its weakest link.

Twenty years after the introduction of the Common Fisheries Policy, maritime fishing activity in the EU remained characterized by an economic fragility brought about by overcapitalization and a rapid increase in costs. These factors, combined with a decrease in fish stock, produced mediocre profits and constantly declining employment in the industry.¹²

The failure of the first two general legislative efforts can perhaps be best explained by the lack of a comprehensive vision combined with the chronic opposition of fishermen, who feel ignored by the process through which Common Fisheries Policy is made. Encouraging cooperative relations between scientists and the fishermen—who are after all closer to the economic and social impacts of fisheries policy—would lead to increased compliance with conservation and management measures by fishermen. It is with this end in view that the Common Fisheries Policy

9. Council Regulation 2847/93, Establishing a Control System Applicable to the Common Fisheries Policy, 1993 O.J. (L 261) 1, *modified by* Council Regulation 2846/98, Establishing a Control System Applicable to the Common Fisheries Policy, 1998 O.J. (L 358) 5. The original regulation 2847/93 should have been adopted at the same time as regulation 3760/92 [see note 5, *supra*], but strong opposition regarding the establishment of satellite control of ship activity could only be overcome after some months of negotiations.

10. *See generally*, Gwenaële Proutière-Maulion, *De la Liberté de Pêche au Droit d'Exploitation des Ressources: Bilan et Perspectives de la Politique Commune des Pêches*, 14 ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 133 (1996); Gwenaële Proutière-Maulion, *Une Nouvelle Réforme pour la Politique Commune des Pêches: le Règlement de la Mer*, DROIT MARITIME FRANÇAIS 697 (July-Aug. 2003).

11. Council Regulation 686/97, Establishing a Control System Applicable to the Common Fisheries Policy, 1997 O.J. (L 102) 1; Commission Regulation 1489/97, Laying Down Detailed Rules for the Application of Council Regulation (EEC) No 2847/93 as Regards Satellite-Based Vessel Monitoring Systems, 1997 O.J. (L 202).

12. *Green Paper*, *supra* note 7; CHRISTIAN LEQUESNE, L'EUROPE BLEUE, À QUOI SERT UNE POLITIQUE COMMUNAUTAIRE DE LA PÊCHE? (2001).

was modified, for the third time, by the adoption of Regulation 2371/2002.¹³

II. NEW ORIENTATIONS OF THE COMMON FISHERIES POLICY BY THE REFORMS OF 2002: FROM RESOURCE CONSERVATION TO SUSTAINABILITY

Surprisingly, the first two Regulations on the Common Fisheries Policy did not mention environmental considerations. Article 2 of Regulation 3760/92, often seen as the legal basis for the integration of demands for environmental protection into the Common Fisheries Policy, only aspired to the protection and the conservation of marine resources as a general goal: to “provide for rational and responsible exploitation on a sustainable basis, in appropriate economic and social conditions for the sector, taking account of its implications for the marine eco-system”¹⁴ Not until the Treaty of Amsterdam would this shortcoming in the Treaty Establishing the European Community be addressed.¹⁵ Article 6 of the Treaty Establishing the European Community now provides: “Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities . . . in particular with a view to promoting sustainable development.”¹⁶

One must recall here an obvious fact about the Common Fisheries Policy: fishing activity can only have an effect on the fisheries ecosystem to the extent that fish mortality caused by fishing contributes to the decrease of marine population levels and to the modification of the demographic composition of fish populations.¹⁷ Similarly, some fishing techniques may modify the seabed and have a significant impact on benthic organisms whose habitat is being destroyed or may produce negative impacts on other species (birds, reptiles, or sea mammals). These direct

13. Council Regulation 2371/02, On the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, 2002 O.J. (L 358).

14. Council Regulation 3760/92, Establishing a Community System for Fisheries and Aquaculture, 1992 O.J. (L 389) art. II.

15. *See generally*, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997.

16. Treaty Establishing the European Community, Nov. 10, 1997 art. 6. *See also* art. 174.

17. *Communication from the Commission to the Council and the European Parliament: Fisheries Management and Nature Conservation in the Marine Environment*, at 4, COM (1999) 363 final; *Communication from the Commission to the Council and the European Parliament—Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy*, COM (2001) 143 final.

effects can also produce indirect effects, such as the modification of the food chain or the risk of pollution. Thus, sustainability of fishing activity is dependent on the salubrious operation of the entire ecosystem, which is also subject to other pressures linked to human activity, like aquaculture, tourism, and commercial navigation. When combined, these activities aggravate the risk of deterioration of marine ecosystems.

Maintaining fishing activities at an economically sustainable level over the long-term is therefore impossible without a rational and careful management program that allows for the protection of all the resources on which fishing relies.¹⁸ The effectiveness of such a program depends, however, on its compatibility with management of other marine activities. This in turn requires that coastal fishing activities be integrated with coastal zone management in general.¹⁹ This integrated view is apparent in Article 2 of Regulation 2371/2002, which provides in part:

The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions. For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimize the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system-based approach to fisheries management

Twenty years after the adoption of the first regulation, there is finally incorporated into the description of marine fisheries the convergence between fishery resource management and preservation of the marine environment. In this way the Common Fisheries Policy has broken with the traditional stock-by-stock approach and has moved towards an integrated management scheme that considers not only the interactions between different stocks, but also the interactions between these stocks and the marine ecosystem as a whole.

18. *Communication from the Commission to the Council and the European Parliament: Fisheries Management and Nature Conservation in the Marine Environment*, at 4, COM (1999) 363 final.

19. *Communication from the Commission to the Council and the European Parliament on the Integrated Management of Coastal Zones*, COM (1995) 511 final; *Communication from the Commission to the Council and the European Parliament—Report on the Progress of the Integrated Coastal Zone Management Demonstration Program*, COM (1997) 744 final.

Regulation 2371/2002 introduces new management and resource preservation measures by providing for the elaboration of multi-year management and regeneration plans.²⁰ These measures are principally aimed at the renewal of endangered stocks (regeneration plan) or the management of fully exploited stocks (management plan). The purpose of these plans is to return fish stocks to biologically safe levels or to keep them there. These two tools are part of a multi-year approach that acknowledges the new environmental dimension of the Common Fisheries Policy. In conjunction with these plans, the regulation also allows the Commission or member states to adopt emergency measures immediately following the issuance of a "citation."²¹

These new arrangements attest to the clear intention of the European Union to safeguard fish resources in order to protect European fisheries. This intention goes beyond resource management and can also be seen in the provisions in Regulation 2371/2002 regarding the adaptability of fishing capacity to available resources. Indeed, in order to benefit from European Union subsidies, member states will have to exercise real oversight over their seagoing fleets to assure that they do not exceed realistic sustainable harvest.

Finally, Regulation 2371/2002 is the first framework regulation to include a chapter providing for a community system of monitoring and enforcement. It provides that monitoring is the responsibility of the member state²² and requires the general use of satellite control systems for ships greater than forty-five feet in length.²³ The main thrust of the enforcement provisions, however, is now aimed at the institution of legal proceedings. Member states are encouraged to initiate legal or administrative proceedings against any natural person or legal entity in case of violation of community regulations.²⁴ The regulation legally compels member states to take immediate action in order to prevent further activity of ships caught in the act of committing serious offenses.²⁵ The goal of this provision is to harmonize the sanctions of member states for the most detrimental infractions.

20. Council Regulation 2371/02, On the Conservation and Sustainable Exploitation of Fisheries Resources Under the Common Fisheries Policy, 2002 O.J. (L 358) arts. V, VI.

21. *Id.* at arts. VII, VIII.

22. *Id.* at arts. XXIII, XXVIII.

23. Effective January 1, 2005.

24. *Supra* note 20 at art. XXV.

25. Council Regulation 1447/99, Establishing a List of Types of Behaviour which Seriously Infringe the Rules of the Common Fisheries Policy, 1999 O.J. (L 167) 5.

The Commission has also been given greater powers. To begin with, the Commission can take preventive measures for a period of three weeks when, in its judgment, violations that pose a serious threat to stock preservation are occurring.²⁶

Moreover, Community inspectors have autonomous powers and can undertake spot checks on ships and at the point of first landing or first sale.²⁷ Although fishermen can object to these spot checks and Community inspectors cannot impose sanctions on the basis of them, data obtained in these spot checks will provide reliable information to the Commission to prepare its evaluation report on the enforcement of the Common Fisheries Policy (which it is required to do every three years). If the Community inspection program is really implemented, it might play an important psychological role, as inspection and surveillance reports prepared by Community inspectors would constitute judicially admissible evidence as national statements.

The new framework regulation for the Common Fisheries Policy strengthens all aspects of fishery resource management policy by perfecting a unique regulatory tool that was introduced by Regulation 3760/92, *i.e.*, a comprehensive, integrated policy designed to secure the sustainable exploitation of fish stocks. The system is striking in its severity—a clear demonstration that the Commission has overcome political pressures. After failing for twenty years, the Common Fisheries Policy seems to have reached maturity.

26. *Supra* note 20 at art. XXVI.

27. This power is limited to certain zones and to certain stocks under the specific control decided by Article 34 of Council Regulation 2847/93, Establishing a Control System Applicable to the Common Fisheries Policy, 1997 O.J. (L 261).