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doi:10.1093/jel/eqq008

Caught in the Net: Driftnet Fishing Restrictions and the European Court of Justice

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Abstract

Driftnets have long been considered a particularly unsustainable type of fishing gear due to their inherent lack of selectivity. Consequently, the use of this equipment is subject to heavy global and regional restrictions. This is especially true in EC waters, where a ban on driftnet fishing has been imposed since 2002. Nevertheless, the EU has historically struggled to enforce this prohibition in the face of concerted opposition to its anti-driftnet policies. In recent months, the European Court of Justice has delivered a series of judgments addressing non-compliance concerns, clarifying both the scope of the legislation and the enforcement duties incumbent upon the various Member States.

1. Background

The long-term sustainability of particular fishing techniques and equipment is an issue that has vexed regional and global fisheries regulators in recent years. Few fishing techniques, however, have facilitated the sustained controversy generated by the use of large-scale driftnets. Driftnetting may be broadly described as a process whereby 'the surface layer of the ocean is fished with nets allowed to drift with winds and currents. . . held open in a vertical position by the tension exerted between numerous floats on the floatline and a weighted deadline.'¹ Driftnets, also known as surface gillnets, have long

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¹ AH Richards, 'Problems of Drift-Net Fisheries in the South Pacific' (1994) 29 Mar Pollut Bull 106, at 106.

constituted a staple fishing technique in many European coastal communities, dating back to the early Roman era.

Driftnetting has consistently proved to be a cost-effective form of fishing, not least since nets are generally set from low-powered vessels, rendering the practice highly fuel-efficient.² Traditional driftnets, primarily constructed from hemp and other organic materials, were initially considered highly selective and ecologically efficient.³ However, since the 1950s, such netting began to be manufactured on a vast scale using synthetic filament with smaller mesh sizes. Between the 1960s and mid-1980s, few discernible restrictions were placed on the size of driftnets by international fisheries bodies, with the enormous expanses of netting routinely deployed in many fisheries eventually generating considerable disquiet over the long-term sustainability of such practices.⁴ Initially, concerns were raised over the indiscriminate capture of immature fish from target stocks, thereby compromising the natural regeneration of staple fisheries, while extensive quantities of driftnets—routinely set at night—also began to pose impediments to local navigation.⁵ However, perhaps more significantly from a regulatory standpoint, the highly indiscriminate nature of large-scale driftnet activities led to the politically sensitive by-catch of large numbers of marine mammals.

Concerns were first raised in the 1960s over the incidental mortality of porpoises by Japanese salmon driftnetters in the North Pacific.⁶ By the 1980s, wholesale by-catches of cetaceans (whales, dolphins and porpoises) had been observed within driftnet fisheries in both the South Pacific⁷ and, especially, the Mediterranean region.⁸ During this period, driftnetting attracted opprobrium from environmental campaigners, with such equipment condemned as ‘walls of death’ responsible for ‘strip-mining the oceans.’⁹ The emerging political visibility of the impact of driftnet fisheries led to the introduction of national restrictions by a number of coastal states. In this regard, Australia

² SP Northridge, *Driftnet Fisheries and their Impacts on Non-Target Species: A Worldwide Review*. FAO Fisheries Technical Paper No. 320 (FAO, Rome 1991) at 1.2.1.

³ Ibid.

⁴ Indeed, by the late 1980s, commercial driftnets used in certain fisheries could extend to dimensions of up to 60 km in length: MR Islam, ‘The Proposed “Driftnet-Free Zone” in the South Pacific and the Law of the Sea Convention’ (1991) 40 ICLQ 184, at 184.

⁵ Richards (n 1) 108.

⁶ RR Reeves and others, *Dolphins, Whales and Porpoises: 2002–2010 Conservation Action Plan for the World’s Cetaceans* (IUCN, Gland 2003) 14.

⁷ MB Harwood and D Hembree, ‘Incidental Catch of Small Cetaceans in the Offshore Gillnet Fishery in Northern Australian Waters: 1981–1985’ in *Thirty-Seventh Report of the International Whaling Commission* (IWC, Cambridge 1987) 363.

⁸ G Notarbartolo di Sciara, ‘A Note on the Cetacean Incidental Catch in the Italian Driftnet Swordfish Fishery, 1986–1988’ in *Fortieth Report of the International Whaling Commission* (IWC, Cambridge 1990) 459.

⁹ A Wright and DJ Doulman, ‘Driftnet Fishing in the South Pacific: From Controversy to Management’ (1991) 15 Mar Pol 303 at 313–4.

instituted a series of fisheries closures in 1986 to protect depleted stocks of dolphins,¹⁰ while in 1987 the US government enacted the Driftnet Impact Monitoring, Assessment and Control Act, restricting the use of such equipment to a maximum of 1.5 nautical miles within American jurisdictional waters.¹¹

From these individual initiatives, the ecological problems associated with driftnet fishing began to receive considerable attention within regional fora. In 1989, the first regional denunciation of driftnets as an unsustainable fishing practice was made through the Tarawa Declaration,¹² issued by the South Pacific Forum Fishing Agency, in response to distant-water driftnetting by Japan and Taiwan.¹³ In November 1989, a regional convention was adopted by the South Pacific states,¹⁴ instituting a ban on the use of driftnets of over 2.5 km in length within a vast expanse of the region.¹⁵ Following this, the concerns over driftnet fishing in the South Pacific were soon extended to the North Pacific Region,¹⁶ as well as the Caribbean¹⁷ and, by the early 1990s, had attained global attention within the UN General Assembly (UNGA). In 1989 and 1990, a series of Resolutions were adopted by the UNGA, calling for the increasingly stringent regulation of this equipment within areas beyond national jurisdiction.¹⁸ In 1991 a further Resolution was adopted by the UNGA calling for 'a moratorium on large-scale pelagic driftnet fishing. . . notwithstanding that it will create adverse socio-economic effects on the communities

¹⁰ Richards (n 1) 108.

¹¹ J Bautista Otero, 'The 1987 Driftnet Act: A Step Toward Responsible Marine Resources Management' (1991) 2 *Colo J Int'l Envtl L & Pol'y* 129.

¹² Reprinted at (1990) 14 *Law Sea Bull* 29. On the political developments towards the adoption of the Tarawa Declaration, see GJ Hewison, 'High Seas Driftnet Fishing in the South Pacific and the Law of the Sea' (1993) 5 *Geo Int'l Envtl L Rev* 313.

¹³ On Japanese driftnet fishing efforts and policies in the South Pacific Region, see I Miyaoka, *Legitimacy in International Society: Japan's Reaction to Global Wildlife Preservation* (Palgrave, London 2004) 50–4.

¹⁴ Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific; reprinted at (1990) 29 *ILM* 1454 [hereinafter 'Wellington Convention'].

¹⁵ For a full appraisal of the Wellington Convention see GJ Hewison, 'The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific' (1993) 25 *Case W Res J Int'l L* 449; see also B Miller, 'Combating Drift-Net Fishing in the Pacific' in J Crawford and DR Rothwell (eds), *The Law of the Sea in the Asian-Pacific Region: Developments and Prospects* (Martinus Nijhoff, Dordrecht 1995) 161.

¹⁶ LA Davis, 'North Pacific Pelagic Driftnetting: Untangling the High Seas Controversy' (1991) 64 *S Cal L Rev* 1057.

¹⁷ On the same day that the Wellington Convention was adopted, the Organisation of Eastern Caribbean States issued the Castries Declaration, calling for a similar management regime to address driftnet fishing activities in this region. Nevertheless, the strong rhetoric was never matched by clear regulatory action, as no specific regional measures were subsequently adopted by this particular body against driftnet fishing. The Castries Declaration is reproduced at (1990) 14 *L Sea Bull* 28.

¹⁸ UN Doc A/Res/44/225 of 22 December 1989 and UN Doc A/Res/45/197 of 21 December 1990. On this process generally see DR Rothwell, 'The General Assembly Ban on Driftnet Fishing' in D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford 2003) at 140.

involved.¹⁹ Resolution 46/215 thereby purported to prohibit the use of large driftnets—initially undefined, but subsequently widely interpreted in line with the 2.5 km limit imposed under the Wellington Convention—upon the high seas.

Although UNGA Resolutions are not ordinarily considered to create binding legal obligations, the driftnet moratorium prescribed under Resolution 46/215 has subsequently become a striking anomaly to this general rule. Indeed, a considerable number of coastal states have enacted domestic legislation to give effect to these international restrictions,²⁰ while a significant volume of bilateral enforcement activity (especially in conjunction with the US authorities) has also emerged.²¹ Moreover, an array of regional fisheries management organisations (RFMOs), intergovernmental organisations and multilateral environmental treaty bodies have also endorsed and applied the ban on large-scale pelagic driftnets, thereby raising convincing claims that the UNGA moratorium may have ultimately passed from the hortatory confines of political Resolutions and into customary international law.²²

As part of the broad trend towards implementing these restrictions within national and regional law, the EC has adopted a series of measures to control the use of driftnets in Community fisheries.²³ In 1992, the first Community restrictions were introduced,²⁴ mirroring the UNGA moratorium, to control the use of driftnets in a number of key European maritime regions. To this end, driftnets of over 2.5 km in length were prohibited in Community fisheries, subject to two broad exceptions in that the restrictions did not apply to the Baltic Sea, Belts and Sound, and that France was allocated a short-term derogation in respect of the national albacore tuna fleet.²⁵ In 1997, further restrictions on driftnet fishing were introduced,²⁶ including the repeal of the French

¹⁹ UN Doc A/Res/46/215 of 20 December 1991. For a comprehensive (and largely critical) analysis of this measure, see WT Burke and others, 'United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management' (1994) 25 *Ocean Dev & Int L* 127.

²⁰ See, for instance, JS Davidson, 'New Zealand Driftnet Prohibition Act 1991' (1991) 6 *IJEC* 264.

²¹ For a comprehensive appraisal of bilateral monitoring and enforcement arrangements, see D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP, Cambridge 2009) 117–24.

²² GJ Hewison, 'The Legally Binding Nature of the Moratorium on Large-Scale High Seas Driftnet Fishing' (1994) 25 *J Mar L & Com* 557.

²³ For a full account of this process, see R Caddell, 'The Prohibition of Driftnet Fishing in European Community Waters: Problems, Progress and Prospects' (2007) 13 *JIML* 265, 271–8.

²⁴ Council Regulation (EEC) 345/92 of 27 January 1992 amending for the eleventh time Regulation (EEC) 3094/86 laying down certain technical measures for the conservation of fishery resources [1992] OJ L042/15.

²⁵ Article 9a.

²⁶ Council Regulation (EC) 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [1997] OJ L132/1.

albacore exemption. Moreover, Community vessels were precluded from keeping on board or using for fishing one or more driftnets whose individual or total length is greater than 2.5 km.²⁷

A year later, Regulation 894/97 was amended to further strengthen the Community's anti-driftnet legislation.²⁸ In this regard, Article 11 was amended to prohibit the use of driftnets completely—irrespective of individual or collective length—within certain listed fisheries in EC waters from 1 January 2002 onwards. This move, which was unprecedented under the Common Fisheries Policy (CFP),²⁹ prevented the keeping on board or use for fishing of driftnets on particular species listed in Annex VIII of Regulation 894/97,³⁰ including albacore tuna and swordfish, traditional staples of the French and Italian driftnet fishing fleets, respectively.

In 2004, the driftnet fishing restrictions were, for the first time, extended to the Baltic Sea areas under Community control following the accession of Poland, Estonia, Latvia and Lithuania to the EU.³¹ This Regulation represented the first coordinated measures to restrict driftnetting in Baltic waters, which had previously been sanctioned on an intensive scale,³² and had remained exempt from the UNGA moratorium due to the absence of any areas of high seas within the region. Regulation 812/2004 has become one of the more ostensibly politicised fisheries Regulations of recent origin, given that the restrictions on driftnet fishing are virtually synonymous with the EC's formal policy on cetacean by-catches,³³ with these measures having been subject to considerable agitation within the Baltic region.³⁴

Notwithstanding the raft of legislation establishing heavy restrictions on this equipment, by an unfortunate irony, Community waters have become something of a global hotspot for driftnet fishing since the late 1990s. In this respect, two key deficiencies may be observed in the legal framework that has facilitated the continued use of driftnets in contravention of EC policies. In the first instance, the various Regulations have long been bedevilled by ambiguity; not least given their long-standing failure to articulate the fundamental

²⁷ Article 11. For a full discussion of Regulation 894/97, see R Churchill and D Owen, *The EC Common Fisheries Policy* (OUP, Oxford 2010) 185–7.

²⁸ Council Regulation 1239/98 of 8 June 1998 amending Regulation 894/97 laying down certain technical measures for the conservation of fishery resources [1998] OJ L171/1.

²⁹ C Lequesne, *The Politics of Fisheries in the European Union* (Manchester UP, Manchester 2004) 124.

³⁰ Article 11a. This provision also prohibited the landing of any Annex VIII species caught with a driftnet by Community vessels.

³¹ Council Regulation (EC) 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation 88/98 [2004] OJ L150/12.

³² RJ Long and PA Curran, *Enforcing the Common Fisheries Policy* (Fishing News Books, Oxford 2000) 283.

³³ On the development of the Regulation 812/2004 and the EC policy on incidental cetacean mortality, see R Caddell, 'By-Catch Mitigation and the Protection of Cetaceans: Recent Developments in EC Law' (2005) 8 *JIWLP* 241.

³⁴ Caddell (n 23) 285–7.

concept of a 'driftnet'. A clear definition was belatedly advanced in 2007, classifying a driftnet as 'any gillnet held on the sea surface or at a certain distance below it by floating devices, drifting with the current, either independently or with the boat to which it may be attached. It may be equipped with devices aiming to stabilise the net or to limit its drift'.³⁵ In the prior absence of a comprehensive definition of such equipment, the French authorities have sanctioned the use of netting known as a tuna gillnet or 'thonaille', which bears a striking resemblance to a driftnet. Secondly, under Regulation 894/97, as amended, the 'competent authorities' of the Member State are to take 'appropriate measures' against vessels engaged in driftnet fishing. There has been a somewhat languid pursuit of national driftnetters, especially by Italy, which the cumbersome non-compliance procedures of EU law have rather served to perpetuate. These particular issues were the subject of the driftnet cases recently reviewed by the European Court of Justice (ECJ), which has established a strident position both on the nature of the obligations laid down under the Regulations, as well as the corresponding monitoring and enforcement obligations incumbent upon the Member States.

2. A Rose by Any Other Name: The Thonaille Litigation

The long-standing absence of a clear definition of a 'driftnet' for the purposes of EC law has presented an opportunity to develop fishing gear derivative of such netting, encompassing the same broad features of driftnets, albeit with minor technical modifications in an attempt to render them legally distinct and therefore outside the purview of the relevant legislation. It has long been asserted by environmental campaigners that the thonailles used by the French fleet to catch albacore and bluefin tuna are little more than driftnets under an assumed name.

Like orthodox driftnets, thonailles are passive fishing gear, the basic operational features of which are that they are reliant upon the movement of fish into the net.³⁶ Targeted independent studies of the effects of thonaille fishing are sporadic. This is primarily because crews using any type of driftnet have exhibited a marked reluctance to cooperate with researchers since the

³⁵ Council Regulation 809/2007 of 28 June 2007 amending Regulations (EC) No 894/97, (EC) No 812/2004 and (EC) No 2187/2005 as concerns driftnets [2007] OJ L182/1.

³⁶ AJ Reid, 'Incidental Catches of Small Cetaceans' in MP Simmonds and JD Hutchinson (eds), *The Conservation of Whales and Dolphins: Science and Practice* (John Wiley and Sons, Chichester 1996) 110. Active gear, by contrast depends on the movement of the net through the water column to catch fish.

Community measures were first introduced.³⁷ However, this fishery primarily targets juvenile Atlantic bluefin tuna, with some additional effort on swordfish.³⁸ As far as a discernible by-catch problem is concerned, it appears that striped dolphins are at a particular risk in this fishery,³⁹ while other species of cetaceans such as sperm whales, long-finned pilot whales and Risso's dolphin have also been documented as incidental catches.⁴⁰ The scale of thonaille effort in the past decade is also subject to a degree of uncertainty, primarily due to difficulties of identifying thonaille vessels, which tend to be small boats operating at night,⁴¹ although environmental campaigners claim that up to 92 *thonaillieurs* may have been active in French waters since 2003.⁴²

Prior to the recent judgments by the ECJ, the thonaille had experienced a somewhat chequered regulatory history in recent years. In April 2003, a decree was adopted to create a special permit for thonaille fishing,⁴³ which was subsequently modified and entrenched in 2004 and 2005.⁴⁴ This legislation was later annulled in 2005 by the Conseil d'État, following a judicial review brought by a series of environmental campaigners.⁴⁵ Although the Commission has repeatedly asserted that it considers the thonaille to be a 'driftnet' and thereby caught within the definition of Regulation 894/97,⁴⁶ permits were seemingly issued by the French authorities for thonaille fishing in 2006 and 2007,⁴⁷ until Regulation 809/2007 was adopted with the rather pointed motivation to 'clarify certain existing provisions to avoid counterproductive misunderstandings'.⁴⁸

³⁷ E Rogan and M Mackey, 'Magafauna Bycatch in Drift Nets for Albacore Tuna (*Thunnus alalunga*) in the NE Atlantic' (2007) 86 *Fish Res* 6, 7; see also L Silvani and others, 'Spanish Driftnet Fishing and Incidental Catches in the Western Mediterranean' (1999) 90 *Biol Conserv* 79.

³⁸ D Bănară and others, 'Atlantic Bluefin Tuna (*Thunnus thynnus*) and Swordfish (*Xiphias gladius*) Catch Distributions Observed during Driftnet Fishery in the Northwestern Mediterranean Sea (2000–2003 Database) (2010) 3 *J Oceanogr Res Data* 1, 2.

³⁹ S Panigada and others, 'Modelling Habitat Preferences for Fin Whales and Striped Dolphins in the Pelagos Sanctuary (Western Mediterranean Sea) with Physiographic and Remote Sensing Variables' (2008) 112 *Remote Sensing Environ* 3400, 3401.

⁴⁰ MJ Cornax and others, *Thonaille: The Use of Driftnets by the French Fleet in the Mediterranean* (Oceana, Madrid 2006) 15.

⁴¹ *Ibid* 11.

⁴² MJ Cornax, *Thonaille: The Use of Driftnets by the French Fleet in the Mediterranean. Results of the Oceana 2007 Campaign* (Oceana, Madrid 2008) 6.

⁴³ Arrêté du 1er août portant à la création d'un permis de pêche special pour la pêche à l'aide de l'engin appelé 'thonaille' ou 'courant volante'.

⁴⁴ Arrêté du 8 juillet 2004 modifiant l'arrêté du 1er août portant à la création d'un permis de pêche special pour la pêche à l'aide de l'engin appelé 'thonaille' ou 'courant volante'; Arrêté du 28 juillet 2005 modifiant l'arrêté du 1er août portant à la création d'un permis de pêche special pour la pêche à l'aide de l'engin appelé 'thonaille' ou 'courant volante'.

⁴⁵ Contentieux No 265034; 3 August 2005.

⁴⁶ See Written Question E-2795/01 of 9 October 2001 and Written Question E-1730/05 of 13 June 2005.

⁴⁷ Cornax (n 42) 12–3.

⁴⁸ COM (2006) 511 final.

Considerable clarification of the precise nature of the thonaille was subsequently provided by the ECJ in March 2009, which now leaves little scope for misapprehension. This followed something of a false-start in a preliminary reference in *Pilato*,⁴⁹ in which it was alleged domestically that thonailles were indistinguishable from driftnets for the purposes of Regulation 894/97. However, the reference was ultimately rejected by the Court, since the forum of the dispute—a local *prud'homie de pêche*—was not considered to meet the demands of Article 234 due to ‘doubt as to the imperviousness of that body to external factors’.⁵⁰ Consequently, the legality of the thonaille legislation was not substantively reviewed until non-compliance proceedings were eventually brought against France for alleged driftnet infringements.

2.1. Case C-556/07 Commission v France

In March 2009, two separate judgments were handed down on the same day by the ECJ addressing the use of the thonaille and the stance taken by the national authorities regarding such netting. In the first instance, the Commission sought a declaration from the Court that France had failed to fulfil its obligations in respect of the EC driftnet fishing restrictions by allocating a series of thonaille permits, and through a failure to establish an effective system of monitoring and control. A converse ruling was sought by France in the latter case, brought against the Council to annul Regulation 809/2007.

Case C-556/07 had spent a considered period of time in gestation, with concerns over the national position on thonaille fishing having been raised by the Commission in July 2003. This led to a series of exchanges with the French authorities over the following two years, until a reasoned opinion was issued in July 2005. The Commission reiterated its long-held view that the thonaille constituted a driftnet for the purposes of Community law. This view was advanced both on the basis of the definition in Regulation 809/2007, as well as the understanding of a driftnet articulated by the Food and Agriculture Organization and the Wellington Convention.⁵¹ Moreover, it was considered that the failure by the national authorities to provide a thorough programme of monitoring and enforcement violated the pertinent obligations of the new ‘basic Regulation’, which had previously reconstituted the fundamental obligations of the Member States under the CFP.⁵²

⁴⁹ Case 109/07 *Jonathan Pilato v Jean-Claude Bourgault*.

⁵⁰ Para 28.

⁵¹ Para 23.

⁵² Council Regulation (EC) 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy [2002] OJ L358/59. For a full analysis of the operation of this Regulation, see Churchill and Owen (n 27) 129–298.

In response, France argued that the thonaille lay outside the definition in Regulation 809/2007, given that a series of national studies had categorically concluded that the technical modifications made to this equipment ensured that it caught fish in a fundamentally different manner to an orthodox driftnet. In particular, the French government considered that the use of floats and anchors meant that thonailles used the oscillations of specific wave fluctuations to catch fish at certain times of the day and did not drift with the wind, which was considered to be a central characteristic of a driftnet.⁵³ Accordingly, given that national programmes had been instituted to monitor thonailles, which the French understood not to be driftnets, the fisheries authorities did not consider themselves in breach of the monitoring obligations prescribed under Regulation 2371/2002.

In reviewing these claims, the Court conceded that, prior to the adoption of Regulation 809/2007, a full definition of a 'driftnet' had not existed under Community law and, moreover, in the absence of such a definition the Court had to look to the articulation of the term in ordinary language.⁵⁴ Having noted that a myriad of definitions had been advanced by international bodies, all of which contained a degree of subjectivity and subtle difference in their basic articulation, the ECJ considered the basic features of a driftnet to be that it is not fixed to the seabed and instead floats within the ocean through its own free movement. It could therefore be depicted as a net that shifts as a result of a variety of natural phenomena that causes the water column to rise and fall.⁵⁵ The Court gave a wide interpretation of the origins of such movement and considered that, for a net to be classed as a driftnet for the purposes of Regulation 809/2007, it mattered little whether it was caused by currents or by other natural phenomena causing oscillations of the waves.⁵⁶ The thonaille netting sanctioned by France could therefore be considered to qualify as a driftnet by virtue of the broad definition advanced under pertinent Community law.⁵⁷

France then contended that, if the thonaille was indeed a driftnet, it could not have been formally considered as such until the Community definition was established under Regulation 809/2007, thereby precluding the possibility of establishing a system of control and monitoring. This rather disingenuous position was given relatively short shrift by the Court, which further ruled that France had also failed to meet the requisite obligations of monitoring, inspection and control.⁵⁸

⁵³ Para 36.

⁵⁴ Paras 48–50.

⁵⁵ Para 57.

⁵⁶ Para 59.

⁵⁷ Para 67.

⁵⁸ Para 78.

2.2. Case C-479/07 France v Council

Similar arguments were advanced—and a similar outcome attained—in a complementary action for which judgment was given following the decision in Case C-566/07. Case C-479/07 represented the latest instalment in a series of attempts by a variety of litigants to overturn the relevant driftnet legislation, which had either been ruled inadmissible by the Court,⁵⁹ or had otherwise failed on the substantive merits.⁶⁰ In the present case, in which a previous application for interim measures was rejected,⁶¹ France sought a ruling to annul Regulation 809/2007, based on an alleged failure to provide reasons for extending the broad definition of a driftnet to include stabilised nets such as the thonaille (although the categorisation of tuna gillnets as such was disputed), as well as infringements of the principles of proportionality and non-discrimination.

In rejecting the French submissions, the Court noted that it had earlier that day ruled that the thonaille was caught within the definition of a driftnet advanced under Regulation 809/2007 and that little further consideration of this issue was necessary. Moreover, it was emphasised that the definition advanced under the Regulation had been inspired to a very large degree by existing international instruments and key scientific documents and had not occasioned any substantive extension of the scope of the legislation.⁶² The preamble of the Regulation had clearly and unequivocally stated that the measure had not introduced any new restrictions on the use of driftnets, and was introduced solely to bring a uniform definition to previous obligations, hence the French claim was rejected.⁶³ Likewise, a plea that the Regulation infringed the obligations of proportionality and non-discrimination on the basis that thonnailles were uniquely French and fundamentally different to driftnets was also swiftly rejected by the Court.

3. Italian Driftnetters and the ECJ

As in France, the EC restrictions on the use of driftnets have constituted a matter of great controversy within coastal communities in Italy, where the use such of netting may be traced back over 2000 years.⁶⁴ In more recent years, extensive driftnet fishing has been undertaken by Italian fleets in the

⁵⁹ Case C-131/92 *Thierry Arnaud and Others v Council*; Case T-138/98 *Armement Coopératif Artesinal Vendéen v Council*.

⁶⁰ Case C-405/92 *Établissements Armand Mondiet SA v Armement Islais SARL*; see Caddell (n 23) 274–5.

⁶¹ Churchill and Owen (n 27) 187.

⁶² Para 38.

⁶³ Para 53.

⁶⁴ Rothwell (n 18) 140.

Mediterranean for swordfish. Such endeavours have nonetheless imbued Italian swordfishermen with a degree of international notoriety, especially since driftnet fishing has consistently yielded high rates of marine mammal by-catches,⁶⁵ prompting significant political pressure to cease and desist.

Italian driftnet fleets have essentially posed two key problems to Community regulators. In the first instance, like their French counterparts, a degree of technical modification has been experienced, with the derivative *spadare* and *ferrettara* netting being deployed in this fishery. More significantly, however, driftnets have continued to be used with a degree of impunity by elements within the Italian fleet, with the enforcement of EC restrictions having posed a considerable challenge to the national authorities.⁶⁶ There is some suggestion that the initial EC measures were met with a lukewarm response by the Italian government, which granted some indulgence to its swordfishermen.⁶⁷ This issue shifted to the international stage in the mid-1990s, when Italy narrowly avoided formal trade sanctions under the extra-territorial operation of US fisheries law following some shrewd political manoeuvring by the Clinton administration.⁶⁸ Notwithstanding concerns over the environmental ramifications of continued driftnet fishing, such practices remain highly controversial as Italian fishermen have received substantial financial support to decommission their driftnets.⁶⁹ A long-standing failure to establish a clear programme of enforcement in Italy ultimately led to infringement proceedings being instituted by the Commission in Case C-249/08.

3.1. Case C-249/08 Commission v Italy

The origins of this case date back even further than Case C-556/07, with inspection missions having been first undertaken by the Commission in 1992, which revealed a series of deficiencies concerning driftnet regulation in a number of coastal regions. This led to a plethora of exchanges between Italy and the Commission, as well as further inspection missions throughout the 1990s, until a reasoned opinion was eventually addressed to the Italian authorities in March 2005. Unlike the French litigation, however, Case C-249/08 was not ostensibly concerned with breaches of the distinct driftnet

⁶⁵ G Bearzi, 'Interactions between Cetaceans and Fisheries in the Mediterranean Sea' in G Notarbartolo di Sciarra (ed), *Cetaceans of the Mediterranean and Black Seas: State of Knowledge and Conservation Strategies* (ACCOBAMS, Monaco 2002).

⁶⁶ *Driftnets and Loopholes: The Continued Flouting of EU Law by the Italian Government of its Driftnet Fishery* (RSPCA and Humane Society International, London 2005).

⁶⁷ T Scovazzi, 'The Enforcement in the Mediterranean of United Nations Resolutions on Large-Scale Driftnet Fishing' (1998) 2 Max Planck Yrbk UN L 365, 372.

⁶⁸ Caddell (n 23) 283–5.

⁶⁹ RR Churchill, 'The EU as an International Fisheries Actor – Shark or Minnow?' (1999) 4 EFA Rev 563.

Regulations per se. Instead, the Commission alleged that there were systemic failings on a central level to establish an effective regime of monitoring and control over fisheries infractions, including *inter alia* considerable deficiencies in respect of driftnet fishing, thereby violating more general provisions designed to promote uniform Member State compliance with the CFP.

Two central complaints were advanced by the Commission, which alleged that the Italian compliance regime was subject to both institutional and procedural deficiencies, in violation of key Regulations addressing fisheries enforcement.⁷⁰ In the first instance, the Commission considered that the overarching framework to enforce pertinent fisheries laws was wholly inadequate, both in terms of resources and because of the litany of different branches of the police and harbour authorities that all claimed a degree of jurisdiction over fisheries infractions. Furthermore, it was alleged that information exchange and the coordination of activities were seriously limited, which further compromised the overall efficacy of the national system,⁷¹ a complaint denied by the Italian authorities. Nonetheless, the Court ruled that the various law enforcement agencies in Italy were poorly placed to ensure compliance with pertinent legislation. The harbour authorities lacked both financial and human resources to undertake sufficient monitoring activities at sea, a task that could not in practice be performed by the police who also claimed jurisdiction over such offences, while satellite surveillance was also highly limited. Accordingly, the ECJ held that the enforcement system was not sufficiently robust as to meet the requirements of Regulations 2241/87 and 2847/93 and the first complaint of the Commission was upheld.⁷²

The second aspect of the complaint concerned the measures adopted under domestic law to criminalise and punish infractions. In this respect, the Commission argued that the pertinent aspects of Regulation 894/97 had not been correctly implemented, given that the Italian legislation in question had criminalised the use or attempted use of driftnets, but not the simple possession of such equipment, as mandated under Article 11(a)(1). Moreover, the Commission contended that the penalties imposed under national law upon conviction of such offences were derisory. With regard to the implementation of EC law, the ECJ noted that it was common ground that Italy had introduced legislation to address the keeping on board of driftnets in June 2008. However, it was equally apparent that no such provision had existed previously; hence Italy had been in breach of the Regulation for a considerable number of years.⁷³ Likewise, the Court confirmed that the sanctions for driftnet violations

⁷⁰ Namely, Council Regulation (EEC) 2241/87 of 23 July 1987 establishing certain control measures for fishing activities [1987] OJ L207/1 and Council Regulation (EEC) 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy [1993] OJ L261/1.

⁷¹ Paras 37–41.

⁷² Para 49.

⁷³ Para 65.

were exceptionally limited, amounting to approximately €1000 upon conviction. Given that such nominal fines—in comparison to the overall value of a catch—were wholly inadequate to effectively punish and deter fisheries infractions, a further breach of Regulations 2241/97 and 2847/93 was upheld.

4. Concluding Remarks

The recent series of driftnet cases before the ECJ would appear to have finally brought to a conclusion a saga that has reflected poorly on the credentials of the EC to effectively promote compliance with its wide-ranging restrictions on such netting. Most importantly, however, the Court has taken considerable steps to address a number of loopholes and ambiguities within the Regulations, which have historically undermined the effectiveness of these provisions to a considerable degree.

Regulation 809/2007 constituted an important and much-needed clarification of the concept of a driftnet, which had previously relied upon the subtleties of the various international instruments for official articulation. Of equal significance would appear to be the judgment in Case C-556/07, as endorsed in Case C-479/07, whereby the Court has taken a wide view of the type of netting caught by this overall definition. Although any such definition will permit a degree of legislative improvisation, these rulings nonetheless substantially reduce the scope for national circumvention of the driftnet Regulations by individual Member States through minor technical modifications. This may prove to be of considerable future importance given that questions remain over other types of derivative gear that are deployed on a relatively widespread basis in Community waters. The *spadare* and *ferrettara* were not substantively examined by the Court in Case C-249/08, while similar modifications have been made by Polish fishermen—a constituency strongly aggrieved by the Baltic restrictions—who have developed so-called ‘semi-driftnets’ for the national salmon fishery.⁷⁴ Such netting may attract close attention from the Commission in future years if it remains widely used on a commercial scale.

Notwithstanding the value of these decisions in the context of driftnet infractions, the inordinate length of time taken to secure firm judgments against France and Italy is amply indicative of the wider difficulties inherent in the enforcement of Community fisheries law. In this regard, as Churchill and Owen observe, ‘[t]he responsibility for taking action to secure compliance by fishing vessel operators and masters with the primary and secondary Community

⁷⁴ Concerns over these practices were raised in another forum, the Agreement on the Conservation of Small Cetaceans of the Baltic, North-East Atlantic, Irish and North Seas 1992: *Report of the Second Meeting of the ASCOBANS Jastarnia Group* (ASCOBANS, Bonn 2006) 8.

rules applicable to them lies with the Member States, not the EC.⁷⁵ As demonstrated in the recent driftnet cases, where an individual Member State is firmly of the view that its netting operates in compliance with the Community standards, or a strong degree of solidarity is demonstrated with vocal coastal communities, a swift and satisfactory resolution has proved to be highly challenging in practice. Such problems echo the strident criticism of the status quo by the Court of Auditors⁷⁶ and may provide further food for thought during the on-going process of CFP reform.

⁷⁵ See (n 27), at 214.

⁷⁶ [2007] OJ C317/1.