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## Who Speaks for the Fish? The Tragedy of Europe's Common Fisheries Policy

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# Who Speaks for the Fish? The Tragedy of Europe's Common Fisheries Policy

## ABSTRACT

*The Common Fisheries Policy, enacted in 1983 as the European Union's primary overfishing regulation scheme, is widely regarded as a failure. Vast overexploitation in Europe's fisheries persists thirty years later, posing grave ecological consequences as well as economic devastation to Europe's fishing industry. In 2013, the EU overhauled the Common Fisheries Policy and enacted measures that oblige the EU and member states to support ecologically sustainable fishing practices, ban the harmful practice of discarding fish at sea, and give the member states more flexibility to tailor implementation to suit local conditions. While the 2013 reforms were momentous, those changes may not sufficiently address the tension inherent in open access fisheries between short-term economic interests of fishermen and long-term sustainability. This Note proposes that the proper solution to the lingering overfishing crisis in Europe requires expanding the role of Regional Advisory Councils such that they can standardize sanctions for violators across the region and restrict member states' ability to harmfully subsidize their fishing fleets. These changes would help level the playing field among competing fishermen, creating the regulatory conditions necessary to intercept the open access dynamic that perpetuates overfishing.*

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## I. INTRODUCTION

“Thirty years ago I worked fewer hours. I had less equipment, less technology. . . . But I caught more fish.”<sup>1</sup>

Fishing is a central feature of life in Europe.<sup>2</sup> Nearly every coastal European state has long depended on the fishing industry as a mainstay of its economy and as a provider of a major food source.<sup>3</sup> As such, the EU and its member states have committed themselves many times to conserving vital fisheries resources.<sup>4</sup> The goal of

1. David Jolly, *Facing Vote on European Subsidies, Fishermen Cling to Way of Life*, N.Y. TIMES, Oct. 23, 2013, at B6, [hereinafter Jolly, *Facing Vote on European Subsidies*] (quoting Gwenaël Pennarun, a fisherman from France), available at [http://www.nytimes.com/2013/10/23/business/international/as-eu-subsidies-vote-nears-fishermen-cling-to-way-of-life.html?\\_r=0](http://www.nytimes.com/2013/10/23/business/international/as-eu-subsidies-vote-nears-fishermen-cling-to-way-of-life.html?_r=0) [<http://perma.cc/KBC5-9GBW>] (archived Mar. 31, 2015).

2. See EUR. COMM’N, THE COMMON FISHERIES POLICY: A USER’S GUIDE 4 (2009) [hereinafter CFP USER’S GUIDE], available at [http://ec.europa.eu/fisheries/documentation/publications/pcp2008\\_en.pdf](http://ec.europa.eu/fisheries/documentation/publications/pcp2008_en.pdf) [<http://perma.cc/UKX5-EMQG>] (archived Jan. 21, 2015) (“Fishing is not only an economic activity, it is also a way of life. Closely tied to the unique characteristics of different marine ecosystems, it is central to the identity and prosperity of many coastal communities.”).

3. See *id.* at 6; *The Sea: How to Catch the Overfishermen*, ECONOMIST, Jan. 24, 2015, (“About 3 billion of the Earth’s inhabitants get a fifth or more of their protein from fish—which means that fish are a bigger source of the stuff than beef is.”).

4. See, e.g., Council Regulation 2371/2002, art. 1, 2002 O.J. (L 358/59) (EC) [hereinafter 2002 Common Fisheries Policy] (memorializing the EU’s commitment to

sustainability remained nominal, however, because European lawmakers falsely believed that fish populations were reliable and plentiful, and they regulated fishing practices under this misconception.<sup>5</sup> Regrettably, the absence of an effective conservation scheme has brought Europe's fisheries to a state of crisis.<sup>6</sup>

In 2009, it was estimated that 88 percent of Europe's fish stocks were being exploited beyond sustainable levels.<sup>7</sup> Thirty percent of fish stocks were being fished beyond safe biological limits, meaning they may not be able to replenish.<sup>8</sup> Still, in 2014, an estimated 75 percent of European fish stocks remained overfished.<sup>9</sup>

Several changes in the dynamics of the fishing industry contributed to the problem of overfishing in Europe. Fishing fleets have become increasingly mobile—European fishermen now face global competition in their fisheries where once the competition was only local.<sup>10</sup> The number of fishermen has greatly increased over the past several decades, and technological advances facilitated fishing on a massive industrial scale.<sup>11</sup> This significant growth in fishing effort has overwhelmed fisheries, as the rate at which fish are harvested has outpaced the fish populations' ability to reproduce, resulting in shrinking fish stocks.<sup>12</sup>

The ecological concerns associated with overfishing are grave.<sup>13</sup> However, not only does overfishing harm the viability of fish stocks and the marine environment more generally, it also threatens to

sustainable fishing); Rep. of the World Summit on Sustainable Dev., Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, U.N. Doc. A/CONF.199/20 (reflecting EU support for sustainable fishing).

5. See CFP USER'S GUIDE, *supra* note 2, at 6 (noting that past practices were not sustainable).

6. Christian Schwägerl, *Will Reform Finally End the Plunder of Europe's Fisheries?*, YALE ENV'T 360 (Feb. 28, 2013), [http://e360.yale.edu/feature/will\\_reform\\_finally\\_end\\_the\\_plunder\\_of\\_europes\\_fisheries/2623/](http://e360.yale.edu/feature/will_reform_finally_end_the_plunder_of_europes_fisheries/2623/) [<http://perma.cc/P5TW-F225>] (archived Apr. 1, 2015) (quoting Ólafur Ragnar Grímsson, president of Iceland, who called the Common Fisheries Policy “a colossal failure” that has led to “colossal destruction of fish stocks” over the last 40 years).

7. *Commission Green Paper on Reform of the Common Fisheries Policy*, at 7, COM (2009) 163 final (Apr. 22, 2009) [hereinafter *Green Paper*].

8. See *id.*

9. See Julia Fioretti & Greg Mahlich, *European Commission Cuts Fish Quotas for 10 Countries for Over-fishing*, REUTERS (Aug. 11, 2014, 9:47 AM), <http://www.reuters.com/article/2014/08/11/us-eu-fisheries-quotas-idUSKBN0GB1B120140811> [<http://perma.cc/REQ5-CSJC>] (archived Jan. 21, 2015).

10. See CFP USER'S GUIDE, *supra* note 2, at 6 (“Europe's fisheries were already highly ‘international’, with many fleets used to fishing a long way from home.”).

11. See Ali Morrow, *Overfishing, Pollution Leave Turkish Waters Bare*, REUTERS (Feb. 10, 2014, 1:32 AM), <http://www.reuters.com/article/2014/02/10/us-turkey-fish-idUSBREA1905B20140210> [<http://perma.cc/DHP2-32XR>] (archived Jan. 21, 2015) (discussing technological fishing advances).

12. See Fioretti & Mahlich, *supra* note 9 (discussing cuts to fish quotas to cure dwindling stocks).

13. See Morrow, *supra* note 11 (noting that the presence of an increased population of jelly fish points to serious ecological damage).

financially devastate the fishing industry.<sup>14</sup> As fish populations dwindle, fishermen must expend more effort and resources to compete with one another for a shrinking number of fish. Eventually, the profit from fishermen's catches will not cover the cost of fishing. One fisherman's account illustrates this distressing sequence of events: "My grandfather and father built that house on the hills with their fishing income . . . but I do not have the opportunity to build a house with my earnings, we work five times more and the fish is worth much less."<sup>15</sup>

It seems counterintuitive that fishermen would continue harvesting distressed fish populations when holding back to allow the fish stocks to regenerate could provide them with a reliable livelihood year after year.<sup>16</sup> Herein lies the open access problem, otherwise known as the tragedy of the commons—without an enforceable agreement among fishermen to conserve the common resource, they will overexploit the resource despite the fact that it is not in their long-term interests. The conflict driving this self-defeating behavior centers on the fishermen's short-term incentives. If a fisherman believes his competitors will continue to fish whether or not he conserves, then it makes sense to fish as much as possible now while there are still fish to catch.<sup>17</sup> So the group must collectively agree to conserve or overexploitation will perpetuate, but effective enforcement is just as essential as the conservation agreement itself. If fishermen believe that their competitors can successfully cheat on an agreement to conserve, they will be incentivized to cheat as well.

The Common Fisheries Policy is Europe's collective agreement to conserve its fish stocks.<sup>18</sup> Its stated objective is to facilitate use of marine resources in European fisheries that provides ecological, economic, and social sustainability.<sup>19</sup> In essence, this means aligning fishing effort with available fishing opportunities, such that fish stocks are able to remain at healthy biologic levels.<sup>20</sup> This would enable fishermen to maximize their long-term profits.<sup>21</sup> However,

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14. See CFP USER'S GUIDE, *supra* note 2, at 9 (discussing the most effective management of European fisheries).

15. Morrow, *supra* note 11.

16. See *Green Paper*, *supra* note 7, at 7 ("[F]ish populations could increase and generate more economic output if they were left for only a few years under less fishing pressure.").

17. See Shi-Ling Hsu, *What IS a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 109–15 (2005) (comparing tragedy of the commons issues in campaign finance and overfishing).

18. See generally 2002 Common Fisheries Policy, *supra* note 4, arts. 1–2 (detailing the EU's agreement to practice sustainable fishing).

19. See, e.g., *id.*

20. See Hsu, *supra* note 17.

21. See *id.*

despite its lofty goals, the Common Fisheries Policy ineffectively responds to overfishing.

The centerpiece of the Common Fisheries Policy was the annual Total Allowable Catch limitation, which caps the amount of a given fish species that may be caught.<sup>22</sup> The limits are set at the EU level, and that amount is then allocated among state governments in the form of “quotas.”<sup>23</sup> The states in turn allocate fishing opportunities among their domestic fleets.<sup>24</sup> Under the 2002 version of the Common Fisheries Policy, this process was infused with politics.<sup>25</sup> Ministers on the Fisheries Council,<sup>26</sup> a European Council configuration, negotiated on behalf of their domestic fishing fleets for quotas far in excess of scientific advice about sustainability—in some cases up to 48 percent higher than advised.<sup>27</sup> When the decision making process is susceptible to political pressure, representatives compete with one another on behalf of their domestic fishing fleets, perpetuating the open access dynamic at the governmental level.<sup>28</sup>

For a regulatory scheme to truly curb the overfishing epidemic, it must intercept the open access dynamic both among the fishermen and between the member states representing their fleets’ interests.<sup>29</sup>

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22. See generally 2002 Common Fisheries Policy, *supra* note 4, art. 1 (discussing fishing capacities).

23. See *id.* art. 20 (describing the process for allocating fishing opportunities).

24. See *id.*

25. See, e.g., David Symes, *Regionalising the Common Fisheries Policy: Context, Content and Controversy*, 11:6 MARITIME STUDIES, June 6, 2012, at 5, available at [www.maritimestudiesjournal.com/content/11/1/6](http://www.maritimestudiesjournal.com/content/11/1/6) [<http://perma.cc/8VTD-JH96>] (archived Apr. 1, 2015) (describing the quota setting process as “horse trading” that “[led] to compromises rather than effective decision making to tackle the fundamental problems facing the fishing industry”); *Euro MPs Back Large-Scale Fishing Reform to Save Stocks*, BBC NEWS (Feb. 6, 2013), <http://www.bbc.co.uk/news/world-europe-21352617> [<http://perma.cc/ZL6A-A8SP>] (archived Jan. 20, 2015) (describing the process for setting quotas as a negotiation-based process in which politics trumped scientific advice).

26. See *Agriculture and Fisheries Council Configuration (AGRIFISH)*, EUR. COUNCIL, <http://www.consilium.europa.eu/en/council-eu/configurations/agrifish/> (last visited Jan. 1, 2015) [<http://perma.cc/AH4U-8VWA>] (archived Apr. 2, 2015) (describing the role of the Fisheries Council).

27. See *Euro MPs Back Large-Scale Fishing Reform to Save Stocks*, *supra* note 25 (describing how powerful countries can stand in the way of reform); *Turning the Tide in Fisheries Policy?*, WORLD OCEAN REV., <http://worldoceanreview.com/en/world-ocean-review/2015/01/turning-the-tide-in-fisheries-policy/> (last visited Jan. 18, 2015) [<http://perma.cc/4CG4-R9J3>] (archived Jan. 21, 2015) (noting the desire of Fishing Ministers to keep high total allowable catches for their nations).

28. See *Green Paper*, *supra* note 7, at 7 (“Another important consequence of the vicious circle of overfishing, overcapacity and low economic resilience is high political pressures to increase short-term fishing opportunities at the expense of the future sustainability of the industry.”).

29. See, e.g., Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–47 (1968) (explaining that a collective, enforceable agreement to conserve a common resource is necessary to fix the disconnect between individuals’ self-defeating short-term interests and the long-term interests of the group); *Turning the Tide in*

That is what past versions of the Common Fisheries Policy failed to do.<sup>30</sup> Avenues were left open for representatives in the EU and member state governments to undermine sustainability in numerous ways.<sup>31</sup> Further, weak compliance and enforcement by member states defeated conservation efforts, inducing widespread disregard for the regulations by fishermen.<sup>32</sup>

The Common Fisheries Policy and its funding provisions underwent massive reforms in 2013 and 2014,<sup>33</sup> and the reformed Fisheries Policy has focused on returning fish stocks to sustainable levels by 2020.<sup>34</sup> These reforms prioritize decision making based on scientific advice, information gathering, reducing the size of European fishing fleets, supporting small scale fishing that is less environmentally destructive, and incentivizing fishermen to be more selective in their fishing practices.<sup>35</sup>

The reformed Common Fisheries Policy is a better conservation mechanism than the 2002 version. However, these changes may not be substantial enough, as the reforms do not effectively guard against cheating on the conservation agreement by member states or fishermen themselves. We should expect the open access dynamic to continue unless further changes are made.

This Note examines the new changes to both the Common Fisheries Policy and the European Maritime and Fisheries Fund. The examination questions whether these reforms will actually bring about real progress in ending overfishing in European waters. Section II of this Note provides a brief history of the Common Fisheries Policy and presents the obstacles facing EU lawmakers. Section III

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*Fisheries Policy?*, *supra* note 27 (showing member states defending the interests of their home fleets).

30. See *infra* Part II (describing the ways in which the 2002 version of the Common Fisheries Policy was flawed as a conservation mechanism). See generally *Green Paper*, *supra* note 7 (listing structural failings of the 2002 version of the Common Fisheries Policy and describing how representatives in EU institutions and member state governments promoted their national fleets' short-term economic interests at the expense of long-term sustainability).

31. See *Green Paper*, *supra* note 7 (indicating that the 2002 version of the Common Fisheries Policy had "imprecise policy objectives" which allowed Fisheries Ministers to set catch limits too high and subsidize already bloated fleets, exacerbating the overfishing crisis instead of prioritizing sustainability).

32. See *id.* at 13 ("Fisheries control has generally been weak, penalties are not dissuasive and inspections not frequent enough to encourage compliance.").

33. See generally Council Regulation 508/2014, 2014 O.J. (L 149/1) (EU) [hereinafter *European Maritime and Fisheries Fund*] (outlining 2014 reforms to European community fishing policies); Council Regulation 1380/2013, 2013 O.J. (L 354/22) (EU) [hereinafter *2013 Common Fisheries Policy*] (outlining reforms to existing European Council fishing policies).

34. See 2013 Common Fisheries Policy, *supra* note 33, *pmbl.*, para. 7 (stating the desire of the Council to see sustainable rates achieved as quickly as possible, but no later than 2020).

35. See *id.* arts. 2–3 (discussing the ways in which the EU is working to attain sustainable fishing practices).

addresses the relevant changes in European Union law that took place in the years since the 2002 version of the Common Fisheries Policy was enacted. Section IV analyzes the new reforms, and finds that they are insufficient to protect fish stocks and the economic viability of the fishing industry. Section V recommends several changes to the Common Fisheries Policy that could more adeptly halt the progression of overfishing in European waters.

## II. THE 2002 COMMON FISHERIES POLICY

The EU drafted the first Common Fisheries Policy in 1983 as a response to the United Nations Convention on the Law of the Sea (UNCLOS).<sup>36</sup> The Common Fisheries Policy was not originally designed to be the supra-national conservation regime that it now is.<sup>37</sup> Rather, the Common Fisheries Policy originated as a regulatory system attempting to preserve traditional free access fishing in the EU when changes in international law threatened to disrupt this practice.<sup>38</sup>

UNCLOS, adopted in 1982, acts as a “constitution for the seas.”<sup>39</sup> “[T]he Convention is an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean . . . .”<sup>40</sup> These issues relate to navigational rights, economic jurisdiction, and territorial sea limits among others.<sup>41</sup> Importantly, UNCLOS gave coastal UN States the right to manage fisheries within a 200 nautical mile Exclusive Economic Zone (EEZ) extending from their coastlines.<sup>42</sup>

As part of UNCLOS, several North Atlantic states announced that they would be extending their coastlines, thereby excluding EU member state vessels from waters where they had traditionally fished.<sup>43</sup> Concerned that this would harm EU member states’ fishing

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36. See CFP USER’S GUIDE, *supra* note 2, at 6, 26.

37. See *id.* at 6.

38. See *id.*

39. U.N. Division for Ocean Affairs and the Law of the Sea, The United Nations Convention on the Law of the Sea, A Historical Perspective (1998), [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm#Key%20provisions](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Key%20provisions) [<http://perma.cc/M3FV-7G32>] (archived Jan. 22, 2015).

40. *Id.*

41. See *id.*

42. See United Nations, Convention on the Law of the Sea: Agreement Relating to the Implementation of Part XI of the Convention, pt. V, arts. 56–57 (Dec. 10, 1982), [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm) [<http://perma.cc/A2ST-BC8A>] (archived Jan. 21, 2015) (creating EEZs and giving states certain sovereign rights in them).

43. See ROBIN CHURCHILL & DANIEL OWEN, THE EC COMMON FISHERIES POLICY 6–7 (2010) (“Canada, Norway, and the USA all announced by mid-1976 that



industries and that exclusion from remote fisheries would put more pressure on European fisheries, the EU decided that it must also extend its coastlines and claim the exclusive economic rights to regulate fishing practices within those boundaries.<sup>44</sup>

Because extending individual member states' territorial waters would disrupt the free access fishing tradition in fisheries shared by member states—fishermen from one member state could be excluded from fisheries falling within the EEZ of another member state—the EU codified an agreement on free mutual access within the member states' EEZ's by drafting the Common Fisheries Policy.<sup>45</sup> “For purposes of fisheries management and exploitation, the EEZs of all coastal member states were merged to form a single EU fishing zone,” which would be centrally managed by the EU.<sup>46</sup> At its inception, the cohesive regulatory scheme for management in shared fisheries was focused on mutual access and “preserv[ation] [of] the diversity which characterised the traditional fabric of the European industry.”<sup>47</sup> In short, they wanted to maintain the status quo.

The Policy's decision-making framework, as outlined in the EU's foundational treaties, largely centralized authority for fisheries management at the EU level.<sup>48</sup> The EU was empowered to set fisheries management policy that was legally binding on the member states.<sup>49</sup> The EU also had the exclusive power to negotiate with third countries (states outside the EU) for access to European fisheries, making third countries' fleets subject to EU fisheries management regulations as well.<sup>50</sup> So the EU now had the authority to regulate fishing effort for all vessels across its fisheries, and the overarching scheme the EU employed focused on limiting fishing effort to align it with available fishing opportunities.<sup>51</sup>

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they would extend their fisheries jurisdiction from their existing 12 nm limits to 200 nm from the beginning of 1977.”)

44. See *id.* (highlighting the Commission's response).

45. See CFP USER'S GUIDE, *supra* note 2, at 6.

46. Symes, *supra* note 25, at 3.

47. CFP USER'S GUIDE, *supra* note 2, at 6.

48. See, e.g., *Green Paper*, *supra* note 7, at 10 (“The current decision-making framework of the CFP does not distinguish principles from implementation: all decisions are taken in Council at the highest political level.”).

49. See CHURCHILL & OWEN, *supra* note 43, at 9–10 (defining the objective of the Common Fisheries Policy “as being ‘to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions’” (footnote omitted)).

50. See *id.* at 7 (“Thirdly, the EC (and not individual Member States) should negotiate agreements with third States that would permit . . . some third States' vessels that had traditionally fished within what were to become Community waters to continue to do so.”).

51. See *id.*

Reassessment of the EU's fisheries management policy<sup>52</sup> was largely spurred by the 2002 World Summit on Sustainable Development in Johannesburg, South Africa, during which the European Community (and member states in their individual capacities) committed itself to take the necessary steps to bring depleted fish stocks to sustainable levels by 2015.<sup>53</sup> In the same year, the Common Fisheries Policy underwent significant reforms intended to facilitate achievement of that goal. However, the 2002 version of the Common Fisheries Policy represented only piecemeal reform, not the shift in focus that was needed to confront the growing overfishing crisis.<sup>54</sup> In fact, the 2002 version of the Policy has even been criticized for exacerbating the problem, primarily through setting unrealistic catch limits and incentivizing industrial fishermen to overexploit fish stocks.<sup>55</sup>

Total Allowable Catch limitations, which act as a cap on the amount of a fish species that may be caught in a given year, were the most prominent of fishing effort controls employed under the 2002 Common Fisheries Policy. This mechanism for allocating fishing opportunities to each member state often thwarted the goal of conservation. The Fisheries Council, which has twenty-seven members who represent the interests of the member state governments and the fishing industry, was empowered to negotiate and vote on the quota scheme each year.<sup>56</sup> The quota-setting process has been likened to "horse trading,"<sup>57</sup> and Fisheries Ministers' concerns about pleasing the highly influential fishing lobby regularly trumped concerns about sustainability. Indeed the political cost of standing up to the fishing industry is great. Some lawmakers even say that the fishing industry is "more [politically] important than any other industry."<sup>58</sup> When catch limitations are set by people who

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52. See CFP USER'S GUIDE, *supra* note 2, at 6 (detailing the necessity of an approach "focus[ing] on promoting the long-term sustainability of the European fishing industry").

53. See World Summit on Sustainable Development, *supra* note 4, ¶ 31(a).

54. CFP USER'S GUIDE, *supra* note 2, at 6–7 (positing that EU fisheries "continue to be characterized by short-term decision-making and short-sighted behaviour" even after the 2002 reforms).

55. See, e.g., Schwägerl, *supra* note 6 (indicating that the overfishing crisis was largely brought about by extraordinary subsidies to the fishing industry and catch limitations implemented under the Common Fisheries Policy).

56. See Council Regulation No. 2371/2002, *supra* note 4, art. 20 (delineating the procedures the Commission should undertake regarding the allocation of fishing opportunities).

57. See Symes, *supra* note 25, at 5 (describing the quota setting process as "horse trading" that led to "compromises rather than effective decision making to tackle the fundamental problems facing the fishing industry").

58. See, e.g., Kate Wilson, Mar Cabra & Marocs García Rey, *EU Subsidies Fuel Spain's Ravenous Fleet*, EUOBSERVER (Oct. 3, 2011, 9:29 AM), <https://euobserver.com/>

directly represent fishing industry interests through a competitive, negotiation-based process it is easy to imagine how the open access dynamic interferes with government efforts to conserve the common resource.

Further, there were not effective provisions installed in the Common Fisheries Policy to counteract this political dynamic. The Fisheries Council was not bound to adhere to scientific advice regarding sustainable catch limits, and having a yearly vote on the limits further encouraged focus on short-term considerations as opposed to sustainability. While there were some limitations on the decision-making authority of the Fisheries Council, they were largely ineffectual. The Fisheries Council was constrained by the precautionary principle<sup>59</sup> as well as the principle of relative stability.<sup>60</sup> The principle of relative stability dictated that the member states' fishing quotas should be relatively consistent over time so as not to abruptly disturb their economies—a principle in tension with the goal of conservation and the precautionary principle.<sup>61</sup> Since, there was no clear hierarchy of policy objectives that bound the Fisheries Council, the principle of relative stability was regularly prioritized over conservation, leading to catch limits that were far too high.<sup>62</sup>

After the 2002 law was in effect for some time, it became clear that a paradigm shift was necessary to reverse the progression of overfishing. The Green Paper on Reform of the Common Fisheries Policy, published by the EU Commission in 2009, identified five structural failings of the 2002 Common Fisheries Policy. The Commission cited overcapacity of fishing fleets, imprecise policy objectives, a decision making system that encouraged short-term

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environment/113722 [<https://perma.cc/MB8W-FC5D>] (archived Apr. 9, 2015) (quoting Valérie Lainé, former EU head of fisheries control).

59. The precautionary principle states that an action having unknown or disputed effects should be avoided. The precautionary principle is applied when 1) “scientific data are insufficient, inconclusive or uncertain” as to the potential risks and 2) “where a preliminary scientific evaluation shows that potentially dangerous effects for the environment and human, animal or plant health can be reasonably feared.” *Glossary: Precautionary Principle*, EUROPA, [http://europa.eu/legislation\\_summaries/glossary/precautionary\\_principle\\_en.htm](http://europa.eu/legislation_summaries/glossary/precautionary_principle_en.htm) (last visited Mar. 17, 2015) [<http://perma.cc/QY94-CTAH>] (archived Apr. 7, 2015).

60. See Alexander Proelss & Katherine Houghton, *The EU Common Fisheries Policy in Light of the Precautionary Principle*, 70 OCEAN & COASTAL MGMT. 22, 22–24 (“[U]nder the auspices of ‘relative stability’ . . . it is highly unlikely that an individual Member State would take up an unpopular action to reduce TACs as this would not only impact its own fishing quota but would also reduce the quotas of the other Member States at the same time.”).

61. See *id.* at 23 (“Fisheries policy therefore occupies a difficult gray area between natural resources exploitation and biodiversity conservation.”).

62. See *Green Paper*, *supra* note 7, at 9 (“Social objectives such as employment have often been invoked to advocate more generous short-term fishing opportunities: the result has always been to further jeopardise the state of the stocks and the future of the fishermen who make a living out of them.”).

planning, lack of stakeholder responsibility, poor compliance, and a lack of political will to ensure compliance as the chronic problems of the 2002 version of the Common Fisheries Policy.<sup>63</sup>

Fleet overcapacity was a fundamental problem of the 2002 law.<sup>64</sup> “Overcapacity” means that fishing fleets are oversized relative to the fishing opportunities available to them both in terms of the number of vessels and the pressure they exert on fish populations.<sup>65</sup> Under the 2002 Common Fisheries Policy, the fleets were able to operate at what would otherwise be unprofitable overcapacity because the industry was buoyed up by subsidies flowing from the EU as well as member states.<sup>66</sup> These subsidies made vessels artificially profitable, encouraging them to continue fishing overexploited fish stocks.<sup>67</sup>

In the wake of the 2002 Common Fisheries Policy enactment, international organizations like the UN and the World Trade Organization considered the role of subsidies in the overfishing crisis.<sup>68</sup> They determined that subsidies which enhance the capacity of fishing fleets were harmful contributors to overfishing, distorting the balance between the size of fish stocks and the size of the fleets harvesting them.<sup>69</sup> Under the 2002 Common Fisheries Policy, the

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63. See *id.* at 8.

64. See, e.g., *id.* (including “a deep-rooted problem of fleet overcapacity” as one of the five structural failings of the policy).

65. See *id.* (“Overall, the European fleets remain far too large for the resources available . . .”); *Overcapacity*, FISHERIES SECRETARIAT, <http://www.fishsec.org/the-issue/management-failures/overcapacity/> (last updated June 17, 2014) [<http://perma.cc/87VF-BMRT>] (archived Jan. 22, 2015) (defining and explaining the meaning of overcapacity).

66. See European Parliament Directorate-General for Internal Policies, *Global Fisheries Subsidies* 9, IP/B/PRECH/IC/2013-146 (Oct. 2013) [hereinafter *Global Fisheries Subsidies*], available at [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513978/IPOL-PECH\\_NT\(2013\)513978\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513978/IPOL-PECH_NT(2013)513978_EN.pdf) [<http://perma.cc/7EGC-M4VV>] (archived Jan. 22, 2015) (“Subsidies that reduce the cost of fisheries operations and those that enhance revenues make fishing enterprises more profitable than they would otherwise be.”).

67. See *id.* at 9–12 (“In the 1950s and 1960s, the more subsidies you gave, the more fish you got, but things have changed: the resource base is too diminished for all these fishing boats to turn a profit, and the subsidies, far from having the effect they had earlier, now contribute to overfishing, i.e., more fish being caught than should be according to the biology of the fish stock.”).

68. U.N. Food & Agriculture Organization [FAO], Report of the Expert Consultation on Identifying, Assessing and Reporting on Subsidies in the Fishing Industry, Dec. 3–6, 2002, 7–8, FIPP/R698 (2003) (recommending further research into the “long-term effects of subsidies” and “the effects of government inaction”); World Trade Organization [WTO], Hong Kong Declaration, Dec. 18, 2005, WT/MIN(01)/DEC/1 (encouraging parties to the agreement to continue to improve their environmental and trade policies).

69. See, e.g., sources cited *supra* note 68; *Global Fisheries Subsidies*, *supra* note 66, at 23–25 (“Capacity-enhancing subsidies are defined as subsidy programs that lead to disinvestments in natural capital assets . . . Excessive disinvestment can lead in some cases to outright destruction of the natural resources.”).

European Commission acknowledged that EU subsidies “support a fleet that is two to three times as large as is ecologically or commercially sustainable.”<sup>70</sup> Fuel subsidies alone, “in the form of direct payments and diesel-tax exemptions, amount to hundreds of millions of euros of additional aid each year.”<sup>71</sup> Frequently, these subsidies were enacted because of social or political pressure from the fishing industry.<sup>72</sup>

EU institutions appeared to prioritize the interests of industrial fishing vessels over the Community at large by continuing to subsidize its already oversized fleets.<sup>73</sup> These subsidies kept vessels like bottom trawlers, which are so environmentally destructive that they “ha[ve] been compared to ‘driving a tractor across the seabed,’ out of bankruptcy.”<sup>74</sup> The political influence of the fishing lobby on subsidization practices is evident at the member state level too.<sup>75</sup> For instance, Spain, one of the highest-subsidizing member state governments in the EU, enacted a 60 percent increase in fuel subsidies in 2005 because local fishers pressured their lawmakers by blockading Mediterranean ports.<sup>76</sup>

Further, the subsidies were generally not cost effective. “Across the EU, the [fishing] sector often costs taxpayers more than it produces.”<sup>77</sup> A study “by the environmental group Oceana” reported that “at least eight countries received more money in public fisheries aid in 2009 than the value of their landed fish.”<sup>78</sup> So in essence, EU taxpayers are paying twice for their fish.

The political influence of the fishing lobby also led to poor implementation and enforcement of Fisheries Policy objectives by member states.<sup>79</sup> Spain has the largest fishing industry in the EU, it receives the most EU funding of any member state, and yet industrial fishing companies “systematically flout the rules while officials overlook fraud.”<sup>80</sup> “The European Court of Justice . . . has found

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70. Jolly, *Facing Vote on European Subsidies*, *supra* note 1.

71. *Id.*

72. *See id.*

73. Schwägerl, *supra* note 6 (“One of Damanaki’s first observations upon taking office was that the European governing institutions were not responding to the public outcry about over-fishing but were largely concerned with making the owners of large, industrial fishing vessels happy.”).

74. *See* Jolly, *Facing Vote on European Subsidies*, *supra* note 1.

75. *See, e.g.*, Wilson, *supra* note 58 (describing the influence of fishing subsidies on Spain’s fishing industry).

76. *See* Sumaila et al., *Fuel Price Increase, Subsidies, Overcapacity, and Resource Sustainability*, 65 ICES J. MARINE SCI. 832, 835 (2008).

77. Wilson, *supra* note 58.

78. *Id.*

79. *See Green Paper*, *supra* note 7, at 14 (“Fisheries control has generally been weak, penalties are not dissuasive and inspections not frequent enough to encourage compliance.”).

80. Wilson, *supra* note 58.

Spain guilty three times of failing to implement” the Common Fisheries Policy objectives.<sup>81</sup> “Spain has refused to enforce catch limits, police its fleet or impose adequate punishment . . . .”<sup>82</sup> Fisheries authorities claim that the gargantuan size of Spain’s fleet makes enforcement expensive and cumbersome, but still the country conducts significantly fewer inspections at their ports than countries with far smaller fleets, so that defense is unconvincing.<sup>83</sup>

There was a lack of effective checks at the EU level to ensure that the member states were effectively implementing and enforcing Common Fisheries Policy objectives, without which the fishing industry was able to essentially control domestic fisheries policy.<sup>84</sup> Environmentalists have called for harsher punishments, including withdrawal of EU funding, for member states that do not implement and enforce the objectives of the Common Fisheries Policy faithfully.<sup>85</sup>

In addition to the lack of political will to enforce conservation regulations, effective enforcement was complicated by practical impediments to catching violators.<sup>86</sup> Illegal fishing is a widespread practice.<sup>87</sup> In fact, one research group estimates that twenty percent of fish sold worldwide were caught illegally.<sup>88</sup> “[T]rying to stop this illegal trade has been more or less futile. The oceans are vast. Navies and coastguard patrols are small. Even finding those who are up to no good has been hard.”<sup>89</sup> Further, there appears to be an element of arbitrage at play—fishermen go to ports with lenient regulations and enforcement to land their illegally caught fish.<sup>90</sup> For instance the Spanish port of Las Palmas on the Canary Islands is notorious for lax

81. *Id.*

82. *Id.*

83. *See id.* (“Fishing secretary Villauriz said control in Spain is expensive because of the sheer size of its industry - more than 10,000 fishing boats, 3,084 miles of coastline and 47 major ports. . . . The Spanish Ministry of Environment, Agriculture and Fisheries told ICIJ that inspections have nearly doubled since 2004 to 9,323 in 2010. That’s still far from the number of inspections other countries are carrying out - the United Kingdom logged nearly 50,000 inspections in 2004.”).

84. *See id.*

85. *See* Schwägerl, *supra* note 6 (citing Greenpeace campaigner Thilo Maack on the issue of coordinated enforcement of fisheries laws).

86. *See Green Paper, supra* note 7, at 13. (“Fisheries control has generally been weak, penalties are not dissuasive and inspections not frequent enough to encourage compliance.”); *How to Catch the Overfishermen, supra* note 3 (“Governments, in thrall to fishing lobbies which are more concerned with making money today than preserving fish stocks for the future, set unrealistic quotas, and there is a lot of illegal fishing too, conducted without permission in controlled waters.”).

87. *See How to Catch the Overfishermen, supra* note 3.

88. *See id.* (“The Pew Charitable Trusts, an American research group, estimates that one fish in five sold in a shop or served in a restaurant has been caught illegally.”).

89. *Id.*

90. *See Combating Illegal Fishing: Dagnet, ECONOMIST*, Jan. 24, 2015.

policing and illegal catch regularly enter the EU there.<sup>91</sup> Adding to its sins, the Spanish government continued to subsidize fishermen who were identified and fined for illegal fishing.<sup>92</sup>

Another problematic feature of the 2002 Common Fisheries Policy encouraged fishing vessels to essentially throw away large numbers of unwanted fish. The 2002 Common Fisheries Policy prohibited fishermen from landing catch that did not match legal “Minimum Landing Sizes (MLS),” “Total Allowable Catch Limitations,” or designated catch compositions.<sup>93</sup> The Policy did not, however, prohibit throwing these unwanted fish overboard—a practice called “discarding.” Consequently, fishermen had “little incentive to fish more selectively” because they could simply discard the fish caught that they could not legally land.<sup>94</sup> “[D]iscarding can result in total catches far exceeding the recommended level of removals from stocks, threatening the sustainability of fisheries.”<sup>95</sup> Discarding leads to vast waste of marine resources,<sup>96</sup> contributes to fish mortality,<sup>97</sup> and has been criticized as morally reprehensible.<sup>98</sup> When the discarded fish are juveniles, the practice is particularly harmful, as this limits the ability of the stocks to replenish themselves.<sup>99</sup>

The Green Paper also indicated that there was widespread dissatisfaction with the top-down fisheries management structure employed under the 2002 version of the Common Fisheries Policy.<sup>100</sup>

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91. Wilson, *supra* note 58 (“One of Spain’s most widely criticised shortfalls is policing its port of Las Palmas on the Canary Islands off the Moroccan coast. Illegal shipments of fish plundered from West African waters regularly filter into the EU through the port, according to multiple investigative reports.”).

92. *See id.* (“ICIJ reviewed every court case adjudicated since 2000 in which subsidised companies unsuccessfully appealed fines imposed by the Spanish government. In more than 80 percent of cases in which the appellant could be identified, firms continued to receive subsidies after the court had upheld penalties, the analysis shows.”).

93. *See* Harriet M. Condie, Alastair Grant, & Thomas L. Catchpole, *Does Banning Discards in an Otter Trawler Fishery Create Incentives for More Selective Fishing?*, 148 FISHERIES RES. 137, 137 (2013).

94. *See id.*

95. *Id.* (citation omitted).

96. *See* Schwägerl, *supra* note 6 (“[D]iscarding[] has led to the waste of 1.7 million tons per year, almost a quarter of the total catch, according to EU estimates.”).

97. *See id.*

98. *See, e.g., EU Faces Battle Over Fish Quotas*, BBC NEWS (Dec. 18, 2008, 3:27 PM), <http://news.bbc.co.uk/2/hi/europe/7789182.stm> [<http://perma.cc/Q76S-G2RE>] (archived Jan. 22, 2015) (“Critics say the practice of discarding is ridiculous and morally reprehensible, as many fish stocks are in decline and fisheries are shrinking.”).

99. *See* Condie, *supra* note 93, at 137.

100. *See Green Paper, supra* note 7, at 10 (“[T]he CFP is regulated through extremely detailed Council regulations that leave very little flexibility in implementing them. This highly unsatisfactory situation is without doubt the main reason why the CFP is criticised by stakeholders.”).

The decision-making framework did not “distinguish principles from implementation: all decisions [were] taken in Council at the highest political level. This . . . resulted in a focus on short-term considerations at the expense of the longer-term environmental, economic and social sustainability of European fisheries.”<sup>101</sup> This top-down management approach was ill-suited to the conditions of open access fishing in Europe’s diverse fisheries.<sup>102</sup> Giving implementation authority to the EU was inefficient and unpopular—stakeholders criticized this structure for being inflexible and micromanaging at a level that is far removed from the fisheries themselves.<sup>103</sup>

The rhetoric in the Green Paper reflected a growing public opinion that marine governance was best accomplished on a regional basis rather than on a nation-state basis—which may not represent the complete interests involved or the boundaries of the ecosystem affected by a nation-state’s jurisdiction.<sup>104</sup> The regional approach to fisheries management was introduced to some extent in the 2002 law through the establishment of Regional Advisory Councils (RACs).<sup>105</sup> The RACs give stakeholders—such as fishing industry professionals, environmental organizations, and consumer organizations—the opportunity to influence fisheries management policy.<sup>106</sup> Their role was strictly advisory, however, as the RACs were “not part of the formal decision-making process.”<sup>107</sup>

Despite the advent of RACs, the fisheries management framework under the Common Fisheries Policy was still very much confined to the legislative and enforcement mechanisms of the EU and the member states, complicating regional management of shared

101. *Id.* (“The current decision-making framework of the CFP does not distinguish principles from implementation: all decisions are taken in Council at the highest political level. This has resulted in a focus on short-term considerations at the expense of the longer-term environmental, economic and social sustainability of European fisheries.”).

102. *See id.* at 11.

103. *See id.* at 10 (“This highly unsatisfactory situation is without doubt the main reason why the CFP is criticised by stakeholders. ‘Brussels’ – in fact the Council of Fisheries Ministers – is seen as deciding on each and every detail of the implementation policy.”).

104. L. van Hoof & J. van Tatenhove, *EU Marine Policy on the Move: The Tension Between Fisheries and Marine Policy*, 33 *MARINE POLY* 726, 727 (2009) (“Politics and policy are no longer framed within the nation-state model alone, but within a diversity of society-centred forms of governance. Governing is increasingly a shared responsibility of state, civil society and market actors.”).

105. *See Regional Advisory Councils: Fact Sheet*, *EUROPA* 1, 1 (2008), [http://ec.europa.eu/fisheries/documentation/publications/cfp\\_factsheets/racs\\_en.pdf](http://ec.europa.eu/fisheries/documentation/publications/cfp_factsheets/racs_en.pdf) [<http://perma.cc/86TH-P5ED>] (archived Apr. 9, 2015) (“The Regional Advisory Councils (RACs) were created as part of the 2002 reform of the Common Fisheries Policy. They were established to give stakeholders . . . a vehicle through which to feed recommendations into CFP policy developments.”).

106. *See id.*

107. *Id.*



fisheries. Accordingly, much of the debate surrounding reform of the Common Fisheries Policy has centered on whether centralized or decentralized management is appropriate.<sup>108</sup> The Green Paper contemplated changing the division of authority, devolving more authority to local organizations and governments to give them greater flexibility in tailoring regulations to the varying needs of the marine regions the rules target.<sup>109</sup>

### III. THE CHANGING LANDSCAPE OF EUROPEAN UNION LAW

During the years between enactment of the 2002 version of the Common Fisheries Policy and the new reforms, there were several significant changes in European Union Law that relate to fisheries management. In 2007 and 2008, respectively, the EU passed the Integrated Maritime Policy<sup>110</sup> and the Marine Strategy Framework Directive,<sup>111</sup> recognizing the need for a regulatory framework based on the regional seas instead of centralized authority in Brussels.<sup>112</sup>

The Commission observed that the EU was at a “crossroads” in its relationship with the oceans, and concluded that the challenges must be met with a cohesive policy framework that addresses all matters relating to Europe’s oceans and seas.<sup>113</sup> The Integrated Maritime Policy provides such “a coherent policy framework that will allow for the optimal development of all sea-related activities in a sustainable manner.”<sup>114</sup> The Commission set up a maritime policy function, increasing coordination between its maritime-related policy proposals such as those relating to maritime transport, fisheries, and energy.<sup>115</sup> While the Integrated Maritime Policy does not require the

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108. See Tim Gray & Jenny Hatchard, *The 2002 Reform of the Common Fisheries Policy’s System of Governance—Rhetoric or Reality?*, 27 MARINE POL’Y 545, 545–46 (2003) (asserting that the CFP has been unsuccessful due to its top-down governance structure).

109. See *Green Paper*, *supra* note 7, at 8 (citing the use of “a framework that does not give sufficient responsibility to the industry” as a key failing of the 2002 reforms).

110. See generally *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 (Oct. 10, 2007) [hereinafter *Integrated Maritime Policy*].

111. See generally Directive 2008/56/EC, of the European Parliament and of the Council of 17 June 2008 Establishing a Framework for Community Action in the Field of Marine Environmental Policy, 2008 O.J. (L 164) [hereinafter *Marine Strategy Directive*].

112. Symes, *supra* note 25, at 10.

113. See *Integrated Maritime Policy*, *supra* note 110, at Executive Summary.

114. van Hoof & van Tatenhove, *supra* note 104, at 729–30 (footnote omitted).

115. See *Integrated Maritime Policy*, *supra* note 110, § 3.1 (explaining how the integrated approach to maritime governance will impact Commission policy proposals).

member states to apply an integrated approach in their domestic laws, it notes that many member states were already doing so.<sup>116</sup> The Commission recognized the important role that stakeholders play in bringing problems and policy suggestions to the attention of lawmakers through mechanisms such as RAC's.<sup>117</sup>

The Marine Strategy Directive is the "environmental pillar" of the Integrated Maritime Policy.<sup>118</sup> It establishes marine regions and sub-regions to be managed by member states in order "to achieve environmentally healthy marine waters by 2021."<sup>119</sup> The directive has strictly environmental objectives,<sup>120</sup> unlike the Common Fisheries Policy which lists ecological, economic, and social sustainability as its objectives.<sup>121</sup> Further, the Marine Strategy Directive primarily empowered the member states, not the EU, to take action cooperatively; and it left wide latitude for the member states to implement the policy's objective as they saw fit.<sup>122</sup> The Marine Strategy Directive is meant to compliment the Common Fisheries Policy under the Integrated Maritime Policy, as "all matters relating to Europe's oceans and seas are interlinked, and . . . sea-related policies must develop in a joined-up way if we are to reap the desired results."<sup>123</sup> In fact, the Integrated Maritime Policy directs the Commission to take action ensuring that the Common Fisheries Policy "reflects the ecosystem-based approach."<sup>124</sup>

In 2007, the EU adopted the Treaty of Lisbon, which made major changes to the EU founding documents: the Treaty on European Union and the Treaty for the Functioning of the European Union.<sup>125</sup> Included in the Treaty of Lisbon were changes to the division of authority over fisheries management, providing avenues for major reform of the Common Fisheries Policy.<sup>126</sup>

116. *Cf. id.*

117. *See id.*

118. *See van Hoof & van Tatenhove, supra* note 104, at 730.

119. *Id.* at 729.

120. *See id.* at 729 ("The consultation process prior to the publication of the MSD did not aim at balancing multiple objectives of ecological, economical and societal but centered upon consensus 'on the magnitude of threats facing the marine environment . . .'" (footnote omitted)).

121. *See* 2002 Common Fisheries Policy, *supra* note 4, art. 2(1).

122. *See van Hoof & van Tatenhove, supra* note 104, at 729 ("At member state level the implementation of the MSD can differ pending on the local institutional and governance setting and traditions.").

123. *See Integrated Maritime Policy, supra* note 110, Executive Summary.

124. *See id.* § 4.1.

125. *See generally* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306).

126. *See* Consolidated Versions of the Treaty on the Functioning of the European Union arts. 3(1)(d), 43(2), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

The first important change gives the European Parliament, whose members represent the interests of European citizens, a foothold to more actively participating in the legislative process for limiting fishing effort.<sup>127</sup> Article 43(2) of the Treaty for the Functioning of the European Union applies the ordinary legislative procedure to “provisions necessary for the pursuit of the objectives” of the Common Fisheries Policy, fully involving the European Parliament in the decision making process.<sup>128</sup> While setting Total Allowable Catch limitations and allocating funds are governed by Article 43(3), which is subject to a special legislative procedure that does not involve the European Parliament,<sup>129</sup> the European Commission has interpreted Article 43(2) to apply to all fisheries decisions apart from establishing yearly fishing opportunities.<sup>130</sup>

Because the European Parliament has many more members than the Fisheries Council, which has twenty-seven members, and because it represents the interests of European citizens as opposed to member state governments and the fishing industry, giving more authority to this legislative body could dampen the political influence of the fishing lobby. Leading up to 2013, it was evident that involving the European Parliament was a promising change in the broken Fisheries Policy decision-making process.<sup>131</sup> Conservation groups looked to the European Parliament “to hold the line and fight hard in the negotiations” against members of the Fisheries Council who “are greatly to blame for the current state of EU fisheries.”<sup>132</sup> Members of the European Parliament like Ulrike Rodust took the reins as champions of conservation, partnering with Maria Damanaki, the EU Commissioner for Maritime Affairs and Fisheries to push for “ambitious reform.”<sup>133</sup>

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127. See *id.* art. 43(2).

128. *Id.*

129. See *The Impact of the Lisbon Treaty on EU Fisheries Policy - An Environmental Perspective*, CLIENTEARTH, § 13 (2010) [hereinafter *Impact of the Lisbon Treaty*], <http://www.clientearth.org/reports/clientearth-briefing-lisbon-treaty-march-2010.pdf> [<http://perma.cc/2CAZ-JN7E>] (archived Apr. 9, 2015) (“However, compared to TACs for example, fishing effort regulation could be seen as more uncertain and indirect, and could be argued to fall more naturally within the objectives of Article 43(2), TFEU.”).

130. See *Green Paper*, *supra* note 7, at 10 (“Under the Lisbon Treaty, the co-decision procedure (under which the Council and the European Parliament take decisions together) would apply to all fisheries decisions apart from establishing yearly fishing opportunities.”).

131. See Schwägerl, *supra* note 6.

132. See *id.* (quoting Uta Bellion, director of the European Maritime Program of the Pew Charitable Trust).

133. See *id.* (“[S]erious reforms are being launched, thanks to Maria Damanaki—a crusading EU Commissioner for Maritime Affairs and Fisheries—and alarm and outrage in the European Parliament.”).

The second significant change in fisheries governance brought about by the Treaty of Lisbon is related to the balance of authority over fisheries regulations between the EU and the member states.<sup>134</sup> In Article 3(1)(d) the Treaty confers exclusive competence over “the conservation of marine biological resources under the common fisheries policy” to the EU.<sup>135</sup> This means that the EU has complete authority to promulgate regulations related to conservation, subject to the principle of proportionality.<sup>136</sup> It also gives the EU and member states shared competence over fisheries more generally, allowing member states to enact regulations when the EU has not preempted their action with its own regulatory scheme on a certain matter.<sup>137</sup> Because sustainability is the chief objective of the Common Fisheries Policy, this provision has the potential to confer a great deal of exclusive authority to the EU.<sup>138</sup>

The changes ushered in by the Treaty of Lisbon provide the tools to institute the kind of conservation agreement necessary to interrupt the open access dynamic in Europe’s shared fisheries. By exercising a greater degree of exclusive competence over fisheries management the EU institutions could, for instance, create a uniform set of fishing gear regulations for all vessels fishing in common fisheries, removing opportunities for member states to undermine the goal of conservation with lenient domestic regulations. However, while a centralized decision maker could potentially further conservation efforts in this way, this priority must be weighed against concerns that a top-down approach could be ill-suited to deal with the needs of highly diverse fisheries and fishing communities.<sup>139</sup> Indeed striking the right balance between centralized and localized authority over fisheries management was one of the greatest challenges in crafting the new Common Fisheries Policy.

#### IV. ANALYSIS OF THE 2013 REFORMS

The 2013 reforms to the Common Fisheries Policy significantly changed many aspects of the 2002 law. In general, the reforms

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134. See TFEU, *supra* note 126, art. 3(1)(d).

135. *Id.* art. 3(1)(d).

136. See *id.*, Protocol No. 2, art. 5 (articulating the areas of exclusive competence of the European Union and explaining the principle of proportionality).

137. See *id.* art. 4.

138. See *Impact of the Lisbon Treaty*, *supra* note 129, § 6 (“For the first time, the Treaty defines the different categories of the EU’s competences as being exclusive, shared and supporting.” (emphasis omitted)).

139. Cf. Gray & Hatchard, *supra* note 108, at 545–46 (explaining the shortcomings of the Common Fisheries Policy and the need to resist calls to make it more top-down).

prioritize sustainability and ecological responsibility. Several new provisions are substantive policy changes that directly regulate fishing practices, while other provisions delineate a new division of authority for fisheries management between the EU, member states, and the Regional Advisory Councils.

### A. Substantive Reforms for Sustainable Fishing

Perhaps the most important change requires EU lawmakers to adopt conservation measures that will produce the “maximum sustainable yield” for a given fish population.<sup>140</sup> “Maximum sustainable yield” describes the maximum amount of fish that may be harvested without interfering with the ability of a fish population to reproduce.<sup>141</sup> This metric acts as a cornerstone for the whole conservation scheme.<sup>142</sup> For vulnerable fish species and fisheries, the EU is required to adopt multi-annual conservation plans calculated to produce maximum sustainable yield.<sup>143</sup> For fish populations not covered by a multi-annual conservation plan, maximum sustainable yield should be achieved through catch or fishing effort limitations.<sup>144</sup> Taking a longer view on conservation is an important change. It represents a departure from the former practice of yearly quota setting that so often prioritized short-term economic interests over sustainability.<sup>145</sup>

Maximum sustainable yield will act as a cap on the total amount of a given fish population that may be caught, so member state quotas may not be negotiated beyond sustainable levels. The reforms still provide that quotas should be allocated with respect to the principle of relative stability, particularly where local communities are economically dependent on fishing.<sup>146</sup> However, conservation now takes precedence over the concern for consistency in doling out

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140. See 2013 Common Fisheries Policy, *supra* note 33, art. 2(2).

141. See *id.* art. 4(7) (defining maximum sustainable yield as “the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process”).

142. See Till Markus, *Towards Sustainable Fisheries Subsidies: Entering a New Round of Reform Under the Common Fisheries Policy*, 34 MARINE POL’Y 1117, 1118 (2010).

143. See *Fisheries: Multi-Annual Plans*, EUROPEAN COMM’N, [http://ec.europa.eu/fisheries/cfp/fishing\\_rules/multi\\_annual\\_plans/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/fishing_rules/multi_annual_plans/index_en.htm) (last updated Nov. 26, 2014) [<http://perma.cc/8AP5-8P6J>] (archived Feb. 17, 2015).

144. See 2013 Common Fisheries Policy, *supra* note 33, pmb., para. 34 (“For stocks for which no multiannual plan has been established, exploitation rates delivering maximum sustainable yield should be ensured by setting catch or fishing effort limits.”).

145. See *Green Paper*, *supra* note 7, at 9–11.

146. See 2013 Common Fisheries Policy, *supra* note 33, art. 16(1).

fishing opportunities.<sup>147</sup> Member states will in turn allocate these fishing opportunities to their fleets in accordance with the ecological, economic, and social sustainability objectives of the Common Fisheries Policy.<sup>148</sup> Proponents of the reforms believe the change in the quota setting process is a major victory. Ulrike Rodust, a German member of the European Parliament said,

[The reforms] will bring an end to the December ritual of fisheries ministers negotiating until 4am, neglecting scientific advice and setting too high fishing quotas. As of 2015, the principle of maximum sustainable yield shall apply . . .<sup>149</sup>

Another major policy change in the 2013 legislation prohibits discarding unwanted fish species, or “by-catch,” at sea, instituting a “landing obligation.”<sup>150</sup> The landing obligation will be phased in gradually between 2014 and 2020.<sup>151</sup> The reforms require fishermen to take unwanted, undersized, and unmarketable fish with them to port—a departure from the former policy, which induced fishermen to throw out unwanted or impermissibly-caught fish.<sup>152</sup> The discard ban is meant to operate together with limits on fishing effort to incentivize more selective fishing practices.<sup>153</sup> In essence, if the fishermen must keep undesirable fish on board their vessels, they will have less capacity to land commercially desirable catches, cutting into their profits.<sup>154</sup>

The discard ban is an output control, much like total allowable catch limitations, and its success is dependent on the degree to which it is enforceable. Some experts question the ability of authorities to enforce the ban.<sup>155</sup> Fishermen will likely face increased costs associated with storage of unwanted fish on board, and they will be forced to forgo opportunities to land more valuable fish.<sup>156</sup> So without

147. See *Euro MPs Back Large-Scale Fishing Reform to Save Stocks*, *supra* note 25 (discussing the European Union’s decision to shift from fishing quotas “to fishing based on ‘maximum sustainable yield’”).

148. See 2013 Common Fisheries Policy, art. 16(6).

149. *Euro MPs Back Large-Scale Fishing Reform to Save Stocks*, *supra* note 25.

150. See 2013 Common Fisheries Policy, *supra* note 33, pmb., paras. 26, 29.

151. See Fiona Harvey, *Discards Ban ‘No Great Victory’ for Fish Stocks*, *Says Expert*, *GUARDIAN* (Nov. 11, 2013, 1:00 PM), <http://www.theguardian.com/environment/2013/nov/11/discards-ban-victory-fish-stocks> [<http://perma.cc/H63J-KJR7>] (archived Jan. 20, 2015).

152. See 2013 Common Fisheries Policy, *supra* note 33, pmb., para. 26.

153. See *id.* pmb., para. 29 (“To this end, improvements of selective fishing techniques to avoid and reduce, as far as possible, unwanted catches must have high priority.”).

154. See *generally id.*

155. See *generally* Francesc Sardà, Marta Coll, Johanna J. Heymans & Konstantinos I. Stergiou, *Overlooked Impacts and Challenges of the New European Discard Ban*, 16 *FISH & FISHERIES* 175, 176–79 (2015) (“[T]he proposed strategy the EU decided on to reduce discards is problematic: by enforcing their official landing.”).

156. See *id.* at 177–78.

economic incentives to observe the discard ban, enforcement of the landing obligation would likely be very costly.<sup>157</sup> The European Parliament has indicated that EU funds will be directed to help fishermen comply with the discard ban, for instance through buying more selective fishing gear.<sup>158</sup>

The European Maritime and Fisheries Fund (EMFF) provides funding for the Common Fisheries Policy and the Integrated Maritime Policy from 2014 to 2020 and specifies how those funds may be used.<sup>159</sup> Allocations to member states amount to 5.749 billion euros in total with 4.34 billion euros allocated to sustainable development of fisheries, 580 million euros allocated to control and enforcement, and 520 million euros allocated to data collection.<sup>160</sup>

The EMFF also sets out conditions for receiving funding for withdrawing, replacing, or modernizing engines.<sup>161</sup> The provisions aim to support smaller-scale fishing that is less environmentally destructive and to reduce the capacity of larger vessels.<sup>162</sup> Funds can go to support small-scale coastal fishing operations less than twelve meters in length so long as the replacement engines have the same or less power than the old one.<sup>163</sup> Larger vessels may receive funding but must replace their engines with new engines with significantly less power output than the old ones.<sup>164</sup>

The EMFF provides funding for temporary cessation of fishing, which supports fishermen who are required to stop fishing for a time period to conserve fish stocks.<sup>165</sup> This measure is important from the standpoint of the tragedy of the commons problem because compensating the fishermen while they cannot legally fish will lessen

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157. *See id.*

158. Press Release, European Parliament, Fisheries Policy Reform: MEPs Agree on Rules for €6.5 Billion EU Aid Fund (Oct. 23, 2013), *available at* <http://www.europarl.europa.eu/news/en/news-room/content/20131018IPR22631/html/Fisheries-Policy-reform-MEPs-agree-on-rules-for-€6.5-billion-EU-aid-fund> [<http://perma.cc/92HN-6HSU>] (archived Apr. 9, 2015) (“This aid will help fishermen to comply with the discard ban, e.g. by buying more selective fishing gear, but will also be used to improve safety and working conditions, data collection and port infrastructure. MEPs will now start negotiating the final rules with member states.”).

159. European Maritime and Fisheries Fund, *supra* note 33. *See, e.g.*, Press Release, Council of the European Union, The EU Institutions Provisionally Agree on the Financing of the Fisheries Reform 1 (Jan. 28, 2014) [hereinafter EU Institutions Provisionally Agree], *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/agricult/140850.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/agricult/140850.pdf) [<http://perma.cc/EB5S-7Y29>] (archived Jan. 20, 2015) (explaining the funding allocations for the European maritime and fisheries fund).

160. *See* European Maritime and Fisheries Fund, *supra* note 33, art. 13 (outlining budgetary resources under shared management).

161. *Id.* art. 41(2)

162. *Id.*

163. *See id.*

164. *See id.*

165. *See id.* art. 33.

their incentives to cheat on the conservation agreement. Funds may also be directed to helping fishermen transition to sustainable fishing through purchasing more selective fishing gear, equipment that limits the impact of fishing on the ecosystem, and to scrap vessels in order to reduce fleet capacity.<sup>166</sup>

There are also provisions in the EMFF having to do with aid granted by member states.<sup>167</sup> These provisions pertain primarily to funding that is incompatible with the internal European market, and they indicate that the EU will have the ability to review member state plans to grant or alter aid.<sup>168</sup> If the Commission determines that aid granted by a member state is incompatible with the internal market, it may direct the state to alter or altogether abandon that plan.<sup>169</sup> If the state does not comply with the Commission's decision, then the Commission or any other interested State may refer the matter to the European Court of Justice.<sup>170</sup>

Uta Bellion, director of the Pew Charitable Trusts' European marine program and the OCEAN2012 coalition observed that "with this agreement it is now up to EU member states to choose what they allocate funding to and how ambitious they want to be implementing the reformed Common Fisheries Policy and ending EU overfishing."<sup>171</sup> This is a noteworthy observation—the Policy creates a framework at the Union level that the member states are responsible for implementing. Under the former funding provisions, the European Fisheries Fund, the Union makes funding contingent on faithful implementation of CFP objectives, and the EMFF also provides for contingent funding.<sup>172</sup> However the efficacy of this provision is questionable since implementation of the 2002 law was generally weak despite the existence of the same systemic check on the member states.<sup>173</sup>

166. *Id.* arts. 34–38.

167. *Id.* art. 8 (outlining the general principles having to do with state aid).

168. *Id.* (referring to sections 107, 108, and 109 of the Treaty on the Functioning of the European Union, which outline the procedure for the EU to review member state plans to grant aid).

169. *See* TFEU, *supra* note 126, art. 108 (detailing the procedure for EU review of member state plans to grant aid).

170. *See id.*

171. *Id.*

172. *See* Council Regulation 1198/2006, of 27 July 2006 on the European Fisheries Fund, arts. 88–89, 2006 O.J. (L 223/1) (EC) (describing the circumstances under which payment would not be available); European Maritime and Fisheries Fund, *supra* note 33, pmb1. ("Union financial support under the EMFF is to be made conditional upon compliance by Member States and by operators with the rules of the CFP.")

173. *See, e.g., Green Paper, supra* note 7, at 9–13 (addressing problems with compliance and member state implementation under the 2002 version of the Common Fisheries Policy).



### B. Changes to Governance Structure

In general, the reforms represent a move towards a more regionalized system of fisheries governance. The new version of the Common Fisheries Policy delegates more decision-making authority to the member states than the 2002 version of the Common Fisheries Policy did. The reforms also enhance the role of Regional Advisory Councils, giving them a more active role in shaping policy.<sup>174</sup>

Under the 2002 policy, the over-centralized control of fisheries management was the chief reason for stakeholder discontent with the Common Fisheries Policy.<sup>175</sup> Micro-management of fisheries at the EU was ill-suited to a geographical area as large and diverse as Europe, and the top-down management structure was largely the product of legislative inertia, not well-founded policy decisions.<sup>176</sup> Legislators seem to have taken seriously the need for more stakeholder involvement in fisheries management, recognizing that “devolution and the granting of greater autonomy to the regions can be seen as a means whereby the state is able to further democratize decision making while retaining hegemony over all its territory.”<sup>177</sup>

Under the reformed Common Fisheries Policy, the member states have broad implementation authority within the parameters of the policy objectives. Of particular significance, the 2013 Common Fisheries Policy makes the member states responsible for bringing fleet capacity to levels commensurate with the fishing opportunities available to its fleets, while allowing the EU to enact measures to this end as well.<sup>178</sup> The member states are empowered to enact technical measures regulating permissible fishing gear and conditions for their use, measures to make fishing more selective, measures limiting the number of days fishing vessels may be at sea, and they may even require fishing vessels to temporarily cease operating.<sup>179</sup>

The 2013 Common Fisheries Policy emphasize the need for greater data collection to facilitate science-based policy decisions, and it gives the responsibility to collect and publish data on the state of fish stocks and the socioeconomic performance of fisheries to the member states.<sup>180</sup> Control and enforcement of the rules under

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174. See 2013 Common Fisheries Policy, *supra* note 33, art. 45.

175. See *Green Paper*, *supra* note 7, at 11–12 (summarizing sources of criticisms for the regulatory framework of the CFP).

176. See *Symes*, *supra* note 25, at 6–7.

177. *Id.* at 4.

178. See 2013 Common Fisheries Policy, *supra* note 33, pmbl., paras. 43–44, art. 7(1)(c).

179. See *id.* art. 7(2) (detailing the technical measures that may be used for regulation).

180. See *id.* art. 25(1) (“Member states shall, in accordance with the rules adopted in the area of data collection, collect biological, environmental, technical, and

Common Fisheries Policy is also left to the member states.<sup>181</sup> The Policy provides that “Member States shall adopt appropriate measures for ensuring control, inspection and enforcement of activities carried out within the scope of the CFP, including the establishment of effective, proportionate and dissuasive penalties.”<sup>182</sup> Additionally, Article 28(2)(d) makes Union vessels operating outside Union waters responsible for upholding the conservation principles delineated under the CFP.<sup>183</sup>

However, the European Commission retains oversight authority over implementation of the Common Fisheries Policy, as it “is responsible for evaluating and controlling the application of the [Common Fisheries Policy] by [member states], as well as facilitating coordination and cooperation between them.”<sup>184</sup> The new Common Fisheries Policy creates a larger advisory role for member states in policy making at the EU level. The member states are empowered under Article 18 of the 2013 Common Fisheries Policy to submit joint recommendations to the Commission for achieving EU conservation measures.<sup>185</sup> The joint recommendations must be based on the best available scientific advice, consultation with the relevant Regional Advisory Councils (RACs) and be at least as stringent as measures under Union law.<sup>186</sup>

RACs may submit recommendations and suggestions on fisheries management and the socioeconomic and conservation aspects of fisheries to the Commission and the member states.<sup>187</sup> They may also inform the Commission and member states of management problems and propose solutions.<sup>188</sup> Additionally, RACs are authorized to participate in data collection and analysis for development of conservation measures.<sup>189</sup> The Commission and, at times, the

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socio-economic data necessary for fisheries management, manage those data and make them available to end-users, including bodies designated by the Commission.”)

181. See *id.* art. 36.

182. *Id.* art. 36(3).

183. See *id.* art. 28(2)(d) (“[The Union shall] ensure that Union fishing activities outside Union waters are based on the same principles and standards as those applicable under Union law in the area of the CFP, while promoting a level-playing field for Union operators vis-à-vis third-country operators.”).

184. European Parliament, Directorate-General for Internal Policies, *The CFP – Infringement Procedures and Imposed Sanctions Throughout the EU 17* (2014) [hereinafter *CFP – Infringement Procedures*], available at [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/514003/IPOL-PECH\\_NT\(2014\)514003\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/514003/IPOL-PECH_NT(2014)514003_EN.pdf) [<http://perma.cc/6P5Y-CEV2>] (archived Apr. 9, 2015).

185. See 2013 Common Fisheries Policy, *supra* note 33, art. 18(1) (“Member states . . . agree to submit joint recommendations for achieving the objectives of the relevant Union conservation measures . . .”).

186. See *id.* art. 18(5) (“Member states shall ensure that the joint recommendations . . . are based on the best available scientific advice . . .”).

187. See *id.* art. 44(2)(a).

188. See *id.* art. 44(2)(b).

189. See *id.* art. 44(2)(c).

member states are obliged to reply to the recommendations, and, if the measures adopted do not conform to the advice of the RACs, the Commission or member states must give reasons for disregarding that advice.<sup>190</sup>

#### IV. RECOMMENDATIONS

While many changes made in 2013 to the Common Fisheries Policy represent progress towards the goal of sustainable fishing, legislators made compromises that resulted in a more moderate Policy,<sup>191</sup> which may not go far enough to bring about the significant change needed to curb overfishing. The EU must recognize that the tragedy of the commons dynamic creates incentives for fishermen and the member state governments to undermine conservation efforts in favor of their short-term economic interests.<sup>192</sup> The 2013 law does not go far enough to constrict member states' ability to undermine conservation objectives through lenient or conflicting domestic regulation of their fleets.

In order to balance the need for regionalized management of fisheries with the need for a central conservation agreement that keeps member states accountable, ensuring faithful implementation, the EU should empower the Regional Advisory Councils to fill this role. This means giving RAC's binding authority to review and either accept or reject member states' domestic regulations so they can ensure that member states will not "cheat" on the conservation agreement by enacting domestic regulations that encourage overfishing.

##### A. *Expanding the Role of Regional Advisory Councils*

Delegation of implementation authority to the member states under the 2013 Common Fisheries Policy is politically popular and is

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190. See *id.* art. 44(4) ("The Commission and, where relevant, the Member State concerned shall reply within two months to any recommendation, suggestion or information received pursuant to paragraph 1.").

191. See, e.g., David Jolly, *European Officials Move to Curb Overfishing*, N.Y. TIMES (May 30, 2013), [http://www.nytimes.com/2013/05/31/business/energy-environment/europe-moves-to-overhaul-fishing-policies.html?\\_r=1&adxnnl=1&adxnnlx=1384463207-ubf6sr9hC97ptjtp+fiOJA& \[http://perma.cc/DU7K-4QHM\]](http://www.nytimes.com/2013/05/31/business/energy-environment/europe-moves-to-overhaul-fishing-policies.html?_r=1&adxnnl=1&adxnnlx=1384463207-ubf6sr9hC97ptjtp+fiOJA&[http://perma.cc/DU7K-4QHM]) (archived Jan. 21, 2015) ("In February, Parliament gave overwhelming support for a strict new policy. But the European fisheries council balked at the plan. Since then, both sides have worked to resolve their differences.").

192. See Hsu, *supra* note 17, at 109–15.

more in keeping with the proper role EU institutions.<sup>193</sup> Allowing the member states to determine their own technical measures for implementing the principles of the Common Fisheries Policy is more democratic and is anticipated to result in more effective fisheries management.<sup>194</sup>

However, in confronting the overfishing crisis, the EU must be mindful of the incentives of individual fishermen to act in their short-term interests and the political pressure they exert on their representatives to enact measures to this end. There are mechanisms at the Union-level for checking this influence, like overseeing implementation and penalizing member state noncompliance by withdrawing Community funding.<sup>195</sup> However, there is a need for consistent policy for all vessels in a given fisheries region.<sup>196</sup> Open access fishing involves a coordination game of sorts, so everyone who “plays” needs to be bound to the same rules. Otherwise, member states could enact regulations that undermine the agreement to conserve, inducing other member states and their fleets to flout the policy objectives as well.

The RAC’s should have binding authority over fisheries management policy in their respective regions.<sup>197</sup> “Community policy approved by the Council of Ministers would be interpreted and implemented by [member states] in the form of regulations and fishing plans agreed through the [Regional Advisory Councils] and subject to the approval of the Commission.”<sup>198</sup> This system would better reflect the ecosystem-based approach to fisheries management as planned by the Integrated Maritime Policy.<sup>199</sup>

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193. See CFP USER’S GUIDE, *supra* note 2, at 11 (“Even more importantly, perhaps, the Member States are responsible for the implementation and control of fisheries policy.”).

194. See *id.* (“[E]ach Member State is free to choose the kind of national fishing industry it wants to encourage.”).

195. European Maritime and Fisheries Fund, *supra* note 33, pmb. (“Union financial support under the EMFF is to be made conditional upon compliance by Member States and by operators with the rules of the CFP.”).

196. See CFP – *Infringement Procedures*, *supra* note 184, at 28.

197. See David Symes, *Regionalising the Common Fisheries Policy: What Kind of Institutional Solution?*, Nordic Council of Ministers’ Conference, at 7 (Oct., 13, 2009) [hereinafter Symes, *Institutional Solution*] (describing a new Regional Advisory Council system with binding authority over member state fisheries management policy, subject to Commission approval).

198. *Id.*

199. See *Integrated Maritime Policy*, *supra* note 110, at § 4.1 (“The Commission will take action to ensure that the Common Fisheries Policy reflects the ecosystem-based approach . . . .”).

### B. Tighter Restrictions on Harmful Subsidization

The new Policy may not adequately address the deep-rooted problem of fleet overcapacity.<sup>200</sup> The reformed Policy requires that the member states take measures to align the capacity of their fishing fleets with the fishing opportunities available to them.<sup>201</sup> Even though the reformed Policy outlines the objectives within which the member states must regulate their fishing practices, more specific and constraining guidance on appropriate national subsidies is needed to ensure that member states do not continue to enhance the capacity of their fleets through subsidies. Given that the fishing lobby exercises considerable pressure over representatives in member state governments,<sup>202</sup> it is likely that, without stricter directives regarding permissible subsidizing schemes, they will continue to issue harmful subsidies that contribute to fleet overcapacity. For instance, that member states should direct funds to areas that will help fishermen scale back their operations and transition to sustainable fishing without devastating the industry, which employs roughly 400,000 people in Europe.<sup>203</sup> Also, there need to be strict limits on member state subsidization programs that incentivize overfishing by cutting costs, such as fuel subsidies and tax exemptions.

The new Regional Advisory Councils should have the authority to approve or reject member states' subsidization plans. RAC's are best able to assess fleet capacity in a region in relation to the status of the fish stocks. It is important to restrict the ability of the member states to subsidize their fleets, so that the fleet of a compliant state—which does not issue harmful subsidies—will not be at a disadvantage in comparison to fleets from states that harmfully subsidize. A level playing field is critical, because if “cheating” on the conservation

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200. See *Green Paper*, *supra* note 7, at 8.

201. Article 22 of the 2013 Common Fisheries Policy mandates that the member states report annually to the Commission about the size of their fleets relative to fishing opportunities. If the annual report clearly demonstrates an imbalance, then the member state shall prepare an action plan for reducing fleet capacity. Failure to submit a report or to implement an action plan for reducing fleet capacity may result in a proportionate suspension or interruption of Union funding for fleet investment. See 2013 Common Fisheries Policy, *supra* note 33, art. 22.

202. See, e.g., Rainer Froese, *Fishery Reform Slips Through the Net*, 7 NATURE 475 (2011), available at <http://www.nature.com/news/2011/110706/full/475007a.html> [<http://perma.cc/DE46-WECE>] (archived Jan. 21, 2015) (“[T]oo many of these [member state ministries of agriculture] have a cosy relationship with the fishing lobby — many of the civil servants firmly believe that it is their job to protect the rights of their national fishing sector, including the rights to obtain subsidies and to overfish.”).

203. Cf. Jolly, *Facing Vote on European Subsidies*, *supra* note 1 (“Fishers need financial help adapting to the changing regulatory environment, [Javier Garat, president of *Europêche*, a fishing industry group in Brussels] said, because without that support ‘it would be very difficult to comply.’”).

agreement is seen as a probability, it could induce widespread disregard for conservation measures.

### C. Uniform Sanctions for Illegal Fishing

Striking the right balance between the regionalization objective of the new Policy and countering the tendency to favor the short-term economic interest of the states' fishing fleets is particularly important in the context of infringement procedures. Member states, in individual and joint capacities, regularly inspect fishing practices of fleets over which they have jurisdiction, and they are responsible for punishing violations.<sup>204</sup> If violations are detected, administrative or criminal proceedings may be initiated.<sup>205</sup> Enforcement schemes differ by member state, but most member states utilize an administrative sanctioning scheme.<sup>206</sup> Modest monetary sanctions are characteristic of member state practices in general.<sup>207</sup>

"[T]he absence of general control standards could impede control pressure and optimisation of inspection activities."<sup>208</sup> Divergent approaches to sanctioning CFP violations could also engender public perception of the CFP as arbitrary and discriminatory, as the European Court of Auditors points out:

Such a perception could have a negative impact on the culture of legality and generate more breaches of CFP rules. This could not only undermine the relevance of the CFP but also undermine the essence of the EU single market in creating a level playing field for economic operators.<sup>209</sup>

The RAC's should develop a framework to harmonize sanctions across member states in their respective regions, making sanctions harsher and more immediate to deter violations. As various forms and severity of sanctions would presumably have different effects on operator compliance, a uniform system is necessary to ensure that all fishermen in a region are equally deterred from violating. The open-access problem demonstrates that individual fishermen can undermine collective conservation efforts by "cheating" on the

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204. See *CFP - Infringement Procedures*, *supra* note 184, at 24.

205. See *id.* at 17 ("The [member states] are fully responsible for the administration of their quotas, inspecting, and sanctioning in case of infringements.").

206. See *id.* at 37 (indicating that the States utilizing the administrative scheme outnumber those under the criminal scheme by more than two to one).

207. See *id.* at 61-62 ("[V]arious stakeholders interviewed for this study argue that monetary penalties do not constitute an effective deterrent against non-compliance of fisheries policies.").

208. *Id.* at 28.

209. *Id.*

agreement to conserve.<sup>210</sup> If fishermen fear that their competitors can get away with illegal fishing, they in turn will be more likely to violate the rules to maximize their short-term economic gains.<sup>211</sup> A cohesive system of effective sanctions could give individual fishermen more reason to adhere to the rules if enacted on a regional basis rather than state-by-state because individuals will know that their competitors face the same penalties they do.

An ideal system would make fines responsive to the value to be gained by violating fisheries rules—thus taking away the economic incentive to violate. Repeat or especially serious violations should be punished by suspending the operator's license to fish or seizing fishing gear, which stakeholders perceive to be more effective deterrence mechanisms.<sup>212</sup> A harmonized sanctions schedule across the member states is also needed to ensure that fishermen do not strategically register their vessels in member states where sanctions are less stringent or take their illegal catch to ports with lenient regulations.

## V. CONCLUSION

Conservation was only a secondary purpose of the Common Fisheries Policy when it was first enacted. The original law was designed at a time when lawmakers believed that fish stocks were both reliable and plentiful, and its primary objective was to preserve free access fishing practices in the EU's "common pond."<sup>213</sup> It was not designed to manage a crisis, particularly one based on complex and unpredictable biological systems.<sup>214</sup> Progress in confronting the

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210. Cf. Hsu, *supra* note 17, at 79 ("[I]ndividuals acting in their own self interest will ruin collective wealth." (footnote omitted)).

211. See *id.* at 81 ("The mutuality of externality places parties in mirroring situations in which every player knows that attempts at cooperative behavior will be met with cheating, and that every player knows that every player knows this. Knowing that even if one refrains from cheating others will cheat creates irresistible incentives to cheat." (emphasis added)).

212. See *CFP – Infringement Procedures*, *supra* note 184, at 62 ("Some civil society stakeholders . . . applauded this new system, as they perceive that such penalties are considered more effective than monetary penalties.").

213. See *How We Manage Our Fisheries*, EUROPEAN COMM'N 6, [http://ec.europa.eu/fisheries/documentation/publications/cfp\\_brochure/how-we-manage-our-fisheries\\_en.pdf](http://ec.europa.eu/fisheries/documentation/publications/cfp_brochure/how-we-manage-our-fisheries_en.pdf) [<http://perma.cc/8Z98-ZNCQ>] (archived Jan. 21, 2015) ("In many ways, our efforts to ensure that the interests of fishers are aligned with those of the fish are hampered by the fact that the tools at our disposal were devised in a very different context. They were designed to divide up a resource that was assumed to be both reliable and plentiful, not to manage complex and unpredictable biological systems in times of scarcity and crisis.").

214. *Id.*

overfishing crisis was stymied by political inertia<sup>215</sup> until the 2013 overhaul of the Common Fisheries Policy and its funding scheme, but even still the reforms may not effectively fix the behavioral economic dynamic underlying open access fishing.

While the 2013 reforms represent marked improvement on former versions of the law, they may not change member state or fishermen's behavior sufficiently to stop the progression of overfishing. This Note recommends that the EU enhance the role of Regional Advisory Councils, giving them binding authority to set fisheries management policy in their respective regions, subject to approval of the Commission. In particular the Regional Advisory Councils should be empowered to review and either ratify or reject the member states' subsidization plans, and they should be required to install a uniform sanctions schedule for all violators in their regions. In these ways, the EU could more adequately address the tragedy of the commons problem inherent in open-access fishing, ushering in a fisheries management regime in Europe that could provide long-term sustainability.

*Emily Self\**

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215. See CFP USER'S GUIDE, *supra* note 2, at 6–7 (positing that EU fisheries “continue to be characterized by short-term decision-making and short-sighted behaviour” even after the 2002 reforms).

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