The prohibition of driftnet fishing in European Community waters: problems, progress and prospects

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This article considers the regulation of driftnet fishing in EC waters. Driftnetting is a controversial fishing technique due to its lack of selectivity, and is subject to sweeping international restrictions. Driftnets are banned under EC law, yet European fisheries are notorious for their continued use of this equipment to the detriment of the marine environment. This article examines why the EU institutions have failed to control driftnet fishing and evaluates the prospects for future compliance, concluding that national administrative processes and external US pressure has proved rather more effective to date than the cumbersome processes under European law.

Introduction

Over the past 30 years, few fishing techniques have proved as controversial or raised as many concerns over their effects upon the marine environment and the long-term sustainability of fish stocks as large-scale pelagic driftnet fishing. The use of this equipment, which essentially entails dragging extensive netting through the oceans, has proved to be especially problematic due to its highly indiscriminate nature, leading to wholesale by-catches of non-target species, as well as juvenile and undersized fish from the target stock. Since the late 1980s, there has been a graduated global policy towards reducing the maximum permissible limit for driftnets on the high seas to 2.5km under international law; a movement that developed out of regional concerns over the activities of distant water fishing fleets in the South Pacific, before permeating the UN General Assembly agenda once North American interests had been engaged, culminating in the near-universal endorsement of these fishing standards by regional fisheries management organisations (RMFOs) and coastal states.

In line with these general developments, the European Community – one of the world's primary fisheries management authorities – first endorsed these measures, before elaborating a series of distinct provisions against driftnet fishing that surpass the global restrictions in two main ways. First, there is no maximum permissible limit for driftnets; this equipment is banned in its entirety in Community waters. Secondly, the legal application of these provisions extends to zones of national jurisdiction, as opposed to being confined to the high seas as is the case under international law. Given the importance of the EC as a global

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fisheries actor, Community endorsement of the high seas restrictions undoubtedly contributed to the prevailing international acceptance of the restrictions on driftnet fishing. That the EC has elected to introduce such stringent measures marks a notable departure from general international policy, yet is nonetheless emphatically illustrative of the right of individual coastal states to enact national fisheries legislation[1] that is more powerful than that prescribed under international law, even if the great majority of individual states have simply replicated the 2.5km limit in their domestic provisions.

It is striking, however, that, notwithstanding a generally high level of adherence to international standards in most global fisheries, over the course of the past 10 years EC waters have become a hotspot of non-compliance in respect of driftnet fishing. Moreover, such infractions are not violations of the distinct technical measures adopted by the EC, in the sense that such netting fulfils international criteria but breaches the narrower European rules; rather they entail the use of driftnets significantly in excess of permitted international standards and often extending up to 8km or more. Equally striking has been the apparent failure of the European authorities to address an emerging picture of serial non-compliance with these provisions on the part of key Member States which have continued to use driftnets or derivative gear in Community waters with little fear or prospect of effective sanction.

To date, EC policy has entailed a carrot-and-stick approach to compliance – generous subsidies have been made available to decommission driftnet vessels and promote alternative and more selective fishing techniques, with subsequent infractions of anti-driftnet legislation subject to infringement proceedings under general European law. This approach has clearly failed in the case of at least two long-standing opponents to the driftnet restrictions since their inception in the late 1990s, namely Italy and France, as driftnets are still widely used (especially by the former) and subsequent non-infringement proceedings have proved largely toothless. This highly unsatisfactory position is amplified by the emergence of additional driftnet actors in and around Community waters, either through the recent enlargement process (especially in the Baltic Sea region), potential enlargement (in the Aegean region) or geographical proximity to other marine areas (north Africa). Alarmingly, unless the current position improves dramatically, the EC seems condemned to endure a perpetual cycle of making extensive subsidy payments, which are then undermined by an inability to control illegal driftnetting in the face of concerted opposition from coastal communities, and compounded by the failure of its official infringement proceedings to pose either an effective deterrent or a swift and viable mechanism to ensure cessation of driftnet fishing activities.

Accordingly, this article examines the problems that have become inherent in enforcing the current driftnet fishing restrictions in European Community waters and seeks to explain this regulatory failure in a geographical location in which a greater degree of adherence might have been expected, given the operation of a distinct legal structure to monitor and address non-compliance and strong political and legislative support for progressing the current restrictions. In so doing, it first examines the problems associated with driftnet fishing and the global movement towards attaining the current high seas restrictions under international law, before detailing the graduated divergence between these provisions and the measures introduced by the EC, and evaluating deficiencies in the current European enforcement procedures vis-à-vis driftnets. Finally, the article considers whether viable alternatives to the laborious EC enforcement procedures exist, either under national law or in alternative fora, in the light of an emerging picture that suggests that, despite the operation of a considerable body of specific legislation, it is becoming increasingly difficult for the EC to control the activities of driftnet fishing vessels in Community waters.

[1] Legal competence over the development of fisheries legislation in the 27 Member States of the European Union (EU) has been vested exclusively in the EC. Acceptance of this position, as well as the Community *acquis* of existing fisheries legislation, policy and case-law, is one of the prerequisites for formal membership of the EU.

Driftnetting and its discontents

Fishing gear comes in a wide variety of forms, but is generally classified into one of two broad categories, namely active or passive. According to one leading expert on fisheries by-catches, '[a]ctive fishing gear depends on movement of the net through the water to catch fish, while passive gear relies on the movement of fish into the gear'.[2] Driftnets, which are also known as surface gillnets, are an example of passive gear, and have been deployed in European waters for centuries.

Driftnet fishing may be defined as a process whereby:

> the surface layer of the ocean is fished with nets allowed to drift with winds and currents. Driftnets are held open in a vertical position by the tension exerted between numerous floats on the floatline and a weighted deadline … [t]his type of gear is designed specifically to capture marine organisms of a wide range of sizes and species, and is consequently less selective by species than gill-nets which have been staked to the sea-bed or tightly hung.[3]

For optimal effectiveness driftnets are mainly installed at night, making it more difficult for fish – as well as other marine species – to detect and negotiate the net.

Until relatively recently, the use of such equipment raised few objections, since it was essentially a highly localised technique deploying small nets woven from hemp and other natural, biodegradable materials. Driftnetting became a major fishing technique in the years following the Second World War, as nets began to be fabricated from synthetic materials such as nylon, allowing manufacturers to produce large-scale nets quickly and cheaply. By the 1960s, fishing vessels had begun to use gillnets extending up to 60km with enormous scope for potential by-catch, a practice that extended well into the 1970s, when concerns began to be raised in a variety of quarters as to the potential ramifications of the intensive use of such equipment. In particular, the highly indiscriminate nature of the nets – which often resulted in the wholesale capture of non-target species – led to them being dubbed 'walls of death' by environmentalists, accusing driftnet fisheries of 'strip-mining the oceans'.[4] Likewise, serious concerns were raised by fisheries managers as to the long-term sustainability of the use of nets of this magnitude, given the enormous potential yield of fish from large-scale driftnetting operations.

In the mid-1980s, a number of individual coastal states began to impose restrictive measures under national law in response to the threat posed by the use of large-scale driftnets in particular fisheries. In 1986, the Australian authorities were forced to close the shark fishery in the Arafura Sea, due to serious concerns over the mortality rate of coastal dolphins in driftnets. The USA also moved to impose temporal and spatial restrictions upon certain distant water fishing fleets, due to concerns about the volume of seals taken as incidental catches in its jurisdictional waters in the North Pacific. Generally speaking, while fisheries managers have advocated restrictions on the deployment of driftnets in the interests of promoting stock regeneration and preventing unsustainable yields of fish, it has been the incidental mortality of large numbers of charismatic and photogenic marine mammals such as cetaceans (whales, dolphins and porpoises) and pinnipeds (seals, sea lions and walruses) that has prompted popular calls for legislative action against such gear at national, regional and international levels, and the political pressures associated with the protection of such species has helped to ensure that a wide variety of legal instruments have been formally adopted to regulate driftnet fishing.

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[2] A J Reid 'Incidental Catches of Small Cetaceans' in M P Simmonds and J D Hutchinson (eds) *The Conservation of Whales and Dolphins: Science and Practice* (John Wiley and Sons 1996) 110.

[3] A H Richards 'Problems of Drift-Net Fisheries in the South Pacific' (1994) 29 Marine Pollution Bulletin 106, 106.

[4] A W and D J Doulman 'Driftnet Fishing in the South Pacific: From Controversy to Management' (1991) 15 Marine Policy 303, 313–14.

The international regulation of driftnet fishing

The current EC restrictions are the product of a series of incremental measures to restrict the use of driftnets on the high seas, advanced by a number of regional and international fora in the late 1980s and early 1990s to address serious concerns over the sustainability of large-scale driftnetting on fish stocks and the wider marine environment. As noted above, the movement towards the imposition of heavy restrictions on the use of this type of gear began in the late 1980s in the Southern Pacific Ocean, and was triggered by wholesale driftnet fishing conducted by distant water fleets, especially Japanese, for albacore tuna.[5] By 1988, catches of albacore tuna had reached such startling levels that the South Pacific Forum Fishing Agency (SPF) formally requested that Japan and Taiwan significantly reduce the scale of their fishing effects.[6] When these consultations failed, the SPF met at Tarawa, Kiribati, in 1989 to discuss the collective response of the South Pacific nations to this issue,[7] resulting in the adoption of the Tarawa Declaration.[8] The Tarawa Declaration condemned driftnetting as 'indiscriminate, irresponsible and destructive', with the SPF countries formally stating their resolve to secure a regional moratorium on the use of driftnets in the South Pacific, in the hope that 'such a ban might be a first step to a comprehensive ban on such fishing'.

By late 1989, the impetus towards regional action was well underway and a working group had already met to prepare a draft convention. On 24 November 1989, the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific[9] was concluded in Wellington, New Zealand, and entered into force on 17 May 1991. Given the concerns over driftnet fishing, the Wellington Convention laid down a general prohibition on this equipment within a vast stretch of water within the South Pacific,[10] defining a driftnet as 'a gillnet or other net or a combination of nets which is more than 2.5 kilometres in length, the purpose of which is to enmesh, entrap or entangle fish by drifting on the surface of or in the water'.[11] The convention itself laid down a series of measures requiring parties to 'take measures

[5] For a comprehensive account of the development of driftnet fishing activities in this region see G J Hewison 'High Seas Driftnet Fishing in the South Pacific and the Law of the Sea' (1993) 5 Georgetown International Environmental Law Review 313, 316–22. The proliferation of driftnet fishing activity in the South Pacific has been attributed to diminished opportunities in the North Pacific, where the fishing season had been truncated to a six-month period between June and December. Furthermore, Japanese fishing vessels have been excluded from the US EEZ in response to a series of infractions of domestic law, including the by-catch of pinnipeds: see I Miyaoka *Legitimacy in International Society: Japan's Reaction to Global Wildlife Preservation* (Palgrave 2004) 50–1.

[6] South Korea also had a lone driftnet fishing vessel operating in this area, which was promptly withdrawn following consultations with the FFA in 1989. Nonetheless, this appeal apparently fell upon deaf ears – Miyaoka notes that at this time the Japanese government 'had no intention of reducing the practice of driftnet fishing' and refused a formal request from SPF representatives to downscale the use of driftnets in this region: Miyaoka (n 5) 52.

[7] The main concerns centred around whether albacore tuna stocks could realistically support fishing on this scale, the effects of by-catches on stocks on non-target species, the associated problems of 'ghost' fishing by lost or discarded gear and the potential impediment posed to navigation by the use of such gear: see Richards (n 3) 106.

[8] 11 July 1989, reprinted (1990) 14 Law of the Sea Bulletin 29. Three months later, in October 1989, the South Pacific Commission endorsed the Tarawa Declaration at its Twenty-Ninth Conference and adopted a resolution of its own condemning driftnet fishing: Hewison (n 5) 326. This endorsement was ultimately a highly significant step in the international movement to ban large-scale driftnet fishing on the high seas, since membership of the South Pacific Commission extends beyond the parties to the SPF and also includes the USA, France and the United Kingdom.

[9] Reprinted (1990) 29 International Legal Materials 1454. There are currently 13 parties to the convention, namely Australia, Cook Islands, F S Micronesia, Fiji, France, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Samoa, Solomon Islands, Tokelau, Tuvalu, the United States and Vanuatu. For a full analysis of the Wellington Convention see G J Hewison 'The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific' (1993) 25 Case Western Reserve Journal of International Law 449; see also B Miller 'Combating Drift-Net Fishing in the Pacific' in J Crawford and D R Rothwell (eds) *The Law of the Sea in the Asian Pacific Region: Developments and Prospects* (Martinus Nijhoff 1995) 161.

[10] Wellington Convention art 2.

[11] ibid art 1(b). The maximum permissible length of a driftnet was apparently fixed at 2.5km. This was the most common length of driftnet deployed by the SPF fleets that used this equipment in their own waters. In addition, 2.5km is approximately equivalent to the 1.5 mile limit established under an earlier provision of US law, the 1987 Driftnet Impact Monitoring, Assessment and Control Act (see below).

consistent with international law' to prohibit the use of driftnets and the transhipment of driftnet catches within areas of national jurisdiction,[12] and also provided parties with a discretion to prohibit driftnet-caught fish imports and restrict port access,[13] or even adopt similar measures under national law to restrict such activities further.[14] A series of protocols also permitted other states with an interest in fishing within the convention area or those with jurisdictional waters adjacent to it to become parties to the convention.[15]

Driftnet fishing, and the accompanying controversy, was not restricted to the South Pacific. Japanese and Taiwanese vessels were using the equipment in the North Pacific squid fishery, as well as in the North Atlantic for squid and salmon.[16] As driftnet fishing began to expand in these areas, so concerns began to mount as to its long-term effects. In the Caribbean there was a growing sense of alarm at the effects of driftnet fishing. On day that the Wellington Convention was concluded in the South Pacific, the Organisation of Eastern Caribbean States (OECS) issued the Castries Declaration,[17] following a conference held in St Lucia on the driftnet issue.

The Castries Declaration effectively mirrored the sentiments of the Tarawa Declaration and the Wellington Convention, and attacked the use of driftnets as 'indiscreet, irresponsible and disruptive'. Like the SPF, the Castries Declaration called upon the OECS countries to 'establish a regional regime for the regulation and management of the pelagic resources in the Lesser Antilles region that would outlaw the use of drift nets and other disruptive fishing methods by commercial vessels, and call upon other States in the region to cooperate in this regard'.[18] As a result of these regional diplomatic initiatives, the issue of driftnet fishing had been placed firmly on the international agenda. Following the conclusion of the Wellington Convention, and in line with the sentiments of the Tarawa Declaration, Australia and New Zealand began to advocate the introduction of a global moratorium on driftnet fishing. They were soon supported by Canada and the initially reluctant US government, anxious to protect the profitability of the Atlantic salmon fishery from the damaging by-catch of immature fish by Taiwanese driftnetters.

In December 1989, two different motions on driftnet fishing were tabled in the United Nations General Assembly (UNGA) by the USA and Japan.[19] The American proposal called for

[12] ibid art 3(a).
[13] ibid art 3(b).
[14] New Zealand, for instance, has enacted extensive powers of search, arrest and seizure in relation to driftnet activities in waters under its jurisdiction: ss 13–15 of the Driftnet Prohibition Act 1991, reprinted (1992) 31 International Legal Materials 214. For an appraisal of this legislation see J Scott Davidson 'New Zealand Driftnet Prohibition Act 1991' (1991) 6 International Journal of Estuarine and Coastal Law 264.
[15] To date Canada, Chile and the USA are the only outside parties to have accepted this invitation. None of the former distant water driftnet fishing nations has become a party to either the Wellington Convention itself or to its Protocols, although it appears that they have ceased fishing with driftnets in the South Pacific of their own volition: see A Bergin 'Political and Legal Control Over Marine Living Resources – Recent Developments in South Pacific Distant Water Fishing' (1994) 9 International Journal of Marine and Coastal Law 289, 301. On 17 July 1990, Japan announced that in the interests of maintaining harmonious relations with the SPF countries, all driftnet fishing activities in the South Pacific would be terminated from the next fishing season onwards: see Miyaoka (n 5) 54.
[16] For a discussion of the legal issues raised by large-scale pelagic driftnet fishing in the North Pacific see L A Davies 'North Pacific Pelagic Driftnetting: Untangling the High Seas Controversy' (1991) 64 Southern California Law Review 1057; see also T L McDorman 'Canada and the North Pacific Ocean: Recent Issues' (1991) 22 Ocean Development and International Law 365 and M Hayashi 'Fisheries in the North Pacific: Japan at the Turning Point' (1991) 22 Ocean Development and International Law 343.
[17] Reprinted (1990) 14 Law of the Sea Bulletin 28.
[18] As yet no such initiative has been established, nor has the driftnet issue been substantively re-examined by the OECS, with the international developments having presumably overtaken any distinct regional project in this regard.
[19] For a full analysis of these developments see W T Burke, M Freeberg and E L Miles 'United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management' (1994) 25 Ocean Development and International Law 127. Burke and others note that the choice of forum for this proposal was unusual, given that UN fisheries policy is generally the responsibility of the FAO. They are somewhat suspicious of the

a three-year phase out of driftnet fishing vessels culminating in a global moratorium from June 1992, while the Japanese proposal appealed for further research on the effects of driftnetting and a lesser set of restraints. A compromise was eventually reached, and Resolution 44/225 was adopted by the Assembly on 22 December 1989.[20]

Resolution 44/225 specifically distinguished between the damaging effects of large-scale commercial pelagic driftnetting and small-scale artesinal fishing in coastal areas by local fishermen. Concerns about the number of non-target species being caught incidentally in large driftnets were central to the terms of the resolution, which called for strengthened international cooperation for the conservation and management of marine living resources and for the sharing of scientific findings. The operative scope of Resolution 44/255 is contained in Article 4, which provided for a moratorium on all large-scale pelagic high seas driftnet fishing to commence from 30 June 1992, supported by the discontinuation of large-scale driftnet fishing operations in the South Pacific and the immediate cessation of the expansion of existing driftnet fishing activities elsewhere. No definition of a 'large-scale driftnet' was advanced by Resolution 44/225, but this has subsequently been widely interpreted to mean driftnets of 2.5km in length, as specified in the Wellington Convention.[21]

The following year, driftnet fishing was back on the agenda of the UN General Assembly, following the failure of a number of distant water fishing fleets to adhere to the resolution. On 21 December 1990, the UN General Assembly adopted Resolution 45/197,[22] which generally commended the efforts of the international community in implementing the provisions of Resolution 44/225. Resolution 45/197 reaffirmed the principles of Resolution 44/225, and expressed concern at the attempts made to expand pelagic driftnet fishing in the Atlantic Ocean, as well as condemning the practice of re-flagging driftnet vessels in order to circumvent legal restrictions on the use of this equipment.

By the time the Wellington Convention had entered into force, opposition to driftnet fishing had grown even stronger. On 20 December 1991, the UN General Assembly adopted Resolution 46/215,[23] its strongest statement yet against the use of driftnets, with the Assembly '[r]ecognising that a moratorium on large-scale pelagic driftnet fishing is required, notwithstanding that it will create adverse socio-economic effects on the communities involved'. Resolution 46/215 called on all members of the international community to phase out their driftnet fleets from 1 January 1992, to reduce existing driftnet fishing operations and to implement a global moratorium on all large-scale pelagic driftnet fishing from 31 December 1992. Unlike the moratorium envisaged in Resolution 44/225, the current moratorium represents a total ban on the use of large-scale pelagic driftnets, and is not qualified by the development of satisfactory conservation and management practices. However, like the previous resolutions adopted by the UN General Assembly on driftnet fishing, Resolution 46/215 only applied to driftnet fishing on the *high seas*, and not in zones of national jurisdiction.[24]

anti-driftnet lobby in this regard, claiming that the wide restrictions on driftnet fishing subsequently imposed would have been less likely to have been granted by the FAO, which would require a higher standard of scientific proof before placing heavy limitations on the use of a previously widespread fishing technique. Instead, they conclude that the conditions of the more politically charged 'bully pulpit' of the General Assembly would prove more conducive to adopting a measure such as this: ibid 137.

[20] Reprinted (1990) 29 International Legal Materials 1555.

[21] While restrictions prescribed by national legislation on the maximum permissible length of driftnets fluctuate somewhat, a significant majority of coastal states have adopted the approach taken by the Wellington Convention, as have all the major regional fisheries management organisations.

[22] Reprinted (1991) 17 Law of the Sea Bulletin 7.

[23] Reprinted (1992) 31 International Legal Materials 241.

[24] As such, the UN General Assembly Resolutions do not apply to certain semi-enclosed seas and coastal regions, since no areas of high seas are present within these locations. A particular example of this in EC waters is the Baltic Sea: see below.

Since the adoption of this measure, the UN General Assembly has adopted a series of resolutions on the driftnet issue, in which it has consistently reaffirmed the importance that it attaches to compliance with Resolution 46/215 and the moratorium on the use of large-scale pelagic driftnets on the high seas.[25] The Secretary-General of the UN General Assembly also compiles an annual report on the implementation of and compliance with the driftnet fishing restrictions, based on information received from both states and regional fisheries management organisations.[26] Although resolutions of the UN General Assembly are not legally binding, it has been convincingly argued that, as a result of state practice giving effect to it, the moratorium on large-scale pelagic driftnet fishing has now become a rule of customary international law.[27] It appears that there has been an almost universal acceptance of the restrictions on driftnet fishing by states with the capacity to use this equipment.

The prohibition of driftnet fishing in European Community waters

With the driftnet restrictions endorsed and adopted by virtually all major regional fisheries and marine resources organisations, it is hardly surprising that the EC, one of the world's most powerful fisheries management authorities, has introduced a series of legislative provisions to regulate the use of this equipment. Nevertheless, as noted above, the EC has adopted a markedly different stance to the global position and has, over a 15 year period, developed a distinct set of standards.

EC policy may be considered to have evolved by means of a three-stage process. The first stage, which may be termed *elaboration*, encompassed the period 1990 to 1997, whereby European fisheries officials introduced a 2.5km limit on the maximum permissible length of driftnets in Community waters, designed to echo the global restrictions introduced by the UN General Assembly, which the EEC (as it then was) had itself supported. These measures, as detailed below, were largely the result of pressure from an eclectic lobby of interest groups originating in Spain and were followed by a second stage, *consolidation*, where between 1998 and 2002 the anti-driftnet resolve strengthened within the EC and a series of provisions was introduced specifically to proscribe the use of this equipment under Community fisheries law. This led to the third (and current) stage, namely *expansion*, where from 2002 onwards there has been a process to extend these provisions into other European marine areas – especially the Baltic Sea – as the EU has undergone an unprecedented scale of growth.

Stage one: elaboration

Driftnets have been used extensively within European waters since the days of the Roman Empire.[28] More recently, however, they have been deployed mainly by French, Spanish, British

[25] See, for example, A/Res/59/25 of 17 January 2005 (art 44), A/Res/58/14 of 21 January 2004 (art 33), A/Res/57/142 of 26 February 2003 (art 5), A/Res/55/8 of 2 March 2001 (art 2), A/Res/54/32 of 19 January 2000 (art 4), A/Res/53/33 of 6 January 1999 (art 2), A/Res/52/29 of 26 January 1998 (art 1), A/Res/51/36 of 9 December 1996 (art 1) and A/Res/50/25 of 5 December 1995 (art 1). See also Decision 49/436 of 19 December 1994, Decision 48/445 of 21 December 1993 and Decision 47/443 of 22 December 1992. Driftnet fishing was not considered by the UN General Assembly at its 56th Session in 2001/2; no resolution was adopted reaffirming its position regarding this equipment and the Secretary-General did not submit a report on the issue. Instead, as far as fisheries were concerned, the UN General Assembly focused its attention on the entry into force of the UN Fish Stocks Agreement.

[26] The Secretary-General has produced reports specifically examining large-scale pelagic driftnet fishing and its impact on marine living resources since 1990. Since 1996, the practice of the Secretary-General has been to amalgamate the annual consideration of driftnet fishing into a consolidated report on a variety of fisheries issues. The relevant reports of the Secretary-General are reproduced in full on-line www.un.org/Depts/los/general_assembly/general_assembly_reports.htm.

[27] See G J Hewison 'The Legally Binding Nature of the Moratorium on Large-Scale High Seas Driftnet Fishing' (1994) 25 Journal of Maritime Law and Commerce 557.

[28] According to the FAO, the use of driftnets in the Mediterranean Sea can be traced back to 177 BC: D R 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 2003) 122.

and Irish vessels fishing for salmon and tuna in the North Atlantic and, rather more controversially, by Italian vessels fishing for swordfish in the Mediterranean. Until the mid-1980s, with the exception of the Italian swordfish fleet, relatively few vessels routinely used driftnets in European fisheries.[29] However, this changed in 1986, following a study on the falling profitability of the Atlantic albacore tuna fishery conducted by the French authorities, which concluded that the pole-and-line techniques widely used at the time constituted an inefficient and outdated method of exploiting this resource. In view of these findings, it was recommended that a small-scale trial of driftnets should be initiated in an attempt to increase the yields of fish from the region. From a preliminary experiment involving two vessels, the French albacore driftnet fleet expanded significantly in subsequent years, culminating in the licensing of over 60 vessels in the 1994 fishing season.[30] French driftnetters were soon joined by vessels from Ireland and the United Kingdom[31] and, as observed by Lequesne, '[t]he new albacore fishing fleet grew until 1992 without the Commission and the European Fisheries Ministers passing any kind of regulation on the use of nets up to 6 or 7 kilometres long'.[32]

The expansion of these activities in the Bay of Biscay soon generated bitter resentment within the staunchly nationalistic coastal regions of the autonomous Basque Country in Spain, especially in the provincial fishing centre of Guipuzcoa, where the potential socio-economic ramifications of driftnet fishing were most acute. In particular, it was feared that an inability to exploit local fisheries effectively due to the presence of foreign fleets could lead to the economic displacement of younger generations in a region already beset by high rates of unemployment, and consequently dilute the strong indigenous cultural and linguistic identity of these traditional coastal communities. These concerns were manifested in a series of highly vocal protests against the use of driftnets, which escalated into coordinated acts of vandalism and intimidation towards the French, Irish and British fleets.[33]

Opposition to driftnet fishing also began to mount within the autonomous regional government and, to this end, hard-line Basque nationalists forged a rather unlikely alliance with a series of environmental NGOs to lobby for EU-wide restrictions on the use of driftnets.[34] At the same time, the central Spanish government seized the opportunity to demonstrate its solidarity with disaffected Basque fishing communities (and, in so doing, managed to divert local attention away from some of the more extreme voices within the region) and adopted a strong stance against driftnet fishing as a prominent component of national policy. Portugal was also quick to support these initiatives and the Iberian Member States began to lead calls within the EU for a regional policy on the use of this equipment in Community waters.

[29] At this time, approximately 3500 driftnet fishermen were employed in the Italian swordfish fleet in the Mediterranean Sea: see R J Long and P A Curran *Enforcing the Common Fisheries Policy* (Fishing News Books 2000) 289.
[30] In 1987, 20 vessels began using this equipment, increasing to 38 in the 1990 fishing season and 64 in 1994: C Lequesne *The Politics of Fisheries in the European Union* (Manchester University Press 2004) 117.
[31] Fishermen from Ireland and Cornwall began to use driftnets in the Bay of Biscay in the 1990 fishing season. By 1994, 18 Irish and 12 UK vessels were regularly deploying driftnets in this region: M Findlay and A E Searle 'The North East Atlantic Albacore Fishery: A Cornish Crisis of Confidence' (1998) 22 Marine Policy 95, 98–9.
[32] Lequesne (n 30) 117.
[33] Basque fishermen (who continued to use traditional pole-and-line methods to catch albacore tuna) systematically damaged driftnets set in the Bay of Biscay, and there were even instances of foreign vessels being rammed in these waters: Lequesne (n 30) 118–19. Some commentators speculate that the notorious Basque terrorist group ETA orchestrated many of these attacks on foreign fleets: Findlay and Searle (n 31) 103.
[34] However, few commentators suggest that this alliance had any basis in environmental altruism. It was instead largely a marriage of convenience designed to intimidate foreign fleets into abandoning local fishing grounds that had provided a steady income for coastal communities in the Basque region for centuries. Indeed, as noted somewhat acidly by Lequesne, the Basque anti-driftnet bloc 'could appreciate the tactical advantage of espousing the cause of dolphins, although in fact it had no compassion for the fate of these marine mammals': (n 30) 122.

Together with the growing opposition to driftnetting by Spain and Portugal (which was supported by Green Party MEPs within the European Parliament), developments within the UN General Assembly began to influence the scope of EC fisheries policy.[35] In February 1990, Manuel Marin, then Commissioner for Fisheries, proposed that the use of driftnets greater than 2.5km in length should be prohibited in Community waters. This proposal was approved by the European Parliament in September 1991, and despite strong and vociferous opposition by France, Italy and Ireland in the Council, in 1992 a regulation to endorse and enforce the UN General Assembly moratorium on large-scale driftnet fishing was adopted by virtue of a qualified majority vote.[36] This measure prohibited the keeping on board and use of driftnets greater than 2.5km in length, both on the high seas and in most areas of Community waters. There were two main derogations to this regulation: first, it did not apply to the Baltic Sea, Belts and Sound,[37] and secondly, an exemption was granted until 31 December 1993 for vessels that had used this equipment in the albacore tuna fishery in the north-east Atlantic, to avoid excessive financial hardship for the fleets concerned.[38]

In 1997, these provisions were strengthened as a result of a growing consensus within the EC over the need to protect stocks of immature fish from incidental capture. Consequently, the previous measure was subsequently repealed and replaced with a regulation that specifically recognised the problems posed to fisheries and the marine environment by the wholesale catches of non-target species, emphasising the potential scope for incidental catches involved in the use of both driftnets and purse-seine nets.[39] Regulation 894/97 reiterated the restrictions imposed upon the use and possession of large-scale driftnets,[40] and repealed the derogation previously granted to the driftnet fleet in the Atlantic albacore tuna fishery.

Stage two: consolidation

In June 1998 the prohibition on the use of driftnets entered a new and unprecedented phase, with the introduction of the most stringent measures ever prescribed in relation to driftnetting in European waters. A new regulation was adopted imposing a complete ban on all driftnet fishing activities within the pre-enlargement Community waters and the high seas, effective from 1 January 2002.[41] This measure specifically prohibited the use of *all* driftnets, regardless of size, in fishing operations for a number of species listed in an annex to the regulation,[42] which goes considerably further than the UN General Assembly Resolutions that it was designed to implement. Regulation 1239/98 provided for a graduated phase-out of

[35] Since the EEC had voted in favour of the adoption of UN General Assembly Resolution 44/225 in 1989, it would appear to be rather hypocritical not to endorse the application of these provisions in respect of Community waters.
[36] Council Regulation (EEC) No 345/92 of 27 January 1992 amending for the eleventh time reg (EEC) No 3094/86 laying down certain technical measures for the conservation of fishery resources [1992] OJ L042/15. Although critical of the proposed restrictions, the United Kingdom apparently diluted its opposition to this measure significantly due to concern at the destabilising effect that Basque extremists had achieved within Spain by exploiting the driftnet issue: see M Holden *The Common Fisheries Policy* (Fishing News Books 1994) 78.
[37] See below p 276.
[38] This exception was qualified by a requirement to prove that the vessels in question had fished for albacore tuna in this area for the previous two seasons, and was inserted at the request of the French government. Vessels qualifying for this exemption were permitted to use driftnets of up to 5km in length. In practice, only the French driftnet fleet derived any real benefit from these provisions; the only other vessels to qualify under this exemption were two Irish vessels licensed by the *Bord Iascaigh Mhara* for an initial trial of driftnets in 1990: Findlay and Searle (n 31) 101.
[39] Council Regulation (EC) No 895/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [1997] OJ L132/1.
[40] Article 11.
[41] Council Regulation (EC) No 1239/98 of 8 June 1998 amending reg (EC) No 894/97 laying down certain technical measures for the conservation of fishery resources [1998] OJ L171/1. The prohibition on the use of driftnets in Community waters was a highly symbolic move; as noted by Lequesne, '[t]his was a precedent in the history of the CFP, since it was the first time that the EU had banned the use of a particular fishing technique': (n 30) 124.
[42] Including 10 species of tuna commonly fished for in Community waters, sea breams, marlins, sailfishes and sharks, as well as swordfish – a traditional staple of the Italian driftnet fishing industry.

driftnet fishing activities from the 1998 fishing season onwards, allowing driftnets to be carried on board vessels until 31 December 2001, subject to the authorisation of the flag state.[43]

The adoption of Regulation 1239/98 marked a change in the legal basis for the provisions concerning driftnet fishing adopted on the part of the EC. In particular, this measure introduced a more overtly ecological tone to the driftnet restrictions, which had previously been inspired by the need to ensure that over-fishing did not jeopardise the present and future economic stability of Community fisheries. Indeed, Regulation 894/97 was only marginally influenced by explicitly environmental factors in the context of driftnet fishing, with these provisions introduced instead 'to ensure the protection of marine biological resources and the balanced exploitation of fishery resources in the interests of both fishermen and consumers'.[44] Regulation 1239/98, on the other hand, notes the provisions of Article 130r(2)[45] of the EC Treaty and the need to take into account requirements of environmental protection 'in a precautionary spirit'. It is therefore designed 'in accordance with the Community's international obligations to contribute towards the conservation and management of the biological resources of the oceans … to regulate strictly any expansion of driftnet fishing by Community vessels'.[46]

This shift in emphasis has been substantively challenged by various entities with the support of certain Member States, although whether this is due to genuine concern over the need to clarify the legal basis of the restrictions or whether it has merely presented a convenient opportunity to attack a technical provision deemed objectionable in certain key coastal communities may be a matter of some debate. Generally, objections have been raised to the perceived creep of ecological considerations, with opponents of the legislation arguing that environmental activism essentially represents the true legal basis for these provisions, with the legislators hiding their intentions behind technical fisheries terms. These arguments have found little favour with the European Court of Justice (ECJ), which has consistently ruled that there is no requirement for the legislation to be framed in overt ecological terms and that the various provisions fulfil a number of different objectives, with resource allocation requirements, fisheries management requirements and environmental considerations constituting multiple sides of the same coin.

The first challenge of this nature was made very soon after the initial 2.5km restrictions were imposed on driftnets when, in November 1993, the ECJ was called upon to examine the validity of Article 1(8) of Directive 345/92, which had introduced the first operative limitations upon this type of equipment.[47] The case of *Établissements Armand Mondiet SA v Armement Islais SARL*[48] appeared to concern a fairly anodyne contractual dispute between two French companies that was referred to the ECJ by the Tribunal de Commerce for a preliminary reference on a point of EC law under the old Article 177 process.[49] Mondiet was a manufacturer of fishing nets and had received an order from the defendant in August 1991 for some 200 driftnets of approximately 7km in length. In November 1991, with the adoption of the new rules on driftnet fishing, the defendant cancelled the order and refused to pay, citing *fait du prince*[50] and insisting that the claimant should bear its own losses.

[43] Article 1.
[44] Preamble to the regulation. Furthermore, the preamble observes that 'the uncontrolled expansion of drift-netting may entail serious disadvantages in terms of increased fishing effort'.
[45] Now art 174 of the current EC Treaty.
[46] Preamble to Reg 1239/98.
[47] Article 1(8) inserted a new art 9a into a previous fisheries provision, Council Regulation 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources [1986] OJ L288/1, limiting the use of driftnets to a maximum permissible limit of 2.5km, subject to a derogation in the North-East Atlantic permitting vessels to use nets of up to 5km in length.
[48] Case C–405/92, [1993] ECR I–6133.
[49] Now art 234 of the EC Treaty.
[50] 'Act of a public authority', a defence broadly similar to the common law concept of frustration of contract, whereby a public authority has introduced a measure that renders the performance of the contract impossible and annuls the agreement as a form of *force majeure*.

The French court was minded to uphold the defendant's plea and release it from the contract on the basis of frustration, subject to a finding from the ECJ that the regulation had ultimately been lawfully adopted. In this respect, a series of questions was put to the court seeking confirmation, inter alia, that the regulation had been valid despite having ecological considerations as its basis, having been apparently adopted without scientific foundation and in the light of concerted lobbying from powerful environmental NGOs, which resulted in a punitive effect upon the fishing industry. The primary argument concerning the invalidity of the regulation was that it had been adopted not as a distinct fisheries management measure, but was instead inspired by ecological reasons – namely the need to address by-catches of non-target species. If this was in fact the true motivation behind the provision, then as a matter of law it should have been based upon Articles 130r and 130s of the EC Treaty,[51] which require the unanimous approval of the European Council, as opposed to the qualified majority vote that it had actually received.[52]

Nevertheless, this assertion failed to find favour with either the Advocate General or, indeed, the court, which stated categorically that the driftnet restrictions had been 'adopted primarily in order to ensure the conservation and rational exploitation of fishery resources and to limit the fishing effort'.[53] Moreover, this finding was not disturbed by the fact that the directive itself had explicitly noted a series of concerns expressed by ecological organisations, as well as the need to protect non-target species from by-catches.[54] Accordingly, as had been consistently upheld by the court,[55] while Articles 130r and 130s did indeed confer a power for the Community to adopt measures on distinct environmental matters, the institutions retained competence to act on other bases. Therefore, if this alternative basis for action – in this instance Article 39 of the EC Treaty, which permitted the Community to ensure the rational development of production and availability of supplies – also pursued one of the objectives of environmental protection, then it did not necessarily follow that the EC was formally obliged to base its competence to act in this manner upon the Environmental Title.[56] Consequently, the directive in question was not inherently invalid and had indeed been elaborated upon a legitimate legal foundation.

A rather more direct attack on the driftnet ban was attempted soon after the adoption of Regulation 1239/98, where an action was heard by the Court of First Instance (CFI) to annul the regulation in its entirety, brought by an alliance of 22 French owners of fishing vessels, and supported officially by France and Ireland.[57] Regulation 1239/98 was defended by the European Council, and later supported by the European Commission and Spain, arguing that the objections raised by the vessel owners were inadmissible on the basis that the requirements of Article 173 of the EC Treaty[58] had not been met, namely that the applicants were not individually concerned with these particular provisions. By way of response, the applicants argued that they had been individually concerned with this legislation on the basis

[51] Now arts 174 and 175 of the EC Treaty.

[52] For a concise discussion of the evolution of EU environmental law-making competence in this respect see P G G Davies *European Union Environmental Law: An Introduction to Key Selected Issues* (Ashgate 2004) 1–24).

[53] Note 48 para 24.

[54] The directive also makes a distinct reference to the Berne Convention on the Conservation of European Wildlife and Natural Habitats 1979. It slightly predated the Habitats Directive, also introduced in 1992 and now one of the pre-eminent provisions of EU nature conservation law, hence the only regional measure in operation in Europe at this time concerning wildlife issues was the Council of Europe initiative – which, conversely, has now been rather overtaken by its EU counterpart.

[55] See for instance *Greece v Council* Case 62/88 [1990] ECR I–1527.

[56] The 'Environmental Title' is the collective description given to a small cluster of provisions in the EC Treaty conferring competence to prescribe measures in respect of the environment, introduced by the Single European Act 1987. Prior to this, there were no explicit grounds for the European institutions to legislate in respect of the environment listed within the original EEC Treaty of 1957.

[57] *Armement Coopératif Artisanal Vendéen v Council* Case T–138/98.

[58] Now art 230 of the EC Treaty.

that the ranks of driftnet fishermen in the French albacore fleet constituted a closed class of traders in the first instance and, moreover, the Council itself had observed that any ban on driftnetting in this particular region was likely to cause substantial economic difficulties.[59]

Nevertheless, the CFI rejected the argument that membership of this closed class of traders permitted the applicants each to be seen as an addressee of the provision.[60] Likewise, the relevant legislation did not necessarily prevent the applicants from using driftnets in the immediate short-term, since the use of this equipment could still be sanctioned by the individual Member States until 31 December 2001, subject to the need to ensure that the number of vessels so authorised did not exceed 60 per cent of the operational driftnet fleet between 1995 and 1997.[61] Accordingly, given that the measure could potentially affect operators of other fishing vessels who might decide to undertake driftnetting activities, the provisions could not be considered to be of individual concern to the applicants and the claim was dismissed, along with a request for measures of inquiry.

Since the decision by the CFI, a further challenge to Regulation 1239/98 has recently been lodged in the form of a preliminary reference from the French courts,[62] which questions the validity of the restrictions on the basis, inter alia, that they appear to pursue a strict environmental objective, although predicated on a different article of the EC Treaty; are not clearly reasoned; and are disproportionate, discriminatory and fail to take into consideration regional variations in environmental and economic considerations throughout the Community. The request was lodged with the ECJ in late February 2007, and it is to be hoped that the judicial organs of the EU will be able to clarify the exact operation of the driftnet fishing restrictions and discourage further challenges to the legislation on this basis.

Stage three: expansion

Since the adoption of Regulation 1239/98, the EU has undertaken two significant rounds of enlargement, with the accession of a further 14 new Member States largely drawn from the former Soviet bloc in central and eastern Europe. On 1 May 2004, a number of countries in the Baltic region became Member States, which brought most of the Baltic Sea area under the regulatory purview of EC fisheries officials. In line with this marine expansion and the accession of Poland and the Baltic States, the restrictions on driftnet fishing have since been extended to the Baltic Sea in the form of a new provision, Regulation 812/2004.[63] Prior to the adoption of this measure, the Baltic Sea area had been exempt from both the existing measures adopted by the EC and the moratorium on large-scale pelagic driftnet fishing operated under the UN General Assembly Resolutions.

As far as EC law was concerned, the lack of an effective regulatory remit within the greater part of the Baltic Sea on the part of fisheries officials rendered the development of such restrictions largely redundant.[64] Accordingly, as noted above, the Baltic Sea, Belts and Sound had previously been excluded from the relevant EC legislation governing the use of driftnets, used predominantly in this region by Sweden, Denmark and Poland for

[59] COM (94) 50 (final).
[60] Note 57 para 52.
[61] ibid.
[62] *Jonathan Pilato v Jean-Claude Bourgault* Case C–109/07. This case is a preliminary reference under art 234 of the EC Treaty from the Prud'homie de pêche de Martigues.
[63] Council Regulation (EC) No 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending reg (EC) No 88/98 [2004] OJ L150/12. For a full analysis of this measure in the context of cetacean conservation see R Caddell 'By-Catch Mitigation and the Protection of Cetaceans: Recent Developments in EC Law' (2005) 8 Journal of International Wildlife Law and Policy 241.
[64] Before 2004, only Finland, Sweden, Denmark and Germany in this region were subject to the competence of the EC in fisheries matters, hence the development of driftnet fishing standards for the Baltic Sea would have been, at best, highly fragmentary in operation.

salmon.[65] Until this recent programme of EU enlargement, the regulation of driftnet fishing in this region had been the responsibility of the International Baltic Sea Fisheries Commission (IBSFC) which, in tandem with the European Council, had sanctioned the use of driftnets up to 21km in length.[66] This departure from orthodox international standards was permitted on the basis that the Baltic Sea does not encompass any areas of high seas, hence the relevant UN General Assembly Resolutions have no practical application in these waters.[67] Additionally, driftnet fishing was considered in some quarters to pose a lesser ecological threat to the marine environment in this region.[68]

Nevertheless, driftnets are currently blamed for significant by-catches of marine mammals in this area, in particular the endangered Baltic harbour porpoise. The extent of the threat posed by incidental catches to porpoises in the Baltic Sea is somewhat difficult to assess, due to a chronic lack of historical data.[69] The limited data that does exist suggests that by-catches represent a significant and pressing threat to this species. Estimates suggest that in Swedish and Polish waters the use of driftnets (for salmon) and gillnets (for cod) account for 50 per cent of the entire by-catch of porpoises.[70] Elsewhere in the Baltic Sea area, however, the driftnet fishing effort is very low.[71] The pre-enlargement regulatory system was somewhat confused, due to the presence of two regional management organisations that exercise competence over cetaceans in the Baltic Sea.[72] Both organisations have endorsed the 2.5km limit on driftnet fishing as established by the UN General Assembly, and ASCOBANS has a strong commitment towards reducing levels of by-catches of small cetaceans in this region.[73]

Regulation 812/2004 is very much a product of the recent overhaul of the CFP[74] and the greater emphasis placed by fisheries officials on the need to implement fully the so-called 'integration principle' into key components of Community policy.[75] In December 2002 a

[65] Estimates suggest that the use of driftnets, in tandem with gillnets, are responsible for approximately 50 per cent of all by-catches of harbour porpoises in this region: P Berggren, P R Wade, J Carlström and A J Reid 'Potential Limits to Anthropogenic Mortality of Harbour Porpoises in the Baltic Region' (2002) 103 Biological Conservation 313, 313. Finland, Estonia, Latvia and Lithuania have practically abandoned driftnet fishing, with the exception of a negligible group of licensed vessels: ICES Advisory Committee on Fishery Management, *Report of the Workshop on Catch Control, Gear Description and Tag Reporting in Baltic Salmon* (ICES 2003). No statistics are currently available in relation to the Russian driftnet fleet, the only state bordering the Baltic that is not a Member State of the EU.

[66] Long and Curran (n 29) 283. As part of the individual accession agreements, Estonia, Latvia, Lithuania and Poland were required to withdraw formally from the IBSFC, which now exists nominally as a forum for fisheries discourse with Russia. As the depositary State of the Agreement, Poland retains symbolic membership of the Commission for administrative expedience, but is subject to the exclusive competence of the EC on fisheries matters.

[67] Indeed, during its tenure the IBSFC consistently emphasised in its reports on driftnet fishing to the UN Secretary-General that the resolutions had no application in this region.

[68] Long and Curran (n 29) 284.

[69] See P Berggren 'Bycatches of Harbour Porpoise (*Phocoena phocoena*) in the Swedish Skagerrak, Kattegat and Baltic Seas; 1973–1993' (1994) Reports of the International Whaling Commission (Special Issue 15) 211, 214. Undoubtedly, Cold War politics and the strategic military importance of the Baltic Sea area have compounded the dearth of research on this issue to a very significant degree.

[70] See Berggren (n 65) 320.

[71] Finland, Estonia, Latvia and Lithuania have practically abandoned driftnet fishing, although Denmark has approximately the same driftnet fishing capacity as Sweden: ICES Advisory Committee on Fishery Management *Report of the Workshop on Catch Control, Gear Description and Tag Reporting in Baltic Salmon, 26–28 January 2003* ICES CM 2003/ACFM:12; copies available from ICES. No data is currently available for the Russian driftnet fleet.

[72] Namely the Helsinki Commission on the Protection of the Marine Environment of the Baltic Sea Area (HELCOM) and the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS).

[73] ASCOBANS adopted a specific plan for the recovery of stocks of the Baltic harbour porpoise, the Jastarnia Plan, which seeks to reduce by-catches of this species towards zero as quickly as possible: www.ascobans.org (1 March 2007).

[74] For a concise account of this process see Caddell (n 63) 248–51.

[75] The integration principle (introduced by the Treaty of Amsterdam in 1997) is articulated in art 6 of the EC Treaty as follows: 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.' For a full discussion and analysis of the integration principle see N Dhondt *Integration of Environmental Protection into Other EC Policies: Legal Theory and Practice* (Europa Law Publishing 2003) especially 15–110.

distinct regulation was adopted to give effect to the integration principle within the CFP,[76] under which the main objectives of EC fisheries law were substantively revised to introduce an ecosystem-based approach to the management of fisheries resources.[77] As part of this process, a series of subsidiary measures in the form of distinct regulations are being elaborated to address specific marine environmental problems posed by commercial fishing activities, of which Regulation 812/2004 – which primarily addresses the conservation needs of cetaceans – is the first such development.[78]

As a result of these developments, Regulation 812/2004 has amended the pre-enlargement position[79] and now requires a complete prohibition on the use of driftnets in the Baltic Sea by 1 January 2008,[80] with an incremental phase-out of this equipment to commence from the 2005 fishing season onwards.[81] Until 31 December 2007, vessels may keep on board or use driftnets if they have been authorised to do so by the flag state,[82] and each Member State must provide the European Commission on an annual basis with a list of vessels that have received this authorisation.[83] Where such equipment is deployed, the netting must be clearly marked with floating buoys containing radar reflectors and identifying clearly the vessel to which the net belongs.[84] In addition, the master of the vessel must keep a detailed log book, documenting the quantity of by-catches of cetaceans and the date and position of such catches.[85]

Despite this, however, although some individual Member States in this region have, for all practical purposes, largely discontinued the use of driftnets,[86] and others, such as Sweden, have introduced a series of national restrictions of their own volition,[87] significant driftnetting activities still continue within the Baltic Sea area and there are already signs of emerging compliance problems, especially with regard to Poland.[88] Indeed, given the potential economic problems in Poland that could result from the introduction of the driftnet restrictions, a further amendment has subsequently been made to the Baltic Technical Regulation amending the timescale for the phase-out,[89] although the original deadline of 1 January 2008 for the cessation of driftnetting in the Baltic Sea remains undisturbed.

[76] Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable development of fisheries resources under the Common Fisheries Policy [2002] OJ L358/59.

[77] Article 2(1) states, '[t]he Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social considerations. For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system-based approach to fisheries management. It shall aim to contribute to efficient fishing activities within an economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those who depend on fishing activities and taking into account the interests of consumers.'

[78] Future initiatives include specific regulations addressing the by-catch problems raised by sharks and seabirds. Given the time frame within which reg 812/2004 was elaborated – and the undoubted role that driftnet fishing has to play in by-catches of cetaceans – it was considered expedient to include the extension of the driftnet ban to Baltic waters within this particular measure.

[79] Council Regulation (EC) No 88/98 of 18 December 1997 laying down certain technical measures for the conservation of fishery resources in the waters of the Baltic Sea, the Belts and the Sound [1997] OJ L009/1.

[80] Article 9 of reg 812/2004. As a result, reg 88/98 has been amended so that this provision now forms art 8a(1). The original deadline set by the Commission was one year earlier than this, with a proposed moratorium to begin on 1 January 2007.

[81] Now art 8a(3) of reg 88/98.

[82] Now art 8a(2) ibid.

[83] Now art 8a(4) ibid.

[84] Now art 8b(1) ibid.

[85] Now art 8b(2) ibid.

[86] Note 71.

[87] Berggren (n 69) 212.

[88] See below p 285.

[89] Council Regulation (EC) No 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending reg 1434/98 and repealing reg (EC) No 88/98.

The enforcement of the EC driftnet ban: progress and problems

Somewhat unsurprisingly, especially given the long traditions of driftnet fishing by many European fleets, the graduated prohibition on the use of this equipment by the EC has proved to be highly controversial in a number of coastal communities, which has led to significant problems in the practical enforcement of these measures. As noted above, many key EC fishing grounds have, over the course of the previous 10 years, gained a degree of international notoriety as hotspots for driftnet fishing, involving the use of equipment that not only breaches the narrow European norms, but also violates accepted international standards. Indeed, this failure to control driftnetting may be considered a serious deficiency in the enforcement of the CFP on the part of the European institutions, and the apparent ease with which the fishing industry in a number of key areas has been able to circumvent these restrictions is a cause for very grave concern.

In many respects, this failure to control the use of driftnets is rather mystifying, especially as the EC enjoys substantial advantages over other more localised fisheries management authorities, given the fact that EU law prescribes significant financial incentives as well as a distinct set of infringement proceedings which have the scope to impose enormous financial penalties upon Member States that routinely fail to comply with the relevant provisions. In theory at least, it might be expected that such measures would have received a far greater degree of adherence than has occurred in practice.

The initial 'carrot-and-stick' strategies adopted by the EC towards promoting compliance were, in fact, a logical response to the challenges of implementing the anti-driftnet legislation. In the first instance, substantial economic incentives and assistance were offered to a number of Member States in the form of generous funding to the vessel operators to decommission their driftnet fleets. Indeed, the European Council has formally agreed to underwrite at least 50 per cent of the cost of decommissioning the Italian driftnet fleet, as well as paying extensive compensation to swordfishermen who cease to use this equipment or convert to other fishing activities instead. Similar 'bribes' of this nature have also been conferred on Spain, France, Ireland and the United Kingdom in order to eradicate driftnet fishing in the North Atlantic.[90] These financial incentives were designed to be supported by the unique infringement proceedings that operate under general EU law to pursue officially those Member States that continue to use driftnets in Community waters.

Nevertheless, the threat of legal action appears to have done rather little in practice to encourage some national authorities to adhere to the legislation. Indeed, Churchill notes that a number of driftnet fishing vessels were subsequently re-flagged in order to circumvent EC restrictions,[91] mainly in response to the economic effects of abandoning the use of this equipment. Likewise, there is substantial evidence to demonstrate that a number of Member States continue to use driftnets in their coastal waters, despite having received many millions of euros in funding to decommission such vessels. Due to its clandestine nature, the scale of illegal driftnet fishing by EU Member States is nearly impossible to quantify accurately, although there have been some ad hoc studies by teams of biologists. In the Mediterranean Sea, one such study of the effects on cetaceans of illegal driftnet fishing for swordfish by Spanish vessels in the Straits of Gibraltar estimated that some 366 dolphins were taken as by-catch in the 1993 fishing season, with 289 individuals taken in the 1994 season, and concluded that the incidental mortality of dolphins in the Mediterranean was not sustainable.[92]

[90] Council Decision 1999/27/EC of 17 December 1998 on a specific measure to encourage diversification out of certain activities and amending Decision 97/292/EC [1999] OJ L008/22.

[91] R R Churchill 'The EU as an International Fisheries Actor – Shark or Minnow?' (1999) 4 European Foreign Affairs Review 463, 480–1.

[92] See L Silvani, M Gazo and A Aguilar 'Spanish Driftnet Fishing and Incidental Catches in the Western Mediterranean' (1999) 90 Biological Conservation 79.

Substantial evidence has also been collected by teams of NGOs monitoring key fishing grounds for instances of non-compliance, such as Oceana, WWF and Greenpeace.

Although the European Commission has recently commenced proceedings for non-compliance against Italy, as well as France and Spain, in respect of infringements of the EU standards,[93] the highly protracted nature of this process has essentially permitted driftnet fishing to continue largely unabated. Indeed, while some practical measures to address the driftnet issue have been introduced by a series of Member States, the success of the EC itself in this process must be considered to have been extremely variable in practice, as case studies of individual fishing fleets demonstrate.

Republic of Ireland

Driftnets in the Republic of Ireland have been predominantly deployed on the west coast in the Atlantic salmon fishery. In the context of a specific fishery, the Irish authorities have attracted the regulatory attention of the European Commission in respect of one particular species of fish, the wild Atlantic salmon, which is currently protected under the Habitats Directive. This is a highly migratory species that spawns in Irish rivers, before travelling into the north Atlantic from which mature individuals will return periodically to spawn. As a result, Irish fishermen set driftnets in the summer months to catch the fish, subject to an annual authorisation process operated by the Department of Communications, Marine and Natural Resources. As is prescribed by the Habitats Directive, any such authorisation must be granted subject to a full scientific assessment, with licences withheld if it is ascertained that authorisation will lead to negative effects upon the stock. Despite a full assessment in 2006 revealing that driftnet fishing would have an adverse impact upon stocks of wild Atlantic salmon, the Irish authorities sanctioned the use of driftnets, which raised concerns over the ecological effects of continued driftnet fishing.

On 3 July 2006, the European Commission issued a reasoned opinion to the Irish authorities, demanding that in order to avoid further infringements Ireland must comply with the Habitats Directive and 'eschew driftnet fishing in 2007'.[94] The reasoned opinion clearly caused some consternation within the relevant government departments and, as a result of prior communications with the Commission, an Independent Salmon Group was established in March 2006 to advise the government on how to align fisheries policy with the relevant scientific advice and transnational legal obligations in relation to wild salmon. The Independent Salmon Group produced a lengthy report in October 2006[95] which recommended inter alia that mixed stock fishing (ie the use of driftnets in this context) should be discontinued due to its indiscriminate nature and the risk of substantial financial penalties being imposed by the ECJ if the Commission's complaint engaging the Habitats Directive were to be upheld. Consequently, a hardship fund of €25 million was established to compensate fishermen for the loss of the driftnet fishery. This was based on the payment of a stipend equivalent to six times the average annual catch in the years 2001–2005, with the creation of an additional community support scheme comprising a fund of a further €5 million to aid the development of those communities in which the economic impacts of a cessation of driftnet fishing would be most keenly felt and to provide alternative opportunities for those directly affected.

As a result of this initiative, driftnets were formally banned in Ireland from 2007,[96] although

[93] Cited by the European Commission on its 'Scoreboard' of compliance with fisheries laws; www.europa.eu.int/comm/fisheries/scoreboard/control_en.htm. The present status of the Commission's non-compliance action is, however, confidential.
[94] IP/06/906.
[95] http://www.dcmnr.gov.ie/NR/rdonlyres/3D783F92-86A8-4D91-B431-55DDE740D279/0/IndependentSalmonGroupreport.pdf (10 July 2007).
[96] Control of Fishing for Salmon Order 2007.

within the affected communities opinion is deeply divided on this issue. Nevertheless, this move may be considered a partial success for the EU policy against driftnets on the basis that legal action – albeit under a very different provision on nature conservation, as opposed to the specific anti-driftnet measures – brought by the European Commission has inspired at least one Member State to discontinue formally the use of this equipment in a key fishing region.

France

As noted above, the anti-driftnet provisions introduced by the EC have long proved controversial in France, where driftnetting has formed a large component of the national salmon fleet since the mid-1980s. French interests have been at the heart of the majority of the legal challenges to the legislation to date and France secured a temporary derogation to the original driftnet provisions in 1992. Nevertheless, a substantial volume of driftnet fishing by the French fleet has continued and the European Commission has formally initiated infringement proceedings against France, which are currently moving extremely slowly towards their eventual conclusion.

An additional complication has arisen in France – and by extension Italy, which as noted below has developed a similar strategy to circumvent the restrictions – in that the French authorities have sought to mitigate the impact of the driftnet fishing restrictions by exploiting the absence of a clear and precise definition of a 'driftnet' in the European legislation and sanctioning the use of the *thonaille*; netting which is effectively the same type as that proscribed under the current norms, but the technical modifications of which renders it distinct and therefore outside the scope of the current restrictions. The *thonaille*, essentially a driftnet under a *nom de plume* and deployed mainly in the Mediterranean Sea, was permitted by virtue of a series of ordinances adopted by the French Ministry of Agriculture and Fisheries in 2003.[97]

Nevertheless, the use of this equipment has recently undergone a substantive challenge under the French administrative law system and the *thonaille* legislation was formally annulled in 2005 by the Conseil d'Etat, the highest administrative review body in France.[98] In this action, brought by a collective of NGOs concerned at the effect of by-catches of non-target species, including several species of protected cetaceans, the *thonaille* legislation was officially ruled to have breached the provisions of Regulation 1239/98 and the ministry was accordingly adjudged to have acted illegally in sanctioning the use of this equipment, with the offending provisions accordingly annulled.

Since this action was brought in France, some proactive steps have been taken within the EU institutions to close this particular loophole and to provide a comprehensive and technically unequivocal definition of a driftnet that has, to date, proved elusive in framing the current legislation. In September 2006, the European Commission proposed a new regulation that would amend Regulations 894/97, 812/2004 and 2187/2005 in relation to the use of driftnets,[99] with the Commission diplomatically noting that the lack of a definition of a 'driftnet' in the current legislation has given rise to the need to 'clarify certain existing provisions to avoid counterproductive misunderstandings as well as facilitate uniformity in the practice of monitoring between Member States'.[100] Accordingly, the Commission has proposed a short regulation incorporating a new definitional article into the current provisions, formally defining a driftnet as:

[97] Arrêté du 1er août 2003 du minister de l'agriculture, de l'alimentation de la pêche at des affaires rurales. This measure was supported by a later ordinance introduced in July 2004.
[98] Contentieux No 265034 3 August 2005.
[99] COM (2006) 511 final.
[100] ibid.

> 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 and/or to limit its drifting.

In January 2007, the Commission's proposal was formally considered by the Committee on Fisheries of the European Parliament,[101] and the proposed definition was endorsed in its entirety. The European Parliament observed that:

> the introduction of a definition of a driftnet in the above three regulations is crucial, given that it will help facilitate the implementation and enforcement of Community legislation in this field and prevent any circumvention of that legislation through varying interpretations at national level.

A resolution endorsing the proposal was formally adopted by an emphatic majority in the European Parliament[102] and the matter has since been forwarded to the European Council, where it is to be hoped that the adoption of a single unifying definition of a driftnet in Community fisheries law will deter the cynical circumvention of these provisions on the part of legislatively creative government departments in future years.

Italy

As far as the EC moratorium on the use of driftnets is concerned, the single most difficult issue of enforcement has arisen in relation to the Italian driftnet fishing fleet. Italian fishermen have used driftnets in the Mediterranean Sea for centuries, and many coastal communities in southern Italy were outraged by the proposed restrictions on this equipment, protesting that these measures would destroy a traditional way of life and lead to severe economic dislocation and hardship.[103]

Italian fishermen have argued that driftnet fishing is not commercially profitable unless driftnets of up to 8km in length are deployed, since swordfish do not swim in schools and are therefore more difficult to catch in economically viable numbers with reduced netting. This placed the government in the somewhat unenviable position of having to placate a plethora of vociferous protests on the driftnet issue,[104] while attempting to develop a strategy to mitigate the financial impact of the EC restrictions. Ultimately, the Italian policy towards driftnets entered a surreal period of constant fluctuation, with the enactment of a series of contradictory domestic measures that first restricted the use of this equipment, before appeasing the fishing industry by relaxing and even retracting this stance.[105] As the Italian government first implemented a series of restrictions in 1991, in line with its obligations under EC law, a number of episodes of civil disobedience and even serious public disorder ensued, culminating in the repeated blockading of the Straits of Medina.[106] In the light of these developments, the Ministry of Agriculture sought an exemption from the EU which would allow driftnets of up to 9km to be deployed in the Mediterranean Sea. This request was

[101] A6-0014/2007 (final) of 26 January 2007.
[102] 633 votes in favour, 17 against and 10 abstentions.
[103] For a comprehensive (if somewhat romanticised) discussion of the importance of the Italian swordfish fleet to coastal communities in southern Italy, see S Collet 'Leviathan Management or Customary Administration: The Search for New Institutional Arrangements' in K Crean and D Symes (eds) *Fisheries Management in Crisis* (Fishing News Books 1996) especially 100–6. On p 101, Collet notes that these communities had hunted swordfish in this manner since the eighth century BC.
[104] An equally vocal campaign was being conducted concurrently by a host of environmental NGOs, concerned about the impact of large-scale driftnet fishing on the marine environment of the Mediterranean region. Driftnet fishing for swordfish has acquired a particularly notorious reputation for incidental mortality, since scientific evidence suggests that by-catches of non-target species can constitute up to 80 per cent of the average yield of this fishing fleet.
[105] For a comprehensive discussion of these developments see Tullio Scovazzi 'The Enforcement in the Mediterranean of United Nations Resolutions on Large-Scale Driftnet Fishing' (1998) 2 Max Planck Yearbook of United Nations Law 365.
[106] ibid 372–3.

duly refused, with the result that there is some evidence of state-sanctioned contravention of EU standards in that the government 'then told fishermen to continue as they had been and ignore the law'.[107] In the absence of a coherent and consistent position on driftnet fishing on the part of the government, Italian swordfishermen continued to use this technique, and rapidly gained a degree of international notoriety as a result.

In 1995, a further twist occurred in this saga when intervention against driftnet fishing in the Mediterranean Sea came from a highly unexpected source – namely the US government, through the external application of its domestic fisheries laws. The US authorities have proved instrumental in enforcing the moratorium on large-scale pelagic driftnet fishing, since a raft of intimidating domestic legislation with an extra-territorial effect has been introduced that has served to promote a greater degree of compliance with the UN General Assembly Resolutions than might otherwise have been expected. In 1987, the Driftnet Impact Monitoring, Assessment and Control Act was passed,[108] requiring the Secretary of State to enter into negotiations with foreign governments whose nationals and vessels conduct high seas driftnet fishing.[109] The purpose of such negotiations was to conclude agreements to monitor and assess the numbers of US marine resources taken as a result of the use of driftnets on the high seas. If a foreign state failed to enter into negotiations and conclude an 'adequate agreement' within 18 months of the commencement of the Act, it would subsequently face certification under the Pelly Amendment to the Fisherman's Protective Act 1967.[110]

Following the conclusion of the Wellington Convention and the adoption of Resolution 44/225 by the UN General Assembly in 1989, the US strengthened its internal fisheries laws in conjunction with the new restrictions on driftnet fishing by passing the Driftnet Act Amendments of 1990.[111] This Act declared that the policy of Congress was to support Resolution 44/225, the Tarawa Declaration and the Wellington Convention, and to seek an international ban on the use of large-scale driftnets on the high seas.[112]

The Act required the Secretary of State to develop agreements with other states to ensure, inter alia, that driftnets are fitted with satellite transmitters providing real-time position information accessible to the US; reliable monitoring is carried out by the US, through the use of on-board observers, of all target and non-target species taken by driftnets; US officials have the right to board and inspect vessels operating in designated areas on the high seas; time and area restrictions are imposed on the use of driftnets; all large-scale driftnets are constructed from biodegradable materials; and the by-catch of non-target species is minimised.[113] The amendments also allowed the US to certify any states:

[107] ibid 372.

[108] Public Law 100–200; codified at 16 U.S.C. §1822. For an appraisal of this legislation, see J B Otero 'The 1987 Driftnet Act: A Step Toward Responsible Marine Resources Management' (1991) 2 Colorado Journal of International Environmental Law and Policy 129.

[109] Section 4003(1) defines a driftnet as being 'a gillnet composed of a panel of plastic webbing one and one-half miles or more in length'.

[110] This provision permits the US government to impose import restrictions on individual states for failing to observe fully marine environmental standards in fisheries activities that affect US interests. In 1989, the US sanctioned Korea and Taiwan for failing to conclude such an agreement, but no further action was taken after both states eventually concluded monitoring agreements: see T L McDorman 'The GATT Consistency of US Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles' (1991) 24 George Washington Journal of International Law and Economics 478, 498. For a discussion of the value of the Pelly Amendment in preventing fishing practices affecting cetaceans see S Charnovitz 'Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices' (1994) 9 American University Journal of International Law and Policy 751, especially 758–76.

[111] Public Law 101–627; codified at 16 U.S.C. §1826.

[112] Section 206(c).

[113] Section 206(d). Unlike the other provisions, the obligation to reduce the taking of non-target species by the Act does not specifically mention the use of large-scale driftnets. This could be interpreted as an extremely wide-ranging obligation to reduce by-catches with *all* types of fishing gear.

> that conduct, or authorise their nationals to conduct, large-scale driftnet fishing beyond the exclusive economic zone of any nation in a manner that diminishes the effectiveness of or is inconsistent with any international agreement governing large-scale driftnet fishing to which the United States is a party or otherwise subscribes.[114]

Following the adoption of Resolution 46/215 by the UN General Assembly, the US enacted the High Seas Driftnet Fisheries Enforcement Act 1992, which further strengthened the measures available to the US authorities to deter the use of illegal driftnets.[115] Under this Act, the Secretary of Commerce is required to publish a list of states whose nationals or vessels conduct large-scale pelagic driftnet fishing on the high seas.[116] Any vessel from a state included on this list is to be denied port privileges in the US, until it has terminated its driftnet fishing activities. From 1 January 1993 onwards, the Secretary of Commerce is obliged to inform the President about states whose nationals or vessels continue to use large-scale pelagic driftnets. The President is then to direct the Secretary of the Treasury to prohibit imports of fish and fish products and sport fishing equipment into the US from that state. If the use of driftnets has not ceased within six months of the prohibition on imports, then the fleet in question will face certification under the Pelly Amendment.

These provisions were in turn strengthened through the enactment of the High Seas Driftnet Fishing Moratorium Protection Act 1995.[117] This statute requires the President to utilise 'appropriate assets' of the Coast Guard, Department of Defence and other federal agencies:

> to detect, monitor and prevent violations of the United Nations moratorium on large-scale driftnet fishing on the high seas for all fisheries under the jurisdiction of the United States and, in the case of fisheries not under the jurisdiction of the United States, to the fullest extent permitted under international law.[118]

The legislative action taken by the US against the use of this specific type of fishing gear is complemented by a general prohibition on the unauthorised taking of *all* marine mammals, as prescribed by the Marine Mammal Protection Act 1972.[119]

Following a successful action brought by environmental lobbyists in the US Court of International Trade, Italy was declared to be in breach of the Driftnet Act,[120] which automatically required the court to issue an order to the Clinton administration to initiate economic sanctions against the Italian government. With neither state keen to commence this process, a series of negotiations were held in which the threat of sanctions was ultimately averted in July 1996, after the Italian government formally undertook to end driftnet fishing by its nationals and vessels, which was sufficient to remove the certification imposed by the US Court of International Trade. To this end, Italy committed itself to a large-scale conversion scheme to eliminate driftnet fishing by its vessels and nationals by 2000.[121] In recent years, however, the issue has resurfaced, and in 2001 the appellants in the initial action tried unsuccessfully to have the Italian government recertified for a series of violations of the terms

[114] Section 206(e)(6).
[115] Public Law 102–582; reprinted (1993) 32 *International Legal Materials* 530.
[116] Section 101.
[117] Public Law 104–43; codified at 16 U.S.C. §1826g.
[118] Section 606.
[119] Section 101(a).
[120] *Humane Society of the U.S. v Brown*, 901 F. Supp. 338 (US Ct. Int'l Trade, 1995), 345. For a full discussion of this case see A Blackwell 'The Humane Society and Italian Driftnetters: Environmental Activists and Unilateral Action in International Environmental Law' (1998) 23 North Carolina Journal of International Law and Commercial Regulation 313.
[121] As part of this agreement, Italy was to receive significant financial assistance from the US government to phase out the use of driftnets, with the cost of converting the swordfish driftnet fleet estimated at $235 million: see Rothwell (n 28) 140.

of the agreement with the US, having independently observed a litany of driftnetting infractions committed by Italian fishing vessels.[122]

Notwithstanding the involvement of the US authorities in the Italian driftnet controversy, and the seeming conclusion of this action in the American courts, substantial violations of both international and EC driftnetting norms continue to be observed in Italian waters. Indeed, specialist NGOs monitoring the Italian fleet have continually recorded instances of significant non-compliance with these initiatives, both in terms of open driftnet use and by means of a more insidious tactic similar to that employed by France, namely the exploitation of the lack of precision in the legal definition of a 'driftnet'. A considerable number of Italian vessels has been detected fishing with driftnets by both the RSPCA[123] and Oceana,[124] which have forwarded their evidence to the European Commission.[125] By an unfortunate irony, however, the collection of further incriminating evidence appears only to prolong an already protracted position further, since EU infringement proceedings require the Commission to enter into communications with the Member State in question, which is then granted a period of time to respond to further allegations of misfeasance, thereby delaying a final hearing in the ECJ on the issue.

As noted above, the Italian authorities, whether by accident or design, have managed to circumvent the relevant EC legislation by means of a legal interpretation of the fishing gear deployed by its fishermen. In this respect, the traditional *spadare* (driftnets) have been reinterpreted as a new type of net, *ferrettara*, which has been formally permitted for domestic use by virtue of recent decrees by the Italian government. Nevertheless, as in the French context, there is very little difference between the two types of gear, and the *ferrettara* legislation essentially permits a de facto return to driftnet fishing, creating a loophole that the European authorities must seek to close in their rectification of the current driftnet legislation.

Emerging problems: Poland, Morocco and Turkey

Notwithstanding that the driftnet fishing in France and Italy currently constitutes the most pressing threats to the efficacy of the EC driftnet legislation, a series of further driftnet fishermen is present in Community waters. Indeed, additional problems are raised by the activities of Poland, a recently inaugurated Member State, as well as two further coastal states in close proximity to Community fishing grounds, namely Morocco and Turkey.

In the context of Poland, as noted above Regulation 812/2004 has yet to enter fully into force

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[122] *Humane Society of the U.S. v Clinton*, 236 F.3d 1320 (Fed. Cir. 2001). For an appraisal of this case see C Espinosa '*The Humane Society of the U.S. v Clinton*: Executive Officers Have Broad Discretion in Determining Sanctions Against Nations Conducting Illegal Driftnet Fishing in the High Seas' (2001). 8 University of Baltimore Journal of Environmental Law 214.

[123] *Driftnets and Loopholes: The Continued Flouting of EU Law by the Italian Government in its Driftnets Fishery* (RSPCA and Humane Society International 2005).

[124] Oceana has undertaken significant monitoring of the Italian driftnet fishery, see for instance *The Use of Driftnets: A Scandal for Europe, A Mockery of the United Nations* (Oceana 2005). Oceana also produces annual reports on the use of driftnets in the Mediterranean Sea; see www.oceana.org (10 July 2007).

[125] The driftnet fishing problems in the Mediterranean Sea have also drawn a stern reaction from the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS). In November 2006 the Scientific Committee of ACCOBAMS adopted a specific recommendation of the use of driftnets in the Mediterranean Sea, expressing its 'grave concern' over the continued non-compliance with legal norms by both the EC and a series of relevant RMFOs: Recommendation SC4.2. ACCOBAMS, like ASCOBANS, is a regional agreement established under the auspices of the Convention on the Conservation of Migratory Species of Wild Animals 1979: see R Caddell 'International Law and the Protection of Migratory Wildlife: An Appraisal of Twenty-Five Years of the Bonn Convention' (2005) 16 Colorado Journal of International Environmental Law and Policy 113. ACCOBAMS is an outspoken critic of the current EC driftnet legislation, especially in relation to the panacea approach taken towards the use of pingers as a by-catch mitigation policy.

in the Baltic Sea, with a number of coastal Member States obliged to downscale their activities in this respect pending the full operation of the driftnet fishing restrictions in this region. Although this position renders an analysis of the position in the Baltic Sea somewhat speculative at this juncture, it is clear that the most immediate difficulties will lie in respect of Polish waters. Prior to the development of the new Baltic standards, non-compliance with driftnet fishing regulations in this area was not generally thought to pose problems on the same level as the Mediterranean question, since the nature of current driftnet fishing activities in the Baltic Sea region means that compliance with these measures is considerably easier to monitor by the relevant authorities than in other areas of the EC. Indeed, as noted by Long and Curran, 'driftnetting in the Baltic is for the anadromous species, salmon, which is harvested in the coastal zone within national jurisdiction and consequently is less difficult to manage and control by the national authorities'.[126] Despite this, however, the proposed restrictions have drawn considerable invective from certain quarters, with the intensive driftnet salmon fishery in Puck Bay likely to witness the greatest problems in this regard.

Indeed, economic dislocation and opposition to the restrictions are already beginning to manifest themselves in this area, where driftnets have traditionally been widely deployed. This issue has already been observed within ASCOBANS, where the Jastarnia Group has called upon the Polish authorities to address the use of driftnets as a matter of urgency. Nonetheless, this may prove to be a considerable challenge and, in reporting to the inaugural meeting of the ASCOBANS Jastarnia Group in 2005, Lidia Kacalska-Bienkowska of the Ministry of Agriculture and Rural Development of Poland observed that:

> Polish fishermen could not replace drift-nets by other gear because of the nature of the country's coastline … The ban on driftnets would lead to the death of the salmon fishery in Poland, and to strong opposition from Polish fishermen, who feared for their future.[127]

In February 2006, the European Parliament received a petition sent on behalf of the Polish Fishermen's Union, arguing that the introduction of Regulation 812/2004 was likely to cause severe economic hardship and to prevent fishermen from pursuing their traditional way of life, and calling for an exemption from the operation of the regulation in Polish waters.[128] This issue is one that will clearly occupy the Polish fisheries authorities for some time, as they have already unsuccessfully applied for a derogation in these waters. Nonetheless, the Italian experience in particular would suggest that generous subsidies and financial assistance should be forthcoming from the EU in due course, to cushion the pecuniary effects of the abolition of driftnet fishing on the Polish fleet.

In the case of Morocco, a problem has arisen in that a significant number of non-EU driftnet fishing vessels, within the Mediterranean region in particular, have subsequently moved into the fishing grounds that have now been vacated by the various Member States.[129] This is a particularly insidious form of circumvention of EU standards, since the Community itself has a very limited scope to bring sanctions to bear against these 'free riders', which are predominantly drawn from coastal communities in North Africa. There is very little available data on the scale of these fishing activities, but the statistics that do exist have revealed alarming rates of by-catches that are widely believed to be unsustainable.[130] In this respect,

[126] Note 29 284.
[127] *Report of the First Meeting of the UNEP/ASCOBANS Jastarnia Group* (ASCOBANS 2005) 2.
[128] European Parliament, Committee on Petitions, Document CM/601531EN.doc; 3 February 2006.
[129] This point was not lost on the opponents of driftnet fishing among the EU Member States; as noted by Long and Curran, 'Italy, in common with the other Member States which border the Mediterranean, has no EEZ/EFZ. Thus there is the belief in Italy that an indiscriminate prohibition of driftnets would immediately cause Italian fishermen to be replaced by foreign fishermen, free from any obligation whatsoever': (n 29) 289.
[130] See S Tudela, A Kai Kai, F Maynou, M El Andalossi and P Guglielmi 'Driftnet Fishing and Biodiversity Conservation: The Case Study of the Large-Scale Moroccan Driftnet Fleet Operating in the Alboran Sea (SW Mediterranean)' (2005) 121 Biological Conservation 65.

the European Council has recently entered into a Fisheries Partnership Agreement (FPA) with Morocco.[131] As a result of the FPA, concluded in May 2006 after the previous such agreement had expired in November 1999, the Council agreed a total financial contribution of €36.1 million per annum, of which €1.25 million are specifically designated to support programmes to abolish the use of driftnets.

As far as Turkey is concerned, recent research suggests that driftnet fishing for swordfish in Turkish waters may also have implications for a series of different stocks of non-target species.[132] As Turkey has formally applied for membership of the EU, it is clear that the use of driftnets in the Aegean may also become an issue if and when Turkey becomes closer to full membership of the European Union and subsequent participation in the Common Fisheries Policy.

Conclusion

There can be little question that the introduction and entrenchment of the global restrictions on the use of large-scale pelagic driftnets on the high seas has proved to be a positive development from both an ecological standpoint and a fisheries management perspective. The use of such vast netting by a number of fishing fleets could not, on any objective basis, be considered responsible husbandry of marine resources, and the resulting indiscriminate by-catch of non-target species and juvenile fish brought a number of commercial fisheries and ancillary stocks to the verge of collapse in the late 1980s. Notwithstanding that by-catches remain a serious threat to many depleted marine species, the cumulative effect of regional initiatives and UN General Assembly Resolutions, augmented by the activities of RFMOs and national authorities, has established a pragmatic and workable set of technical standards to address a particularly destructive fishing technique which has generally operated with relatively few infractions.

Despite this global position, significant regulatory problems have been raised by the use of driftnets in European waters, especially in key fishing grounds such as the North-East Atlantic and the Mediterranean Sea, where the great majority of driftnet fishing infractions committed to date have been detected. That European fishing grounds have constituted a fertile area of non-compliance is striking, especially since these waters are currently subject to the most stringent legal restrictions on driftnets, in the form of a complete ban on the use of this equipment instituted under EC law. Nevertheless, despite holding several substantive advantages over other fisheries management authorities – such as a distinct legal compliance mechanism and a strong political structure – the EC has proved to be highly unsuccessful in its attempts to prevent such infractions of fishing standards, in a manner that has not been replicated on such a scale in other geographical areas.

Given these difficulties in securing compliance, the EC driftnet provisions may be considered to be experiencing a curious paradox: while there is strong political support for the moratorium and a host of legislation to entrench it, the practical enforcement of these measures has largely failed at every step, with a substantial and unsustainable volume of driftnet fishing being regularly undertaken in Community waters. The legislation itself must be judged to have been technically flawed in the first instance, and this loose drafting has facilitated and encouraged non-compliance, with various Member States enacting domestic laws to permit the use of modified gear that is essentially driftnets under an assumed name, such as the French *thonaille* and the Italian *ferrettara*. However, while some initiatives have

[131] Council Regulation (EC) No 764/2006 on the conclusion of the Fisheries Partnership Agreement Between the European Community and the Kingdom of Morocco [2006] OJ L141/1.

[132] See O Akyol, M Erdem, V Ünal and T Ceyhan 'Investigations on Drift-Net Fishery for Swordfish (Xiphias gladus L) in the Aegean Sea (2005) 29 Turkish Journal of Veterinary and Animal Sciences 1225.

recently been taken towards closing this loophole, there is no guarantee that introducing a new definition of a driftnet will be any more successful, since certain national legislators have consistently proved themselves adept at generating creative technical ordinances to by-pass these provisions. Indeed, the absence of effective legal sanctions against such instances of state-sponsored non-compliance constitutes a rather more troubling state of affairs than the lack of specialist technical precision within the current EC fisheries laws.

Likewise, infringement proceedings and the current incentive schemes to promote compliance must also largely be considered to have failed. The current incentive scheme, namely the availability of large subsidies to promote alternative fishing techniques, has seen the payment of substantial sums of money to decommission driftnet fishing vessels, yet there is considerable evidence that some grant recipients have continued to deploy this equipment in EC waters with little apparent fear of sanction. Furthermore, the failure of infringement proceedings against a variety of Member States must also constitute a cause for serious concern. Indeed, the EC non-compliance procedures have proved to be unduly cumbersome and such processes have been on-going against a number of Member States to date with little tangible progress. By an unfortunate irony, the greater the volume of evidence of non-compliance received by the European Commission in the current infringement proceedings, the longer a substantive course of legal action is effectively postponed, since such evidence must be presented to the Member State in question for an official response before the matter may proceed further. In this way, the current infringement proceedings against Italy and France largely appear to have stagnated, despite compelling evidence that driftnet fishing is still routinely occurring in national waters.

Where effective legal action against the use of driftnets has occurred, it cannot objectively be attributed to EC efforts to promote compliance; instead, it has largely been the result of national processes or the activities of external fisheries actors. In Ireland, for instance, despite some evidence that a final warning from the EC was a catalyst for action, the new national anti-driftnet provisions are largely the fruits of a concerted domestic campaign and an independent government review. Likewise in France, the *thonaille* legislation was annulled not by Community pressure, but as a result of the domestic judicial review process. In the case of Italy, the most effective pressure brought to bear on the national authorities regarding driftnet fishing has arisen through the extra-territorial application of US fisheries laws and the associated spectre of trade sanctions, as opposed to any distinct legal processes advanced under European law.

Consequently, it must be seriously questioned whether the EC is truly capable of enforcing the European driftnet ban on its own terms. This must be a cause for great concern, since a prompt solution to this problem – on an EU level, at least – is not immediately apparent, notwithstanding the inauguration of a new Community Fisheries Compliance Agency. The enforcement apparatus of EU law is a slow-moving machine and, while an *ex post facto* judgment may eventually be delivered at some point in the coming years imposing substantial financial penalties for non-compliance, this is of little practical value to the marine environment at present. Instead, those committed to securing compliance may eventually be forced to work through the national administrative law processes and/or invoke the possibility of extra-territorial US enforcement – and with NOAA monitoring the position closely, this latter prospect remains very much a live option. Ultimately, however, given the strong political and legislative sentiment against the use of driftnets on the part of EU institutions, the fact that concerned stakeholders may be better served pursuing recalcitrant Member States in the US courts for breaches of European rules must be considered an especially bleak and damning indictment of current EC fisheries enforcement mechanisms in respect of driftnet fishing.