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# Reforming EU Participation in Fisheries Management and Conservation on the High Seas†

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## INTRODUCTION

The European Union (EU) holds exclusive competence on matters of fishery conservation and management in European waters and in this role has participated actively in the international conventions and agreements that shape modern fishery management on the high seas. As the world's fifth largest fish producer in 2012<sup>1</sup> and a formidable political entity, the EU is well-positioned to influence further development in this regulatory network, as well as to address key weaknesses in the performance of regional fishery management organizations (RFMOs). The EU has shown its willingness to play a positive role within the external dimension of its Common Fisheries Policy (CFP), in which it proposes to “strengthen and enhance” international compliance with RFMOs.<sup>2</sup> However, in the past the EU itself has been criticized heavily for its conduct in such organizations and has seemed to contribute to their overarching problems. To assess the potential legitimacy of the CFP claim to “strengthen and enhance” RFMO performance, this article explores the legal background for EU participation in international marine living resource management and the development of its role in the field, and evaluates two case studies of past EU conduct in two major RFMOs: the Northwest Atlantic Fisheries Organization (NAFO) and the International Commission for the Conservation of Atlantic Tunas (ICCAT).

## LEGAL OVERVIEW

### Legal Framework for EU Participation in International Fisheries Organizations

As the EU's CFP approached a new round of reform in 2012, its significance transcended EU waters by far.<sup>3</sup> The Union's power to affect the world's marine fisheries is enforced by sheer volume of production: collectively, the EU was the world's fifth largest harvester of fish in 2012 and it accounted for over five percent of world marine capture in 2011, while 20 percent of its landings were caught on the high seas.<sup>4</sup> The majority of this catch was extracted from the Eastern Atlantic and Mediterranean, but EU fleets also operate globally and have been increasingly present on the high seas and in other countries' exclusive economic zones (EEZs) over the last few decades.<sup>5</sup> Additionally, the EU has the world's largest single market for fisheries products.<sup>6</sup> Given the breadth of its activity alone, therefore, the EU is an essential player in the realm of international fisheries management.

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1 European Commission, 2012. Facts and Figures of the Common Fisheries Policy.

2 European Commission, 2009. Green Paper on Reform of the Common Fisheries Policy, p. 5. COM(2009) 163.

3 Id.

4 European Commission, 2012. Facts and Figures of the Common Fisheries Policy; FAO for data on worldwide capture; Eurostat for capture by 27 member states; European Commission, Directorate-General for Maritime Affairs and Fisheries, “Fishing outside the EU,” <[http://ec.europa.eu/fisheries/cfp/international/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/index_en.htm)>.

5 European Commission, 2012. Facts and Figures of the Common Fisheries Policy; R. Watson, D. Zeller and D. Pauly, “Spatial expansion of EU and non-EU fishing fleets into the global ocean, 1950 to the present,” WWF Netherlands, 2012, available online: <[http://www.wwf.org.uk/wwf\\_articles.cfm?unewsid=5623](http://www.wwf.org.uk/wwf_articles.cfm?unewsid=5623)>.

6 European Commission, Directorate-General for Maritime Affairs and Fisheries, “Fishing outside the EU,” available online: <[http://ec.europa.eu/fisheries/cfp/international/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/index_en.htm)>.

Within the context of international law, the role of the EU in fisheries is equally important, albeit more complex. Since the EU is a supranational organization, its degree of participation in any international institution (or treaty regime) is different from that of a sovereign state, and is determined both externally and internally.<sup>7</sup> Externally, the EU's involvement depends on whether the international institution in question allows for the participation of supranational organizations, and if it does, to what degree such participation is allowed – usually outlined in relevant provisions of the institution's constitutional treaty. For example, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) includes in its final clauses the provision that “the Convention shall be open for signature by ... international organizations,”<sup>8</sup> where the latter are defined as “intergovernmental organization[s] ... to which its member States have transferred competence over matters governed by this Convention.”<sup>9</sup>

Accordingly, the second factor that defines the EU's capacity to participate in international institutions is determined internally, depending on how legal competences are divided between the EU and its member states. As a supranational organization, the EU may hold legal competences that have been explicitly conferred unto it by its member states, and these competences can be either exclusive or shared with the member states.<sup>10</sup> Although the division of different competences is broadly outlined in the Treaty on the Functioning of the European Union (TFEU), their external implications are often implied or inferred from the external dimension of internal competences,<sup>11</sup> and from the general rights to cooperate with third countries granted to the EU in the TFEU.<sup>12</sup> Particular international competences of the EU are also often defined through agreements themselves, in which the EU often states its relative competences.

In the case of fisheries, the TFEU demarcates exclusive EU competence over “the conservation of marine biological resources under the common fisheries policy” and shared competence over other fisheries-related matters, such as research or technological development.<sup>13</sup> The exact scope of “conservation” remains undefined in the TFEU, in large part because the extent of EU competence has expanded over the years along with the development of the CFP and with increased EU participation in relevant international institutions.

For the purposes of international law, current EU competence in fisheries relations is best defined by the EU declaration upon ratifying UNCLOS in 1998. The EU claims exclusive competence over “the conservation and management of sea resources” and the corresponding right “to adopt the relevant rules and regulations ... and, within its competence, to enter into external undertakings with third States or competent international organizations.”<sup>14</sup> In short, where it comes to most matters of fisheries – excluding flagging jurisdiction, which reverts to member states, and research and technological development, which fall under the shared competences – the EU has exclusive competence to represent its member states.<sup>15</sup>

On the basis of this competence, the EU has become a formidable force in international living marine resource management. It has taken on an active role in various multilateral fisheries organizations, often superseding previous participation by its member states.<sup>16</sup> Where it comes to fisheries management and conservation, the EU represents its member states' interests and negotiates and adopts measures within the framework of the international institutions. The EU is then also responsible for implementing measures from international treaties and agreements on an EU-level. This is accomplished through the Common Fisheries Policy.

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7 R. Wessel, “The Legal Framework for the Participation of the European Union in International Institutions,” *Journal of European Integration* 33, no. 6 (2011): 621–735.

8 1982 United Nations Convention on the Law of the Sea (UNCLOS), Article 305 (1) (f).

9 *Id.*, Annex IX (1).

10 Treaty on European Union. 2007. Title I, Article 5.

11 Wessel, see n. 7 above.

12 Treaty on the Functioning of the European Union. 2007. Part V, especially Title V, Articles 216-7.

13 *Id.*, Part I, Title I, Article 3 (d); *Id.*, Article 4 (d).

14 UNCLOS 1982. Declaration of the European Community upon signature (7 December 1998). Declaration made pursuant to article 5(1) of Annex IX to the Convention and to article 4(4) of the Agreement.

15 *Id.*

16 Lawrence Juda, Professor, University of Rhode Island, pers. comm. 2013.

## International Significance of the Common Fisheries Policy

As the main legislation resulting from the EU's exclusive competence in living marine resource management and conservation, the CFP governs most aspects of fisheries policy in the EU. Its jurisdiction includes catch allocation, industry and market regulations, control and enforcement, and international relations.<sup>17</sup> Although it mainly sets regulations for fisheries within EU waters, the CFP has large international implications as well. For one, it performs the important function of aligning internal law with international responsibility (the supranational equivalent of enabling legislation). Where this role of the CFP has previously been more implicit, it is now formally integrated into the legislation by the external policy provisions in the revised proposal of 2011.<sup>18</sup>

Needless to say, member states' compliance with international agreements undertaken by the EU as a whole is crucial for maintaining the respectability of the EU as a competent international legal entity. The CFP governs the behavior of all EU vessels concerning living marine resources, whether they are fishing in their flag state's territory, in wider EU waters, or on the high seas and in third countries' EEZs.<sup>19</sup> Breaches of compliance by individual member states might therefore damage the international credibility of the EU as a whole, making third party states and multilateral organizations reluctant to trust it. Hence, the success of the CFP to integrate external policy into internal legislation and enforce it determines in part the extent of future EU participation in international fisheries institutions.

The significance of the CFP for the international community does not end there. As already observed, the EU holds a prominent role in the world's fisheries due to its considerable annual catch and its extensive consumer market for fish products. Consequently, the EU is an essential participant in successfully implementing international conservation measures and can exercise considerable political influence in the field. Because the CFP reflects the combined interests of all member states, its regulations can be instrumental in ensuring that EU influence is used for the positive development and sustainable preservation of global living marine resources. This potential has understandably received international attention, including from academics and various institutions and international non-governmental organizations.<sup>20</sup> For instance, the World Wildlife Fund has actively called for responsible EU governance, asking the EU "to ensure that [its] fishing zeal is matched by the accountability to ensure its fleets fish sustainably, and to champion sustainable fisheries management on the international stage."<sup>21</sup>

The currently ongoing reform of the CFP is therefore subject to due interest. The CFP is based on multi-annual plans and is subject to review every ten years. As it approached the new review cycle in 2012, the European Commission called for a fundamental reform of the CFP: "not ... yet another piecemeal, incremental reform but a sea change cutting to the core."<sup>22</sup> While the main focus of the reform falls on addressing overarching issues with fisheries in EU waters – such as persistent overfishing, heavy industry subsidies, and fleet overcapacity – various documents of the reform process suggest that the new CFP intends to address its own international influence and responsibility. The 2009 Green Paper on Reform cites important worldwide resolutions with the clear intention of integrating them into the CFP: "The World Summit on Sustainable Development in 2002 spelled out specific targets for fisheries

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17 Council of the European Union. 2002. Council Regulation (EC) No 2371/2002 on the conservation and exploitation of fisheries resources under the Common Fisheries Policy, Article 1 (2). *Official Journal of the European Communities*, L 358/59.

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

19 See n. 17 above.

20 Including a dedicated issue of *Ocean & Coastal Management* 70 (2012): 1–68.

21 WWF Global. 2012. "Wild west fishing in distant waters," Press release report in response to R. Watson et al. 2012 study "Spatial expansion of EU and non-EU fishing fleets into the global ocean, 1950 to the present," requested by WWF Netherlands, 2013, available online: <<http://wwf.panda.org/?203247/Wild-west-fishing-in-distant-waters>>.

22 European Commission. 2009. Green Paper on Reform of the Common Fisheries Policy, p. 5. COM(2009) 163.

management ... which must be taken on board by all fisheries managing authorities. Important steps have also been taken in the United Nations to limit the impact of fisheries in the high seas.”<sup>23</sup> The 2011 reform proposal confirms this intention by including a section on external policy previously not present in the CFP. This new section aims, as explained in the proposal itself, to align the CFP more closely with international agreements and to ensure that EU participation in international multilateral organizations serves “to strengthen them and enhance their performance in the management and conservation of international fish stocks.”<sup>24</sup> In short, the new CFP proposal shows awareness of its potential and actual role in the management of international living marine resources and purports to establish the EU as a positive leader in this field.

## MODERN INTERNATIONAL FISHERIES MANAGEMENT AND THE EU

The external policy provisions in the revised CFP proposal represent only the latest step of EU participation in international fisheries management. As previously mentioned, the range of EU involvement expanded through the years, and in fact, it did so parallel to the development of modern international fisheries management. To properly understand the significance of the reformed CFP’s claim, therefore, one must first comprehend how the current international fisheries regime developed, and what role the EU played in its progress.

### Development of the Modern Fisheries Management Framework

The modern fisheries management framework emerged with the development of the EEZ in the 1970s and its codification in UNCLOS. Earlier, waters beyond coastal states’ territorial seas were regarded as high seas subject to the “freedom of the sea” and full freedom of fishing.<sup>25</sup> However, growing concern with distant water fishing fleets and dwindling stocks in the 20th century led many coastal states to extend their jurisdiction beyond three nautical miles, and eventually to the integration of EEZs into international law with UNCLOS.<sup>26</sup>

The EEZ was defined as an area up to 200-NM from territorial sea baselines, in which coastal states have certain rights, jurisdiction, and duties over economic resources,<sup>27</sup> including determining total allowable catch (TAC), allocation, and necessary conservation measures.<sup>28</sup> EEZs were claimed by most coastal states globally, including ones that are not party to the Convention but view the EEZ as customary law.<sup>29</sup> At the time, it was estimated that over 95 percent of the world’s fish came from areas over the continental shelf (due to the abundance of nutrients there), hence the EEZ’s establishment ensured some form of authority over the majority of fishing resources worldwide.<sup>30</sup>

However, as ecological boundaries rarely coincide with human political borders, the migration patterns of fish resulted in issues with transboundary stocks (moving between two or more states’ EEZs), straddling stocks (moving between the EEZs and the high seas), and highly migratory stocks (moving over extensive distances in the ocean).<sup>31</sup> The provisions addressing these issues in the 1982 Convention were only cursory as it was believed at the time that straddling and highly migratory stocks are of minor

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23 Id.

24 European Commission. 2011. Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy. COM(2011) 425 final. Explanatory Memorandum, p. 9.

25 H. Grotius. 1609. *Mare Liberum*; As codified in Article 2 of the 1958 Geneva Convention on the High Seas.

26 Lawrence Juda, Professor, Professor, of Rhode Island, pers. comm. (2013).

27 1982 United Nations Convention on the Law of the Sea (UNCLOS), Part V, Article 55.

28 Id., Articles 61, 62.

29 The most prominent among these, of course, is the U.S.

30 L. Juda, “The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique,” *Ocean Development and International Law* 28, (1996): 147–166.

31 Id.

importance given the small share of catch extracted from them.<sup>32</sup>

Various incidents in the years after the Convention quickly proved this notion wrong. Distant water fishing fleets, now increasingly excluded from their previous fishing grounds, began targeting straddling and highly migratory stocks instead, often resulting in their overexploitation – as with pollock in the Bering Sea “Doughnut Hole,” groundfish on the Grand Banks of Newfoundland, and bluefin tuna in the Atlantic Ocean, among others.<sup>33</sup> Such incidents stressed the need for strengthening international cooperation on high seas fisheries. Several agreements in the early 1990s addressed this need: the Food and Agricultural Organization of the UN (FAO) drafted a “soft law” Code of Conduct for Responsible Fisheries and the binding 1993 Compliance Agreement,<sup>34</sup> and in 1995, negotiations at the UN led to the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement, UNFSA).<sup>35</sup>

The new regime changed the freedom of fishing on the high seas fundamentally. Previously unlimited,<sup>36</sup> it was now subject to certain responsibilities, such as treaty obligations, the rights of coastal states, and cooperation for conservation measures.<sup>37</sup> Recognizing the inherent jurisdictional difficulty in cooperating to manage straddling species or highly migratory species (such as tuna), the Fish Stocks Agreement emphasized the importance of regional management fisheries organizations (RFMOs) as a mechanism for international cooperation.<sup>38</sup> The UNFSA includes a binding obligation for its parties to enlist in such organizations and limits the access to stocks under any RFMO’s jurisdiction to members of the particular RFMO and states complying with its measures.<sup>39</sup> Through such means, international ocean law seeks to limit unregulated fishing on the high seas.

However, despite subjecting most of the world’s fisheries to some form of authority and conservation, the modern regime of fisheries management remains imperfect, particularly concerning high seas fishing. Straddling and highly migratory species are still the world’s most heavily overexploited species.<sup>40</sup> Specific shortcomings of the management system have been emphasized. Generally, given the nature of international treaties, the 1982 Convention and the 1995 Fish Stocks Agreement are only binding on states that are party to them, resulting in “free riding” states that reap the benefits of the agreements without contributing to conservation.<sup>41</sup> Moreover, RFMO efforts have been consistently limited by illegal, unreported, and unregulated (IUU) fishing. Interested states have attempted to address these issues through various means of international pressure, including blacklisting or banning fish product imports from non-complying states – a practice that the EU has adopted.<sup>42</sup> Such measures have proved only partially effective as banned states can often find other markets with relative ease.

Weaknesses have been observed with RFMO management itself. Many RFMOs predate the Fish Stocks Agreement and were originally established as international fora for quota allocation, making them ill-qualified to conserve the stocks.<sup>43</sup> In addition, the performance of many member states within RFMOs has been found lacking, while particular provisions in many RFMO constitutional treaties fail to limit bad faith actions.<sup>44</sup> In the Northwest Atlantic Fisheries Organization (NAFO), for instance, provisions for

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32 *Id.*, as well as United Nations 1982 Convention on the Law of the Sea (UNCLOS), Part V, Articles 63,64; FAO. 2007. *The State of World Fisheries and Aquaculture 2006*.

33 *Id.*

34 FAO. 1995. *Code of Conduct for Responsible Fisheries*; FAO. 1993. *Compliance Agreement*.

35 United Nations 1995 *Fish Stocks Agreement*.

36 See Article 2 of the Geneva Convention on the High Seas (1958).

37 1982 United Nations Convention on the Law of the Sea (UNCLOS), Part VII, Articles 116-119.

38 1995 United Nations *Fish Stocks Agreement*, Part III, Article 8.

39 *Id.*, Article 8 (4).

40 FAO. 2012. *The State of World Fisheries and Aquaculture 2011*.

41 Lawrence Juda, Professor, of Rhode Island, pers. comm. (2013).

42 *Id.*

43 K.M. Gjerde, D. Currie, K. Wowk and K. Sack, “Ocean in peril: Reforming the management of global ocean living resources in areas beyond national jurisdiction,” *Marine Pollution Bulletin* 74, no. 2 (2013): 540–551.

44 *Id.*

opting out from the yearly catch quota agreements allowed members to disregard the conservation efforts of the organization on a continuous basis.<sup>45</sup> Recognizing the need to address these weaknesses, international attention has recently focused on strengthening the performance of RFMOs in order to better ensure successful conservation of global fisheries resources.

### Developing EU Participation in the Modern Fisheries Management Regime

In the negotiations leading up to the 1982 Convention, the European Economic Community (EEC, EU's predecessor) participated solely as an observer.<sup>46</sup> At the time the Convention was debated, the EEC did not yet hold exclusive competence over fisheries management. In fact, it was precisely the establishment of the EEZ system, especially in juxtaposition to the natural paths of fish and traditional fishing practices between member states, that provided the original motivation for a common fisheries policy.<sup>47</sup> The first legislation establishing such policy for the EEC was put into force in 1983,<sup>48</sup> shortly after the conclusion of the UNCLOS negotiations. In its first review in 1992, the EU Council claimed that the policy had "proved to be an effective instrument"<sup>49</sup> and thus the exclusive competence over fisheries was reinforced in the 1992 Maastricht Treaty on European Union.<sup>50</sup>

Once established as a competent legal entity in the field, the EEC sought to take part in subsequent developments of the modern fisheries management regime. It became increasingly active, participating in drafting the FAO Code of Conduct and the Compliance Agreement, as well in the negotiations for the 1995 Fish Stocks Agreement.<sup>51</sup> Upon signing the 1982 Convention in 1998, as discussed earlier, the EEC attached an exhaustive declaration outlining its competence in fisheries conservation.<sup>52</sup> The declaration also included an important statement on fisheries jurisdiction: "The Community ... wishes to declare [that it] does not consider the Convention to recognize the rights or jurisdiction of coastal States regarding the exploitation, conservation and management of fishery resources other than sedentary species outside their exclusive economic zone."<sup>53</sup> The statement was notable for two reasons. First, it stressed the EEC as a legal entity with a uniform position on the development of international law in fisheries; and second, it declared this position very strongly: the EEC/EU's policy was to promote institutional cooperation on managing high seas fisheries rather than to promote extended coastal state jurisdiction.

The EEC/EU's ratification of the UN Fish Stocks Agreement in 2003 entailed a similar declaration of competence, which expanded upon the first with regard to shared competences and included port state measures and measures with respect to non-members of RFMOs and states not party to the UNFSA.<sup>54</sup> This expansion is important because it marks the rising involvement pursued by the EU in international fisheries management. From a passive observer in the formation of UNCLOS, it had already become an active participant in negotiations and agreements with the establishment of its competences. Its expanded declaration of competences with the UNFSA declaration could be seen, especially in the context of subsequent claims and actions, as an overture to further strengthening its role: from an equal participant to a leader in developing future international fisheries management.

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45 A. Aneiros, "Spain, the European Union, and Canada: A New Phase in the Unstable Balance in the Northwest Atlantic Fisheries," *Ocean Development & International Law* 42 (2011): 155–172.

46 *Id.*

47 European Commission. 2009. Green Paper on Reform of the Common Fisheries Policy, p. 6. COM(2009) 163.

48 Council of the European Communities. 1983. Council Regulation (EEC) No. 170/83 establishing a Community system for the conservation and management of fishery resources.

49 Council of the European Communities. 1992. Council Regulation (EEC) No. 3760/92 establishing a Community system for fisheries and aquaculture.

50 Treaty on European Union. 1992. Title II, Article G (B)(3)(e).

51 See Aneiros, n. 45 above.

52 UNCLOS 1982. Declaration of the European Community upon signature (7 December 1998). Declaration made pursuant to article 5(1) of Annex IX to the Convention and to article 4(4) of the Agreement.

53 *Id.*

54 UNFSA 1995. Declaration concerning the competence of the European Community.

Certainly the expanded competence declared upon ratifying the Fish Stocks Agreement was justified by corresponding legal action. EU efforts to combat IUU fishing are outlined by a 2008 regulation citing the EU's international obligations to UNCLOS, UNFSA, and the Compliance Agreement.<sup>55</sup> Since the legislation's entry into force in 2010, the EU has been involved in placing import bans and other market limitations on seafood products from states that do not comply with RFMO measures or are otherwise seen as fishing unsustainably, and it has done so in reference to IUU vessels listed by the International Maritime Organization (IMO).<sup>56</sup> In the context of these actions, the EU's willingness to exert positive influence on global fisheries management, paying due regard to international law and competent international organizations, is indisputable. Understood in this light, the claim in the new CFP proposal – to “strengthen compliance in the international context”<sup>57</sup> – can be seen merely to express a continuing effort on the part of the EU.

At the same time, while aiming to enforce third states' compliance with RFMO measures, the EU has faced severe criticism in the past for its own conduct within RFMOs. Critics of the EU have pointed out its reluctance to use best practices within the management framework when those practices interfere with individual member states' interests. In at least two instances – regarding Newfoundland turbot (Greenland halibut) resources managed by NAFO and bluefin tuna under the International Commission for the Conservation of Atlantic Tunas (ICCAT) – the EU has been seen to exploit the weaknesses of the RFMO regime and undermine internal compliance with RFMO conservation measures, rather than propagate best practices. Given these cases, the claim in the reformed CFP proposal appears to be subject to challenge; however, more recent conduct in both RFMOs proves that the claim is instead an indication for changing policy.

## CRITICISMS OF EU PARTICIPATION IN RFMOs

### EU Conduct in the Northwest Atlantic Fisheries Organization (NAFO)

The 1990s Newfoundland turbot (Greenland halibut) fisheries conflict between Canada and Spain has been studied in depth as an example of the clashing interests between coastal and distant water fishing states after the introduction of the new EEZ regime.<sup>58</sup> Indeed, the dispute was among the incidents that threw light on the new regime's omissions and thereby inspired negotiations for the 1995 UNFSA. Following the 1977 establishment of Canada's 200-NM fisheries jurisdiction Spain was excluded from its traditional operations on the Grand Banks fishing grounds and forced to retreat. However, as the “nose” and “tail” of the Grand Banks fell beyond the 200-NM limit, Spanish vessels continued to fish there for straddling species (mainly turbot, but also others) that have primary residence in Canadian waters.<sup>59</sup>

Straddling stocks in this area are subject to the jurisdiction of NAFO, which was established in 1979 with both Canada and the then European Economic Community among its original founding members.<sup>60</sup> After the change in Canadian jurisdiction, Canadian representatives in NAFO reported an intensification

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55 Council of the European Union. 2008. Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. *Official Journal of the European Union*, L286/1.

56 European Commission. Directorate-General for Maritime Affairs and Fisheries, “Illegal fishing (IUU),” available online: <[http://ec.europa.eu/fisheries/cfp/illegal\\_fishing/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/illegal_fishing/index_en.htm)>.

57 European Commission. 2011. Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy. COM(2011) 425 final. Explanatory Memorandum, p. 9.

58 See, for instance, Juda, n. 30 above; Y. Song, “The Canada-European union turbot dispute in the northwest Atlantic: An application of the incident approach,” *Ocean Development & International Law* 28, (1997): 269–311; Aneiros, n. 45 above; or D. Day, “Tending the Achilles' heel of NAFO: Canada acts to protect the nose and tail of the Grand Banks,” *Marine Policy* 19, no. 4 (1995): 257–270.

59 Song, n 58 above.

60 Id.



in stock depletion due to overfishing on the “nose” and “tail” of the Grand Banks.<sup>61</sup> In response, TACs were set for many of these species, yet NAFO’s conservation efforts stagnated when the EEC began making frequent use of an objection procedure under the NAFO Convention and opted out of the TACs systematically once Spain acceded to the EEC in 1986.<sup>62</sup> In the short period between 1986 and 1992, the EEC objected to various NAFO decisions 51 times.<sup>63</sup> Unsurprisingly, this conduct by the EEC/EU was severely criticized in the international community, not only by Canada, but also by other coastal states with a vested interest in preserving straddling stocks primarily residing within the coastal states’ EEZs.<sup>64</sup>

The conflict escalated in March 1995, when the Canadian government extended the jurisdiction of its Coastal Fisheries Protection Regulations to encompass the “nose” and “tail” of the Grand Banks and proceeded to arrest the Spanish vessel *Estai*, which was fishing in that area.<sup>65</sup> Spain and the EU immediately protested the action, and Spain initiated proceedings at the International Court of Justice (ICJ) against Canada. As the ship was seized beyond Canada’s 200-NM limit, Spain denounced the Canadian overreach in jurisdiction, which it perceived as a breach in “universally accepted norm of customary law codified in ... the 1982 Convention on the Law of the Sea.”<sup>66</sup> The EU’s diplomatic note to Canada expressed a similar view, stating that “Canada is not only flagrantly violating international law, but is failing to observe normal behavior of responsible States.”<sup>67</sup> It elaborated further, that the Canadian conduct “is particularly unacceptable since it undermines all the efforts of the international community ... to achieve effective conservation through enhanced cooperation in the management of fisheries resources.”<sup>68</sup>

Needless to say, the Canadian government regarded such language from the EU as markedly hypocritical. It had seen the Community’s endless objections to NAFO quota measures in the previous years as illegal behavior hidden “under the mantle of legality”<sup>69</sup> and, therefore, as actions justifying due retaliation. For Canada, the issue of “enhanced cooperation in the management of fisheries resources” was indeed in question here. Where Spain insisted before the ICJ that the case regards solely a matter of violated jurisdiction, Canada stressed the indivisibility of fisheries conservation from the subject of the dispute, and was joined in this opinion by the Court.<sup>70</sup> The conflict arose out of concern with preserving fisheries resources straddling the Canadian 200-NM limit, hence the matter of these stocks’ conservation was to be addressed in resolving the conflict.

Thus the issue came down to alternate interpretations of the UNCLOS provisions on straddling stocks, with both sides trying to make a point about how international cooperation for the conservation and allocation of such resources should develop. Canada stressed the UNCLOS provisions that subjected the freedom of fishing on the high seas to “the rights and duties of coastal States.”<sup>71</sup> It preferred an interpretation of the obligation “to take, or to cooperate with other States in taking, such measures ... as may be necessary for the conservation of the living resources of the high seas”<sup>72</sup> that would favor its interests in the stocks as a coastal state, and found its interests to be aligned with those of conservation.

The EU’s position was founded in the opposing view. In particular, the EU acted in defense of Spain’s interests in the Newfoundland fishing resources; but in more general terms, it also strove to protect the freedom of the high seas against continuously extending coastal state jurisdiction. In the view of the EU Fisheries Commissioner at the time, Emma Bonino, Canada was an aggressor state using the

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61 Day, n. 58 above.

62 Id.

63 Song, n. 58 above.

64 Lawrence Juda, Professor, University of Rhode Island, pers. comm. (November 2013).

65 Song, n. 58 above.

66 *Spain v. Canada*, [1998] I.C.J. Fisheries Jurisdiction, Jurisdiction of the Court, Judgment.

67 Id.

68 Id.

69 Day, n. 58 above.

70 *Spain v. Canada*, n. 66 above.

71 United Nations 1982 Convention on the Law of the Sea (UNCLOS), Part VII, Article 116.

72 Id., Article 117.

case to impose its own interests: she stated that “Canada has not only taken an EU boat to satisfy its internal needs and to hide its inefficiency in fisheries management. Canada has taken the international community hostage.”<sup>73</sup> Canada’s extension of internal legislation to encompass waters beyond the 200-NM limit was regarded by the EU as a dangerous precedent for creeping jurisdiction. As the statement in the EU’s declaration upon signing UNCLOS reveals,<sup>74</sup> the EU continued to oppose the codification of coastal states’ interests in the international fisheries management framework.

The conflict abated when the EU and Canada agreed on an enhanced enforcement scheme for vessels fishing in the NAFO regulatory area, which was formally integrated into NAFO the same year.<sup>75</sup> While the EU discontinued its objection practice, its past abuse of the procedure renders some of its subsequent claims of strengthening international compliance with RFMO measures questionable. It bears noting, however, that the EU’s conduct in NAFO was indicative both of the weaknesses in the developing regime and of the clashing views on managing high seas fisheries that largely caused these weaknesses.

### **EU Conduct in International Commission for the Conservation of Atlantic Tunas**

The 2008 Performance Review of the International Commission for the Conservation of Atlantic Tunas (ICCAT) was harsh in assessing its failures in managing Atlantic tuna and tuna-like species under its international mandate; yet it was even harsher in evaluating the performance of its members. The review panel expressed the view that “rather than ICCAT failing in its mandate it is ICCAT that has been failed by its members” and that ICCAT’s otherwise sound management approaches were “undermined by systematic failures by [members] to implement such rules and recommendations.”<sup>76</sup>

Overall, the review addressed alarming declines in tuna populations in ICCAT’s regulatory area during the 2000s. Atlantic bluefin tuna, in particular, was so severely overfished during that period that in 2009 it earned a nomination for protection under the Convention on International Trade in Endangered Species of Flora and Fauna (CITES).<sup>77</sup> ICCAT’s estimate for catches in 2007 was between 39,000 and 54,000 tonnes – “substantially higher than the agreed TAC of 29,500 t and far in excess of the [scientific committee’s] recommendation of 15,000 t.”<sup>78</sup> ICCAT referred to this conservation failure by its contracting parties as “an international disgrace”;<sup>79</sup> yet the organization’s assessment that its members had largely failed its efforts by conducting IUU fishing and disrespecting quotas was echoed by others in the international community. A study by the WWF on the status of bluefin tuna in the Eastern Atlantic and Mediterranean Sea in 2004–2005 found that EU fleets, especially French vessels, were responsible for much of the overexploitation of Mediterranean bluefin tuna stocks, fishing well beyond their quotas and underreporting their catch to ICCAT by thousands of tonnes.<sup>80</sup>

Rhetoric at the time suggested that the EU itself was displeased with the performance of individual member states in the bluefin tuna fishery. Upon closing the fishery in 2008, Commissioner Joe Borg criticized member states’ conduct and pointed to specific failures of implementation and breaches in compliance, including “unreliable catch declarations, failure to respect reporting deadlines, delays in submission of fishing plans, and failure to communicate satellite data on the movements of the vessels

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73 “EU/Canada: EU Suspends Ties with Canada over Fisheries Dispute,” *European Report*, March 14, 1995.

74 “The Community ... wishes to declare [that it] does not consider the Convention to recognize the rights or jurisdiction of coastal States regarding the exploration, conservation and management of fishery resources other than sedentary species outside their exclusive economic zone.” UNCLOS 1982, Declaration of the European Community upon signature (7 December 1998).

75 Aneiros, n. 45 above.

76 2008 ICCAT Performance Review, Executive Summary, p. 2.

77 D.G. Webster, “The irony and the exclusivity of Atlantic bluefin tuna management,” *Marine Policy* 35, no. 2 (2011): 249–251.

78 2008 ICCAT Performance Review, Executive Summary, Part III, p. 60.

79 Id.

80 WWF, 2006. “The plunder of bluefin tuna in the Mediterranean and East Atlantic in 2004 and 2005: Uncovering the real story.”

concerned.”<sup>81</sup> Despite the Commissioner’s motivation to “ensure a sustainable future for European fisheries,”<sup>82</sup> the EU’s inability to control its fleets regardless of its best intentions suggested a degree of ineptitude and questioned the EU’s competence in international fisheries management.

This interpretation was especially pertinent on several occasions upon which Mediterranean states’ interests were seen to sway important decisions for the fishery’s international management. For instance, the EU was criticized by multiple non-governmental organizations (such as Greenpeace, WWF, and Oceana) for its role in negotiating 2009 ICCAT quotas for Mediterranean and Eastern Atlantic bluefin tuna at levels significantly higher than the scientific recommendation.<sup>83</sup> The same year, the EU was also perceived as irresponsible when the proposed CITES trade ban of bluefin tuna received official support by the Fisheries Commission, but was nevertheless vetoed by the “Club Med” of southern member states that had commercial stakes in the fishery.<sup>84</sup>

The EU’s conduct in the bluefin tuna fishery did not appear grounded in a consistent policy as it had been in the NAFO controversy. Instead, Commissioner Borg’s rhetoric strongly suggested that the EU’s policy had been compromised by Mediterranean member states’ lack of compliance,<sup>85</sup> whereas the quota and trade ban votes in 2009 suggested to the international community that those states’ individual commercial interests were more likely to influence the behavior of the EU with regard to the bluefin tuna fishery than the reverse. Hence, the conservation failures here were in a way more dangerous to EU international authority. They questioned its ability as a supranational organization to fully govern the actions of its members, even when granted exclusive competence. Therefore it is not surprising that subsequent actions by the EU – such as its ban on IUU fishing and an increased attention of RFMOs in general – began to address these weaknesses.

## REFORMING EU PARTICIPATION IN RFMOs

Given the criticisms leveled against the EU for its past participation in NAFO and ICCAT, the validity of its claim in the revised CFP proposal – to “strengthen compliance” with RFMOs globally – could be questioned. However, when reviewed in the context of recent rhetoric from the Fisheries Commission and current Commissioner Maria Damanaki, the claim could also be seen as an indication of changing policy and a desire to shape a more positive leadership role for the EU through the CFP.

Commissioner Damanaki has shown particular sensitivity to the global significance of EU fisheries policy. Her speeches often emphasize the EU’s responsibility for the sustainable management of international stocks. The Commissioner’s rhetoric consistently reflects the external ambitions of the CFP reform. In response to a WWF study on the spatial expansion of EU fishing fleets, Commissioner Damanaki commented: “I can’t agree more with those that see the reform of the Common Fisheries Policy as a unique opportunity to overcome once and for all the problem of overfishing, in EU waters as well as on a global scale.”<sup>86</sup> Similarly, Damanaki’s opening speech at a 2012 conference gathering leaders from 15 RFMOs in Brussels conveyed her view that “taking care of European waters alone is not good enough. As a global player, the EU is also responsible for external waters and must prove that we assume our responsibility for sustainable ocean governance in RFMOs and other international fora.”<sup>87</sup> The

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81 2008 ICCAT Performance Review, Executive Summary, Part III, p. 59.

82 *Id.*

83 N. Williams, “Anger over bluefin tuna decision,” *Current Biology* 18, no. 24 (2008): R1110–R1111.

84 “Mediterranean EU countries block bluefin tuna ban,” *The Guardian*, 22 September 2009, available online: <<http://www.theguardian.com/environment/2009/sep/22/eu-bluefin-tuna-ban-blocked>>.

85 2008 ICCAT Performance Review, Executive Summary, Part III, p. 59.

86 M. Damanaki. 2012. Response to WWF, “Spatial expansion of EU and non-EU fishing fleets into the global ocean 1950 to present,” available online: <[http://ec.europa.eu/commission\\_2010-2014/damanaki/headlines/press-releases/2012/01/20120125-3\\_en.htm](http://ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2012/01/20120125-3_en.htm)>.

87 M. Damanaki. 2012. Speech at “Regional Fisheries Management Organisations – fit for the future” conference in Brussels, 1 June 2012, available online: <[http://ec.europa.eu/commission\\_2010-](http://ec.europa.eu/commission_2010-)

language of her speeches expresses both ambition for leadership and a sense of global responsibility, the latter of which may previously have been seen as lacking in EU fisheries policy.

The EU has shown a willingness to support its words with action. It is not coincidental that recent years mark the introduction of certification of all seafood products to ensure sustainable catches and regulations for banning IUU products,<sup>88</sup> nor that external policy is for the first time being integrated formally into the text of the CFP. Furthermore, the EU has recently taken steps toward positive leadership in the very same organizations where its participation has previously been criticized.

In NAFO, the EU helped drive reform in 2007 to enhance NAFO's overall performance.<sup>89</sup> It is a point of interest that the EU has done so by aligning its interests with Canadian ones, even while maintaining its principal opposition to the expansion of coastal states' jurisdiction.<sup>90</sup> A stronger NAFO proved in the interest of both sides because it would ensure better conservation of straddling stocks, thus alleviating Canadian concerns, but it retained the decision-making authority over high seas fishing measures for the organization, ensuring equitable control for all parties. As part of the exchange, the objection procedure was revised, allowing for objections only if measures are found inconsistent with the provisions of the NAFO Convention or discriminatory against the objecting member.<sup>91</sup> The amended NAFO Convention strengthened the authority of the organization through tougher compliance measures and included integrated approaches from the UNFSA and FAO Compliance Agreement.<sup>92</sup> While it remains imperative for the EU to continue enforcing NAFO regulations internally, its participation in the negotiations proved that the EU was capable of applying its policies internationally in a constructive manner.

Similarly in ICCAT, recent actions by the EU have been indicative of a more positive role. As its misconduct in this context was threatening to the international prestige of the EU in fisheries management, it is not surprising that in response the EU stressed internal compliance heavily. In 2009, EU legislation addressed an ICCAT multi-annual recovery plan for bluefin tuna and included enforcement, monitoring, and control measures.<sup>93</sup> In addition to internal control, several contemporary ICCAT resolutions were integrated into EU law through this legislation, including the ICCAT regional observer program and its scheme of joint international inspection.<sup>94</sup> The legislation also prohibited all trade, import and export, or processing of bluefin tuna that does not comply with ICCAT measures.<sup>95</sup> In addition, as seen earlier, the EU introduced a separate regulation battling against IUU fisheries catches by third states. Since then, the EU has also complied with a payback on quotas for 2012–2019 to compensate for the reported overfishing by the French fleet in 2007.<sup>96</sup> In short, recent actions by the EU suggest its strong intention to improve its standing with ICCAT, and assert a positive influence on the organization's performance.

In the context of these recent actions, EU rhetoric can therefore indeed be interpreted as an indication of changing policy. The CFP is after all in the process of reform, and it would seem that this includes in

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2014/damanaki/headlines/speeches/2012/06/20120601\_speech\_en.htm>.

88 Id; Council of the European Union, 2008. Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. *Official Journal of the European Union*, L286/1.

89 Aneiros, n. 45 above.

90 Id.

91 Id.

92 Id.

93 Council of the European Union. 2009. Council Regulation (EC) No 302/2009 concerning a multiannual recovery plan for bluefin tuna in the eastern Atlantic and Mediterranean. Chapter V, Control Measures. *Official Journal of the European Union*, L96/1.

94 Id.

95 Id.

96 WWF, 2012. "Paving the way for recovery of bluefin tuna – an example of EU fisheries reform," available online: <<http://www.wwf.eu/?206799/Paving-the-way-for-recovery-of-bluefin-tuna---an-example-for-EU-fisheries-reform>>.

part reforming the EU's international role in global ocean governance. Significantly, this turn in conduct coincides with the EU's growing tendency to address environmental concerns with legislation, as exemplified by the recent Marine Strategies Framework Directive (MSFD). Indeed the reform of the CFP speaks to the need to integrate fisheries policy into the EU's increasingly comprehensive approach to marine policy as a whole.<sup>97</sup> Better science, ecosystem-based management, and the precautionary principle have been expressed as pillars of this new approach, which is reflected both in the internal regulations of the reformed CFP and in the international leadership role now sought by the EU.<sup>98</sup> Whether the reform succeeds in establishing the EU as a positive leader for the future of international fisheries and the role of RFMOs in managing them will depend on the continued compliance of its member states. It is clear, however, that this is the role that the EU intends to take.

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97 European Commission. 2009. Green Paper on Reform of the Common Fisheries Policy. COM(2009) 163.

98 M. Damanaki. 2012. Speech at "Regional Fisheries Management Organisations – fit for the future," conference in Brussels, 1 June 2012, available online: <[http://ec.europa.eu/commission\\_2010-2014/damanaki/headlines/speeches/2012/06/20120601\\_speech\\_en.htm](http://ec.europa.eu/commission_2010-2014/damanaki/headlines/speeches/2012/06/20120601_speech_en.htm)>.