

OVERFISHING AND SUSTAINABLE FISHERIES: A PROGRAM FOR POLITICAL ACTION

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MARÉE AMÈRE: POUR UNE GESTION DURABLE DE LA PÊCHE (Rapport sur l'apport de la recherche à l'évaluation des ressources halieutiques et à la gestion des pêches). By Marcel-Pierre Cléach. Paris: Office parlementaire d'évaluation des choix scientifiques et technologiques. 2008. Pp. 175.

Overfishing is a serious problem, not only for the fishermen who rely on ocean resources for their livelihood, but also for the communities that are economically dependent on the fishing industry and for the many people who rely on fishery resources for food. Until relatively recently, it was thought that fishery resources were inexhaustible and that therefore there was no need to limit or manage fishing activities. As Hugo Grotius wrote, "fishing in the sea is free, for it is impossible to exhaust its riches."¹ As world population grew and maritime technology advanced, however, it became clear that fisheries resources were in fact exhaustible. Some form of limitation and/or management of fishing activities was therefore necessary.² Access to ocean areas for fishing, which had previously been

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1. HUGO GROTIUS, *THE FREEDOM OF THE SEAS* 43 (Ralph van Demann Magoffin transl., James Brown Scott ed. 1916) (1609). As recently as 40 years ago, the Stratton Commission Report, an important and highly influential study of problems in the fisheries sector, stressed efficient exploitation of fishery resources and economic development rather than conservation and management. COMM'N ON MARINE SCI., ENG'G AND RES., *OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION* (1969). For a similar perspective, see PANEL OF OCEANOGRAPHY, PRESIDENT'S SCI. ADVISORY COMM., *EFFECTIVE USE OF THE OCEANS* (1966). See generally Donna R. Christie, *From Stratton to USCOP: Environmental Law Foundering at Sea*, 82 WASH. L. REV. 533, 533-34 (2007).

2. See, e.g., PEW OCEAN COMM'N, *AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE* 46 (2003), available at http://www.pewtrusts.org/uploadedFiles/www.pewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceans_final_report.pdf; U.S. COMM'N ON OCEAN POLICY, *AN OCEAN BLUEPRINT FOR THE 21ST CENTURY* 1 (2004), available at http://oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf; JOINT OCEAN COMM'N INITIATIVE, *FROM SEA TO SHINING SEA: PRIORITIES FOR OCEAN*

regarded as open to all, was increasingly restricted by the coastal states which relied on the resources of those areas.³ And, more and more, the international community accepted the claims of those states to restrict or condition access to ocean areas proximate to their coast and to regulate activities in those areas.⁴

While the need for a legal and regulatory framework (at national, regional, and international levels) for limitations on ocean fishing activities and for the management of fishery resources is now unquestioned, and even though many rules and administrative structures are presently in place, regulation of ocean fishery resources has proved to be extremely problematic. Fishery regulation is a highly emotional and politicized area, with many groups having conflicting interests. Commercial fisherman, the fish processing and distribution industry, pleasure fisherman, coastal communities, environmentalists, and aquaculturists all have their particular concerns and priorities. The scientists and economists who study the area often do so from particular perspectives, which make their research, findings, and recommendations suspect to stakeholders with different priorities. There is also disagreement regarding the modalities of regulation. For example, some see individual transferable quotas as the optimum management tool, while others find such devices totally unacceptable. Lacking informed and effective regulation, many important fish stocks continue to decline, and some have already reached or are approaching levels which are unsustainable.⁵

Since concerted action by government is essential to dealing with the number of interrelated problems that must be confronted at the national, regional, and international levels, the task falls ultimately to political leaders to organize and implement appropriate solutions. But to be

POLICY REFORM 3 (2006); CENTRE D'ANALYSE STRATÉGIQUE, RAPPORT DU GROUPE POSÉIDON: "POLITIQUE MARITIME DE LA FRANCE": UNE AMBITION MARITIME POUR LA FRANCE (2006); COMM' N EUR. COMM., GREEN PAPER ON THE FUTURE OF THE COMMON FISHERIES POLICY 135 (2001), available at http://ec.europa.eu/fisheries/greenpaper/volume1_en.pdf.

3. See, e.g., Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 2(b)(1), 90 Stat. 331, 332 (1976); Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1996).

4. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 1 (July 25); United Nations Convention on the Law of the Sea art. 57, Dec. 10, 1982, 1833 U.N.T.S. 397 (allowing coastal states to establish a 200 mile Exclusive Economic Zones).

5. See generally FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE (2006), available at <http://www.fao.org/docrep/009/a0699e/A0699E00.HTM>. The Report relies heavily on data provided by PHILIPPE CURY & YVES MISEREY, UNE MER SANS POISSONS (2009).

effective, those solutions must be based on the best available scientific and economic data and must be acceptable to those involved directly in fisheries activities. One principal reason for the failure of effective fishery regulation to date is the pervasive culture of non-compliance with existing rules, largely occasioned by the inability of political leaders and administrators (at all levels) to enact rules truly responsive to the best current scientific and economic information available, to put in place effective regulatory structures, and to create a culture of compliance among all stakeholders.

The Report here under review, entitled *Maré amère: Pour une gestion durable de la pêche* (Bitter Tide: For a Sustainable Management of Fishing) (hereinafter the Report) prepared by French Senator Marcel-Pierre Cléach for the French Parliamentary Office for the Evaluation of Scientific and Technological Choices, has been described as "exemplary and courageous."⁶ It boldly calls on political leaders to step up and lead, "to exercise their prerogatives,"⁷ as "the difficulties encountered in France and in Europe stem largely from public authorities which have not exercised their powers because of weakness or complicity."⁸ In Senator Cléach's opinion,

[t]hose ministries charged with fisheries management have until now regarded their role as primarily social. It has consisted in taking political charge of a population—fisherman—who have a refractory and confrontational, if not aggressive, reputation. . . . A long-term vision of the profession and the management of marine resources has been relegated to a secondary position.⁹

Senator Cléach asserts that a new conception of fisheries regulation must replace the one which presently exists. It must be based on:

the idea that fisheries must . . . be managed '*seriously*', that is to say that scientific criteria, respect for TAC [total allowable catch] and quotas, minimum sizes, and authorized techniques must apply to all, in the interest of fishermen, and that the State has the duty to enforce them.¹⁰

6. MARCEL-PIERRE CLÉACH, MARÉE AMÈRE: POUR UNE GESTION DURABLE DE LA PÊCHE 153 (2008) (Statement of Office parlementaire d'évaluation des choix scientifiques et technologiques).

7. *Id.* at 115.

8. *Id.* at 115-16.

9. *Id.* at 116.

10. *Id.* at 117. Effective fisheries regulation must be based on reliable scientific information. For considerations of some of the problems inherent in obtaining such information see Holly Doremus, *Data Gaps in Natural Resource Management: Sniffing for*

Also, political leaders must take economic factors into account. They must consider the possibility that fishing should no longer be subsidized by the state, but must become a profitable, autonomous economic activity.¹¹ In addition, given the nature of the resource, such political action must be regional and international. To this end, Senator Cléach proposes the formation of a group composed of national and European parliamentarians that would seek to create a sustainable and responsible fishing industry. He sees such a group as necessary because of the small number of legislators and other government professionals concerned with ocean resources management in any one country and at the European level.¹²

Two points must be stressed, because each is essential to successful fisheries management. First, the Report calls for strong political leadership,¹³ and second, for basing policy on scientific and economic realities. "On what should a management decision be based, if not on scientific facts? By whom should a public decision be made, if not by elected representatives responsible for the general interest?"¹⁴ These features of the Report point to a hard-nosed, realistic approach to the problem of over-fishing and the collapse of fish stocks, one that aims at a long-term solution to the problem, and not at a temporary accommodation of particular current interests. To be successful, such an approach must be comprehensive and multi-factorial. It must aim at "the intergenerational sustainability of stocks, the economic profitability of fisheries, and an equity that takes into account the social aspects of these developments."¹⁵

Leaks Along the Information Pipeline, 83 IND. L. J. 407 (2008); Alyson C. Flournoy, Heather Halter & Christina Storz, *Harnessing the Power of Information to Protect Our Public Natural Resource Legacy*, 86 TEX. L. REV. 1575, 1579 (2008); Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1602 (2008).

11. CLÉACH, *supra* note 6, at 117.

12. *Id.* at 121.

13. In this regard the Report echoes the message of the recent report INT'L BANK FOR RECONSTR. & DEV. & FOOD & AGR. ORG. OF THE UNITED NATIONS, THE SUNKEN BILLIONS: THE ECONOMIC JUSTIFICATION FOR FISHERIES REFORM (2008), available at <http://site.resources.worldbank.org/EXTARD/Resources/336681-1215724937571/SunkenBillionsAdvanceWebEd.pdf>. "Sustainable fisheries are primarily a governance issue, and the application of fisheries science without addressing the political economy of fisheries is unlikely to rebuild marine fish wealth. Restoration of marine fish wealth and rebuilding the flow of net benefits implies fisheries governance reforms with an increased emphasis on the economic and social processes, informed by, rather than centered on, biological consideration." CLÉACH, *supra* note 6, at 53.

14. CLÉACH, *supra* note 6, at 9.

15. *Id.* at 50.

Because any reform can only result from a shared understanding of the problem, it appears indispensable to your rapporteur to widely disseminate those data which have achieved a broad consensus among scientists, both economists and fisheries scientists.

To this end, and contrary to the too-often postulated conflict between the 'friends of fishermen' and the 'friends of fish,' the sole objective cannot be . . . the return of stocks to the level of sustainable exploitation . . . Such an objective is much too 'fisheries-centric' and also [deals with the problem] species by species. It is necessary to develop a larger vision, both economic and social, aiming at the organization of fisheries which are profitable both economically and socially and, more fundamentally, to ask ourselves what is the best way to exploit the richness of fisheries resources.¹⁶

Perhaps the best examples of the Report's hard-nosed approach, especially when considered in the French context, are its recommendations for significant reductions in fishing capacity and for the elimination of subsidies to the fishing industry. According to the Report, most fisherman are well aware of the economic and ecological problems of their sector.¹⁷ They know that continuously increasing capacity to pursue ever diminishing stocks is a "vicious circle" which can only lead to the total collapse of both the stocks themselves and the fisheries industry. The only viable long-term solution is the reduction in the size of the industry, resulting in the reduction of capacity to capture fish. This would necessarily entail an end to state subventions of the industry, which now only serve to preserve this sector which is too large when viewed from an economic perspective.

Once the obligation of political leaders to lead is recognized, what form is this leadership to take? First of all, a common approach to fisheries management must be developed through dialogue among fishermen, scientific and economic experts, and political leaders (*les décideurs politiques*).¹⁸ Based on extensive interviews with fishermen, fisheries economists and scientists, and others concerned with fisheries management,¹⁹ Senator Cléach laments that France lags far behind other nations, Panama and Peru, for example, with respect to the possibility of constructive dialogue between fishermen and scientists.²⁰ French fishermen

16. *Id.*

17. *Id.* at 107.

18. *Id.* at 89.

19. *Id.* at 155-69. The Report indicates that 171 people were interviewed.

20. *Id.* at 89.

reproach French marine scientists with their disinterest in their problems and what they regard as the scientists' hidden ecological agenda.²¹ According to Senator Cléach, "the divide is immense between these two . . . protagonists regarding fisheries management."²²

What can the "deciders" do about this? First of all, administrators should condition funding of fisheries scientists, who are largely employed by the state, on the reestablishment of dialogue with fishermen.²³ Also, the work of fisheries scientists should be evaluated on the basis of their success in cooperating with fishermen and the degree to which fishermen are involved in their scientific research. "Given the present state of affairs, that is perhaps even more important than publications."²⁴ Since government officials determine the funding of Ifremer, the principal French ocean research organization, they can insist on provisions like these in its quadrennial contract,²⁵ as well as requiring Ifremer to accord a higher priority to ocean-resources research and mandating a holistic "ecosystem" approach to the study of fish stocks.²⁶

Besides taking the specific actions mentioned above and also doing things like creating marine protected areas²⁷ and regulating pleasure fishing,²⁸ political leaders must take steps to actively involve fishermen in management efforts, since "nothing is possible against them . . . [and] nothing is possible without them, without their consent and their active collaboration."²⁹ Fishermen are well aware of the precarious economic and ecological situation of their sector.³⁰ Rather than fishermen in each

21. *Id.* at 90.

22. *Id.* at 91.

23. *Id.*

24. *Id.* at 92.

25. *Id.* at 91. Ifremer (*Institut français de recherche pour l'exploitation de la mer*) (French Research Institute for the Exploitation of the Sea) was created in 1984 to study the ocean and its resources, to monitor marine and coastal zones, and to make recommendations concerning sustainable maritime activities. It has an annual budget of around 235 million euros, about 1500 personnel, five centers (English Channel/North Sea, Brest, Nantes, Toulon, and Tahiti), and twenty-six locations on the coastline of metropolitan France and French overseas regions. Ifremer is under the joint supervision of the Ministry of Ecology, Energy, and Sustainable Development and Town and Country Planning; the Ministry for Higher Education and Research; and the Ministry for Agriculture and Fisheries. See generally, *Discovering the Oceans with Ifremer*, <http://www.ifremer.fr/anglais/institut/missions.htm> (last visited Apr. 16, 2009).

26. CLÉACH, *supra* note 6, at 96.

27. *Id.* at 100-06.

28. *Id.* at 138-41.

29. *Id.* at 106.

30. *Id.* at 107.

European country competing with each other to take more fish by increasing national capacity, it is in the interest of all to reduce total capacity.³¹ Furthermore, the culture of poaching in ocean areas allocated to others and lax enforcement by national authorities of the rules with respect to their own fishermen must be altered.³²

How are these things to be done? Senator Cléach proposes the introduction of individual transferable quotas (ITQ).³³ Instead of each nation having an overall allowable catch and then that nation's fishermen competing against each other to take as much of that quota as possible, each fisherman would be allocated an individual share, which he could take himself or transfer to someone else. The use of the ITQ system would mark "the end of a principle considered immutable, that of free access to the vocation of fisherman. The sea is open, fish belong to whomever captures them, so everyone has the right to become a fisherman."³⁴ In France, the institution of the ITQ system would require amending a 1997 law that says that ocean resources are "common property" and reaffirms the right of access to them.³⁵

Finally, Senator Cléach thinks that, in order for the new system to work, it is essential that consumers let fishermen know that they expect them to engage only in responsible, sustainable fishing.³⁶ To this end, government must put in place mechanisms to provide consumers with information, like ecologically-responsible labeling and fish-size tables, and instruction to enable them to make fisheries-friendly choices when purchasing fish.

What is most significant about the Cléach Report is its clear recognition that political leaders must take a strong affirmative lead to deal with the problem of overfishing. As a product of a parliamentary endeavor, involving both senators and deputies, it represents a good first step in exercising that leadership. It calls on political leaders to take action and offers a political approach (the meaningful involvement of all stakeholders) along with a set of general policies (e.g., the need to rely on accepted scientific and economic data, the need to consider the problem in all its aspects—ecological, economic, and social), as well as many specific suggestions (e.g., the reduction of fishing capacity, the ending of state

31. *Id.*

32. *Id.* at 107-09.

33. *Id.* at 109-15.

34. *Id.* at 112.

35. *Id.* at 115.

36. *Id.* at 122.

subventions, the establishment of marine protected areas, specific strategies for fostering dialogue between fisherman and scientists).

The Report is also notable for its firm grounding in scientific and economic data and for its frequent reference to relevant contemporary scholarship and prior reports. Thus, the Report draws extensively on relevant FAO data, French and European Union reports, reports by other organizations, and scholarly writings. In addition, the Report draws heavily on interviews conducted by the rapporteur with fisheries experts, such as scientists, economists, administrators and regulators, and academics, from France, other European countries, the European Union, and North and South America. A list of the 171 people interviewed by the Rapporteur, along with their professional and national identifications, is included in an annex to the Report.³⁷

Since it is political leaders who must take the lead in efforts to create and manage sustainable fisheries if there is to be any realistic possibility of success in this effort, it is significant that this Report and its call for action come from one of those leaders and is addressed primarily to his colleagues in government. It is not the product of experts or stakeholders, but of one with the position, and the power it affords, to move matters forward. It is only to be hoped that his fellow *décideurs*, in France, the European Union, and elsewhere, take the Report's recommendations seriously and act soon to study and implement its recommendations.³⁸

37. *Id.* at 159-69.

38. There are hopeful signs that the conclusions and suggestions of the Cléach Report have already found a wider audience. See COMM'N EUR. COMM., GREEN PAPER ON THE REFORM OF THE COMMON FISHERIES POLICY 5 (2009) (calling for "a whole-scale and fundamental reform of the [EU's] Common Fisheries Policy" to deal with "the current reality of overfishing, fleet overcapacity, heavy subsidies, low economic resilience and decline in the volume of fish caught by European fishermen"). It echoes the Cléach Report in identifying certain structural failings of current fisheries policy: "a deep rooted problem of fleet overcapacity; imprecise policy objectives resulting in insufficient guidance for decisions and implementation; a decision-making system that encourages a short-term focus; a framework that does not give sufficient responsibility to the industry; lack of political will to ensure compliance, and poor compliance by the industry." *Id.* at 8.