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Fisheries Management in European Union and United Kingdom Waters after Brexit: A Change for the Better?

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Introduction*

From 1983 until the end of 2020 inclusive, fisheries in the territorial seas and exclusive economic zones (EEZs) of the United Kingdom (UK) and other European Union (EU) Member States in the Northeast Atlantic¹ were managed by the EU, in place of its individual Member States, by virtue of its exclusive competence in relation to “the conservation of marine biological resources under the common fisheries policy.”² The main features of this management system are as follows.³

Each year the EU, acting on scientific advice from the International Council for the Exploration of the Sea (ICES), adopts an EU total allowable catch (TAC) for most stocks of commercial interest found in EU waters. TACs are

* I am very grateful for valuable comments on an earlier version of this article from Daniel Owen, Andrew Serdy and two anonymous reviewers. The usual disclaimer applies.

- 1 As used in this article, the Northeast Atlantic includes the North Sea but not the Baltic Sea, as UK vessels do not fish there and very few Baltic vessels fish in UK waters. For similar reasons, EU waters outside the Northeast Atlantic are beyond the scope of this article. The EU Member States with coastlines in the Northeast Atlantic are Belgium, Denmark, France, Germany, Ireland, Netherlands, Portugal, Spain and Sweden.
- 2 Treaty on the Functioning of the European Union (TFEU) (2007), *Official Journal of the European Union* (OJ) 2016 C202/47, Art. 3(1)(d). This provision codifies a ruling of the European Court of Justice in 1981 that as from the beginning of 1979 the “power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community” (as the European Union was then known). See Case 804/79, *Commission v. United Kingdom* [1981] ECR 1045, para. 17.
- 3 The main EU legislation embodying this system is Reg. 1380/2013 on the Common Fisheries Policy, OJ 2013 L354/22. It replaces a series of earlier and similar regulations adopted at 10-year intervals since 1983. For detailed studies of the EU’s management system, see E. Peñas Lado, *The Common Fisheries Policy: The Quest for Sustainability* (Chichester, UK: Wiley, 2016), especially Chap. 4; and J. Wakefield, *Reforming the Common Fisheries Policy* (Cheltenham, UK: Edward Elgar, 2016). For an older, but still relevant, study, see R. Churchill and D. Owen, *The EC Common Fisheries Policy* (Oxford: Oxford University Press, 2010).

then divided into quotas, allocated to individual Member States, the basis of allocation being the principle of “relative stability.” The principle combines three elements: past catches, preferential treatment for regions particularly dependent on fishing, and the loss of catches resulting from the exclusion of EU vessels following the extension of fisheries jurisdiction to 200 nautical miles (M) in the late 1970s by other States in the North Atlantic, to give each Member State a percentage share of the TAC. TACs and quotas are set in terms of ICES Statistical Areas, not the zones of individual Member States. The EU’s principle of “equal access” means that the vessels of a Member State that hold a quota for a particular ICES Statistical Area may fish for that quota anywhere in that Area, regardless of which Member States’ waters come within the Area. There is one qualification to this principle: a vessel of one Member State may not fish within 12 M of another Member State’s baselines unless that Member State enjoys historic rights to fish in an area between six and 12 M from those baselines (the 6–12 M zone).

TACs and quotas are the central elements of management under the EU’s Common Fisheries Policy (CFP), but they are supplemented by multiannual plans for some stocks and by what are known as technical conservation measures (such as closed areas and seasons, gear regulations, minimum fish sizes and so on). Although the adoption of conservation and management measures (i.e., legislative jurisdiction) lies exclusively with the EU (subject to some limited powers to adopt local measures, delegated to Member States by Articles 19 and 20 of Regulation 1380/2013), the enforcement of those measures is largely the responsibility of individual Member States, subject to a degree of oversight and co-ordination by the EU, as the EU lacks more than a rudimentary competence to exercise enforcement jurisdiction.

On January 1, 2021, the UK ceased to be subject to the CFP and became responsible for fisheries management in its own waters. The EU’s system of fisheries management, as described above, continues to apply in the waters of its remaining Member States in the Northeast Atlantic. However, each party’s management autonomy is tempered by new obligations to manage jointly many fish stocks found in the Northeast Atlantic as a result of the Trade and Cooperation Agreement agreed to by the EU and the UK in 2020.⁴

The aim of this article is to analyze the new regime for fisheries applying to UK and EU waters since the beginning of 2021, and to explain why and how it came about. Accordingly, the following section attempts to explain why the UK decided to leave the EU and its CFP and the process by which it did so.

4 See n. 23 below. The parties’ obligations to cooperate under international fisheries law fall outside the scope of this article.

This is followed by an analysis of the new regime, focusing on management measures, allocation of catches and access to fishing grounds. The article ends with some concluding observations that consider whether the new regime is a change for the better.

The Road to Brexit⁵

In 2010, David Cameron became Prime Minister of the UK, heading a Conservative/Liberal Democrat coalition government. In a speech made in 2013, he called for an “in/out” referendum on the UK’s membership in the EU.⁶ Prime Minister Cameron’s call appears to have been motivated in part by a desire to quieten the increasingly vocal minority among his fellow Conservative Members of Parliament (MPs), who were bitterly and viscerally opposed to UK membership in the EU, and to head off an electoral threat from the UK Independence Party (UKIP), whose main policy was that the UK should leave the EU and which, opinion polls suggested, was attracting voters from his own party. Nevertheless, Cameron was unable to implement his proposal for a referendum because of opposition from his Liberal Democrat coalition partners.

However, in the 2015 UK general election the Conservative Party won an overall majority and was able to govern without the support of other parties. That allowed Cameron to push ahead with a referendum on whether the UK should remain within the EU or leave. The referendum was held in June 2016 and resulted in a 52–48 majority, on a 70 percent turnout, in favor of the UK leaving the EU. Although the referendum result was not legally binding, and in spite of the fact that two of the four constituent parts of the UK (Northern Ireland and Scotland) voted in favor of remaining in the EU⁷ and a widespread belief that there was a substantial majority in each house of Parliament in favor of the UK remaining in the EU, the two largest political parties (Conservative

5 “Brexit” is a term that was coined in the mid-2010s as a convenient shorthand for the UK’s withdrawal from the EU. Given the focus of this article, this section gives only a limited account of the road to Brexit and cannot explore the full drama of that story. The factual information in this section is based on contemporary news media. For reasons of space, and because much of the information is well-known, more specific references are not given.

6 D. Cameron, “EU Speech at Bloomberg,” *UK Government* (January 2013), available online: <<https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>>.

7 The UK is not a federal State, but given the extent to which powers have been devolved to Northern Ireland, Scotland and Wales since the late 1990s, it is reasonable to describe it as quasi-federal.

and Labour) decided to accept the result of the referendum, and that consequently the UK should leave the EU.

Having campaigned in favor of remain, Cameron resigned as Prime Minister immediately after the result of the referendum was announced. He was succeeded by Prime Minister Theresa May. Even though May was a supporter of UK membership in the EU, albeit a lukewarm one, it was her task to negotiate the UK's withdrawal from the EU. As an exercise in educating the electorate of the consequences of the choice before them, the referendum campaign was deeply flawed. In particular, those advocating leave did not spell out what kind of relationship with the EU they envisaged for the UK if it left, preferring to campaign under the rather vacuous slogan, "Take back control," "control" being amplified at times to refer to "control of our laws, our borders, our money and our waters."

One of the largest blanks in the Leave canvas was subsequently filled in by May when she announced at the annual Conservative party conference in October 2016 that the UK would leave the EU's customs union and single market.⁸ This remarkable announcement, which went a long way to determining the form of the UK's future relationship with the EU, was made without May having consulted her cabinet or Parliament or publishing any government paper setting out the reasons for, and implications of, her decision. Nevertheless, from then on withdrawal from the EU's customs union and single market became a constant of UK government policy.

The other 27 members of the EU (EU27) interpreted the somewhat ambiguous provisions of Article 50 of the Treaty on the European Union (TEU),⁹ which deals with the withdrawal of a Member State from the EU, to mean that an agreement on the terms of withdrawal, such as the division of EU assets and liabilities, should be negotiated first, and only when such an agreement had been concluded, could negotiations begin on an agreement on the UK's future relationship with the EU. Although the UK wanted the two sets of negotiations to proceed concurrently, as the weaker negotiating party it was forced to accept the position of the EU27. Accordingly, negotiations began on a withdrawal agreement. Those negotiations were protracted and fractious, but eventually resulted in the conclusion, in November 2018, of the Agreement on the Withdrawal of the United Kingdom from the European Union, together

8 The "single market," according to the definition in Article 26(2) of the TFEU, n. 2 above, is "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

9 Treaty on the European Union (2007), OJ 2016 C202/1.

with an accompanying Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom.¹⁰

In January 2019, May submitted the Withdrawal Agreement and the Political Declaration to Parliament for approval. The House of Commons rejected them by a large majority, with many of May's own MPs voting against. May made two further attempts to secure the Commons' approval, but each was unsuccessful. That led May to resign in June 2019. She was succeeded by Prime Minister Boris Johnson, who had resigned as Foreign Secretary a year earlier over May's proposed negotiating strategy for the Withdrawal Agreement. Johnson set about re-negotiating the Withdrawal Agreement and Political Declaration, but the negotiations were even more fraught than before. A revised Agreement and Declaration were eventually concluded in October 2019.¹¹ By that time Johnson had lost his Parliamentary majority as a result of expelling some Conservative MPs who opposed aspects of his Brexit policy from the party. However, in a general election held in December 2019, Johnson won a resounding 80-seat majority. On January 9, 2020, the House of Commons approved the revised Withdrawal Agreement by a large majority, and the UK formally left the EU on January 31, 2020.

The 2019 Withdrawal Agreement and Political Declaration are very similar to the 2018 Agreement and Declaration except in relation to arrangements for Northern Ireland, where they adopt a different solution to the need to avoid a "hard" land border between Northern Ireland and Ireland. Articles 126 and 127 of the 2019 Withdrawal Agreement established a transition period following the UK's departure from the EU, ending on December 31, 2020. During that transition period the UK remained generally subject to EU law, including the CFP. Paragraphs 71–74 of the Political Declaration outlined the fisheries relationship that should follow the end of the transition period. While "preserving regulatory autonomy," the EU and UK should co-operate together, and with other States, to ensure fishing at sustainable levels and to develop non-discriminatory measures for the conservation, rational management and

10 The Withdrawal Agreement and the Political Declaration are both available online: <<https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>>.

11 Agreement on the Withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community, January 24, 2020, *United Kingdom Treaty Series* 2020 No. 3; Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom, available online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf>.

regulation of fisheries, including shared stocks. Furthermore, the EU and UK would “use their best endeavours” to conclude and ratify “a new fisheries agreement on, *inter alia*, access to waters and quota shares” by July 1, 2020, in order for it to be in place in time to be used for determining TACS and quotas for the first year after the transition period.

The delay in concluding the Withdrawal Agreement meant that there was a maximum of only 11 months in which to negotiate the future relationship agreement, as the UK government declined to exercise an option in the Agreement to extend the transition period for a further one or two years. Negotiations were complicated by the COVID-19 pandemic, as most of the negotiating sessions took place virtually.¹² When negotiations did eventually get under way, there was considerable friction and fractiousness, with the UK’s chief negotiator, David Frost, taking an abrasive and confrontational approach. By the summer of 2020, it became evident that there were three core issues on which the parties were finding agreement particularly difficult—fisheries, the so-called “level playing field” (i.e., fair conditions of competition in relation to trade and investment), and “governance” (i.e., dispute resolution mechanisms)—and the negotiations continued to focus on those three issues throughout the autumn of 2020.

In the case of fisheries, the negotiating positions of the parties were far apart. The EU’s negotiating directives, adopted in February 2020, sought to maintain the status quo on allocation and access, while proposing cooperation over the sustainable management of stocks that would now become shared between the EU and the UK.¹³ By contrast, the UK, in a draft agreement published in May 2020, proposed that the parties should conduct negotiations each year over TACS for shared stocks, allocation (based on the principle of zonal attachment),¹⁴ and conditions of access to each other’s waters.¹⁵

12 The account of the negotiations that follows is based primarily on British news media, especially the BBC and *The Guardian* newspaper.

13 Council of the EU, Doc. 5870/20 ADD 1 REV 3 of February 25, 2020, available online: <<https://www.consilium.europa.eu/media/42736/st05870-adoire03-en20.pdf>>. See also the Commission’s Draft Agreement on the New Partnership with the UK, March 18, 2020, pp. 82–88, available online: <<https://ec.europa.eu/info/sites/default/files/200318-draft-agreement-gen.pdf>>.

14 The principle of zonal attachment is not defined in the draft agreement. It is often considered to mean that each party’s share of the TAC of a shared fish stock should correspond to the proportion of that stock found in its waters. The concept of zonal attachment is also discussed in Annex C of a UK government White Paper, *Sustainable Fisheries for Future Generations* (Cm. 9660, 2018).

15 UK government, Draft Working Text for a Fisheries Framework Agreement between the UK and EU, available online: <<https://assets.publishing.service.gov.uk/government/>

Subsequent negotiations focused on allocation and access. The UK sought a much larger share of the catch from its waters for UK vessels. During the period 2015–2018 (inclusive) that share has been calculated to average 33 percent by weight (51 percent by value), compared with the EU27's share of 46 percent by weight (35.5 percent by value).¹⁶ By contrast, the waters of the EU27 were far less important for UK vessels, accounting over the same period for 13.5 percent of the UK catch by weight (10.5 percent by value), compared with figures of 80 and 82 percent for UK waters.¹⁷ The catch by UK vessels in EU27 waters was only about one-eighth by weight (one-sixth by value) of that by EU27 vessels in UK waters.¹⁸ For its part, the EU27 wanted to maintain their share of the catch in UK waters, which accounted for about 29 percent by weight (23 percent by value) of the entire marine fish catch in the Northeast Atlantic by vessels from the EU27. That percentage was very much larger for some individual EU Member States, with vessels from Belgium, Denmark, Germany, Ireland and the Netherlands each taking one-third or more of their catch from UK waters.¹⁹

The UK initially demanded that 80 percent by value of the EU27 catch in UK waters should be transferred to the UK, which would have had a devastating impact on the fishing industries of the five States just mentioned. In response, the EU offered a transfer of only 15–18 percent. The UK also wanted to terminate the right to fish in the 6–12 M zone off the UK that some Member States enjoyed.²⁰ By mid-December 2020, the parties' positions on the proportion of

uploads/system/uploads/attachment_data/file/886009/DRAFT_Fisheries_Framework_Agreement.pdf>. See also the White Paper, n. 14 above, pp. 18–19, where the government sets out its broad objectives for a fisheries agreement with the EU.

16 See I.R. Napier, *Fish Landings from the UK EEZ 2015–2018* (Scalloway: NAFC Marine Centre, University of the Highlands and Islands, 2020), p. 8, available online: <<https://www.shetland.uhi.ac.uk/research/statistics/reports/eez-reports/eez-report-2020-07/>>. The remaining share of the catch was taken by vessels from Norway and the Faroe Islands. Popescu and Scholaert give similar figures for the period 2012–2019. See I. Popescu and F. Scholaert, *EU-UK Relations in Fisheries* (European Parliament, 2021), p. 4, available online: <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/689341/EPRS_IDA\(2021\)689341_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/689341/EPRS_IDA(2021)689341_EN.pdf)>.

17 Napier, n. 16 above, p. 61. Most of the catch came from Irish waters. *Id.*, p. 69.

18 *Id.*, p. 113.

19 Popescu and Scholaert, n. 16 above, p. 5. See also I.R. Napier, *Fish Landings from the United Kingdom's Exclusive Economic Zone by Area, Nationality & Species* (Scalloway: NAFC Marine Centre, University of the Highlands and Islands, 2016), p. 25, available online: <<https://www.shetland.uhi.ac.uk/research/statistics/reports/eez-reports/eez-report-2016-11-11/>>.

20 There were 21 separate stretches of UK coast within the 6–12 M zone of which vessels from one or more of Belgium, France, Germany, Ireland and Netherlands had the right to fish. By contrast, there were only five stretches of EU27 coast where UK vessels had the right to fish in the 6–12 M zone. See Reg. 1380/2013, n. 3 above, Annex 1.

EU27 catches to be transferred had narrowed appreciably, and the principle of a transition period to effect that transfer had also been agreed, although not the length of that period. By that time, agreement had been reached on the other two core issues, the level playing field and governance. It was only fisheries that was holding up the conclusion of an agreement on the UK's future relationship with the EU.

It was obvious that fisheries could not be allowed to stymie an agreement. The UK fishing industry represents only around 0.1 percent of the UK's GDP, a miniscule figure compared with the proportion of the UK economy that would benefit from the tariff-free trade and other benefits that the envisaged agreement would provide. Furthermore, the lack of an agreement was not in the interests of the UK fishing industry itself. It has been estimated that while the industry would have gained US\$420 million from the exclusive access to UK waters that would have resulted from the lack of an agreement, it would have lost almost US\$500 million in the absence of tariff-free trade.²¹ Such trade is of great importance because UK consumer demand for fish is concentrated on a very few species (principally white fish). As a result, the UK fishing industry exports much of its product, including farmed salmon. Just over half (by weight), worth £1.345 billion, went to the EU in 2019. The imposition of tariffs on those exports would have made them significantly less competitive on EU markets. At the same time fish worth £1.210 billion was imported from the EU27 to satisfy UK consumer demand;²² were the UK to impose tariffs on those imports, they would be significantly more expensive.

Faced with these economic realities, compromises were made, especially on the UK side, and on Christmas Eve 2020, just one week before the expiry of the transition period, it was announced that negotiations on the Trade and Co-operation Agreement (TCA),²³ as the agreement is known, had been successfully concluded. The Agreement was signed on December 30, 2020. It entered provisionally into force on January 1, 2021, and definitively into force on May 1, 2021.

21 H. Bartelings and Z. Smeets Kristkova, "Impact of Hard Brexit on European Fisheries" (University of Wageningen, 2018), p. 13, available online: <<https://edepot.wur.nl/505902>>.

22 Marine Management Organisation, *Sea Fisheries Statistics 2019, Section 4: Trade*, available online: <<https://www.gov.uk/government/statistics/uk-sea-fisheries-annual-statistics-report-2019>>. See also Popescu and Scholaert, n. 16 above, pp. 8–9.

23 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, December 30, 2020 (entered into force May 1, 2021) *United Kingdom Treaty Series 2021* No. 8; OJ 2021 L149/10 [TCA].

The fisheries provisions of the TCA are analyzed in detail in the following section, but two general points may be made here. First, there are many infelicities, ambiguities and obscurities in its provisions: some examples are given below. They are probably due to the rushed state of the final negotiations. Second, the fisheries provisions, like the rest of the TCA generally, betray a lack of trust between the parties. That is evident from the detailed provisions on counter-measures and compulsory arbitration in the event that one party suspects the other of non-compliance.²⁴ By contrast, most bilateral fisheries agreements, including those concluded by the EU with third States in recent years, have limited provisions on dispute resolution, often requiring no more than consultations between the parties.

The Fisheries Regime in EU and UK Waters since 2021

This section analyzes the regime laid down by the TCA that now governs fisheries in EU and UK waters. It focuses on three issues: the management of fish stocks, allocation of catches, and access to waters.²⁵ For reasons of space, there is no consideration of other fisheries questions, such as the nationality and ownership of fishing vessels²⁶ or participation in regional fisheries management organizations.²⁷ Trade in fisheries products is discussed only briefly in the concluding observations.

The Management of Fish Stocks in EU and UK Waters

The TCA provides that in principle the EU and UK each has regulatory autonomy for the management of the fish stocks found in its waters.²⁸ It was politically important for the UK government to have this principle recognized explicitly in the TCA, given its attachment to the idea of Brexit as representing

24 See TCA, Arts 501, 506, n. 23 above. See discussion of these provisions at text following n. 67 below and at n. 83 below, respectively.

25 In the discussion of these issues, the position of the Channel Islands and the Isle of Man, for which the TCA makes special provision (see Arts 502, 503, 506(2)), will not be considered. The islands are not part of the UK, but British Crown Dependencies. They are self-governing, with the United Kingdom being responsible for their defense and international relations.

26 On which, see TCA, n. 23 above, Annex 20, Schedule of the European Union, Reservation No. 21 and Schedule of the United Kingdom, Reservation No. 13.

27 On which, see A. Serdy, "The 2018 Fisheries White Paper, the Fisheries Act 2020 and their international legal dimension," *Cambridge International Law Journal* 10, no. 1 (2021): 73–95, pp. 77–86.

28 TCA, n. 23 above, Art. 496(1).

the regaining of lost sovereignty by the UK and once again becoming an “independent coastal State.” This phrase has been widely used in official UK publications and is even found in the TCA itself.²⁹ Nevertheless, the phrase is something of a tautology, as States are by definition independent. It is also misleading, as it implies that the United Kingdom was not an “independent State” while a member of the EU. While there were certainly greater limitations on its sovereignty while a member compared with the position since, it did not cease to be “independent.”³⁰

While each party enjoys regulatory autonomy in fisheries management for its waters, that autonomy is heavily qualified by the TCA. First, Article 496(1) provides that in adopting management measures for its waters, each party must pursue the objectives set out in Article 494(1) and (2) and “[have] regard to the principles referred to in” Article 494(3). Those objectives comprise environmental sustainability; the maintenance and progressive restoration of populations of harvested species “above biomass levels that can produce the maximum sustainable yield”; and “contribut[ing] to achieving economic and social benefits.” The TCA does not say who is to enjoy such benefits, but presumably it is primarily the parties’ fishing and associated industries. The principles of fisheries management listed in Article 494(3) include the precautionary approach (defined in Article 495(1)(b)); “long-term sustainability (environmental, social and economic) and optimum utilisation” of shared stocks; basing management decisions on the best available scientific advice;³¹ ensuring selectivity in fisheries to protect juvenile and spawning fish and to avoid unwanted bycatch; and minimizing “harmful impacts of fishing on the marine ecosystem and taking due account of the need to preserve marine biological diversity.” In practice, these objectives and principles do not represent new management obligations for the parties as each had already included such objectives and principles in their national legislation.³² Indeed, that legislation in some respects goes further, notably in requiring an ecosystem-based approach to management,³³ something that is not explicitly called for by the TCA.

29 See, for example, *id.*, preamble, recital 19, Art. 494(1) and Annex 38, preamble.

30 See further Serdy, n. 27 above, pp. 76–77. He argues that the reference to “coastal” reflects the change in the position of the UK from having significant distant-water fishing interests up to the mid-1970s to the position today, where UK vessels fish predominantly in UK waters.

31 Under Article 496(2) this is an obligation, rather than simply a principle to which regard is to be had. The principal source of such advice should be ICES (see Art. 494(3)(c)).

32 See, respectively, Reg. 1380/2013, n. 3 above, Art. 2 and Fisheries Act 2020, c. 22 (UK), s. 1.

33 Reg. 1380/2013, n. 3 above, Art. 2(3); Fisheries Act 2020, n. 32 above, ss. 1(4) and (10).

A second, and more significant, restriction on fisheries management autonomy is an obligation on each party not to apply its measures to the fishing vessels of the other party in its waters unless it also applies the same measures to its own vessels.³⁴ This principle of non-discrimination is also included in the principles in Article 494(3) referred to above, as paragraph (f), which adds that measures should be “proportionate,” a term that the TCA does not define or explain. The term may well be intended to have the meaning that it has in general EU law and UK administrative law, where the concept of proportionality refers to a requirement that no stricter means be used than are necessary to achieve the particular end desired. Measures of one party that “are likely to affect the vessels” of the other party must be notified to the latter before they are applied, “allowing sufficient time for the other Party to provide comments or seek clarification.”³⁵

Many of the fish stocks formerly found in the waters of the EU in the Northeast Atlantic are, since Brexit, found in the waters of both the EU and the UK. They are therefore what are generally referred to in international fisheries law as “shared stocks.” Many, if not most, EU-UK shared stocks are listed in Annex 35 of the TCA, although the 76 stocks on that list are nowhere identified or described in the TCA as “shared stocks.” Annex 35 stocks are subject to joint management by the EU and the UK. This is the greatest limitation on their management autonomy. The main tool of joint management is the setting each year of TACS. Under Article 498, TACS are to be based on “the best available scientific advice, as well as other relevant factors, including socio-economic aspects.” Assuming that Annex 35 stocks are all “shared stocks,” the objectives and principles set out in Article 494 are to be taken into account. The reference to “socio-economic aspects” in Article 498 suggests that scientific advice may be departed from to set larger TACS than those recommended by scientists for the purposes of short-term economic gains for the fishing industry. If that happens in practice to any degree, stocks will be fished above safe biological levels and the TCA’s objective of sustainability will not be met.

If the parties fail to agree on TACS by December 20 preceding the year to which TACS are intended to apply, each party must set “a provisional TAC corresponding to the level advised by ICES, applying from 1 January.”³⁶ Provisional TACS continue to apply until the parties reach agreement on definitive TACS.

Given that the TCA did not come into force provisionally until January 1, 2021, it was too late for the timetable envisaged for the setting of agreed TACS

34 TCA, n. 23 above, Art. 496(2).

35 Id., Art. 496(3).

36 Id., Art. 499(2). Different procedures apply to “special stocks” (see Art. 499(3–6)).

for 2021 to apply. Nevertheless, the parties held talks to agree on TACs for 2021, and eventually reached agreement in June 2021.³⁷ In the meantime, each party had set provisional TACs, as required by Article 499 of the TCA.³⁸

Under Article 498(4) of the TCA, annual consultations on TACs may also cover stocks for which fishing is prohibited; the determination of the TAC for any stock not listed in Annexes 35 and 36 (Annex 36 is discussed below), and the parties' respective shares; "measures for fisheries management" other than TACs, such as fishing effort limits; and stocks of mutual interest other than those listed in Annexes 35–37. Although the TCA makes no explicit mention of technical conservation measures, such as closed seasons and areas, fishing gear regulations and so on, they are presumably included in the phrase "measures for fisheries management" in Article 498(4) and they were in fact discussed in the 2021 TAC negotiations.³⁹ Some harmonization of the parties' technical conservation measures applying to Annex 35 stocks would seem desirable for the effective management of those stocks. In the short term this will not be a problem, as the UK rolled over into UK law the EU's technical conservation measures applying before 2021.⁴⁰

Before Brexit, the EU shared a number of commercially important stocks in the North Sea with Norway. They were jointly managed under a bilateral agreement of 1980,⁴¹ whereby the two parties met each year to agree on TACs (based on ICES advice) and other management measures. Since Brexit, those stocks,

37 Written Record of Fisheries Consultations between the United Kingdom and European Union for 2021, June 11, 2021 (hereafter EU-UK Written Record 2021), available online: <https://ec.europa.eu/oceans-and-fisheries/news/sustainable-fisheries-commission-signs-first-ever-annual-agreement-fishing-united-kingdom-2021_en>.

38 EU Regs 2021/91 and 2021/92, OJ 2021 L31/20 and 31, as amended by Regs 2021/406 and 2021/703, OJ 2021 L81/1 and L146/1. The Regs cover the period from January 1 to July 31, 2021. The UK does not appear to have published provisional TACs. Instead, it has published the UK's share of provisional TACs. See UK Department for Environment, Food & Rural Affairs, "Policy Paper: Fishing Opportunities for British Fishing Boats in 2021," available online: <<https://www.gov.uk/government/publications/fishing-opportunities-for-british-fishing-boats-in-2021>>.

39 See EU-UK Written Record 2021, n. 37 above, para. 12. Technical conservation measures are also one of the matters that the Specialised Committee on Fisheries, established by Art. 8(1)(q) of the TCA, may discuss. See TCA, n. 23 above, Art. 508(1)(d).

40 Under the European Union (Withdrawal) Act 2018, c. 16 (UK), s. 3. Some of these measures have subsequently been amended. See Fisheries Act 2020, n. 32 above, Schedule 11, para. 11.

41 Agreement on Fisheries between the European Economic Community and the Kingdom of Norway, February 27, 1980 (entered into force June 16, 1981) OJ 1980 L226/48. Further on the Agreement, see Churchill and Owen, n. 3 above, pp. 333–337; see also T. Bjørndal and G. Munro, *Brexit and the Consequences for Fisheries Management in the North Sea*, SNF Working Paper 03/20 (Bergen: Centre for Applied Research at NHH, 2020),

which are listed in Annex 36A of the TCA, are now shared by the EU, Norway and the UK. Clearly, they cannot be managed purely under the 1980 EU-Norway Agreement. Instead, the three parties are to negotiate a new trilateral agreement for the management of shared North Sea stocks.⁴² Negotiations for such an agreement had not been completed at the time of writing (June 2021). In the meantime, the three parties reached an *ad hoc* agreement in March 2021 establishing TACs for shared North Sea stocks for 2021 and each party's share of the TACs.⁴³ Those TACs are in line with ICES' scientific advice.⁴⁴ Should the three parties be unable to agree on TACs for any future year, Article 499 of the TCA provides that the EU and UK are to set provisional TACs in the way described above.

There are a number of other shared stocks in the Northeast Atlantic that before Brexit were managed jointly by the EU and two or more other States/territories,⁴⁵ and that since Brexit are now also shared by the UK. Three such stocks, two of mackerel and one of blue whiting, are listed in Annex 36, table B. Accordingly, the UK has taken part in negotiations with the EU and the other States and territories concerned on management measures for such stocks for 2021. Negotiations for blue whiting were successful,⁴⁶ but those for mackerel were not.⁴⁷ Where no agreement is reached on TACs for Annex 36B stocks, the

available online: <<https://ukandeu.ac.uk/wp-content/uploads/2020/06/Brexit-and-the-consequences-for-fisheries-management-in-the-North-Sea.pdf>>.

- 42 Agreed Record of Fisheries Consultations between the European Union, Norway and the United Kingdom for 2021, March 16, 2021, para. 8, available online: <https://ec.europa.eu/oceans-and-fisheries/fisheries/international-agreements/northern-agreements_en#ecl-inpage-649>. At the same time the EU also reached agreement with Norway on stocks not shared with the UK: available online at id.
- 43 Id., Table 1.
- 44 See id., paras 12–17.
- 45 The term “territories” is used to refer to the Faroe Islands and Greenland, which, although part of the Kingdom of Denmark, have a high degree of autonomy in fisheries matters and are not part of the EU.
- 46 See Agreed Record of Conclusions of Fisheries Consultations between Norway, the European Union, the Faroe Islands, Iceland and the United Kingdom on the Management of Blue Whiting in the North-East Atlantic in 2021, October 19–21, 2020, available online: as in n. 42 above.
- 47 See Norwegian Government Press Release of May 27, 2021, available online: <<https://www.regjeringen.no/en/aktuelt/norway-establishes-a-national-quota-for-northeast-atlantic-mackerel-for-2021/id2853951/>>. See also Agreed Record of Conclusions of Fisheries Consultations between Norway, the European Union, the Faroe Islands, Greenland, Iceland and the United Kingdom on the Management of Mackerel in the North-East Atlantic in 2021, December 4, 2020, available online: as in n. 42 above, where the parties agreed on a ceiling for mackerel catches in 2021.

EU and the UK are required to establish provisional TACs under Article 499 of the TCA in the way described above.

There is one further stock in the Northeast Atlantic that before Brexit was managed jointly by the EU and two or more other States/territories and is now shared with the UK, but that is not listed in any of the Annexes to the TCA. That is Norwegian spring-spawning (Atlanto-Scandian) herring. It is not only a shared stock but also a straddling stock. The UK took part in the successful negotiations for management measures for this stock for 2021.⁴⁸

Allocation

As we have seen, allocation was a vital issue for both parties in the negotiation of the fisheries provisions of the TCA. The EU wished allocation to continue to be based on the principle of relative stability, whereas the UK wanted it to be based on zonal attachment. The provisions on allocation in the TCA are a negotiated compromise, although one that appears to be closer to the aspirations of the EU than those of the UK.

Where the two parties have agreed on TACs for the 76 stocks listed in Annex 35, each party's share of the TAC is as set out in that Annex.⁴⁹ The latter lists each party's share as a percentage of the TAC for each stock for each of the years from 2021 to 2025 inclusive, and then for the period from 2026 onwards. Over the period 2021–2026 there are increases in the UK's percentage shares of the TACs for 53 of the 76 stocks compared with its pre-Brexit shares under the Common Fisheries Policy. Most of those increases are slight. Stocks where there are significant increases include Celtic Sea haddock, North Sea hake and sole, and nephrops in ICES Area 7.⁵⁰ The same principle of allocation applies for the stocks shared with Norway and other third States/territories listed in Tables A and B of Annex 36. Here only the shares of the EU and UK are set out, those shares adding up to 100 percent. That must mean that where a TAC for a stock is set, the portion of the TAC that remains after the shares allocated to third States/territories have been deducted is to be shared according to the

48 See Agreed Record of Conclusions of Fisheries Consultations between Norway, the European Union, the Faroe Islands, Iceland, the Russian Federation and the United Kingdom on the Management of the Norwegian Spring-Spawning (Atlanto-Scandian) Herring in the North-East Atlantic in 2021, October 20–21, 2020, available online: as in n. 42 above.

49 TCA, n. 23 above, Art. 498(3).

50 See further ABPmer, *EU-UK Trade and Cooperation Agreement: Thoughts on Fisheries from a UK Perspective* (2021), pp. 2–5, available online: <<https://www.abpmer.co.uk/blog/white-paper-eu-uk-trade-and-cooperation-agreement-thoughts-on-fisheries-from-a-uk-perspective/>>.

percentages set out in Tables A and B. For some of those stocks (such as North Sea haddock, herring and whiting), there is a significant increase in the UK's percentage share over the period 2021–2026.

There is the possibility of some modification of the strict percentage shares set out in Annexes 35 and 36 through the use of “quota swaps.” This means that where one party has a share of the TAC for a particular stock that it anticipates its vessels will not fully catch, it may “swap” that unused portion for an unused portion of the other party's share of the TAC for a different stock. Such a mechanism operates in the CFP to mitigate the rigors of the relative stability principle of allocation.⁵¹ Article 498(8) of the TCA provides that the parties are to set up a mechanism for voluntary quota transfers, with the Specialised Committee on Fisheries (referred to above) to decide on its details. In June 2021, the parties agreed to set up an interim mechanism, pending a decision by the Committee.⁵²

If no agreement is reached on TACs for the stocks listed in Annex 35 and Tables A and B of Annex 36 for a particular year, and the EU and UK have each set provisional TACs in the way described earlier, each party “shall set its share for each of the provisional TACs, which shall not exceed its share as set out in the corresponding Annex.”⁵³ This is an important and welcome provision. It avoids the situation that has occurred from time to time in internationally managed fisheries, such as with the Norwegian spring-spawning (Atlanto-Scandian) herring fishery in 2013/2014,⁵⁴ where the parties are either unable to agree on a TAC or they agree on a TAC but are unable to agree on its allocation, and each then sets a quota for its fishing vessels, the combined totals of which significantly exceed the scientifically recommended TAC.⁵⁵

According to the UK government, the allocation provisions of the TCA represent

a significant uplift in quota for UK fishers, currently estimated to be worth around £146m for the UK fleet. This is equal to 25% of the value of the average annual EU catch from UK waters and will be phased in over five years; with the majority of this value (15%) being transferred

51 See Reg. 1380/2013, n. 3 above, Art. 16(8).

52 See EU-UK Written Record 2021, n. 37 above, para. 8.

53 TCA, n. 23 above, Art. 499(7). For the parties' provisional shares of the TAC for 2021, see n. 38 above.

54 On which, see European Commission Press Release, “Herring Dispute: EU lifts Measures against the Faroe Islands,” *European Commission* (August 18, 2014), available online: <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_931>.

55 See ABPmer, n. 50 above, p. 1.

in the first year (2021). It ends the dependence of the UK fleet on the unfair ‘relative stability’ mechanism enshrined in the EU’s Common Fisheries Policy and will mean that the UK vessels are able to take a larger proportion of the total landings from UK and EU waters going forward.⁵⁶

As TACS, and therefore the shares thereof, are set in terms of weight and not value, it is not easily possible to verify whether this claim is correct.⁵⁷ In any case, the degree of transfer in future years in terms of value will depend on the size (by weight) of the TAC of each stock for which the UK receives a quota in any particular year and the sales price of the species concerned at that time.

Access

As we have seen, access for the vessels of one party to the waters of the other was a major issue in the negotiation of the fisheries provisions of the TCA. The EU desired access to continue to be based as far as possible on the position as it was under EU law up to the end of 2020 (as described in the Introduction above), whereas the UK wanted the access of EU²⁷ vessels to its waters to be significantly reduced. The provisions on access in the TCA are a negotiated compromise, albeit one that is closer to the aspirations of the EU than those of the UK. Those provisions are complex. First, they establish a regime for an “adjustment period,” intended to provide “the social and economic benefits of a further period of stability,”⁵⁸ which runs from the beginning of 2021 to June 30, 2026. Second, there are provisions governing the position for the second half of 2026. Third, a permanent regime is laid down for the period from 2027 onwards.

The regime for the “adjustment period” is set out in Article 2(1) of Annex 38. It provides that during this period

each Party shall grant to vessels of the other Party full access to its waters to fish:

(a) stocks listed in Annex 35 and tables A, B and F of Annex 36 at a level that is reasonably commensurate with the Parties’ respective shares of the fishing opportunities;

56 UK Government, *UK-EU Trade and Cooperation Agreement: Summary* (2020), para. 125, available online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf>.

57 It has been argued that the government’s claim was correct at the time that it was made, based on the quotas that the UK received in 2020 and prices in 2018. See ABPmer, n. 50 above, pp. 2–3.

58 TCA, n. 23 above, Annex 38, preamble, third recital.

(b) non-quota stocks at a level that equates to the average tonnage fished by that Party in the waters of the other Party during the period 2012–2016;

(c) for qualifying vessels to the zone in the waters of the Parties between six and twelve nautical miles from the baselines in ICES divisions 4c and 7d–g to the extent that each Party’s qualifying vessels had access to that zone on 31 December 2020.⁵⁹

A number of points may be noted about this provision. Beginning with paragraph (a), the stocks listed in Annex 35 and tables A and B of Annex 36 have already been identified above. Table F, which has not previously been referred to, lists 12 stocks “that are only present in one Party’s waters.” Nevertheless, table F, reflecting past practice, provides for a fixed percentage share of ten of those stocks for the other party.⁶⁰ Paragraph (a) also refers to “fishing opportunities.” This term is not defined in the TCA. It is usually used in international fisheries discourse to refer to the fish available to a State for catching by its vessels (i.e., its quota) in an internationally managed fishery, and is clearly used in this sense in several places in the TCA.⁶¹ The phrase “reasonably commensurate” in paragraph (a) is obviously rather vague and has the potential to give rise to disputes. However, it needs to be read in the context of the preamble to Annex 38, which speaks of fishers being “permitted” during the adjustment period “to continue to access the waters of the other Party as before the entry into force” of the TCA, and the opening sentence of Article 2(1), which speaks of the vessels of one party having “full access” to the waters of the other party. “Full access,” when read with the preamble, would seem to refer to the pre-TCA position.

Turning now to paragraph (b), this is rather more precise than paragraph (a). The “non-quota stocks” referred to are defined in Article 495(1)(e) as “stocks which are not managed through TACs.” Instead, they are stocks that are managed by other means, such as limitations on effort. There is little mention of such stocks in the TCA. Apart from the provisions on access and the definition section, the only other reference is to the Specialised Committee on

59 “Qualifying vessel” is defined as “a vessel of a Party, which fished in the zone mentioned in the previous sentence in at least four years between 2012 and 2016, or its direct replacement.”

60 See also EU-UK Written Record 2021, n. 37 above, para. 7 and table 2. TACs for table F stocks are set unilaterally by the State in whose waters each stock is found.

61 See, for example, TCA, n. 23 above, Arts. 498(8), 500(2)(a), 500(1)(f) and (m).

Fisheries developing “multi-year strategies for the conservation and management of non-quota stocks.”⁶²

Although Annex 38 states that access will continue during the adjustment period on the same basis as the position before 2021, that is actually not the case as far as the 6–12 M zone is concerned. Paragraph (c) limits access to that zone to coastlines lying within the ICES Statistical Areas mentioned. In the case of the UK coast, that means that more than half of the areas where vessels from one or more EU Member States previously had access to the 6–12 M zone are no longer open to such access. They include all the areas around Scotland and the north of England. In the case of 6–12 M zones off EU coasts, the UK has lost access to two of the five areas where it previously had access.

The adjustment period expires on June 30, 2026, but permanent arrangements on access do not come into effect until January 1, 2027. Arrangements for the intervening six months are dealt with by Articles 4(2) and (3) of Annex 38. They provide that if one party makes any changes during this period “in the level and conditions of access” to its waters, it must notify the other party. If the latter is unhappy with those changes, it may adopt “compensatory measures” in accordance with Article 501, discussed below.

Permanent arrangements on access from 2027 onwards are set out in Article 500. The terms of access are to be discussed in the parties’ annual consultations on TACs. Where agreement has been reached on TACs, each party shall grant the vessels of the other party access to fish in its waters in the relevant ICES Statistical Areas “at a level and on conditions determined in” those consultations with the aim of “ensuring a mutually satisfactory balance between the interests of both Parties ... In particular, the outcome of the consultations should normally result in each Party granting” access as set out in paragraphs (a) to (c) of Article 500(4).⁶³ These paragraphs are in substance the same as paragraphs (a) to (c) of Article 2(1) of Annex 38, discussed above, and the comments made there about those paragraphs apply equally to paragraphs (a) to (c) of Article 500(4). In granting access, a party may take into account the compliance of an individual or groups of vessels with the rules applicable in its waters during the previous year and the measures taken by the other party to address any non-compliance.⁶⁴ During their consultations on access, the parties may agree on “further specific access conditions” in relation

62 Id., Art. 508(1)(c). In their discussions on TACs for 2021, the parties confirmed their commitment to developing such strategies: see EU-UK Written Record 2021, n. 37 above, para. 13.

63 TCA, n. 23 above, Arts. 500(3) and (4).

64 Id., Art. 500(7).

to the fishing opportunities agreed, any multi-year strategies for non-quota stocks developed by the Specialised Committee on Fisheries and any technical and conservation measures agreed on by the Parties.⁶⁵ Article 497, which also applies during the 2021–2026 adjustment period, provides that where the vessels of one party have been given access to the waters of the other, the latter shall issue authorizations to fish to such vessels. The flag State party of such vessels shall take all necessary measures to ensure compliance with the rules applicable to those vessels in the other party's waters, including the conditions set out in authorizations.

What has been said so far applies where the parties have agreed on TACs for a particular year. Where they have not so agreed, and have therefore set provisional TACs (as explained above), they shall grant provisional access to fish in their waters for stocks listed in Annexes 35 and 36. They shall also grant provisional access for non-quota stocks "in proportion to the average percentage of a Party's share of the annual TAC which that Party's vessels fished in the other Party's waters in the relevant ICES sub-areas during the same period of the previous three calendar years" for the period from January 1 until March 31 of the year in question (January 1 to February 14 in the case of Annex 36 stocks).⁶⁶ For the 6–12 M zone, access for January of the year in question is to be at a level equivalent to the average monthly tonnage fished in that zone in the previous three months. Where agreement on TACs has not been reached within two weeks of the expiry of each of the periods mentioned, each party shall notify the other of changes in the level and conditions of access to its waters that will apply as from the expiry of those periods. At the same time, the parties "shall seek to agree [to] further provisional access arrangements at the appropriate geographical level with the aim of minimising disruption to fishing activities."⁶⁷

If no such agreement is reached, and one party is unhappy with changes in the level and conditions of access notified by the other, it may take "compensatory measures" under Article 501 "commensurate to the economic and societal impact" of those changes. Compensatory measures, which must be those that "will least disturb the functioning" of the TCA, may include the suspension, in whole or in part, of access to its waters and the preferential tariff treatment granted to fishery products by the TCA. Thereafter, the parties shall consult within the Specialised Committee on Fisheries with a view to reaching a mutually agreeable solution. If they are unable to do so, the party that notified the

65 Id., Art. 500(2).

66 Id., Art. 500(5). It is not obvious why the periods differ as between Annex 35 and Annex 36 stocks.

67 Id., Art. 500(6).

changes may request the establishment of an arbitration tribunal pursuant to Article 739. That tribunal is limited to reviewing the conformity of the compensatory measures with the conditions for their imposition.

Before Brexit, the annual negotiations under the EU's bilateral agreement with Norway included not only the setting of TACs for their shared stocks and the allocation thereof between the parties, but also provisions for the access of one party to the waters of the other. After Brexit, the EU could continue to negotiate such access under its bilateral agreement, and indeed duly reached agreement with Norway on access for 2021.⁶⁸ The UK, however, would need to negotiate its own bilateral agreement with Norway if UK vessels were to have access to Norwegian waters after 2020. A framework agreement on access was concluded in September 2020.⁶⁹ It provides in principle for the access of the vessels of one party to the waters of the other, but the practical details of such access are to be determined each year in consultations between the parties. Such consultations on access in 2021 were held, but failed to reach agreement.⁷⁰ Thus, for the first time in over 40 years, UK vessels had no access to Norwegian waters (nor Norwegian vessels to UK waters). This was a significant blow to those UK vessels that had traditionally fished in those waters, especially for cod, for which quotas were low in UK and EU waters. The fish that Norwegian vessels would have caught in UK waters will, of course, be available to UK fishers, but such fish are mainly species, such as mackerel, of less value and lower consumer demand than cod. At the time of writing (June 2021), it remained to be seen whether the parties would manage to agree on access for 2022 and the following years.

While still within the CFP, UK vessels also had access to Faroese waters (and Faroese vessels had access to UK waters) under a bilateral fisheries agreement between the EU and the Faroe Islands.⁷¹ As in the case of Norway, the UK has

68 Agreed Record of Fisheries Consultations between the European Union and Norway for 2021, March 16, 2021, available online: as n. 42 above.

69 Framework Agreement on Fisheries between Norway and the United Kingdom, London, 30 September 2020, available online: <<https://www.gov.uk/government/publications/uk-norway-framework-agreement-on-fisheries-cs-norway-no12020>>. On the agreement, see the UK Government's Explanatory Memorandum, available online: id.; and R. Barnes, "UK/Norway," *International Journal of Marine and Coastal Law* 36, no. 1 (2021): 155–164.

70 Norwegian Government Press Release, April 30, 2021, available online (in Norwegian only): <<https://www.regjeringen.no/no/aktuelt/norge-og-storbritannia-avslutter-fiskeri-forhandling/id2846634/>>. See also the references in n. 73 below.

71 Agreement on Fisheries between the European Economic Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part, March 15, 1977 (entered into force provisionally January 1, 1977) OJ 1980 L226/12.

concluded an agreement with the Faroe Islands to provide for the continuation of such access post-Brexit, under which the conditions for access are subject to annual consultations.⁷² Just as with Norway, consultations between the Faroe Islands and the UK failed to reach agreement on access for 2021.⁷³

Concluding Observations—Is the Post-Brexit Fisheries Regime a Change for the Better?

This article will conclude by attempting to answer the question posed in its title: Is the new regime governing fisheries in the waters of the EU and the UK following Brexit a change for the better? That immediately raises the question of from what or whose perspective the change in the regime should be evaluated. Five perspectives will be considered here: those of fisheries management; the UK fishing industry; the fishing industries of the EU²⁷; those EU institutions concerned with fisheries management; and the UK government.

Beginning with the perspective of fisheries management, many of the stocks that had been exclusively managed by the EU before Brexit are now managed jointly by the EU and UK. In theory, there ought to be little change in the nature and quality of management as a result of that change, given that the objectives of management in the TCA and the UK Fisheries Act 2020 largely reflect those of the CFP as set out in Regulation 1380/2013;⁷⁴ the UK has continued to apply the EU's existing technical conservation measures (at least in the short term);⁷⁵ and management continues to be based on scientific advice from ICES. Under both the TCA and CFP the objective of sustainable management is tempered by a requirement that management contributes to achieving economic and social benefits.⁷⁶ Before Brexit, that requirement led the EU to

72 Framework Agreement on Fisheries between the Faroes and the United Kingdom, Copenhagen, 29 October 2020, available online: <<https://www.gov.uk/government/publications/ukfaroes-framework-agreement-on-fisheries-cs-faroe-islands-no12020>>. On the agreement, see the UK Government's Explanatory Memorandum, available online: id.

73 See BBC News website, April 30, 2021; Scottish Fishermen's Federation Press Release of April 30, 2021, "Statement on Failure of UK-Norway Fisheries Deal for 2021," available online: <<https://www.sff.co.uk/statement-on-failure-of-uk-norway-fisheries-deal-for-2021/>>; and National Federation of Fishermen's Organisations Press Release of April 30, 2021, "No Norway Agreement for 2021," available online: <<https://www.nffo.org.uk/no-norway-agreement-for-2021/>>.

74 See Reg. 1380/2013, n. 3 above, Art. 2.

75 See text at n. 40 above.

76 See, respectively, TCA, n. 23 above, Art. 494(1) and Reg. 1380/2013, n. 3 above, Art. 2(1).

set TACs for some stocks in excess of scientific advice,⁷⁷ although in recent years the degree to which it has done so has declined significantly.⁷⁸ It remains to be seen whether that trend will continue under the TCA, or whether there will be a reversion to greater departure from the scientific advice. The TACs agreed to by the EU and UK for 2021 will need to be studied carefully to see how far they conform to ICES advice, something that is beyond the scope of this article. It is very important that they should do so, as according to a recent report by the environmental non-governmental organization, Oceana, of the 82 stocks that are shared by the EU and the UK, and by the EU, the UK and Norway, only 42.7 percent were being exploited sustainably in 2020, while 25.6 percent were overfished; in relation to the remainder, there was insufficient data to reach a conclusion.⁷⁹ The fact that it took the EU and the UK five months to agree on TACs for 2021 may simply be a sign of teething problems, exacerbated by the fact that the TCA was not concluded until almost the end of 2020 so that the envisaged timetable for agreeing on TACs could not be followed, or it may be an indication that the EU and the UK will find it more difficult to agree on TACs than the Council of Ministers of the EU on its own has done in the past.

Compared with management under the CFP, there is more uncertainty and scope for potential disruption built into the TCA. First, from 2027 onwards, access for the vessels of one party to the waters of the other will become subject to annual negotiation, with the very real possibility of failure to agree. Furthermore, where access is provisional because provisional TACs apply, a party dissatisfied with its conditions of access may take compensatory measures, as explained above. Second, from 2030 onwards, the fisheries provisions of the TCA are to be reviewed every four years.⁸⁰ That compares with the ten-year reviews of the CFP. Should a review of the TCA's fisheries provisions indicate that changes to those provisions are desirable, the Specialised Committee on Fisheries "may adopt measures, including decisions and recommendations ... in relation to any ... aspect of cooperation on sustainable

77 For a number of years, the New Economics Foundation has published a series of annual reports giving details of the degree to which that has been done, available online: <<https://neweconomics.org/section/publications/fisheries>>.

78 Oceana, *UK Fisheries Audit* (2021), pp. 10, 71–73, available online: <https://europe.oceana.org/sites/default/files/oceana_uk_fisheries_audit.pdf>.

79 Id., p. 31. For the UK government's assessment of the status of 13 "key stocks," see Marine Management Organisation, *Stocks and their Level of Exploitation* (2020), pp. 9–23, available online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920035/2019_Main_stocks_and_their_level_of_exploitation.pdf>.

80 TCA, n. 23 above, Art. 510.

fisheries management.”⁸¹ That appears to include a power of amendment.⁸² Third, if one party considers that the other party is not complying with the provisions of the TCA, it may unilaterally suspend access to its waters and tariff-free trade in fishery products on giving seven days’ notice. Within a further seven days, the parties shall seek to resolve the matter within the Specialised Committee on Fisheries. If no resolution is reached within that time, the party that gave notice of suspension must refer the matter to arbitration.⁸³ Fourth, the fisheries provisions of the TCA may be unilaterally terminated “at any moment” by either party giving written notice to the other.⁸⁴ Remarkably, no reason for such notice need be given. However, termination is very much a nuclear option, as not only do the fisheries provisions of the TCA terminate nine months after such notice has been given, but so, too, do the provisions on trade, aviation and road transport. Finally, the geographical distribution of some of the stocks that are the subject of joint management under the TCA may change as a result of environmental changes, particularly those caused by global climate change. If that happens to any marked degree, it may give rise to disputes between the parties as to whether certain stocks are still shared or to demands that a party’s percentage shares of the TACs for particular stocks should be changed.

In the light of the evidence at the time of writing (June 2021), it is hard not to conclude that the change from sole management by the EU of shared stocks to joint EU-UK management is a change for the worse.

Turning now to an evaluation of the changes made by the TCA from the perspective of the parties’ fishing industries, and starting with the UK industry, there are two clear benefits for UK fishers. First, there is a gradual increase in the shares of the TACs for many of the stocks listed in Annex 35 and tables A and B of Annex 36 allocated to UK vessels, although that increase is significantly less than the UK fishing industry had been hoping for and will be distributed unevenly between different sectors of the industry.⁸⁵ The second benefit is that inshore fishers in Scotland and the north of England will no longer face competition from EU27 vessels in the 6–12 M zone. That is also less than the UK industry had been hoping for, which was a complete end to fishing by EU vessels in the whole of the UK’s 6–12 M zone.

81 Id., Art. 508(2).

82 Id., Art. 8(4)(c).

83 Id., Art. 506.

84 Id., Art. 509.

85 See further B. Stewart, “What does the trade deal mean for fisheries,” *UK in a Changing Europe* (December 27, 2020), available online: <<https://ukandeu.ac.uk/fisheries-trade-deal/>>.

There are, however, also some clear disadvantages for the UK fishing industry. First, the TCA has introduced changes to the trade regime. As pointed out above, the UK fishing industry has for a good many years exported a significant proportion of its catch to the EU27. Before Brexit, such exports were free of all restrictions. While trade in fishery products remains free of tariffs and quantitative restrictions, at least for so long as the EU does not invoke the powers of suspension referred to above, UK fishery exports to the EU are now subject to a number of non-tariff measures. These include the need to provide documentation showing that the fishery product in question complies with the rules of origin attached to the TCA and the EU's sanitary and phytosanitary regulations and is not the product of illegal, unreported or unregulated fishing.⁸⁶ Completing such documentation is a considerable extra cost for UK exporters. When such non-tariff measures were introduced by the EU at the beginning of 2021, there were considerable delays at UK/EU border ports while such documentation was inspected, causing much fresh fish to deteriorate and no longer be marketable.⁸⁷ In addition, in early 2021, the EU introduced a ban on the import of live bivalve molluscs (including mussels and oysters) from most parts of the UK because the waters where they were produced did not meet EU water quality standards.⁸⁸ All these developments caused a decline of 79 percent in exports of fishery products to the EU during January 2021, compared with the position 12 months earlier,⁸⁹ and a decline of 52 percent for the first quarter of 2021.⁹⁰ That led the UK government to establish a fund of £23 million to compensate exporters who had suffered losses.⁹¹ At the time of writing, it remained to see how much of the decline was caused by

86 For a summary of these measures, see Popescu and Scholaert, n. 16 above, pp. 11–12. See also guidance from the UK government, “Exporting or moving fish from the UK,” (December 31, 2020), available online: <<https://www.gov.uk/guidance/exporting-or-moving-fish-from-the-uk>>.

87 For example, journey times, by lorry and ferry, from the exporting UK seller to the importing EU buyer that had previously taken around sixteen hours were taking two to three days. See *Channel 4 News*, February 4, 2021 and *The Guardian*, January 14, 2021.

88 “EU bans the importing of live Class B bivalve molluscs from UK,” *The Fishing Daily* (February 3, 2021), available online: <<https://thefishingdaily.com/latest-news/eu-bans-the-importing-of-live-class-b-bivalve-molluscs-from-uk/>>. See also “Export of live bivalve molluscs,” *UK Government* (March 26, 2021), available online: <<https://deframedia.blog.gov.uk/2021/03/26/export-of-live-bivalve-molluscs/>>.

89 L. O’Carroll, “UK Food Exports fall sharply after Brexit,” *The Guardian* (March 23, 2021), available online: <<https://www.yumpu.com/news/en/issue/90389-the-guardian-2021-03-23/read?page=14>> (quoting a report from the Office for National Statistics).

90 “UK food and drink exports to the EU almost halve in first quarter,” *BBC* (June 18, 2021), available online: <<https://www.bbc.co.uk/news/business-57518910>>.

91 Department for Environment, Food & Rural Affairs, Press Release, January 19, 2021, available online: <<https://www.gov.uk/government/news/new-financial-support-for-the-uks-fishing-businesses-that-export-to-the-eu>>.

teething problems while exporters and customs officials adjusted to the new documentary requirements, and possibly also by the COVID-19 pandemic, and how much of the decline is long term.

A second disadvantage for the UK fishing industry, although possibly only temporary, is that UK vessels lost access to Faroese and Norwegian waters in 2021, the first such loss for 40 years. It remains to be seen whether this is just a temporary aberration, and the parties succeed in agreeing on access for 2022 and future years. However, had the UK remained in the EU, UK vessels would have continued to have access to Faroese and Norwegian waters in 2021 alongside vessels from other EU Member States.

Finally, there is one change for the UK fishing industry as a result of Brexit that it was not possible to evaluate at the time of writing. Before the Brexit, the UK fishing industry was eligible for, and received, significant financial assistance from the European Maritime and Fisheries Fund (EMFF). Since the beginning of 2021, the eligibility of the UK fishing industry for such funding obviously ceased. The UK government announced in February 2021 that it would be “bringing forward details of a ... £100 million package to help the industry to maximise the opportunities for growth” post Brexit.⁹² Until the details of that package have been revealed, it is impossible to know how it will compare with the funding that the industry previously received from the EMFF.

Contrary to what it had been led to expect from Brexit, there is little doubt that overall the UK fishing industry is worse off as a result of Brexit. That view has also been forcefully expressed by leaders of various fisher organizations in the UK.⁹³

Turning to the fishing industries of the EU27, the vessels of only a minority of the 22 EU Member States with a marine fishing industry had fished in UK waters before Brexit, but they include several significant States in fisheries terms, notably Denmark and France.⁹⁴ For them, the TCA is entirely a change for the worse.⁹⁵ First, they will suffer an increasing reduction in their shares of

92 Department for Environment, Food & Rural Affairs, Press Release, February 25, 2021, available online: <<https://www.gov.uk/government/news/additional-support-for-uk-fish-and-shellfish-exporters-to-the-eu>>.

93 For samples of such views, see Stewart, n. 85 above; “Industry fury at Brexit sell-out,” *Fishing News* (January 11, 2021), available online: <<https://fishingnews.co.uk/news/boris-brexit-betrayal/>>; and S. Morris and R. Carroll, “Angry UK fishers say industry will suffer lasting harm,” *The Guardian* (December 29, 2020), available online: <<https://www.yumpu.com/news/en/issue/55120-the-guardian-2020-12-29/read?page=10>>].

94 Popescu and Scholaert, n. 16 above, p. 5.

95 That is the also the view of the European Fisheries Alliance, which represents the fishing industries concerned. See “EU Fishers are paying a high price for a Brexit agreement,” *European Fisheries Alliance* (December 24, 2020), available online: <<https://fisheriesalliance.eu/eu-fishers-are-paying-a-high-price-for-a-brexit-agreement-the-present-deal-is-a-significant-blow-and-leaves-them-facing-an-uncertain-future/>>.

TACS from 2021 onwards. Second, those vessels that had traditionally fished in the UK's 6–12 M zone around Scotland and the north of England have now lost that access, while access to other UK waters after 2026 is uncertain. Although UK vessels will no longer have access to two areas of the 6–12 M zone in EU waters where they previously had the right to fish, those rights were in practice so little exercised that there will be only marginal benefits for EU inshore vessels fishing in those areas. Third, EU vessels fishing in areas that include both EU and UK waters, instead of needing to be cognizant only of the EU's fisheries regulations, as was formerly the case, now need also to be familiar with the UK's regulations. Fourth, EU27 fishing enterprises that export fishery products to the UK, which in the past was done in considerable quantities, now in theory face much the same non-tariff barriers as UK exporters to the EU. In practice, those barriers were not applied during 2021 because the UK authorities did not have the necessary infrastructure in place to administer them.⁹⁶ In December 2020, the European Commission proposed a regulation that would, *inter alia*, establish a €600 million fund to compensate fishers adversely affected by Brexit.⁹⁷ The proposed regulation did not appear to have been adopted at the time of writing.

Finally, the changes made by the TCA to fisheries in UK and EU waters will be evaluated from the perspectives of the parties themselves, as represented by the EU governmental institutions primarily concerned with fisheries management (the Council of Ministers and the European Commission) and the UK government. As far as the former are concerned, their previous exclusive management autonomy for many fish stocks is now shared with the UK. Furthermore, their previous, and largely harmonious, cooperation with Norway over the management of some shared stocks now also involves the UK, as do the multilateral arrangements for the management of certain shared and straddling stocks of the Northeast Atlantic. It is probably fair to surmise that the EU institutions do not consider this as a change for the better. Their experience in negotiating the Withdrawal Agreement and the TCA, together with their continuing frustration during the spring and early summer of 2021 with the UK's failure properly to implement the Protocol on Northern Ireland attached to the Withdrawal Agreement,⁹⁸ probably means that they

96 J. Partridge, "Import checks system delayed by six months while border posts are set up," *The Guardian*, March 12, 2021. This is not available online, however, a virtually identical story, without a credited author, is available online: <<https://www.theguardian.com/politics/2021/mar/11/uk-forced-to-delay-import-checks-on-eu-goods-by-six-months-2022-border-post-not-ready>>.

97 EU Doc. COM(2020) 854, available online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0854&qid=1625046105906>>.

98 See, for example, *The Guardian*, June 9–11, 2021.

regard the UK, at least under its current government, as an unpredictable, unreliable and not entirely trustworthy negotiating partner in the annual negotiations on TACs and other management measures under the TCA and the multilateral arrangements referred to above.

Finally, that brings us to the UK government in this evaluation of the changes made by the TCA. The leading members of the government are all ardent and visceral believers in Brexit, an essential political qualification for appointment to ministerial office by Prime Minister Boris Johnson. Their overriding priority to “get Brexit done,”⁹⁹ as far as fisheries was concerned, was for the UK to leave the Common Fisheries Policy and once again become “an independent coastal State.” The successful achievement of that goal is in itself regarded by the UK government as a hugely beneficial change. The conditions to which the UK government had to agree in order to enable that achievement, namely the fisheries provisions of the TCA, were a secondary matter. Those provisions are a long way from what the UK government originally proposed and desired, which was an agreement like that between the EU and Norway, where TACs and conditions of access would be agreed on each year and TACs would be allocated between the parties based on the principle of zonal attachment. What the UK government has ended up with is something very different, as seen above. Nevertheless, with its general tendency to deny or put a gloss on bad news, the UK government, rather than expressing disappointment with the fisheries provisions of the TCA, stated that the TCA

firmly and explicitly recognises UK sovereignty over our fishing waters and puts us in a position to rebuild our fishing fleet and increase quotas in the next few years, finally overturning the inequity that British fishermen have faced for over four decades ... [It] reflects the UK’s ... new identity as a sovereign independent coastal State with the right to manage the resources in its waters. The UK is now free to create its own laws and fisheries management practices to the benefit of fishers and coastal communities across the whole UK.¹⁰⁰

Apart from the perspective of the UK government, which contains a large amount of psychological denial, the fisheries provisions of the TCA clearly represent a change for the worse in the regime governing fisheries in EU and UK waters, compared with the position before 2021.

99 The phrase is one repeatedly used by Prime Minister Boris Johnson. The political slogan featured heavily in the Conservative Party’s 2019 general election campaign.

100 UK Government, *UK-EU Trade and Cooperation Agreement: Summary*, n. 56 above, paras 4, 123.