
Jill Wakefield*

Common Fisheries Policy Reform and Sustainability

Abstract

Despite rigorous rules of regulation, the European Union's Common Fisheries Policy has failed to deliver any of its stated objectives. The principles governing the operation of the policy are not sufficiently well-defined and have not been effective to deliver anticipated outcomes of economic, environmental and social sustainability. This article looks at how this concept of sustainability has been understood in the common fisheries policy with regard to the marine fish resource and how its meaning is to change under the proposed reform of the policy. While under the current policy, sustainability is an undefined concept concerned with meeting human needs, in the Proposed Regulation the concept presents a concrete target to guarantee the sustainability of the resource itself. Nevertheless, as with earlier fisheries reform, the Proposed Regulation focuses on the process of regulation rather than addressing the outcomes of its operation. It is submitted that the Proposed Regulation will do no more than ameliorate the current situation, so the EU needs to introduce a mechanism to impose a financial cost on industrial fishing activity which will ensure the sustainability of the resource. Market-based instruments, used to good effect to address other environmental problems within the EU, should be deployed to protect marine fisheries.

1 Introduction

The European Union's Common Fisheries Policy (CFP) established an equal access regime for the common fish resource, founded on principles of equality and relative stability. Regulation of the resource is to facilitate exploitation, albeit sustainable exploitation, and it is the promotion of economic activity that drives the policy. In implementation, the policy is to apply the precautionary approach to deliver outcomes of social as well as economic and environmental sustainability. In 2010, the European Commission summarised the actual

outcome for this conflicted policy: 'Currently, most fish stocks are exploited at levels well in excess of their maximum sustainable yield, in other words the optimal volume of catches that can be taken each year without threatening the future reproductive capacity of a fish stock.'¹ The Commission described the current situation of overfishing, fleet overcapacity, heavy subsidises, low economic resilience and decline in the volume of fish caught by European fishermen in its Green Paper on the reform of the CFP and, with masterful understatement, concluded, 'the current CFP has not worked well enough

* Dr Jill Wakefield, Associate Professor, School of Law, University of Warwick, Coventry CV4 7AL, UK.
E-mail: j.wakefield@warwick.ac.uk

** For a list of abbreviations used in this article, see page 13

¹ European Commission, Facts and Figures on the Common Fisheries Policy, (Luxembourg: Publications Office of the European Union, 2010) 4

to prevent those problems'.² The CFP has never addressed the core issue characteristic of all common pool resources whereby those accessing the resource do not pay for it and, in consequence, exploit it to exhaustion.

In July 2011, the Commission published a Proposal for a Regulation (Proposed Regulation) that is intended to govern the operation of the CFP for the coming decade and overcome the problems inherent in the policy.³ Although the proposed reforms will add to the already complex and labyrinthine system of regulation,⁴ the measures mark a very significant shift in emphasis. Environmental sustainability is the immediate objective of the policy and the Commission goes further describing the conservation of marine biological resources as the fundamental pillar to achieve the objectives of the CFP.⁵ Environmental sustainability of fish stocks is to be achieved through the restoration of fish stocks to maximum sustainable yield by 2015.⁶ This is the first time a quantifiable target has been set for the policy, rather than simply anticipating sustainable outcomes.

However, the reforms proposed are not as radical as they might at first appear, for the target of maximum sustainable yield is not to be binding and the principles according to which the target is anticipated to be achieved are those underpinning the current regime. To date, these retained principles have operated to facilitate a system of exploitation leading to degradation. Although the Commission recommended that the most pernicious of these principles, relative stability, be eliminated it has become an entrenched value of the CFP and the Member States have refused to countenance its removal.⁷ Moreover, no mechanism for transferring the true costs of resource exploitation onto the fishing industry is provided in the Proposed Regulation and this promises to be the most serious obstacle to achieving sustainability once the new fisheries regime is established. In promoting sustainability for other common resources, the EU has

used market-based instruments to internalise user costs, as seen in the carbon trading scheme. Consideration must be given to extending market-based instruments to achieve a sustainable fish resource.

2 Current and Proposed Regulation

2.1 The current regulations

It was not until 1983 that the Member States were able to agree a common management system for marine fishing when the Regulation adopted set the objectives of the policy to include 'the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions'.⁸ The provisions that have regulated the sector since 2002 are set out in the Fisheries Regulation for the management and conservation of the fish resource which has the general objective to 'ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions'.⁹ Three outcomes are anticipated to be delivered: a commercially viable industry, sustainable environmental conditions and support for poor coastal communities dependent on fishing. These outcomes are to be delivered through an undefined 'sustainable exploitation' which is to function in accordance with the application of the precautionary approach.

Enormously complex rules have been devised to control fishing activity. Measures include: the setting of total allowable catches; quotas limiting the catch that may be landed; effort management limiting the amount of capacity and activity that may be put into catching fish; technical measures to aid conservation and limit the environmental impact of fishing which deal with such matters as fishing gear and closures of fishing areas. The 2002 reform introduced powers to establish recovery plans for stocks that have been fished beyond their biological sustainability,¹⁰ and long-term (multi-annual) management plans to maintain single or multiple stocks,

² European Commission, Green Paper: Reform of the Common Fisheries Policy, COM(2009) 163 final, 4-5

³ European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, COM(2011) 425 final, (Proposed Regulation)

⁴ See R. Churchill and D. Owen, *The EC Common Fisheries Policy* (Oxford, 2010) for a detailed account of the operation of the CFP.

⁵ Proposed Regulation COM(2011) 425 final, Explanatory Memorandum, 7

⁶ Ibid. Article 2(2)

⁷ Ibid. Explanatory Memorandum, 4: 'Relative stability is generally seen as a central pillar of the CFP, especially by Member States.'

⁸ Council Regulation 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources, OJ 1983 L24/1, repealed

⁹ Council Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ 2002 L358/59 (Fisheries Regulation), Article 2(1)

¹⁰ Ibid. Article 5

taking ‘account of interactions between stocks and fisheries’, within their biological limit for exploitation.¹¹ In addition, the Commission was given emergency powers to be exercised in the event of ‘a serious threat to the conservation of living aquatic resources, or to the marine eco-system’ because of fishing activity to impose restrictions for up to six months.¹²

The overriding importance of the sustainability of the fish resource was emphasised in the 2002 reform of the CFP when the ecosystem-based approach was formally adopted.¹³ This coheres with the EU’s Sixth Environmental Action Programme of 2002, expiring in 2012, which set out a thematic strategy for the protection and conservation of the marine environment seeking to promote the sustainable use of the seas and the conservation of marine ecosystems.¹⁴ The Programme calls for greater focus on prevention and the implementation of the precautionary principle with regard to the protection of human health and the environment.¹⁵ The instrument also observes that ‘a prudent use of natural resources and the protection of the global eco-system together with economic prosperity and a balanced social development are a condition for sustainable development.’¹⁶ The action programme is based particularly on the polluter-pays principle, the precautionary principle and preventive action, and the principle of rectification of pollution at source.¹⁷ Marine environmental protection is to be pursued under integrated maritime policy (see below), including the implementation of the ecosystem approach endorsed by the European Council in December 2007.¹⁸ An ecosystem approach to fisheries management is ‘about ensuring goods and services from living aquatic resources for present and future generations within meaningful ecological boundaries.’¹⁹ Meaningful ecological boundaries are to be maintained in accordance with FAO guidelines so that fisheries impacts keep populations within viable levels

and maintain biological diversity.²⁰ Scientific advice is essential to these assessments.

Year on year, fishing operators must demonstrate compliance with increasing numbers of requirements, while the supervision and policing of the fisheries regime is onerous for the enforcement authorities both at European and Member State level. Despite all the efforts at effective regulation, this process-driven fisheries policy has not delivered the desired outcomes.

2.2 The proposed reforms: maximum sustainable yield as a concept of sustainability

A new fisheries regime is presented in the Proposed Regulation that is intended to govern the operation of the CFP from the start of 2013 until the end of 2022, focused on an ecosystem based approach with its central platform being to introduce a standard for extraction at maximum sustainable yield (MSY) to restore and maintain fish stocks. For the future, therefore, EU fisheries will be subject to a target, albeit non-binding, that, by 2015, ‘exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield’.²¹

The mid-twentieth century concept of MSY as exploitation in the greatest harvest that can be taken annually while maintaining the average size of the stock has gradually taken on a different meaning. Developments in environmental law and policy now link MSY with the wider marine ecosystem. The 1992 UN Conference on Environment and Development adopted Agenda 21 to promote sustainable development to protect the environment including the oceans and integrate this objective with those social, economic and development

¹¹ Ibid. Article 6

¹² Ibid. Article 7

¹³ Ibid. Article 2(1)

¹⁴ Council of the European Union and the European Parliament Decision 1600/2002/EC, laying down the Sixth Community Environment Action Programme, OJ 2002 L242/1

¹⁵ Ibid. Recital 5

¹⁶ Ibid. Recital 6

¹⁷ Ibid. Article 1

¹⁸ European Council, Conclusions on Maritime Policy in the meeting of 14 December 2007, available at:

http://ec.europa.eu/maritimeaffairs/conclusions_20071214_en.html

European Council ‘Council conclusions on integrated maritime policy, 2973rd General Affairs Council meeting, Brussels, 16 November 2009’, available at:

http://www.se2009.eu/polopoly_fs/1.23727!menu/standard/file/111184.pdf

¹⁹ European Commission Communication, ‘The role of the CFP in implementing an ecosystem approach to marine management’ COM(2008) 187 final, 3

²⁰ Food and Agriculture Organisation of the United Nations, The Ecosystem Approach to Fisheries. FAO Technical Guidelines for Responsible Fisheries. No 4, Suppl. 2 (Rome, 2003, FAO)

²¹ Proposed Regulation, Article 2(1)

objectives otherwise pursued by States.²² At the same time, the UN Convention on Biological Diversity (CBD) was adopted, conceived as the mechanism that would translate the principles of Agenda 21 into firm commitments. At the World Summit on Sustainable Development in Johannesburg in 2002, States agreed MSY as the standard for fishing and adopted a 'Plan of Implementation' including the achievement of sustainable fisheries. The Plan recognises that attaining sustainable fisheries will require action at all levels to 'maintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015',²³ and while this standard is not binding it is the agreed base objective for all fisheries.

Since 2006 the Commission has sought to implement the changed understanding of MSY within fisheries management to a concept of sustainability rather than exploitation,²⁴ explaining the extraction of fish should be at a level no greater than that which calculates the largest average long-term take from the stock of fish without depressing its ability to reproduce.²⁵ The Proposed Regulation is anticipated to meet the EU's international commitments on MSY with the restoration and maintenance of fish resources at levels which can produce the maximum sustainable yield, not later than 2015. Even where scientific information is wanting 'proxies' are to be applied to achieve maximum sustainable yield.²⁶ This coheres with the target set for fisheries in the Commission's 2011 communication on the EU's

biodiversity strategy which set out the means of achieving the CBD targets adopted by the European Council in 2010²⁷. MSY is to be reached by 2015 following which fisheries are to be treated as integral to their ecosystems with 'a population age and size distribution indicative of a healthy stock, through fisheries management with no significant adverse impacts on other stocks, species and ecosystems, in support of achieving Good Environmental Status by 2020, as required under the Marine Strategy Framework Directive'.²⁸

Unfortunately, the Proposed Regulation does not impose an obligation to restore stocks to MSY but merely aims to ensure that this is done.²⁹ A weak definition of MSY is given in the Proposed Regulation as being 'the maximum catch that may be taken from a fish stock indefinitely'.³⁰ EU stocks have suffered from both recruitment overfishing, that is excessive fishing effort or catch so that the adult population (spawning biomass) is too small to replenish itself, and growth overfishing, fish caught at a smaller size than would produce the maximum yield per recruit. MSY has various meanings and can be measured in various ways. While the current state of a stock or the potential yield from a stock is readily estimated,³¹ calculating the optimum biomass to deliver MSY is problematic because of uncertainties in the relationship between stock size and recruitment as well as variabilities in the marine environment. Following consideration of various options in the Impact Assessment,³² the Commission is aiming for fishing mortality that delivers maximum yield per recruit (F_{msy}) by 2015,³³ with the intention this should

²² The World Summit on Sustainable Development, Johannesburg 2002; The Convention on Biological Diversity approved by Council Decision 93/626/EEC, OJ 1993 L309

²³ The Johannesburg Plan of Implementation, Article 30(a), accessed at: http://www.un.org/jsummit/html/documents/summit_docs/2309_planfinal.htm

²⁴ Commission Communication, Implementing sustainability in EU fisheries through maximum sustainable yield, COM(2006) 360 final

²⁵ Commission Memorandum/06/268 'Fishing at MSY levels means catching the maximum proportion of a fish stock, that can safely be removed from the stock while, at the same time, maintaining its capacity to produce maximum sustainable returns, in the long term.'

²⁶ Proposed Regulation, Recital 5

²⁷ European Council, Conclusions on Biodiversity in the meeting of 15 March 2010, available at: <http://register.consilium.europa.eu/pdf/en/10/st07/st07536.en10.pdf>

²⁸ Commission Communication, 'Our life insurance, our natural capital: an EU Biodiversity Strategy to 2020', COM(2011)244, paragraph 3.4, Target 4

²⁹ Proposed Regulation, Article 2(2)

³⁰ Proposed Regulation, Article 5

³¹ J.R. Beddington and G.P. Kirkwood, 'The estimation of potential yield and stock status using life-history parameters', *Philosophical Transactions of the Royal Society B: Biological Sciences* 2005; 360:163–170, 163, 'The potential yield of a fish stock can be readily estimated from its demographic parameters and these in turn can be estimated using well-understood methods of sampling, experimentation and statistical estimation. The current state of a stock can be estimated in a variety of ways, both directly via research surveys and indirectly using information on catch levels, their age composition and the effort levels associated with taking those catches.'

³² European Commission, Impact Assessment SEC(2011) 891

³³ Proposed Regulation, Explanatory Memorandum, 2; Proposed Regulation, Preamble 5, Article 2

be considered an upper limit rather than a management target reference point.³⁴

The Proposed Regulation includes measures previously used to control fishing activity but these have now been reclassified as ‘conservation measures’. There is a new requirement to land all catches, so that the discarding of fish caught outside quota is to be phased out.³⁵ Tools familiar from previous regulatory instruments include the adoption of multi-annual plans, setting targets for the sustainable exploitation of stocks and adapting capacity to fishing opportunity. There is a commitment, reiterating earlier legislation, to shift from single stock total allowable catch (TAC) systems for setting extraction rates to multi-stock management multi-annual plans that aim for the maintenance or restoration of fish stocks above levels capable of producing maximum sustainable yield.³⁶ While the TAC is deemed to have worked well when it was simply used to allocate fishing opportunities between Member States,³⁷ in practice, it has consistently been set at levels that exceed biological sustainability, and is ill-suited to respond to the serious conservation challenges facing the EU. Nevertheless, the TAC has been retained as the main management device pending the introduction of the multi-stock multi-annual plans.

Multi-annual plans are anticipated to deal with mixed fisheries, in which preference could be given either to the most valuable stocks or to the most sensitive stocks, a matter considered in the Impact Assessment but not specifically addressed in the Proposed Regulation. The multi-annual plans will be long-term, adopted as an absolute priority for stocks outside safe biological limits but also used for stocks at or within safe biological limits.³⁸ Management plans are to be based on sound

scientific advice, so that emphasis is placed on the obligation of Member States to gather the data necessary for the preparation, implementation and enforcement phases of the policy.

Great attention has been paid in recent years to adjusting property rights to regulate the use of natural resources.³⁹ To eliminate overcapacity in the EU fishing fleet, access to the resource is to be controlled,⁴⁰ and the Proposed Regulation stipulates the adoption of individual transferable rights (ITRs) currently used by some Member States across the whole of the EU: ‘[A] mandatory system of [revocable] transferable fishing concessions (on fishing opportunities for regulated stocks) as from 2014 for all vessels with the exception of vessels under 12 meters with passive gear’.⁴¹ ITRs are perceived as ‘a major driver for fleet capacity adjustment’. The impact assessment has shown ‘clear positive and significant contributions from such a system of transferable fishing concessions to eliminate overcapacity and to improve economic results of the fishing industry’.⁴² While ‘the implementation of an individual transferable quota management system could contribute to the conservation of fish stocks, reduce over-capacity and enhance profitability of the fishing industry’,⁴³ there is evidence that the benefits promised by economic theory is not borne out in practice,⁴⁴ and while it may be conceded ITRs have their niche they are no panacea.⁴⁵

As to external fisheries policy, the Sustainable Fisheries Agreements with third countries are to be continued.⁴⁶ It is recognised that both external policy and actions should be fully aligned with the principles and objectives of the CFP, and full participation should be maintained in international fora, including the regional fisheries

³⁴ Commission Staff Working Paper, Summary of the Impact Assessment on the Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, SEC(2011) 892

³⁵ Proposed Regulation, Article 7

³⁶ Ibid. Article 9

³⁷ European Commission, *The Common Fisheries Policy: A User's Guide* (Brussels, 2009) 15

³⁸ Proposed Regulation, Preamble, paragraphs 16-17

³⁹ For a comprehensive account, see, R. Barnes, *Property Rights and Natural Resources*, (Hart, Oxford and Portland, Oregon, 2009)

⁴⁰ Proposed Regulation, Articles 27-33

⁴¹ Proposed Regulation, Explanatory Memorandum, 8, Preamble paragraph 29 and Articles 27-33

⁴² Proposed Regulation, Explanatory Memorandum, 7

⁴³ M. Salomon, ‘Marine environment protection for the North and Baltic Seas’, *Marine Pollution Bulletin* 49 (2004) 1127-1128

⁴⁴ E. Pinkerton and D.N. Edwards, ‘The elephant in the room: The hidden costs of leasing individual transferable fishing quotas’ *Marine Policy* 33 (2009) 707-713, challenge assumptions of economic theory used to promote the benefits of ITQs.

⁴⁵ T. Tietenberg, ‘The Tradable-permits Approach to Protecting the Commons’, in D. Helm (ed.), *Climate Change Policy*, (Oxford University Press, Oxford, 2005), 167-193, 193

⁴⁶ Proposed Regulation, Articles 41-42

management organisations, the UN and FAO to press for better management and conservation of international fish stocks.⁴⁷ However, the principles on which external fisheries policy is set do not correspond with those informing EU internal fisheries policy. Thus, although the CBD calls for MSY by 2015, in international fishing arrangements the EU may agree indefinite deferment.⁴⁸ Whilst the EU professes to act in accordance with a precautionary approach both internally and externally, in practice this may not be so. For example, the EU is party to the North East Atlantic Fisheries Commission (NEAFC).⁴⁹ Despite the International Council for the Exploration of the Sea (ICES) advising NEAFC to set a precautionary limit of 20 000 tons for deep-sea redfish catch in the Irminger Sea in 2009, 2010 and 2011,⁵⁰ following EU proposal, the catch for 2011 was set at 38 000 not reducing to the ICES recommendation until 2014.⁵¹

While the CFP is to remain outside the scope of the EU's maritime environmental protection programme, the terms of the Proposed Regulation attempt to harness the operation of the CFP to environmental protection provisions by requiring the integration of Union environmental legislation requirements.⁵²

3 Fisheries and the Integrated Maritime Policy

An integrated approach was deemed necessary to give coherence to hitherto discrete marine policies including maritime transport, fisheries, energy, surveillance and policing of the seas, tourism, the marine environment, and marine research, which for too long had 'developed

on separate tracks, at times leading to inefficiencies, incoherencies and conflicts of use.'⁵³ The Marine Strategy Framework Directive (MSFD) is the environmental pillar of the integrated maritime policy, designed to 'protect and preserve the marine environment, prevent its deterioration or, where practicable, restore marine ecosystems in areas where they have been adversely affected',⁵⁴ and aims to achieve 'good environmental status' for European seas by 2020.⁵⁵ The quality required is for healthy, productive seas which are sustained not just for current generations but for future generations. It is for each Member State to assess the state of their marine environment, according to eleven qualitative descriptors of the marine environment specified in the MSFD. This individual assessment, in concert with the assessments of other Member States in the area, will define 'good environmental status' at regional level so that clear environmental targets and monitoring programmes may be established.⁵⁶

Although fisheries receive specific attention under the MSFD, fisheries are not subject to its direction and the MSFD notes that they will continue to be regulated exclusively through the CFP. However, as a result of the MSFD, some measures adopted under the Fisheries Regulation may be given wider application. Thus, conservation measures available under the CFP to be taken following scientific advice, such as the full closure of fisheries in the event of fish stock collapse, may be augmented so that closure may be ordered 'to enable the integrity, structure and functioning of ecosystems to be maintained or restored and, where appropriate, in order to safeguard, inter alia, spawning, nursery and feeding

⁴⁷ Proposed Regulation, Explanatory Memorandum, 8, Articles 39-40

⁴⁸ ICCAT Report 2010-2011 (II), 80. The current date for MSY for East Atlantic and Mediterranean tuna is 2022 but with only a 60% probability of achievement.

⁴⁹ The North East Atlantic Fisheries Commission (NEAFC), established in 1981, began accepting scientific advice from the International Council for the Exploration of the Sea only in 2003-4. See Permanent Committee on Management and Science of the North-East Atlantic Commission 30 September – 1 October 2010, discussion on Irminger Sea redfish, 7

⁵⁰ Morten Vinther, ICES Advice for 2011, Presentation to the 29th Annual Meeting of NEAFC, 9th November 2010, London

⁵¹ NEAFC, Multi-Annual Interim Conservation and Management Measure for Deep and Shallow Pelagic Redfish in the Irminger Sea and Adjacent Waters to apply from 2011 to 2014 in the NEAFC Convention Area, commencing 10 May 2012

⁵² Proposed Regulation, Article 2(4)

⁵³ Ibid. 4

⁵⁴ Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ, L164/19, Article 1(a)

⁵⁵ Ibid. 'Good environmental status' is defined in Article 3(5) as meaning: 'the environmental status of marine waters where these provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations'.

⁵⁶ Commission Decision of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters, OJ 2010 L232/14, Recital 6

grounds.’ Beyond this, while future reforms of the CFP are to take account of the terms of the MSFD there is no further reference to the CFP.⁵⁷ Currently, when the marine strategy is applied in the context of the fisheries policy, it is the objectives and principles laid down in the Fisheries Regulation that determine policy.

In the Proposed Regulation the Commission has sought to devise a fisheries policy that will cohere with the broader integrated maritime project and its emphasis on long-term sustainability. Hence, the thrust of the Proposed Regulation is to effect a change in values so that the sustainability of the resource becomes accepted as the key to the sustainability of the economic activity. However, to make such a transition the existing principles of regulation would have to be recalibrated to direct the policy along its new path and, unfortunately, no such amendment is proposed.

4 Resource Sustainability and Sustainable Exploitation

Sustainable development is a principle of EU internal market policy.⁵⁸ By operation of Article 11 TFEU, ‘environmental protection requirements’ are to be integrated into defining policy and into its implementation particularly with a view to promoting sustainable development, so although mandatory such requirement may not override other policy considerations such as socio-economic imperatives.⁵⁹ Under the current CFP, exploitation of the resource is to be sustainable which is defined in the legislation as meaning, exploitation ‘in such a way that the future exploitation of the stock will not be prejudiced’ or adversely impact marine eco-systems.⁶⁰ Sustainable exploitation was anticipated through the

application of the precautionary approach and, despite its failure, it is this mechanism the Proposed Regulation assumes will deliver the sustainability of the resource.

4.1 Precaution

Under the Proposed Regulation, while sustainable exploitation is no longer an objectives of the CFP,⁶¹ it is retained in the recitals, underpinning and providing the unifying thread within the body of the Proposed measure. ‘Sustainable exploitation of marine biological resources should be based on the precautionary approach, which is to be derived from the precautionary principle referred to in the first subparagraph of Article 191(2) of the Treaty.’⁶² Although the precautionary approach is ‘derived’ from the precautionary principle it is a management approach particular to the CFP and does not apply the precautionary principle.

Article 15 of the Rio Declaration explained the precautionary principle, as agreed by the signatory states, to mean that lack of full scientific certainty of serious damage should not postpone cost-effective preventive measures, so that erring on the side of caution to exclude risk is justified according to the precautionary principle. The precautionary principle was incorporated into EU law in the environmental chapter of the Maastricht Treaty which at the same time stipulated that environmental protection requirements *must* be integrated into the definition and implementation of other Community policies.⁶³ The General Court has confirmed the comprehensive reach of the precautionary principle holding that ‘it is intended to be applied in order to ensure a high level of protection of health, consumer safety and the environment in all the Community’s spheres of activity.’⁶⁴ According to the Court

⁵⁷ Marine Strategy Framework Directive, Recitals 39 and 40

⁵⁸ Article 3 TEU: ‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.’

⁵⁹ ‘Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.’

⁶⁰ Defined in Fisheries Regulation, Article 3

⁶¹ Proposed Regulation, Article 2

⁶² Ibid. Recital 7

⁶³ Article 174(2) TEC, now Article 191(2) TFEU: ‘Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.’ Before the introduction of the environmental chapter into Single European Act of 1986, the EU’s first environmental action programme provided that agricultural policy, which includes fisheries, was to take account of concern for the protection of the environment: European Commission, Programme of action of the EC on the Environment, OJ 1973 C112/1; Ex Article 6 TEC, now Article 11 TFEU

⁶⁴ Joined Cases, T-74, 76, 83-85, 132, 137, 141/00, *Artégodon GmbH and Others v Commission*, [2002] ECR II-4945, paragraph 183

the precautionary principle is an autonomous ‘general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests.’⁶⁵

The Court of Justice has never found it necessary to explain the difference between the precautionary approach and the precautionary principle but, where the precautionary principle has been invoked with regard to the CFP, the Court has been careful to substitute the terminology of legislation, observing that it is the ‘precautionary approach’ which is to be applied in the Fisheries Regulation ‘in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine ecosystems’.⁶⁶

4.2 The precaution approach in management measures

If the precautionary approach were to apply the precautionary principle to give priority to environmental vulnerability in the context of scientific uncertainty, this should be evident the general management of the fisheries regime. Although there is a general requirement to apply the precautionary approach to all management decisions, the Fisheries Council has exceeded extraction levels advised by its scientific experts on a routine basis. A recent study analysed TACs for eleven stocks from 1987 to 2011 and found that in 68% of cases scientific recommendations on catch levels had been exceeded, and these politically-adjusted TACs averaged catches 33%

above scientifically recommended levels. The authors modelled the effects of such politically-driven decision-making on stock sustainability and found that this failure to adhere to scientific advice dramatically increases the probability of a stock collapsing over the next forty years.⁶⁷ From this evidence, general management of fisheries does not apply the precautionary principle to promote the environmental sustainability of the fish resource over the competing social and economic aspects of fisheries. However, there are specific powers available to the institutions to adopt measures to displace fishing activity in favour of the protection of the resource available to the Commission in emergency measures and to the Fisheries Council in recovery plans.

4.3 The precautionary approach in emergency measures

Emergency measures may be adopted by the Commission on its own initiative or at the request of a Member State, first, if there is evidence of a serious threat to the conservation of living aquatic resources, or, secondly, if fishing activities have caused a threat to the marine ecosystem, in either case requiring immediate action.⁶⁸ Even in the case of a serious threat, emergency measures are not mandatory and the length for which they can be imposed is restricted to a six month period renewable once. Sparse use has been made of these powers; emergency measures have been adopted to protect cold-water coral reefs from the effects of trawling off Scotland,⁶⁹ anchovy in the Bay of Biscay,⁷⁰ and, in 2003, Baltic Sea cod stocks.⁷¹ More usually, emergency measures are deployed to control the import of fish from outside the EU on the ground that their import poses a potential threat to human health.⁷²

⁶⁵ Ibid. paragraph 184

⁶⁶ Case C-453/08 *Karanikolas and Others*, ECR I-0000, Judgment of 2nd September 2010, Paragraph 45

⁶⁷ B.C. O’Leary, J.C.R. Smart, F.C. Neale, J.P. Hawkins, S. Newman, A.C. Milman, C.M. Roberts, ‘Fisheries Mismanagement’, *Marine Pollution Bulletin*, 62(2011) 2642-2648

⁶⁸ Fisheries Regulation, Article 7(1):

⁶⁹ Commission Regulation (EC) No 1475/2003, OJ 2003 L 211/14

⁷⁰ Commission Regulation (EC) No 1037/2005, OJ 2005 L 171/24

⁷¹ Commission Regulation (EC) 677/2003 establishing emergency measures for the recovery of the cod stock in the Baltic Sea, OJ 2003 L 97/31

⁷² Although emergency measures are used to control fishing, only one measure is in force to control fishing inside EU waters, Commission Regulation (EC) No 677/2003 establishing emergency measures for the recovery of the cod stock in the Baltic Sea OJ 2003 L 97/31. Emergency measures are more often used to control the import of fish, such as: Commission Decision of 12 November 2008 on emergency measures suspending imports from Peru of certain bivalve molluscs intended for human consumption, OJ 2008 L307/9; Commission Decision of 30 September 2009 on emergency measures applicable to crustaceans imported from India and intended for human consumption or animal feed, OJ 2009 L 258,31; Commission Decision of 12 July 2010 amending Decision 2008/630/EC on emergency measures applicable to crustaceans imported from Bangladesh and intended for human consumption, OJ 2010 L 178/312

In contrast with the current situation, the Proposed Regulation marks a substantive change with regard to emergency measures. Any serious environmental threat to marine biological resources or the marine ecosystem, whatever its cause and whichever element of the marine ecosystem is at risk of being affected, may be capable of displacing fishing activity. Moreover, these measures are not time-limited, the only stipulation being that they must be temporary rather than permanent.⁷³ However, it would appear there is little chance these temporary measures will apply the precautionary principle because the ‘serious threat’ triggering the adoption of these measures must be sufficiently certain as to require immediate action. Action by an administrative authority to prevent undertakings engaging in the lawful pursuit of economic activity for which they have been established and on which the livelihoods of their employees depend is a very serious matter and would have to be objectively justified; intervention on a lesser ground of scientific uncertainty would be unlikely to be justifiable.

5 Monitoring and Control

While the issue of illegal, unreported and unregulated fishing was addressed in legislation adopted in 2008,⁷⁴ the more complex problems of effective monitoring and control of the use of the fish resource by participants in the CFP were sought to be resolved in a new control system.⁷⁵ Subsequently, the Commission has continued to emphasise that the success of any reform to the fisheries regime is predicated on the effective control of fishing activity. In its Communication to the Council and European Parliament concerning the Proposed Regulation the Commission observed that achieving the sustainable resource objective ‘depends greatly on a winning combination of *compliance* by operators and effective *enforcement* by public authorities’.⁷⁶

In the Proposed Regulation, the Commission has sought to introduce a principle of conditionality to the availability of certain financial and other resources for both Member States and individual operators.⁷⁷ Compliance with the CFP rules would be a precondition for accessing funding so that any breach would risk an interruption or suspension of payments. It is to be wondered that during over the thirty years of regulation the linking of funding and compliance has not been firmly established. Its omission has meant that no culture of compliance among operators has evolved. Now, the success of the proposed reforms are to depend on the belated establishment of effective, proportionate and dissuasive sanctions.⁷⁸ But the detail reveals that such sanctions as are adopted will be imposed only in the event of serious infringement and will be applied only for the year of the breach.⁷⁹ Whether such limited financial detriments will be sufficient to deter operators from circumventing the rules remains to be seen. What is certain is that any chance of success is dependent on the detection of infringements, requiring Member States to commit substantial sums to monitoring activities which they may or may not be inclined to do. Developing a culture of compliance requires time and time is not on the side of reform in fisheries.

6 Shifting Responsibility for Environmental Sustainability

In its 2007 Green Paper on the use of market-based instruments (MBIs) for environmental and related policy purposes the Commission suggested that, rather than relying on traditional civil liability mechanisms to protect the environment, an alternative solution could be found in MBIs operating within a clear regulatory framework.⁸⁰ These would provide flexibility but also offer a cost-effective way to achieve policy objectives in situations of market failure, in particular those sectors exploiting

⁷³ Proposed Regulation, Art 13(1): ‘On the basis of evidence of a serious threat to the conservation of marine biological resources, or to the marine eco-system and requiring immediate action, the Commission, upon a reasoned request of a Member State or on its own initiative, may decide on temporary measures to alleviate the threat.’

⁷⁴ Council Regulation 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, OJ 2008 L 286/1

⁷⁵ Council Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, OJ 2009 L 343/1

⁷⁶ COM(2011) 417 final, 8, section 2.5

⁷⁷ Proposed Regulation, Recital 52

⁷⁸ Ibid. Article 46(2)(d) and (e)

⁷⁹ Ibid. Articles 51 and 52

⁸⁰ European Commission, Green Paper on market-based instruments for environment and related policy purposes, COM(2007) 140 final. One radical idea being pursued is using MBIs for habitat banking, see, Report for European Commission DG Environment, The Use of Market-Based Instruments for Biodiversity Protection – the Case of Habitat Banking, (February 2010), available at: <http://ec.europa.eu>

environmental assets of a public nature which entirely lack any costs internalisation mechanism or which do not sufficiently account for the ‘true’ or social cost of economic activity.⁸¹

The OECD set out the polluter pays principle as an economic mechanism to allocate costs and encourage the rational use of scarce environmental resources and thereby rectify the negative externalities that arise from activities that damage environmental goods.⁸² A user-pays principle is given definition by the UN: ‘The user-pays principle is the variation of the polluter-pays principle that calls upon the user of a natural resource to bear the cost of running down natural capital.’⁸³ From an economist’s perspective both principles internalise costs and there is no distinction to be drawn between them.

6.1 EU market-based instruments to promote environmental sustainability

Despite its preference for regulation, MBIs have been adopted by the EU for a range of environmental problems. The EU’s Environmental Liability Directive (ELD) institutes an insurance-based public law regime based on the polluter-pays principle for the prevention and remediation of environmental damage and reduction in the costs of such damage borne by society. A dual system of liability is established by the ELD imposing strict liability on operators in listed activities and fault-based liability for non-listed activities. The Environmental Liability Directive took cognisance of the change in commercial culture that large-scale polluter-pays liability created. It was a new situation for both operators and Member States, and Member States were advised to encourage operators to obtain appropriate insurance or other forms of financial security and if these were not available to ensure that such instruments were developed by the market.⁸⁴

A user-pays based regime of liability has been established by the EU’s Water Framework Directive (WFD) and

the Directive makes no distinction between user-pays and polluter-pays principles, stating that water usage should be costed in accordance with the polluter-pays principle: ‘the principle of recovery of the costs of water services, including environmental and resource costs associated with damage or negative impact on the aquatic environment should be taken into account in accordance with, in particular, the polluter-pays principle’.⁸⁵ The water resource is characterised as a particular common resource: ‘Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such.’⁸⁶

The ability of the polluter-pays principle to transfer responsibility for environmental damage to those causing damage may lose efficacy where pollution is diffuse, caused by virtually all human activity as witnessed in greenhouse gas emissions into the sink of the global atmosphere. Indeed, as the Environmental Liability Directive observes, ‘not all forms of environmental damage can be remedied by means of the liability mechanism’ and particularly pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors.⁸⁷ Market-based solutions, nonetheless, may be applied in such situations. Indeed, the EU has embraced a market solution for carbon emissions, establishing a trading scheme which came into force in 2005 and has become the largest carbon market in the world.⁸⁸ Emitters who wish to emit more than the allowable units they hold must buy additional allowances and these sale and purchase transactions produce a price per unit of pollution. Tradable fishing rights are to be made mandatory under the Proposed Regulation but, unlike the carbon trading scheme which imposes responsibility on the polluter for air quality, the trading in rights for fish extraction impose no responsibility on the user for fish restoration and maintenance.

⁸¹ European Commission, Green Paper on market-based instruments for environment and related policy purposes, COM(2007) 140 final, 3

⁸² OECD Council Recommendation on Guiding Principles concerning International Aspects of Environmental Policies, C(72) 128 final, OECD 1972, 11 ILM 1172 (1972), 6

⁸³ United Nations Glossary of Environmental Statistics

⁸⁴ Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L143/56, Article 14

⁸⁵ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1, Recital 38

⁸⁶ Ibid. Recital 1

⁸⁷ Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L143/56, Recital 13

⁸⁸ Directive 2003/87/EC of the European Parliament and Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ 2003 L275/32, as amended

6.2 International market-based instruments to promote environmental protection

An insurance-backed liability mechanism has been adopted at international level to deal with vessel-source oil pollution and the incidence of serious oil pollution events covered by the regimes established under the Convention on Civil Liability for Oil Pollution Damage (CLC) 1969 and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (Fund 71). Pollution incidents have steadily diminished, suggesting greater care in the industries concerned. As liability regimes, the primary objective of the Conventions is to compensate those individuals damaged, and monitoring of the scheme suggests that individuals suffering damage are being adequately compensated. Nevertheless, the CLC regime institutes polluter-pays responsibility for the clean-up of the spill in that the polluter is required to reimburse States affected for the cost of environmental clean-up. There is little responsibility for remediation written into these conventions and the signatory States have not shown themselves willing to increase the burden on a key industrial sector. States have preferred to bear the excess cost of clean-up themselves, taking on the mantle of final insurers in such pollution events. The scheme operates well for the purposes of compensation and remediation to baseline level and it is open to the signatory States to increase responsibility for remediation. The EU Member States rejected a more comprehensive coverage proposed by the Commission in 2003.⁸⁹

The most important innovation of the CLC was the imposition of strict liability upon the shipowner: ‘the owner of a ship at the time of an incident...shall be liable for any pollution damage caused by the ship as a result of the incident.’⁹⁰ All responsibility for a pollution event is ascribed to the shipowner, regardless of whether there was fault and regardless of whether the shipowner had acted diligently to prevent harm. Once harm has occurred though the oil spill from the vessel, the individual

responsibility of the shipowner is engaged. Fund 71 introduced a general, collective responsibility for the oil receivers to cover any excess not met by the shipowner. This was novel in that responsibility for the effects of the oil spill were accepted by third parties uninvolved in the damaging act but benefiting from the transport of the resource. Subsequent instruments extended the types of damage that are compensatable beyond clean-up to include reasonable reinstatement of environmentally damaged areas as well as increasing the amount of compensation recoverable.⁹¹

6.3 Adopting an insurance-based system to secure sustainability for EU fisheries

The application of the polluter/user pays principle in the CLC and Fund model provides two exemplars of responsibility, individual and collective. The scheme presents a blueprint for a mechanism that would transfer responsibility for the sustainability of fisheries from the EU and Member State authorities onto the users of the resource. Following the CLC model, the EU should consider adopting an insurance-based system of responsibility to achieve the restoration and maintenance of fish stocks. Just as those exploiting the oil resource are made responsible for its damaging effects on the marine environment so the damaging effects of fishing on the fishing resource should be imposed on those operators who most benefit from its use, the industrial fishing sector and the fish receivers. However, if the industry is to be responsible for the maintenance or, indeed, the improvement in the state of fish stocks, there must be an objective and quantifiable basis against which its performance may be measured.

The findings of the consultation on the reform of the CFP show that there is support for results-based management from environmental NGOs, industry and the European Parliament, as well as some Member States, but this is qualified by the requirement for ‘clear objectives and measurable targets’.⁹² The objective of bringing all stocks

⁸⁹ European Commission, Proposal for a regulation of the European Parliament and of the Council on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures, COM (2000) 802 final

⁹⁰ CLC 69, Article III(1)

⁹¹ The International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 92) and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage Fund Convention 1992, Article 2(3). Subsequently, also, Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, in force 2005, establishing the Supplementary Fund, providing a third higher tier of compensation, but to date only twenty seven States have signed up to this Protocol.

⁹² European Commission, Staff Working Document, Synthesis of the Consultation on the Reform of the Common Fisheries Policy, SEC(2010)428 final, 7

up to MSY levels by 2015 imposes a positive obligation on operators. Moreover, there is no reason why this objective should not be achieved because, of those who responded in the CFP consultation process, ‘most contributions share the objective to gradually reach exploitation rates matching with MSY in 2015.’⁹³ Responsibility for the state of a fishery at the end of a fishing cycle needs to be instituted. As the date for achieving MSY has been set at 2015, and the Proposed Regulation should be amended to make it legally-binding, the objective for the fishing industry is already in place. The licensing system needs to incorporate a term whereby those making use of the resource, whatever the nature of their property interest, are required to account for the resource in 2015 at MSY level. Beyond this, the industry must meet the further obligation that the MSY level achieved in 2015 is maintained at a level that will deliver good environmental status for European seas by 2020.

7 Conclusion

Over the years during which the CFP has been in operation, the understanding of environmental sustainability has changed and the protection of the environment and natural resources have come to be promoted internationally. The sustainability of the fish resource has always been a central concern of the Common Fisheries Policy but fish sustainability competes with economic and social priorities in the decision-making process. The management of fisheries according to the precautionary

approach does not apply the precautionary principle and therefore does not defer to environmental vulnerability and scientific uncertainty. Consequently, fishing activity is constrained only in exceptional circumstances despite the clear evidence of an ever diminishing resource.

The Proposed Regulation marks a very significant development in that sustainability of the EU’s fish resource is finally recognised as key to delivering economic viability for the industry and support for coastal fishing communities. Determining appropriate levels of fishing effort and catch is to be within the strictures of achieving MSY by 2015. However, the failure to define MSY or to make it legally-binding is likely to seriously undermine the impact of these reforms. Although the precautionary approach to the management of fisheries now has a target, it is non-binding and decision-makers will have no justification in preferring the protection of the resource over the protection of jobs or the exploitative activity of the fishing industry. In the current economic climate and the difficulties faced by all EU governments with regard to jobs and growth, the pressure to facilitate economic activity and the appropriation of the marine resource is bound to intensify rather than diminish. In such circumstances, there is a pressing need to transfer the responsibility for the sustainability of the fish resource to those who are using it and profiting from it. An insurance-based scheme would achieve this end and enable the industry to play a positive role in sustaining the resource on which it depends.

⁹³ Ibid. 8

List of abbreviations

CBD	UN Convention on Biological Diversity
CLC	Convention on Civil Liability for Oil Pollution Damage 1969
CFP	European Union's Common Fisheries Policy
ELD	EU's Environmental Liability Directive
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
Fmsy	Fishing mortality that delivers the maximum sustainable yield
ICES	International Council for the Exploration of the Sea
ITRs	Individual transferable rights
MBIs	Market-based instruments
MSFD	EU's Marine Strategy Framework Directive
MSY	Maximum Sustainable Yield
NEAFC	North East Atlantic Fisheries Commission
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Co-operation and Development
TAC	Total allowable catch
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WFD	EU's Water Framework Directive

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