

1. Introduction

In the middle of the twentieth century the world's oceans were considered a common resource open to all. It was only in coastal waters that controls and restrictions on usage were imposed by the littoral States for their own benefit and as they saw fit. However, with rapid technological advances, the great wealth and resources lodged within the oceans danced tantalisingly before the grasp of nations and fish were a most accessible asset. Writing in 1960, the Director of Fisheries at the Food and Agriculture Organization of the United Nations (UNFAO) sketched what he thought the future of world fishing should be and that he anticipated fisheries developing in the same way as agriculture. In the context of high seas fishing he opined, 'the aim in fisheries must be toward husbandry, so that stocks of fish can be herded and grazed as a farmer herds cattle'.¹ The Law of the Sea rationalised this view and extended the jurisdiction of States to 200nm, creating exclusive economic zones for the exploitation of fisheries by the coastal State, while fishing in the high seas was envisaged as being shared through the institution of regional fisheries management organisations.

An analogy between fishing activity and agriculture may be possible in respect of aquaculture, where husbandry of the resource must be exercised but, whatever FAO's view in 1960, there is no such correspondence with the marine fish capture industry which treats fish as a self-renewing resource to be exploited at will. The flaw in the agricultural approach is that while fish may constitute a destructible, renewable resource,² they may lose their ability to replenish for a multitude of reasons. These include where too many fish are removed, excessive numbers of sexually mature fish are removed, excessive numbers of immature fish are removed, their food source, possibly other fish, is removed, or if their habitats are degraded or destroyed in the fishing process. The whole thrust of development in marine fishing has been to transform activity

¹ D.B. Finn, *Fish: The Great Potential Food Supply*, (FAO, Rome, 1960) 21

² J.P. McInerney, *Natural Resource Economics: The Basic Analytical Principles*, in J.A. Butlin (ed.), *Economics and Policy* (Longman, London, 1981) 30–58

from a low-technology artisanal trade into a high-technology commercial industry. Most technical progress has been devoted to extraction and little to the preservation or expansion of the resource. Treated as any other commercial market, the drive towards market efficiency within the fisheries industry promotes the take-up of new technologies and increasing industrialisation to facilitate the more efficient extraction of the resource. The economic imperative protects the interests of the industrial sector, underwritten by huge capital investment which demands a return. Economic efficiency and competitiveness militate in favour of economies of scale, which have led to concentrations squeezing out the artisanal sector.³ The industrial sector lobbies its national government which, in turn, vigorously promotes its own national industrial interests even though the resultant policy may be inimical to the wider public interest.⁴

Industrialisation of fishing has led to the expansion of fishing activity into seas previously inaccessible and towards the capture of stocks that were previously unknown or not valued. As each new area of the sea is opened up to fishing, the larger, easier-to-catch fish are targeted first as these are more profitable than smaller fish, which tend either to be discarded or used for fish meal.⁵ Larger fish take longer to mature and, unable to withstand heavy fishing pressure, decline. This depletion of marine fisheries has led to fishing down the food chain or 'fishing down marine food webs', a ubiquitous phenomenon whereby fishing moves to target the smaller species or to other previously unexploited areas.⁶

EUROPEAN UNION WATERS

An analogy with agriculture may explain why, when the EU came to fashion a fisheries policy, fisheries were subsumed under the Title of 'Agriculture' in the Treaty of Rome and have remained there in all subsequent revisions. Fisheries are to be managed in the same way as

³ C. Lequesne, *The Politics of Fisheries in the European Union*, (Manchester University Press, Manchester, 2004) 158

⁴ E. da Conceição-Heldt, *The Common Fisheries Policy in the European Union: A Study in Integrative and Distributive Bargaining*, (Routledge, London, 2004) at 41–43; Lequesne (n 3) 42

⁵ D. Pauly, Review of: B. Lomberg, 'The Sceptical Environmentalist: Measuring the Real State of the World', (2002) 3 *Fish and Fisheries* 3–4

⁶ D. Zeller, et al., 'Trends in Global Marine Fisheries – A Critical View', in P. Wrammer, H. Ackefors and M. Cullberg (eds.), *Fisheries, Trade and Development* (Royal Swedish Academy of Agriculture and Forestry, Stockholm, 2009) 55–77, 57–58

agricultural land is managed. Under the amended Agriculture and Fisheries Title of the Treaty, the fisheries policy has no specific provisions but, along with farming, has the objectives, through increasing productivity and technical progress, of ensuring a fair standard of living for workers in the sector, stabilising markets and ensuring the availability of supplies at reasonable prices.⁷ When, finally, in 1970, the EU adopted its first fisheries measure, a further policy objective was added, that of conservation. A common structural policy for the fishing industry was laid down which, although concerned with establishing the principle of free access to the waters under the jurisdiction or sovereignty of the Member States, also included a power for the Council to adopt conservation measures where there was a risk to stocks from intensive exploitation.⁸ Between them, the Treaty and 1970 structural policy for fisheries established four contradictory policy objectives: economic rationality, food security, social measures and conservation. An obvious mechanism for managing such disparate and conflicting objectives would have been to impose strong central control. Instead, an incoherent implementation has emerged with the EU controlling fishing policy and Member States retaining responsibility for the sector's economic or industrial strategy. Unsurprisingly, each Member State has pursued different, and even contradictory, objectives.

In its 2001 Green Paper on common fisheries policy (CFP) reform, the Commission concluded with regard to its own fisheries policy that: 'it is difficult to formulate a single diagnosis regarding its economic and financial results and the conditions of its short- and long-term viability.'⁹ In the 2002 Fisheries Regulation, the objectives of the CFP were laid out as to ensure the 'exploitation of living aquatic resources' to provide

⁷ Following the Lisbon amendment, the word 'Fisheries' is now included in the Agricultural title but the substantive objectives have not changed; Consolidated version of the Treaty on the Functioning of the European Union, [2012] OJ C326 (TFEU), Title III, Agriculture and Fisheries, Articles 38–44

⁸ Council Regulation (EEC) No 2141/70 laying down a common structural policy for the fishing industry, [1970] OJ Spec Ed 703, Article 2 providing open access and Article 5 enabling the Council to adopt conservation measures, subsequently replaced by Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry, [1976] OJ L20/19

⁹ European Commission, *Green paper of 20 March 2001 on the future of the common fisheries policy*, COM (2001) 135 final (2001 Green Paper)

sustainable economic, environmental and social conditions.¹⁰ The three conflicting objectives, economic, environmental and social sustainability, each represent a public interest. A balance was intended so that priority could be given to any one of the policy's objectives with the idea that an equilibrium could be restored thereafter and, thereby, all public interests pursued. However, the continued failure to give priority to resource sustainability on which each of the other outcomes depended has led to a distortion of implementation.

To meet social objectives specified in the Treaty, the CFP was to ensure a fair standard of living for those whose livelihoods depend upon fishing activities.¹¹ Social objectives seemingly ameliorate the EU's dominant approach in favour of industrialised, commercial exploitation. Unfortunately, although fishing communities and jobs are to be protected, these social objectives have enabled the industry to press for the maintenance of maximum fish capture even where stocks are declining or depleted. Resistance to calls for reduced fishing activity, the closure of fisheries or reduction of time spent fishing is justified in the protection of jobs or communities. Fisheries receive substantial economic support from Member State and EU resources. Price supports, some tariff protection and subsidies paid to industry, for example fuel subsidies, are justified on the same grounds.¹²

The irreconcilable tension between the conservation of fish stocks and the promotion of fishing activity to protect jobs has helped maintain overcapacity in the fleet and excessive extraction rates. Although the fleet is recognised as too large for the available resource, its reduction conflicts with meeting social objectives.¹³ Overcapacity is not just a problem within the EU, but also creates effects beyond EU borders. Instead of directing their energies at sustainability within EU fisheries, the EU has always sought to extend its fishing entitlements, focusing on opening up new areas for exploitation, maximising the EU's share of the

¹⁰ Council Regulation (EC) 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, [2002] OJ L358/59, (2002 Fisheries Regulation), Article 2(1)

¹¹ 2002 Fisheries Regulation, Article 2(1)

¹² Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity (Text with EEA relevance), [2003] OJ L283/51

¹³ C. von Dorrien, 'Fishing for Sustainable Policies – Political Causes of Over-fishing and Solutions for Sustainable Fisheries', in H. von Storch, R.S.J. Tol and G. Flöser (eds.), *Environmental Crises* (Springer, Berlin Heidelberg, 2008) 83–100, 91

take from international waters and targeting less exploited species.¹⁴ External fisheries policy has been driven by the need to accommodate excess capacity within the EU fleet, but securing new fishing opportunities has driven the expansion of the fleet. This in turn has contributed to the depletion of fish stocks of third countries that have accommodated the EU fleet.

Originally, the Community paid third countries for access rights for Community fleets to appropriate their fish resources: 'The financial compensation was based on the access to the fishing possibilities offered by the coastal state concerned.'¹⁵ One such arrangement was entered into with Morocco. The terms of the 1992 'cash for access' agreement with Morocco seemed to meet development objectives of that State by facilitating the modernisation and expansion of the Moroccan fishing fleet. At the time, the agreement, which provided fishing opportunities to more than 500 EU vessels operating in Moroccan waters, was described by the Commission as being the most important fisheries agreement between the EU and a partner country.¹⁶ Nevertheless, the result of this was that the waters of Morocco's exclusive economic zone were fished intensively both by the home fleet and the EU fleet. In 1995, the serious depletion of stocks led the Moroccan government to suspend the operation of the 1992 fisheries agreement and exclude the EU fishing boats, demanding substantial cuts in the EU catch. The impasse was resolved in a fisheries protocol which ran from the end of 1995 for four years. On the expiry of this agreement in 1999, it was not renewed. Despite having overexploited the Moroccan resource, the affected EU fleets were given financial compensation under the Financial Instrument for Fisheries Guidance (FIFG) until the end of 2001, and thereafter adjustments were to be facilitated for those previously dependent on the fishing agreement with Morocco.¹⁷

¹⁴ For example, *Report of the Liaison Committee of ICES to the North-East Atlantic Fisheries Commission 1972* (International Council for the Exploration of the Sea, 1972)

¹⁵ European Commission, Communication on an Integrated Framework for Fisheries Partnership Agreements with Third Countries, COM (2002) 637 final, paragraph 2.3

¹⁶ European Commission, EU/Morocco Fisheries Partnership Agreement: past and future, Press Release, Memo/05/275

¹⁷ Council Regulation (EC) No 2561/2001 aiming to promote the conversion of fishing vessels and of fishermen that were, up to 1999, dependent on the fishing agreement with Morocco, [2001] OJ L344

Despite the EU wanting to promote its values in the wider world and contribute to international objectives for sustainable development,¹⁸ there has been little evidence of conservation and sustainability in external fisheries policy. Internationally, the Commission has competed aggressively for a share of the living marine resource. While fisheries policy is designated a common policy, no such policy has been achieved.

THE COURT OF JUSTICE AND THE INTERNAL MARKET

There has been no compromise solution to conflicting objectives and the policy has been an ad hoc response to problems as they arise. With its disparate objectives, a decisive interpretation of the policy was required and this could have been provided by the Court of Justice, in much the same way as the nebulous concept of citizenship was given explication. However, instead of providing clarity, the Court has merely compounded incoherence. Most regrettable among the various interventions of the Court of Justice in fisheries policy was its interpretation of the nature and operation of the secondary legislation of the CFP in relation to the primary legislation of the Treaty.

The primacy of EU law over national law had been long-established so that Union legislation would take priority over national law.¹⁹ Following the inception of the CFP, the exploitation of the fish resource was henceforth to be regulated under the terms of the Basic or Fisheries Regulation. This controlling instrument was adopted initially by a Council Regulation and established a Community system for the conservation and management of fishery resources, introducing an enforceable limit on the quota catch of species covered by an annual regulation.²⁰ The Commission, acting on the advice of the EU Scientific and Technical Committee for Fisheries, and information from the International Council for the Exploration of the Seas (ICES), established a Community reserve for each species known as the total allowable catch (TAC).²¹ Quotas were then allocated between the Member States, which were based on the

¹⁸ Consolidated Version of the Treaty on European Union, [2012] OJ C326 (TEU), Article 3(5)

¹⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585

²⁰ Council Regulation (EEC) No 170/83 establishing a Community system for the conservation and management of fishery resources, [1983] OJ L24/1

²¹ Article 12, Council Regulation (EEC) No 170/83, required the Commission to set up a Scientific and Technical Committee for Fisheries which was to be

Member State historical catch for the species concerned and were supposed to operate to give preference to coastal communities dependent on fishing. This division of entitlements has been the basis of fisheries policy throughout its currency and has been retained in each of the subsequent decennial reforms.

It had taken the Member States nearly ten years to reach this agreement for a common policy and the expectation was twofold: first, that fish stocks would be sustainable under the policy and, secondly, that each of the Member States with maritime populations engaged in fishing would be protected by legislation guaranteeing a national quota for their own fishing communities. Despite the agreed objectives of the legislation, the second of these, protection of fish stocks for local populations, was frustrated by the Court of Justice, 'wrong-footed' in a series of quota-hopping cases culminating in the *Factortame* judgment.²²

In an effort to reserve its share of the quota to national benefit, the UK government had adopted legislation imposing certain requirements for a national link before fishing vessels could be registered in the territory. However, a fundamental right of establishment is conferred by the Treaty whereby nationals of a Member State may set up business in any other Member State.²³ In a contest between the constitutionally protected private rights of individuals to establish themselves in another Member State and the public interest in the fish resource allocated by operation of secondary legislation, constitutional rights took priority over public interests.²⁴ The effect of the Court's ruling was to render the public good of the fish quota awarded to each Member State irreconcilable with the private rights of operators. Any discrimination between national operators and those claiming a fish quota entitlement by reason of establishment is illegal. No constraints are imposed on the established entity with regard to landings, so that, having harvested its share of the host Member State's fish quota, the enterprise is not obliged to land the catch in the State to which it was allocated. The resource entitlement and financial reward the Member State was to have enjoyed through its share of the fish quota is lost to that State.

consulted regularly and was required to produce an annual report to include an assessment of stocks and address conservation.

²² R. Churchill, *Quota Hopping: the Common Fisheries Policy Wrongfooted?* (1990) 27 C.M.L. Rev. 209–247, who contends that both objectives were undermined.

²³ Articles 49–55 TFEU

²⁴ Case C-221/89 *R v Secretary for Transport, ex p. Factortame* [1991] ECR I-3905

The resolution of the *Factortame* litigation served to highlight the futility of implementing policy by secondary legislation where its provisions would be in conflict with the constitutional provisions of the Treaty.²⁵ Fish stocks are now a common EU resource that Member States compete to capture. Following *Factortame*, the Member States are unable to fashion a new policy which would address the complex needs of the sector, so leaving fisheries vulnerable to over-exploitation.

With a policy which could no longer serve societal needs, in particular the interests of the largely marginalised coastal fishing communities, the Member States displayed lax adherence to regulatory provision and an unwillingness to deploy resources for the enforcement of Union fisheries rules.

THE COURT OF JUSTICE AND THE EXTERNAL MARKET

The EU is founded on the values of democracy, and the rule of law and justice, and the aims of the Union include the promotion of these values and the well-being of its people.²⁶ As such, the EU's values should inform the construction of its policies and in 'its relations with the wider world, the EU is to uphold and promote its values and interests and contribute to the protection of its citizens'.²⁷ Under the 2013 Fisheries Regulation, the values of the EU are to be adhered to in implementation of the CFP, but this requirement was not expressed in earlier versions.²⁸ Despite this, as the values constitute the very foundations of the EU, they

²⁵ J. O'Reilly, 'Judicial Review and the Common Fisheries Policy' in D. Curtin and D. O'Keefe, *Constitutional Adjudication in European Community and National Law, Essays for the Hon. Mr Justice T.F. O'Higgins* (Butterworth, Dublin, 1992) 51–65, 52: 'The [*Factortame*] cases also act as a reminder of the importance that attaches at all times to the constitutional provisions of the EC Treaty. They will take priority over secondary Community legislation, including in this context the common fisheries policy, unless appropriate amendments are made.'

²⁶ Article 2 TEU

²⁷ Article 3(5) TEU

²⁸ Regulation (EU) No 1380/2013 of the European Parliament and of the Council on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, [2013] OJ L354/22 (2013 Fisheries Regulation), Recital 52 and Article 31(6)

would be expected to be uppermost in the Court of Justice's considerations in adjudicating fisheries disputes. However, the Court has omitted examination of the public interest in fisheries measures adopted in internal policy,²⁹ and has ignored issues of public interest in reviewing agreements with third countries. Operation of the external fisheries policy was exposed in the *Odigitria* case, where arrangements that were ethically questionable were brought to the attention of the Court.³⁰

Under the terms of the Law of the Sea Convention (LOSC), States determine the size of the catch of living marine resources within their exclusive economic zone,³¹ but the Convention also stipulates that the coastal State must 'promote the optimum utilisation of the living resource'.³² States which do not have the capacity to harvest the surplus catch themselves are required to make that stock available to third countries.³³ The European Union makes particular use of opportunities to capture surplus stocks of less developed countries. Agreements for access to the excess resources of both Guinea-Bissau and Senegal had been entered into by the Union, which paid each government for those rights. A Greek fishing vessel operating under a licence to fish granted by Senegal was stopped in an area of water which was the subject of a dispute between Guinea-Bissau and Senegal and arrested by officials of Guinea-Bissau. The master of the vessel was prosecuted under Guinea-Bissau law, the cargo confiscated and the boat held for two months. Evidence from the Commission revealed that the area had been in dispute since 1960 and, at the time of the incident, the sovereignty of the contested area was being adjudicated before the International Court of Justice.

A claim for damages was made by the owners of the fishing vessel to the General Court, complaining about the Commission having concluded fishing agreements in respect of waters which it knew to be in dispute. The Court asserted that no fault lay with the Community institutions and that any 'uncertainty was not attributable to the agreements and protocols' concluded by the Union but 'to a dispute for which the Community

²⁹ Case T-177/01 *Jégo Quéré & Cie SA v Commission* [2002] ECR II-236 was treated as raising a constitutional issue and the unmeritorious substantive claim unconsidered.

³⁰ Case T-572/93 *Odigitria AAE v Council and Commission* [1995] ECR II-2025; Case C-55/94, *Gebhard* [1995] ECR I-4165

³¹ 1982 United Nations Convention on the Law of the Sea (LOSC) (Montego Bay, 10 December 1982, 1833 UNTS 3), Article 61

³² Article 62(1) LOSC

³³ Article 62(2) LOSC

is not responsible'. In finding in the Commission's favour 'for not having given up the benefits which conclusion of the fishing agreements could bring to the Community',³⁴ the Court effectively defined the public interest in terms of a future speculative economic interest. How or whether these agreements could be conducive to the Union's values or to the public interest in upholding those values both internally and externally, let alone the interests of Guinea-Bissau, was not examined. Although the case was appealed to the Court of Justice, the benefit to be derived by the Union was not the subject of consideration.³⁵

The public interest in entering into fishing access arrangements with third countries has never been scrutinised. Fisheries policy seems to be implemented beyond rigorous systems of account and, without being subject to close democratic examination or judicial scrutiny, it may result in adverse impacts and undermine EU values. In relation to the development impact of the EU's external fisheries policy in its fisheries exploitation arrangements with Guinea-Bissau, the OECD noted: 'The exploitation of the fish resources has minimal impact on the country's economy; there is increased dependency on hard currency payments from EU; the fisheries management system remains weak and resources are vulnerable to overexploitation.'³⁶

In failing to locate its assessment of fisheries measures within the broader values of the Union project, the Court of Justice risks validating deleterious activities both externally and internally.

THE COURT OF JUSTICE AND THE REVIEW OF POLICY IMPLEMENTATION

Perhaps surprisingly, agreements with third countries entered into for the purpose of opening up new fishing grounds are also vehicles to facilitate the restructuring of the Union fleet. Joint ventures between Union undertakings and third country enterprises create entities to which surplus EU fishing vessels may be despatched, in furtherance of the objectives of

³⁴ Case T-572/93 *Odigitria AAE v Council and Commission* [1995] ECR II-2025, paragraph 44

³⁵ Case C-293/95 P *Odigitria AAE v Council and Commission* [1996] ECR I-6129

³⁶ A.E. Neiland, 'Special Chapter on Policy Coherence for Development in Fisheries', in *Review of Fisheries in the OECD Countries: Policies and Summary Statistics 2005*, (OECD, 2005) 97–154, 132

transfer of capital, technology and know-how.³⁷ In its communication concerning the setting up of these partnerships, the Commission addresses objectors to the policy with the rhetorical question: ‘Why are Fishery Partnership Agreements necessary?’³⁸ In answer, the Commission asserts they are to ensure sustainable management of fisheries resources inside and outside Union waters, achieve coherence between internal and external policy, and contribute to ‘a world partnership for sustainable development’.³⁹ The policy seems to have been devised without regard to the adverse effects that such agreements are known to have on fish stocks outside the EU, instead presenting partnership agreements with third countries as of mutual benefit. Compounding the possible adverse effects of the policy externally, the Court has interpreted capacity reduction measures in such a way as to frustrate the internal policy intention in its entirety.

A fishing partnership had been entered into between the EU and Argentina, the general purpose being to promote the rational exploitation of marine resources.⁴⁰ The benefits of the agreement were set out as being the provision to EU fishermen of new fishing opportunities and, to Argentina, of concessions, in particular, tariff concessions.⁴¹ As part of the arrangement, a transfer of surplus vessels from the EU to Argentina had been agreed, the advantage to Argentina being that they would aid the modernisation of its fleet while for the EU it would meet one of the CFP objectives for the removal of excess capacity. Pursuant to the partnership agreement, private undertakings had set up a joint venture that included an arrangement for the transfer of two vessels from the UK fleet to the Argentinean fleet.

Prior to the completion of the transfer of the vessels, the UK vessel owners sold the licences attaching to the boats to a third party. Following investigation for an infringement of law, the Commission addressed a reasoned opinion to the UK. In response, the UK adopted a legalistic and

³⁷ Communication from the Commission on an integrated framework for fisheries partnership agreements with third countries, COM (2002) 637 final

³⁸ *ibid.*, 9

³⁹ *ibid.*, citing: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Towards a global partnership for sustainable development, COM (2002) 82 final

⁴⁰ Council Regulation (EEC) No 3447/93 on the conclusion of the Agreement between the European Economic Community and the Argentine Republic on relations in the sea fisheries sector, [1993] OJ L318/1, now repealed

⁴¹ *ibid.*, preamble

literal approach to the relevant legislation, arguing that its only obligation had been to remove the vessels from the national register of fishing vessels and had no duty to withdraw the associated fishing licences, a position it maintained in the subsequent infringement action brought by the Commission for failure to withdraw the licences at the time the transfers were agreed.⁴² An action was also brought against the Netherlands concerning a similar situation.⁴³ The UK's defence was that, since the owners of the vessels were no longer the holders of the licences, it had not infringed any obligation under the relevant regulation. Seeking to rebut the defence, the Commission relied on the purpose for which the legislation had been adopted: 'If the Community authorised such re-use of licences relating to vessels definitively transferred to a non-Member State, the objective of reducing the fishing fleet would not be achieved.'

Although policy determination is a matter for the legislative authorities, the Court of Justice has a responsibility to give a clear assessment of the legislation brought before it and provide interpretation that ensures coherence within the law. Indeed, the Court has stated that, in interpreting a measure of EU law, the provision must be put into context and interpreted in the light of the legislation as a whole.⁴⁴ Various methods of interpretation have been adopted by the Court of Justice, including the literal,⁴⁵ but as Advocate General Mayras has observed, there are 'many cases in which the Court has rejected a literal interpretation in favour of another which it found more compatible with the objective and whole scheme of the legislation in question',⁴⁶ such as the teleological approach which has found its most prominent expression in the principle of *effet utile*. According to the Court, this rule of interpretation presupposes 'the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied'.⁴⁷ The principle of useful effect

⁴² Case C-64/04 *Commission v UK* [2007] ECR I-2623, paragraph 17

⁴³ Case C-64/04 *Commission v UK*; Case C-34/04 *Commission v Netherlands* [2007] ECR I-1387

⁴⁴ Case 283/81 *CILFIT and Ors v Ministry of Health* [1982] ECR 3415, paragraph 20

⁴⁵ K. Lenaerts and J. Gutiérrez, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 20 *Colum. J. Eur. L.* 3 (2013–2014), 3–61

⁴⁶ Opinion of Advocate General Mayras, Case C-67/79, *Fellinger v Bundesanstalt für Arbeit, Nuremberg* [1980] ECR 535, 550

⁴⁷ Case 8/55 *Federation Charbonniere Belgique v High Authority* [1954–56] ECR 292

has wide currency, relied on by parties to actions,⁴⁸ seen to operate broadly to reconcile different regulatory approaches to safeguarding rights,⁴⁹ and deployed by the Court in order not to deprive a legislative provision of its effectiveness.⁵⁰

In context, the argument put by the Commission that the legislation was for the purpose of reducing the catching capacity of the fleet appears compelling as the fisheries policy, then extant, provided that the Council was to set objectives and rules for fleet reductions ‘with a view to achieving a balance on a sustainable basis between resources and their exploitation’.⁵¹ Also included in this fisheries regulation were provisions requiring Member States to operate a national system of fishing licences.⁵² A subsequent regulation had been adopted setting out the minimum information to be contained in fishing licences and stipulating the withdrawal of licences of vessels definitively withdrawn from fishing activities.⁵³ In order to adjust fishing effort, a funding instrument was adopted whereby Member States were permitted to permanently transfer vessels to a third country provided the transfer would be unlikely ‘to infringe international law or affect the conservation and management of marine resources’. In such case, vessels were to be deleted from all fishing registers, meaning that no fishing licence could be issued for the vessel.⁵⁴ Structural funds were made available for actions under these provisions.

⁴⁸ Case C-628/11 *International Jet Management GmbH* [2014] OJ C142, paragraph 55

⁴⁹ Case C-283/11 *Sky Österreich GmbH*, judgment of the Court (Grand Chamber) of 22 January 2013, Opinion of Advocate General Bot delivered on 12 June 2012, paragraph 60

⁵⁰ Case C-92/12 PPU, *Health Service Executive* [2012] OJ C194, paragraph 124; Case C-561/12 *Nordecon AS and Ramboll Eesti AS* [2014] OJ C45, paragraph 38; Case C-227/14 P, *LG Display Co. Ltd and LG Display Taiwan Co. Ltd v Commission* [2015] OJ C205, paragraph 84

⁵¹ Council Regulation (EEC) No 3760/92 establishing a Community system for fisheries and aquaculture, [1992] OJ L389, repealed, Article 11

⁵² Council Regulation (EEC) No 3760/92, Article 5

⁵³ Council Regulation (EC) No 3690/93 establishing a Community system laying down rules for the minimum information to be contained in fishing licences, [1993] OJ L341/93, repealed, Article 5

⁵⁴ Council Regulation (EC) No 3699/93 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products, [1993] OJ L 346/1, repealed, Article 8

Instead of considering the fisheries management scheme as a whole and elucidating to ensure the coherence of the legislative package, the Court focused on the one provision of the funding instrument concerning fishing licences. The Court went on to rule that the measure: '[did] not prohibit, as such, utilisation of fishing capacity made available by the transfer of vessels to a non-Member State to issue new licences, since that article merely requires the flag Member State to withdraw the fishing licences relating to vessels which are subject to definitive withdrawal from fishing activities'.⁵⁵

Taken out of the context of capacity reduction, the Court was able to conclude that the United Kingdom had complied with the obligation to withdraw fishing licences. Adopting a legalistic, textual adherence to one provision of legislation, the Court failed to put the treatment of fleet reduction into the overall scheme devised by legislation and establish the full object and purpose of the legislation. A narrow reading of the legislation led to a constrained, minimal obligation for the Member State to remove capacity. If the Court were to always proceed in this manner, its ruling would be unremarkable. But, in other circumstances, the Court of Justice has taken a teleological rather than legalistic approach,⁵⁶ and is credited as not simply being concerned with 'ascertaining the aim of a particular legal provision' but with interpreting rules in the light of the 'broader context provided by the EC (now EU) legal order and its constitutional telos'.⁵⁷ In this case, however, the Court condoned an entirely inadequate implementation of law by a Member State which thereby enabled the circumvention of the objective of capacity reduction to prevent overexploitation of the resource.

For its part, although the Commission had been informed that the licences remained in circulation, it nevertheless decided to pay Community assistance to the vessel owners, applying a test of 'good faith'.⁵⁸ A lax control of funding by the Commission enabling the circumvention of rules to guard against fraud was matched by the casual disregard by

⁵⁵ Case C-64/04 *Commission v UK*, paragraph 43

⁵⁶ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I

⁵⁷ M.P. Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', (2007) 1 *European Journal of Legal Studies*, at: <http://www.ejls.eu/2/25UK.pdf>

⁵⁸ Case C-64/04 *Commission v UK*, paragraph 23

the UK of measures designed to reduce the fishing effort.⁵⁹ The Netherlands, too, was exonerated from any responsibility for its application of legislative provision.⁶⁰

Two issues arise from this case. The first is whether this ruling has deterred the Commission from taking action against Member States for breach of fisheries provisions.⁶¹ The second, and far graver issue, is that of the involvement of the EU and its excess capacity in the development of third country fisheries. Politically, the subject has scarcely been raised and never adequately addressed. The effects of exporting excess fleet capacity and facilitating the redeployment of investment from within the EU to external areas is not assessed critically, the EU's only purpose being to ensure the interests of its own citizens. Sustainability in seas beyond EU waters seems not to concern the Union institutions, and it has certainly not concerned the Court.⁶²

⁵⁹ The UK's indifference to the proper operation of the CFP did not stop with its failure to give effect to legislation adopted to reduce the size of the Community fleet; it had a perfunctory approach to supplying data to the Commission necessary to enable the Commission to make properly informed decisions. The UK routinely neglected to supply the Commission with statistics on the fishing effort deployed by its registered fleet, see Case C-236/05 *Commission v UK* [2006] ECR I-10819

⁶⁰ Case C-34/04 *Commission v Netherlands* [2007] ECR I-1387, paragraph 52: 'With regard to Article 8 of Regulation No 3699/93, it is sufficient to point out that Article 5 of Regulation No 3690/93, the sole provision referred to in the Commission's pleadings, makes no reference to that article at all. In any event, Article 8 of Regulation No 3699/93 lays down, inter alia, what the measures to stop vessels' fishing activities permanently may include and requires vessels deleted from the register to be excluded from fishing in Community waters. It does not, however, follow from that provision that the fishing capacity made available in the national register of fishing vessels by the permanent transfer of vessels to a non-Member State should not be used to issue new fishing licences.'

⁶¹ Court of Justice of the European Union, Annual Report 2014 (Luxembourg, 2015), at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/en_ra14.pdf. In 2014, no infringement action was brought by the Commission for breach of fishing regulation.

⁶² FAO, *Review of the state of world fishery resources*, Technical Paper 457 (Rome, 2005), detailing declines in Argentine fish stocks.

BETTER REGULATION THROUGH INTEGRATED MARITIME POLICY

While over decades the CFP seemed incapable of moving towards a more sustainable model, there has been increasing concern over the state of the marine environment. Overexploitation of the natural resource may be appraised as an environmental rather than an economic issue and be considered in the context of the EU's environmental strategy. The Sixth Environmental Action Programme was adopted in 2002 by the European Parliament and Council. It included a thematic strategy for the protection and conservation of the marine environment which sought to promote the sustainable use of the seas and the conservation of marine ecosystems.⁶³ Wealth generation and employment opportunities derived from Europe's oceans and seas had been adversely affected as a result of environmental degradation.⁶⁴ A wide range of activities, including shipping, ports, transport, tourism, oil, gas and mineral extraction, renewable energy operations, submarine telecoms, marine fishing and aquaculture and fish processing, are based on or in the marine area. These sectors may be in competition with each other and policies adopted for each sector may be in conflict with each other. Added to this, the marine environment is subject to huge stresses as a result of climate change, pollution from the land and air, waste disposal, the introduction of alien species and overfishing. A strategy was needed to protect the resource on which marine-related economic and social activities depend. To achieve a more coherent approach to the socio-economic demands on the marine resource, while at the same time providing environmental protection, it became accepted that integrated policies needed to be substituted for sectoral policies. Furthermore, in order for such policies to be effective, implementation would have to be across national boundaries. In October 2007, the Commission published a Communication setting out its plan for an Integrated Maritime Policy (IMP).⁶⁵

⁶³ Decision No 1600/2002/EC of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme, [2002] OJ L242/1

⁶⁴ Communication from the Commission to the Council and the European Parliament – Thematic Strategy on the Protection and Conservation of the Marine Environment {SEC (2005) 1290}, COM (2005) 504 final, 3

⁶⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An Integrated Maritime Policy for the European Union, COM (2007) 575 final

The environmental pillar of the IMP is found in the Marine Strategy Framework Directive (MSFD), which is 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’.⁶⁶

With a view to achieving this, the Directive aims to achieve ‘good environmental status’ for European seas by 2020.⁶⁷ Member States are obliged to evaluate requirements in the marine areas for which they are responsible and, in consultation with other Member States in the same region or third countries in the region, draw up and implement coherent management plans with the objective of achieving good environmental status for their seas by the 2020 deadline. Implementation is to be monitored by the Member State. In commenting on progress towards the implementation of the Directive, the Commission observed its efficacy would be greatly benefited if the ‘closely related’ CFP were to integrate the ecosystem approach as an overarching principle.⁶⁸

In the Lisbon Treaty, the objectives on the functioning of the European Union were amended to include a general objective of sustainable development, with a high level of protection and improvement of the quality of the environment.⁶⁹ Furthermore, ‘environmental protection requirements must be integrated into the definition and implementation of Union policies and activities, in particular with a view to promoting sustainable development’.⁷⁰

Sustainable development of the fisheries sector must imply sustainable stocks which could then provide a reasonable and continuing standard of living for those employed in the sector. The Commission has sought to promote an integrated approach to the management of marine areas in order to ensure sustainable seas. Nevertheless, it remains the case that the CFP does not incorporate the provisions or principles of the MSFD and is not made subject to marine environmental policy.

⁶⁶ Directive 2008/56/EC of the European Parliament and of the Council establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), [2008] OJ L164, Article 1(a)

⁶⁷ Marine Strategy Framework Directive, Article 1(1): ‘This Directive establishes a framework within which Member States shall take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest.’

⁶⁸ *ibid*, 8

⁶⁹ Article 3(3) TEU

⁷⁰ Article 11 TFEU

THE COMMISSION'S ANALYSIS OF THE COMMON FISHERIES POLICY IN 2001

Although architect of the CFP, by the mid-1990s, a despairing Commission lamented of the policy that: 'too many fishermen are chasing too few fish, and too many young, immature fish are being caught. Increased public demand, pressure on fishermen to cover rising investment costs and the development of ever more sophisticated equipment like sonar and radar, which are able to pinpoint shoals of fish with greater accuracy, have increased strains on a scarce resource'.⁷¹

In its 2001 Green Paper,⁷² the Commission stated that the main challenge for the CFP was to conserve fish stocks which, by this time, included a large number whose volume was described as being 'below what is biologically reasonable', demersal roundfish stocks (fish dependent on sea beds, such as cod, haddock, sea breams, groupers, red mullet) being the most endangered and subject to excessive exploitation. Inadequate priority was given to environmental issues in the CFP, a problem 'aggravated by insufficient knowledge about the sea's ecosystems and the secondary effects of fishing'. The Commission acknowledged that its scientific advice and information was weak, lacking expert input and beset by unreliable data. Nevertheless, the Commission stated that it was promoting environmental issues in the CFP.⁷³

With no responsibility for the regeneration of fish stocks, the fishing industry responded to dwindling stocks by investing in increasingly sophisticated fishing technology, further depleting stocks and damaging ecosystems to a point beyond biological regeneration.⁷⁴ Fleet size was excessive,⁷⁵ and improvements in design and technology in vessels meant that a reduction in the number of vessels might not be adequate to reduce overfishing. Some Member States suggested that public-sector aid should no longer be permissible for the construction and modernisation of vessels. All Member States were agreed that there had to be a balance between the capacity of the fleet and exploitation rates compatible with

⁷¹ European Commission, *The new common fisheries policy*, (Luxembourg, 1994), 13

⁷² 2001 Green Paper

⁷³ European Commission, Elements of a strategy for the integration of environmental protection requirements into the common fisheries policy, COM (2001) 143 final

⁷⁴ 2001 Green Paper

⁷⁵ 2001 Green Paper

long-term management aims. A further problem in counteracting overfishing was that the responsibility for the monitoring and control of fishing activity was divided between the Union and the Member States. Control measures were inadequate but also uneven across the EU because legal provision and sanctions varied between Member States. Union inspectors had limited powers, while Member State monitoring was characterised by a lack of human resources and necessary skills. As a result of diminishing fish stocks and increasing use of technology, employment in the sector continued to decline and the Commission advised further reductions in fleet capacity.

In reviewing the failure of the CFP, the Commission did not point at the industry. Instead, the fault lay in a regulatory regime which had not succeeded in dealing with what the Commission described as an 'inexhaustible list' of problems, compounded by a failure to deploy all the tools which it had at its disposal to manage stocks. Overly complex rules, in, for example, technical measures which differed according to the geographical sectors, had led to an unmanageable regime. According to the Commission, the main control mechanism had been the total allowable catch, but, under pressure from the Member States, this had often been set too high. An inflated agreed catch limit was then further augmented by overfishing, unrecorded landings and discards. Although the Commission had tried to include other measures such as capping fishing effort (the capacity of a vessel in tonnage and power multiplied by the activity expressed as time at sea) 'progress remained limited'. Governance was weak and inadequate in reacting to local problems or crises, for example, acting to impose an immediate prohibition of fishing in certain zones in order to avoid irreparable damage to stocks. Actors in the sector were not involved in decision-making even where technical measures, such as those concerning the use of types of fishing gear, were to be adopted. This lack of participation had led to hostility within the fishing industry regarding measures for control.

THE COMMON FISHERIES POLICY REFORMS

The Commission anticipated a reformed 2002 regime introducing flexibility into decision-making, allowing rapid emergency action and providing for further involvement of the people concerned. Improved governance was seen as essential to improving compliance with, and

commitment to, fisheries policy.⁷⁶ Participation for stakeholders to ensure their input to policy was central to the new governance strategy, to be achieved in the institution of new regional advisory committees. Certain management-related responsibilities were to be decentralised to deal with urgent or local problems. In decision-making, more systematic consideration was intended to be given to scientific advice. Efforts were to be made to ensure the compatibility of the CFP with other policies affecting marine coastal areas. This new direction for governance indicated a solution in subsidiarity. A move from sectoral decision-making to integrated management of marine areas would introduce coherence. Sustainability was to be ensured through the pursuit of a more scientifically certain and environmentally sensitive strategy, and it may have been intended that decision-making apply the precautionary principle.

Despite the ambitions of the 2002 CFP, the Commission, in reviewing its operation described its effects: overfishing, fleet overcapacity, heavy subsidies, low economic resilience, and decline in the volume of fish caught by European fishermen, concluding the policy had ‘not worked well enough to prevent those problems’.⁷⁷ In 2011, elaborating on the reasons for failure, the Commission adduced the ‘Tragedy of the Commons’⁷⁸ and the associated free-rider problem as explanation for the policy’s lack of success. Unsurprisingly, therefore, theoretical solutions to these two problems underpinned the Commission’s proposals for the 2013 reform, promoting the idea of private property rights for fisheries in general and the relevance of work of Eleanor Ostrom in particular.⁷⁹ This attempt by the Commission to break with past failures was duly rejected by fisheries lobby groups and their client Member States, leaving policy in limbo and setting low expectations for the new fisheries regime that would come into force in 2014.

⁷⁶ 2002 Fisheries Regulation

⁷⁷ European Commission, Green Paper on the Reform of the Common Fisheries Policy, COM (2009) 163 final, 4–5

⁷⁸ European Commission, Summary of the Impact Assessment accompanying the document ‘Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy’, SEC (2011) 892, 2

⁷⁹ E. Ostrom, *Governing the Commons* (Cambridge University Press, New York, 1990)

CURRENT PROSPECTS

The latest reform of the CFP led to a new Fisheries Regulation adopted at the end of 2013 and in force on 1 January 2014 to manage the conservation and exploitation of marine fish stocks and regulate the conduct of aquaculture.⁸⁰ A separate regulation deals with the common market in fishery and aquaculture products.⁸¹ A third regulation to provide financial supports for fisheries was adopted in 2014, leading to the new integrated European Maritime and Fisheries Fund (EMFF).⁸² Under the latest iteration of the CFP, management of the marine fish resource is required to ensure fish stocks are restored to sustainability and maintained in that state for the long-term. The objective is for environmentally sustainable fishing activities through precautionary management at maximum sustainable yield (MSY) exploitation rate,⁸³ with the intention that this will ensure and deliver ‘sustainable exploitation’, but this is to retain the status quo.⁸⁴ Exploitation is a term that has neither economic nor legal definition but is used in international instruments governing fisheries so that it has international recognition. Fisheries are routinely characterised as ‘resource use regimes’,⁸⁵ but on the Commission’s own analysis, this is an incorrect representation of European fisheries as many fisheries have been fished to the point of collapse. ‘Exploitation’ comprises a different notion from that of ‘use’ and has been linked by the FAO to the mechanisation of fishing fleets.⁸⁶ Once artisanal fishing becomes industrialised, extraction is able to move beyond

⁸⁰ 2013 Fisheries Regulation

⁸¹ Regulation (EU) No 1379/2013 of the European Parliament and of the Council on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, [2013] OJ L354

⁸² Regulation (EU) No 508/2014 of the European Parliament and of the Council on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council, [2014] OJ L149/1

⁸³ 2013 Fisheries Regulation, Article 2(2)

⁸⁴ *ibid.*, Part III: ‘Measures for conservation and sustainable exploitation of marine biological resources’

⁸⁵ A. Berghöfer, H. Wittmer, F. Rauschmayer, ‘*Stakeholder Participation in Ecosystem-based Approaches to Fisheries Management: A Synthesis from European Research Projects*’, (2008) 32 *Marine Policy* 243–253

⁸⁶ FAO, Fisheries and Aquaculture Department, ‘*The State of World Fisheries and Aquaculture 2006*’ (Rome, 2007) 42

user to exploitation and from there to overexploitation. Overexploitation of the fish resource may be the result of illegal, unregulated or unreported fishing, but may also be the result of regulated activity carried out within the terms of legal permissions, which is the situation in EU waters.

That the CFP has not succeeded in the restoration of fish stocks is hardly surprising for, at its most fundamental level, the CFP confuses cause with effect. It is not the fish stock that is the problem, but rather the ability of the fleet to extract more from the stock than is economically justified. Rather than controls on extraction volumes, the target of regulation needs to be the extractive capacity of the fleet itself. Attempting to rectify a problem by addressing its consequences is bound to end in failure. Since Gordon's seminal article,⁸⁷ the market failure that drives the over-expansion of fishing fleets has been well understood. Gordon further demonstrated that if this market failure could be addressed, the resultant equilibrium capacity of a fishing fleet would always be less than the ability of the resource to replenish itself, allowing the resource to recover, natural catastrophes excepted. Although the current regulatory regime lacks the ability to achieve this desirable outcome, other market-based instruments, some of which are already used by the EU, could produce the required result. Fishing fleets over-expand because they pay nothing for the resource itself; it is extracted free of charge as a gift of nature. If the cost of the resource were borne by the industry, the fleet would adjust to a sustainable economic equilibrium and the economic health of the industry would of itself ensure the biological health of the fishery.

ORGANISATION OF THE BOOK

This book is concerned with the legislative provisions governing the operation of EU marine fisheries and the effect of the changes introduced as a result of the 2013 Fisheries Regulation. It looks at the role of the Court of Justice in the interpretation of common fishery policy measure and principles of law operating in connection with it. The purpose of the book is to understand why, when the CFP generates such a welter of regulatory provisions and has undergone a series of major reforms, EU fisheries have declined from a position of an abundance to one of overfished stocks, many in a precarious state.

⁸⁷ H.S. Gordon, 'The Economic Theory of a Common Property Resource: The Fishery', (1954) 62 *Journal of Political Economy* 124–142

A fundamental obstacle to achieving the stated policy outcomes is the language of fisheries. The CFP expresses principles unique to the sector. They are not found elsewhere in EU law, and the Court of Justice has found no consonance between them and the general principles of EU law applying across all other sectors. The particular interpretation of fisheries principles by the Court has entrenched a right of extraction and left decision-makers with almost untrammelled discretion. A refusal to accept the public interest in the marine fish resource has rendered legislators immune from challenge and exacerbated the regulatory capture by industry, which the most recent reform of the policy has cemented.

Legislation imposes no responsibility for the state of marine fisheries on those exploiting the resource. An attempt has been made to integrate environmental protections into fisheries policy through a requirement that fisheries policy contribute to the achievement of good environmental status for the seas, but this is not a legally-binding objective. To overcome the problem of environmental degradation, the EU has begun to adopt market-based instruments and introduced a requirement that those accessing a common resource pay for its use. In this book, it is proposed that the user-pays principle be adopted to redress the degradation caused by industrial fishing activity, thereby internalising the external costs generated by the industrial fishing sector.

The book deals chiefly with the EU's main fishing ground in the North-East Atlantic and does not cover the Mediterranean or aquaculture. Despite frequent references to the artisanal sector and traditional fishing communities, their needs are largely ignored by legislation, so that a distinct regime would have to be adopted if their interests are to be promoted and protected.

Chapter 2 describes the framework of international legal instruments that have formed the basis of EU fisheries regulation. A raft of measures has been adopted by the international community to protect living marine resources and to promote environmental sustainability. However, the most significant impact of international law with regard to fisheries has been to entrench the right of States to exploit the living marine resource.

Chapter 3 deals with the evolution of the EU's CFP, which was initially a subset of agricultural policy and continues to be treated as a harvesting sector. The substantive reforms introduced by the latest Fisheries Regulation are outlined and discussed in the context of the new policy obligation to ensure that fishing is environmentally sustainable in the long term. Overfishing driven by overcapacity is a major threat to resource sustainability and, although each Member State is to be responsible for adjusting fleet capacity, incentives for capacity reduction that had been proposed in the 2013 CFP reform were not adopted. Attempts to

ensure the sustainability of the resource are continued through revised control measures, including the introduction of a discard ban and a requirement to fish at MSY. However, the legislation applies no pressure on the industry for husbandry of the resource. To support reforms, a new funding instrument has been established with aids to the fishing industry maintained, even though under EU law there is prohibition on aid for other commercial sectors. Hitherto, the provision of aid has not managed to reduce the catching power of the fleet to match the available resource. A system to deliver robust, evidence-based policy has not emerged, and scientific evidence is given no priority in decision-making. Instead, as under international law, the right to fish is protected and treated by the Court of Justice as fundamental.

Good governance principles have been introduced under the 2013 Fisheries Regulation, and these are discussed in Chapter 4. Following the direction under the TEU that the division of responsibilities at Union, national and local level should be clarified, the institutional structure of the CFP has been overhauled so that decision-making will operate at Union, regional, national and local level. To replace the centralised model that predominated under earlier policy, new cross-border, regionalisation has been introduced. However, absent from the reforms is any provision to protect the interests of coastal communities particularly dependent on fishing. Provision is made for appropriate stakeholder involvement through Advisory Councils with the idea that this will ensure greater commitment to CFP rules. No measure may be adopted without reference to the relevant Advisory Council but membership is weighted to give the majority voice to the fishing industry. This apparent democratisation of decision-making fails to impose safeguards to prevent regulatory capture and therefore has severe implications for actual democracy, competition and sustainability.

Chapter 5 considers the precautionary approach to fisheries management set by international law and which underpins the management of EU marine fisheries. The distinction between the precautionary principle, a concept recognised in EU law but not international law, and the precautionary approach is analysed. The precautionary principle operates to protect against risks to human health and only applies to the environment if human welfare may be compromised. Even though the precautionary approach is understood not to require certainty of damage before the adoption of measures to restrict fishing, in practice, it is only applied where there is certainty that damage will occur. The inability of the precautionary approach to ensure the sustainability of the resource is indicated by the intention to move to an ecosystem-based approach

which, it would seem, is expected to achieve good environmental status for the seas through the introduction of a MSY standard for extraction.

Sustainability in EU fisheries is the subject of Chapter 6. The CFP pursues sustainable exploitation, which is its basic principle along with the principle of relative stability. These two principles are unique to EU fisheries. Sustainable exploitation gives priority to socio-economic factors and is expressed in fish catch levels, which, routinely, have been set too high. Challenges to such decisions on ground of environmental protection have not been successful. Relative stability is a principle that guarantees fish shares to Member States and militates against the reduction in quotas. The language of precaution and sustainability as applied in EU fishery legislation and as judicially interpreted is a significant obstacle to change. Successive reforms have simply overlain these fundamental concepts without dismantling them. As a result, these concepts continue to determine the operation of fisheries.

Chapter 7 is concerned with integrating environmental protection into marine management. As the environment is a shared area of competence, progress relies on the Member States agreeing management plans. The EU has devised an IMP to overcome fragmented decision-making. To establish an environmental pillar for the Policy, the MSFD has been adopted. This Directive demands the achievement of good environmental status for seas by 2020 but progress towards this has been slow. One reason is the fact that the MSFD does nothing to integrate the CFP within its scope and subject the CFP to its broader environmental objectives. That issue aside, the optimum solution for achieving good environmental status under the MSFD would be the harmonisation of approaches between Member States. To this end, Marine Directors, senior officials appointed by the Member States, have recommended drawing on the experience of the Water Framework Directive (WFD) and the use of market-based instruments.

Over twenty years ago, the EU approved market-based instruments as mechanisms that would promote the responsible use of natural resources. Chapter 8 considers the use of market-based instruments, such as the user-pays principle in the WFD and the polluter-pays principle in the Environmental Liability Directive (ELD). These instruments demonstrate the potential of market-based instruments to deliver policy goals in situations of market failure. So successful is the mechanism, that the Commission proposed extending the existing financial security provisions of the Civil Liability Convention for Oil Pollution Damage (CLC) in a new EU scheme. These provisions were intended to persuade operators towards the prudent conduct of their affairs with a view to protecting the environment.

Chapter 9 considers the problem of externalities in EU fisheries. A new approach to fisheries sustainability is suggested, whereby this responsibility is transferred to operators. It is proposed that regulation of fisheries build on the experience of the regulation of the water and waste industries by employing user-pays market-based instruments. The establishment of a fund is suggested in order to transfer the responsibility for the sustainability of the fish resource from the regulator to the industry.

Chapter 10 gives concluding remarks on the change for sustainability.