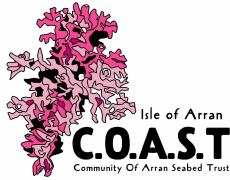


A RESPONSE TO THE CONSULTATION ON THE COMMON FISHERIES POLICY



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The presenters of this response to the CFP consultation are bound together by two common approaches. In this response we'll outline those approaches and then turn to the CFP Consultation Document.

(1) European Fisheries Management – an irrational system

The first is that expressed by Paul Dengbol of the European Commission at a recent conference on the CFP in London.

'Over-fishing is a rational response to an irrational system'²

The presenters profoundly agree with this statement. All the agents involved in commercial fishing and its management behave in a completely rational way but we argue that the system of fisheries management itself is irrational and leads almost inevitably to stock collapse.

¹ While this response did not originate from the Scottish Sea Angling Conservation Network (SSACN) we are happy to endorse principles contained within it.

² Speaking at Common Fisheries Policy Conference London Coastal Management for Sustainability 30 July 2009

(2) Commercial Fisheries – A public resource

The second is a relatively novel concept expressed by the work of Appleby in the United Kingdom³ and Macinko and Bromley in the United States.⁴ These authors approach fisheries management failures with a belief that the question of who owns the fishery has been forgotten. In United Kingdom waters the right to fish is owned by the Crown on behalf of the general public.⁵ Under EU law that right can be exploited by UK citizens and citizens of the EU Member States. Under UK law the general public should be getting some form of return for the exploitation of their resource. It is not immediately apparent that the general public are getting any particular benefit from the commercial fishing sector and therefore this raises two issues:

(1) Over-involvement of the fishing sector

It may sound a sweeping statement, but in our experience, most fisheries management structures in the United Kingdom, institutionally exclude general public representation. Fisheries management is usually characterised by close liaison with those of knowledge and acquaintance of the interests of the fishing industry, and environmental representatives. This technocratic approach tends to marginalise the vast majority of stakeholders whose rights are being exploited. Even those members of the general public who have an obvious interest in fisheries are routinely excluded from management. Such a list would include: divers, recreational anglers, charter fishermen, coastal hoteliers and coastal communities. It is interesting to note that while fishermen may feel in the United Kingdom that they are not being listened to by DEFRA and the EU, the reverse is probably true and fishermen are probably one of the most closely consulted groups of any UK industry. This is in direct contrast with the rules against bias and conflicts of interest, which govern the allocation of all other public resources. It is fair to say that the absence of clear public benefit through what is intrinsically a biased and unrepresentative system puts many aspects of the current management system on the very margins of what is permissible under UK law, if not beyond it.

(2) Lack of financial return for the general public

³ Appleby, T. (2005) *The public right to fish : Is it fit for purpose* Journal Water Law 16 201-206.

⁴ Macinko, S. & Bromley, D.W. (2004) *Property and Fisheries for the Twenty First Century: Seeking coherence from legal and economic doctrine* Vermont Law Review 28 (3) 623-661

⁵ see inter alia See Marston, G. (1981) *The Marginal Seabed : United Kingdom Legal Practice* Clarendon : Oxford 18

Under international law a coastal state has the right to exploit its marine natural resources, within its EEZ (or to the edge of the continental shelf).⁶ The UK Government have fully exploited this right with industries such as oil, gas, aggregates extraction and increasingly windfarms. In all cases the UK Crown bodies receive some form of royalty payment, which directly compensates the UK citizen for the exploitation of their resources, these royalty payments are decided by fairly standard commercial tender arrangements. Fishing is in marked contrast. Instead of receiving payment, the UK and EU taxpayer tends to subsidise fishermen to over-fish. In its fiduciary capacity as owner of the fishing right in UK waters, the Crown should seek to obtain a reasonable return. There is enough evidence contained just within the consultation document itself, to show that simply is not happening.

THE CONSULTATION DOCUMENT

From the outsiders' perspective some of the aspirations of reformed CFP seem a little muddled. Take the statement:

The fishing industry is essential to supplying food to European citizen and supporting livelihoods in coastal areas.

On the face of it this sentence is perfectly laudable, but the two parts of the sentence are not supported by evidence. We agree that the profligate waste of a potential food source will seem increasingly senseless as natural food resources become scarce over the next century, and we do agree that the fishing industry is essential. We do not, however, accept that the fishing industry is essential to support livelihoods in coastal areas. The south west of England, for example, has a long coastline and a large fishing fleet, most of the population live on the coast and yet a perusal of the South West Regional Development Agency's review of the economy does not mention fishing at all; it is economically insignificant.⁷ To claim that the fishing industry is essential to support livelihoods is vastly overstating the case. We perceive a grave confusion in the minds of fisheries managers: is their role to support the long-term sustainability of the resource, or the fishermen? In reality these can be contradictory aims. Too much support to the fishermen will inevitably lead to over-exploitation.

The reality of the position is that healthy stocks will lead to a revitalised industry, therefore this secondary objective of supporting livelihoods needs to be dropped, as its best it is simply restating the primary objective, but at its worst it is contradicting it.

⁶ A 58 United Nations Convention on the Law of the Sea

⁷ <http://download.southwestrda.org.uk/file.asp?File=/other/quarterly-economic-reports/Economics-Review-Nov-09-Tagged.pdf> accessed 26th November 2009

Furthermore we see another inherent contradiction in the following:

European fish stocks have been overfished for decades and the fishing fleets remain too large for the available resources the high volatility of oil prices and the financial crisis have exacerbated the low economic resilience (of the fishing fleet).

If the fishing fleet is too large, then natural waste through people leaving the industry for economic reasons is exactly what is required. Bizarrely, the EU has sought to stem the economic trend by permitting fuel subsidies⁸ (beyond those they already received because of the tax exempt status of marine heavy oil). It does not require any degree of prescience to see the direct consequence of these subsidies will be to continue the practice of over-fishing. No other industry received these subsidies and many industries would have had a far better case for subsidy through the downturn.

As a result we very much welcome the IMP objective of placing fishing within the broader maritime picture.

We would be more than happy to assist in giving evidence for the broader context.

ADDRESSING THE ISSUE OF OVERCAPACITY

Legislation

Some legislation should be used.

We support the creation of marine protected areas through legislation to exclude certain types of gear and for the creation of no take zones.

We also support exploring the potential to legislate to create fisheries exploitation licences, rather than the cumbersome method of allocation of quota and fishing vessel licences. A proper tender process with limited time periods for such licences with standard commercial terms should be considered in the long run.

One-off scrapping fund

The solution is not a one-off scrapping fund. This has been tried on numerous occasions and has failed. It tends to distort the market.

Transferable rights

⁸ <http://www.fishsubsidy.org/faqs/> accessed 26th November 2009

There is a de facto market in fishing vessel licences and quota in the UK already. This market needs to be professionalized, we would recommend short term licences with the provision in the medium term to charge for permission to exploit the fishery and thus recompense the general public properly. We recommend the inclusion of environmental impact assessments for fisheries, the inclusion of appropriate gear restrictions, the inclusion of appropriate penalty mechanisms (including early termination of the licence). We also recommend that the drafting of these licences should mirror other natural resource licences.

Common Standards

We consider that there should be some commonality of standards, although different fisheries may well require different licensing arrangements. Some commonality of standards will be required under EU tendering rules.

FOCUSING THE POLICY OBJECTIVES

The primary obligation of the CFP should be towards sustainable resource management. This, and only this, will ensure the long-term viability of the industry.

Secondly, the CFP should maintain biodiversity and contain broad conservation objectives.

Thirdly the CFP should broaden its social responsibilities. In the UK press at least, fisheries management is characterised by a battle between competing polemics of environmental activism and commercial fishing. Neither of these parties represent the true interests of the community at large, to whom the resource legally belongs. To comply with UK law the CFP needs to demonstrate responsibilities to those broader community interests: anglers, divers, sailors, coastal dwellers etc. The polemics and commerce verses the environment need to be removed from the debate and substituted with a more rational set of criteria, based on the fairly standard principles of commercial resources management operating in most other equivalent sectors.

Jobs

There are regional structural funds available for the creation of jobs within the EU. While at one level we would welcome support given to coastal communities, such a measure must come at a cost to the member states' tax payers. We do not consider that commercial fishing should have any special status beyond other economic activities. We would welcome the removal of all such subsidy, as in our

view it tends to distort rather than enhance coastal communities. In the event of the application of subsidy we would recommend broadening subsidy to activities such as recreational angling, diving and wildlife watching as alternative careers for former fishermen, great care would need to be taken in the application of such subsidy that it did not damage the livelihoods of those who are already engaged in these sectors without the benefit of subsidy.

FOCUSING THE DECISION MAKING PROCESS

Division of responsibilities

The EU has a problem with fisheries management. In our view it arises because there is an inherent conflict between the member state and the Commission over who manages the resource. Neither party comes away from this conflict creditably. Many member states seem to have confused national interests with the short-term needs of some over-represented commercial fishing interests, while the mechanisms for deciding fisheries measures via the Council of Ministers often leaves the EU with the blame for member states own political failures. The struggle here is to design a management system, which is more broadly accountable.

One appealing method is for broader overall goals to be set by the Commission with detailed management to be delegated back to the Member State. The Commission could then take on an inquisitorial role to ensure these criteria are met. To remedy the defects in the political system, broader goals – such as the avoidance of conflicts of interest, legal requirements to ensure stock stability could be within the confines of the EU, while detailed technical measures could be delegated back to the member state for the operation of fisheries within their EEZ. For clarity historic fishing rights in territorial waters of member states should be phased out. This arrangement is an anathema to UNCLOS⁹ and creates an over-complex jurisdictional muddle, for coastal states trying to regulate activities in these waters.

The RACs could then have a role to co-ordinate measures within the adjacent EEZs. Since RACs have no status under international law and thus no enforcement powers it is difficult to see how RACs can progress further than being a talking shop.

To pass fisheries management policy decisions to the EU Parliament has some appealing prospects because of the democratic nature of the institution. Many member states do not have sizeable coastal fisheries however, and therefore there is a grave question whether it is

⁹ A 56 United Nations Convention on the Law of the Sea

appropriate for them to legislate on the management of a resource, which legally belongs to another member state. To use an analogy, it is unlikely that the UK Government would be supportive of a measure, which promoted the concept of the UK's oil and gas fields being regulated from Brussels rather than London.

Decentralisation

We believe decentralisation with proper legal safeguards would be an appropriate solution for reasons detailed above.

There is a risk that member states become increasingly nationalistic toward their fishery resource. This risk could be counterbalanced by making those member states significantly financial responsible if they fail to manage that resource in the long-term interests of the EU. Greater decentralisation with strong enforcement powers from the Commission, would be in line with the principle of subsidiarity.

Stakeholder engagement

The decision making process for the allocation of the fishery resource is currently riven with inherent conflicts of interest. For instance in England the new Inshore Fisheries Authorities are meant to comprise the following parties under the terms of the UK's Marine and Coastal Access Act 2009.

S151 (2) The persons appointed as members of the authority for the districtmust comprise—

(a) persons acquainted with the needs and opinions of the fishing community of the district, and

(b) persons with knowledge of, or expertise in, marine environmental matters.

In any other commensurate organisation (such as the planning body of a local authority) such persons would be barred from the decision making body itself, although perfectly free to lobby it. We feel that far broader stakeholder engagement is essential if fishing is to be properly managed. We feel that having commercial fishermen and environmentalists sitting on state bodies in an administrative capacity should not be permissible. Both of these parties should play an advisory role, not a decisive one.

Institutional conflicts of interest should be removed from the decision-making framework.

We are also concerned that many grass-roots fishermen are excluded from the lobbying process. We feel as a bare minimum fishermen's organisations should publish lists of active members and have audited accounts available, so that government at all levels can ascertain which elements of the fishing sector are being represented, and identify and target those elements of the fishing sector which have not been able to engage in the process. We are particularly concerned that the potters and divers of the UK sector have weaker representation than some of the trawling sectors.

We also feel that ACFA and the RACs should take a long hard look at who their stakeholders actually are.

ENCOURAGING THE INDUSTRY TO TAKE MORE RESPONSIBILITY

Responsibility

We feel the industry could be given greater flexibility and responsibility if fishing was essentially authorised by licences rather than by the free for all currently demonstrated under the public right to fish. Licences could be given to companies or associations of fishermen with the method of fishing left up to them, but with a firm understanding that independent science would establish that such fishing had to be carried out sustainably and with appropriate penalties contained within the licence.

Producer Organisations

We do not feel that POs have sufficient clarity in their structure. We would prefer their replacement by companies or other associations of fishermen who would then commercially tender for fishing rights, rather than the slightly insidious closed-door operations of POs.

Enforcement

Having contractual arrangements rather than criminal arrangements between the member state and fishermen, should make enforcement more straightforward, with the ability to suspend licences contained within the licence for failing to comply with the CFP. At present enforcement rates continue to be low. For instance in 2008 the Scottish Fisheries Protection Agency achieved just one inshore prosecution, and their prosecution rates generally were appallingly low (follow the link below for official results).¹⁰

¹⁰ <http://www.scottish.parliament.uk/business/pqa/wa-09/wa0722.htm>
accessed 26th November 2009

Responsibility v competitiveness

If fishing is licensed in such away that environmental responsibility is rewarded then the two can be easily achieved. The peril with the present system is that competition is organised as a race for fish; stock collapse is an inevitable result of a poorly organised market.

Good examples of fisheries practice

There are plenty of examples from diver caught scallops as opposed to the dredging for them and creel prawns as opposed to trawled prawns. Unfortunately, in the Clyde fishery at least, institutionally it is the more damaging methods, which are promoted, while the sustainable operations are marginalised by the administrative structures.¹¹

DEVELOPING A CULTURE OF COMPLIANCE

Enforcement

Enforcement can be via criminal or civil penalties through contractual arrangements. The best method is to ensure that the management structures and administrative processes are weighted towards sustainable fishing. Using the Clyde as an example, the current Inshore Fisheries Group is weighted towards those using very debateable fishing methods. While the managing bureaucracy favours this approach, enforcement will always be difficult, as the entire administrative structure is emitting the wrong message.

Compliance and funding

We would not recommend a link between compliance and funding. There is a danger that in rewarding good practice the EU would also be tacitly accepting that bad practice can continue, but at a commercial risk. Having said that, if funding is to continue, it should only be targeted at sustainable fisheries.

Self management

Self management could assist if fishermen had trust that the bureaucracy would assist reporting poor conduct. Using the Clyde once again as an example anecdotal evidence would suggest that it is very difficult for whistleblowers to obtain successful prosecutions.

¹¹ See the astonishing make up of the Clyde Inshore Fisheries Group
<http://www.scotland.gov.uk/Topics/Fisheries/Sea-Fisheries/InshoreFisheries/IFGsMap/ClydeIFG> accessed 11th December 2009

FURTHER IMPROVING THE MANAGEMENT OF EU FISHERIES

Fleet capacity

The overwhelming responsibility of the CFP is to ensure sustainable fishing practice. This question demonstrates the distorted relationship between the CFP and the industry. Unless there is a breach of EU competition law the Commission has no right to regulate for the protection of small or medium sized enterprises in this sector (SME)s. There is no evidence SMEs conduct themselves any more efficiently or sustainably than larger ones, indeed there is a firm argument that larger industrial operators may be easier to control than smaller ones, and that they may seek an investment return for the long term. In our view attempts to protect SMEs plays to a romantic vision of the fishing sector, which has no place in modern commercial resource management. We also feel that in attempting to distort the entrants to the market the EU is acting ultra vires, unless there is a threat of breaches of EU competition law. We feel this sort of emotive approach tends to make the CFP far more complex than it needs to be.

MAKING THE MOST OF OUR FISHERIES

These are scientific questions on which others are better qualified to answer. It would not however be particularly difficult for commercial lawyers to draft clauses ensuring sustainable fishery into any licences granted to the fishing sector, based on sound science.

RELATIVE STABILITY

Relative stability seems to us to be a discredited concept. Firstly this breaches other aspects of EU competition law, where freedom of establishment is one of the key principles of the EU. It is embarrassing for the Commission that one of the few areas of sole title to the EU should be one which breaches one of the EU's most basic principles. Secondly, through the secondary market in vessel licences, quota and business ownership means that relative stability has been circumvented by the market. The key principle which needs to be focussed upon is that if the fishery resource is owned by the member state, and it should receive some payment by commercial entities exploiting it. Member states should not get bogged down in futile debates over the size of their respective fleets.

Small vessels inshore

Small vessels can still do enormous amounts of damage. Perhaps it would be better to restrict inshore fishing to low-impact fisheries rather than according to vessel size.

FOOD MARKETS

Others are better qualified to comment in this area than us.

CFP INTEGRATION WITH OTHER POLICIES

The CFP needs to operate closely with the creation of marine protected areas. However it also needs to take into consideration the increasing recreational use of the sea and the fishery. Anglers, divers, sailors, hoteliers and other coastal dwellers all have a stake in the resource and have a perfectly acceptable requirement for an unsullied and enjoyable environment. Not only should the CFP consider the marine conservation requirements but also the needs of the broader community for marine protection on a more ad hoc basis.

KNOWLEDGE BASE

The EU needs to broaden the range of its consultees to include those stakeholders who do not necessarily have a financial interest but may have a considerable depth of knowledge. Currently the EU now consults with environmental organisations and increasingly anglers, which is a good start. Divers, shipping companies, ports, coastal dwellers and other marine enthusiasts all have a role to play in stakeholder engagement and the provision of data.

STRUCTURAL SUPPORT

It is not immediately obvious why the industry should receive any support at all, since over-capacity would appear to be the biggest problem affecting the fleet.

We would recommend a phased removal of all subsidy since it is very unclear what benefit the EU tax payer receives.

EXTERNAL DIMENSION

We are not in a position to comment on the external dimension, beyond adding our voices to the call for restrictions on EU vessels over-fishing in overseas waters.

AQUACULTURE

We are unsure of the future role for aquaculture because of the base dependency of the industry on some of the more damaging types of commercial fishing to provide food for the farmed fish. We would like to see the promotion of EU research into marine husbandry, where

aquaculture is blended with commercial fishery to promote sustainable fish farming without the reliance on destructive fishing practices.

CONCLUSION

Many of the opinions made within this response may be novel. None of them are made in the spirit of criticism of any of the parties engaged in fishing industry, its management, or its policing. Our aim is merely to set on paper those points which have seemed to us to be the root cause of the 'irrationally' identified of by Paul Dengbol of the Commission. We would welcome the opportunity to develop these arguments further, and to provide additional information. We are also open to discussion and would be happy to concede that some of our arguments may be flawed when set in the context of others' experiences.

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