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2 Fisheries Management in United Kingdom Waters after Brexit

An Assessment of the Changes Made by the Trade and Cooperation Agreement

*Robin Churchill**

Introduction

Before it joined what was then the European Economic Community (EEC) in 1973, the United Kingdom (UK) had exclusive fisheries management authority over those waters to which international law accorded it jurisdiction. From 1973 to 1983 that authority was tempered by certain obligations of EEC law. However, from the beginning of 1983 the EEC, having become exclusively competent for fisheries management in the waters (i.e., the territorial sea and exclusive economic zone (EEZ)) of its Member States, adopted a comprehensive system of fisheries management for those waters under its Common Fisheries Policy (CFP). For almost 40 years, until the end of 2020, UK waters were included in that system. At the beginning of 2021, however, the UK regained its former fisheries management autonomy as a consequence of having left the European Union (EU), as the EEC had by that time become. Nevertheless, that autonomy is subject to considerable constraints under the Trade and Cooperation Agreement (TCA), the main treaty governing post-Brexit relations between the UK and the EU.¹

The following three sections of this chapter outline in more detail the developments briefly described above. They are followed by a section analysing the constraints on the UK's regained fisheries regulatory autonomy that result from the TCA. The chapter ends with some concluding observations, briefly assessing the changes made by the TCA.²

* This chapter draws on the author's article, 'Fisheries Management in European Union and United Kingdom Waters after Brexit – A Change for the Better?' (2022) 36 *Ocean Yearbook* (forthcoming).

1 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 provisionally on 1 January 2021 and definitively on 1 May 2021) UKTS 2021 No. 8; OJ 2021 L149/10 (TCA).

2 The provisions of the TCA relating to the waters of the Channel Islands and the Isle of Man are not discussed in this chapter as the islands are not part of the UK,

Fisheries Management in UK Waters before 2021

Until 1965, the UK's jurisdiction to manage fisheries was limited to its territorial sea, which at that time was no more than three miles in breadth.³ In that year the UK extended its fisheries jurisdiction to 12 miles in accordance with the European Fisheries Convention, which, with 11 other States, it had concluded the previous year.⁴ Under the Convention a State party was permitted to establish a 12-mile fisheries zone off its coasts within which it had the exclusive right to regulate fisheries. However, vessels from other parties that had traditionally fished in the outer six miles of the new zone were permitted to continue to fish there indefinitely. Importantly, Article 10 of the Convention stipulated that its provisions did not prevent the establishment of a 'special regime in matters of fisheries' between Member States of the EEC.

In June 1970, the then six members of the EEC took the first steps towards such a 'special regime', and the CFP, with the adoption of two regulations, one on 'structural' issues, the other on the common organisation of the market in fishery products.⁵ The former included the so-called 'equal access' principle, according to which the vessels of one EEC Member State had the right to fish in the waters of any other Member State on the same conditions as the vessels of that other Member State. At that time, the UK had already applied to become a member of the EEC, as had Denmark, Ireland and Norway. These four applicant States were dismayed that after years of difficult negotiations, the EEC had reached agreement on the two regulations just before membership negotiations were due to begin, so that the applicant States would have to accept them as part of the *acquis communautaire*. They were particularly opposed to the equal access principle, which they feared would lead to large numbers of EEC vessels coming to fish in their waters. That fear was undoubtedly an important reason why there was a majority against Norwegian membership in the subsequent referendum. The other applicant States, however, became members of the EEC at the beginning of 1973, after having succeeded in negotiating a ten-year derogation to the equal access principle, under which fishing was reserved to the vessels of an EEC Member State in a six-mile zone off its coasts. In certain specified regions where the local population was heavily dependent on fishing, including considerable stretches of the UK's coast, access to the 6–12-mile zone was reserved for local fishing vessels, subject to any rights that the vessels of other Member States enjoyed under the European Fisheries Convention.⁶

but British Crown Dependencies. For such discussion, see Chapter 3 by Andrew Serdy in this book.

3 In this chapter, all references to 'miles' are to nautical miles.

4 Fisheries Convention, March 9, 1964 (entered into force 15 March 1966) 581 *United Nations Treaty Series* 57. The 12 parties were: Belgium, Denmark, France, Germany, Ireland, Italy, Netherlands, Poland, Portugal, Spain, Sweden and the UK.

5 Regs 2141/70 and 2142/70, OJ Special Edition 1970 (III) 707.

6 Act of Accession 1972, Arts. 100–103, OJ 1972 L73.

By the mid to late 1970s, there was a world-wide move, encouraged by the progress made in negotiations on a new coastal State maritime zone, the EEZ, at the Third UN Conference on the Law of the Sea, unilaterally to establish 200-mile EEZs or exclusive fishing zones (EFZs), without waiting for the Conference to end and the adoption of a new treaty on the law of the sea. In the north-east Atlantic, Iceland established a 200-mile EFZ in 1975, while the Faroe Islands, Greenland and Norway made it clear during 1976 that they would establish 200-mile EFZs or EEZs from the beginning of the following year. Those developments had significant implications for EEC fishing vessels, many of which (including UK vessels) had traditionally fished in the waters embraced by the new zones. They also led the EEC Commission to put forward a package of proposals under which EEC Member States in the north-east Atlantic would extend their fisheries jurisdiction to 200 miles in concert from the beginning of 1977; management of the fish stocks found within the new limits would become the exclusive responsibility of the EEC, and not individual Member States; and the EEC, rather than individual Member States, would negotiate agreements on the access of EEC fishing vessels to the waters of third States. The first of those proposed measures was successfully implemented, all the Member States concerned establishing a 200-mile EEZ or EFZ at the beginning of 1977 or shortly thereafter.⁷ The EEC also successfully negotiated agreements with the Faroe Islands and Norway permitting EEC vessels to continue to fish in Faroese and Norwegian waters, albeit at a reduced level of activity.⁸ No agreement could be reached with Iceland, however.⁹

There was considerable resistance, particularly from the UK, to the Commission's proposal that the EEC should become responsible for fisheries management in its Member States' waters, and negotiations on the matter in the Council of Ministers made little progress. However, the Commission received considerable support for its proposal from 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'.¹⁰

7 The UK established a 200-mile EFZ from the beginning of 1977 by means of the Fishery Limits Act, 1976. C. 86, <www.legislation.gov.uk/ukpga/1976/86/contents> accessed 1 July 2021; the EFZ was not converted into an EEZ until 2014.

8 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, 15 March 1977 (entered into force provisionally 1 January 1977) OJ 1980 L226/12; and Agreement on Fisheries between the European Economic Community and the Kingdom of Norway, 27 February 1980 (entered into force 16 June 1981) OJ 1980 L226/48.

9 An agreement was eventually reached in 1992. See further R Churchill and D Owen, *The EC Common Fisheries Policy* (Oxford: Oxford University Press, 2010), p. 340. See also pp. 333–338 on the EEC's Agreements with the Faroe Islands and Norway, <https://ec.europa.eu/oceans-and-fisheries/fisheries/international-agreements/north-ern-agreements_en> accessed 2 July 2021.

10 Case 804/79, *Commission v. United Kingdom* [1981] ECR 1045, para 17. The Court's ruling was subsequently codified in Art. 3(1)(d) of the Treaty on the

Nevertheless, it was not until January 1983 that the Council was able to agree on a community system of fisheries management.¹¹

Although that system has been reviewed and modified at ten-year intervals (in 1992, 2002 and 2012/2013),¹² its basic features, as far as EU waters in the north-east Atlantic Ocean are concerned, have remained largely unchanged. Thus, each year the Council, acting on a proposal from the Commission, which in turn bases its proposals on scientific advice received from the International Council for the Exploration of the Sea (ICES), adopts total allowable catches (TAC) for most stocks of commercial interest found in EU waters. Most TACs are divided into quotas, allocated to individual Member States. The basis of allocation is 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 miles – to give each Member State a percentage share of the TAC. Those percentages were negotiated and fixed in 1983,¹³ and have remained largely unchanged since.

TACs and quotas are set in terms of ICES Statistical Areas, not the zones of individual Member States. The principle of equal access means that the vessels of a Member State that holds 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 that principle: a vessel may not fish within the 12-mile zone off any Member State unless a vessel has the nationality of a Member State that enjoys historic rights to fish in the outer six miles of the zone. Those rights are set out in an annex to the basic regulation. Essentially, they are the rights that derive from the European Fisheries Convention (see above).

Although the second and third elements of the principle of relative stability tended to favour the UK, the principle as a whole, together with the equal access principle, have proved very unpopular with the UK fishing industry and many UK politicians. The two principles are seen as the reason why vessels

Functioning of the European Union (TFEU) (OJ 2016 C202/47), which provides that the EU has ‘exclusive competence’ in relation to ‘the conservation of marine biological resources under the common fisheries policy’. This phrase has never been defined either by the Court or the EU legislature. In practice it has been interpreted widely to include most kinds of fisheries management measures. In relation to other kinds of fisheries’ measures, competence is shared between the EU and its Member States: TFEU Art. 4(2)(d). However, where the EU exercises its shared competence in respect of a particular matter, the Member States lose their competence in respect of that matter: TFEU, Art. 2(2).

11 Council Regulation (EEC) 170/83, OJ 1983 L24/1.

12 See, successively, Reg. 3760/92, OJ 1992 L389/1; Reg. 2371/2002, OJ 2002 L358/59; and Reg. 1380/2013, OJ 2013 L354/22. Collectively, they are known as the basic regulations.

13 See Regs 170/83 (n 11) and 172/73, OJ 1983 L24/30. See further R. Churchill and D. Owen (n 9), at 149–154.

from EU Member States have taken what many in the UK have regarded as a disproportionate proportion of the catch in UK waters in recent years. Thus, during the period 2015–2018 (inclusive) that proportion has been calculated to average 46 per cent by weight (35.5 per cent by value), compared with the proportion taken by UK vessels of 33 per cent by weight (51 per cent by value).¹⁴ By contrast, the waters of EU Member States have been far less important for UK vessels, accounting over the same period for 13.5 per cent of the UK catch by weight (10.5 per cent by value), compared with figures of 80 and 82 per cent for UK waters.¹⁵ The catch by UK vessels in EU waters was only about one-eighth by weight (one-sixth by value) of that by EU vessels in UK waters.¹⁶

TACs and quotas are the central elements of management under the CFP. They are supplemented by a number of other measures. These include: technical conservation measures, such as closed areas and seasons, gear regulations, minimum fish sizes and so on;¹⁷ multiannual plans for some stocks;¹⁸ the landing obligation, which requires EU vessels to land all the fish that they catch rather than, as was previously often the case, discarding fish at sea that were over quota or undersized;¹⁹ and some input controls, such as effort limitation. Although the adoption of conservation and management measures (i.e., legislative jurisdiction) lies with the EU (subject to some limited powers delegated to Member States to adopt emergency or local measures²⁰), the enforcement of those measures is largely the responsibility of Member States, subject to a degree of oversight and coordination by the EU,²¹ as the EU lacks more than a rudimentary competence to exercise enforcement jurisdiction.

14 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, <<https://www.nafc.uhi.ac.uk/t4-media/one-web/nafc/research/statistics/eez-reports/EEZ-Report-2020-07-01.pdf>> accessed 1 July 2021, at 8. 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), <[www.europarl.europa.eu/RegData/etudes/IDAN/2021/689341/EPRS_IDA\(2021\)689341_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2021/689341/EPRS_IDA(2021)689341_EN.pdf)> accessed 1 July 2021, at 4. All website references in this chapter were correct as at 1 July 2021.

15 *Ibid.*, at 61. Most of the catch came from Irish waters: *ibid.*, at 69.

16 *Ibid.*, at 113.

17 On which, see Reg. 1380/2013, (n 12), Arts. 6 and 7 and Reg. 2019/1241, OJ 2019 L198/205.

18 On which, see *ibid.*, Arts. 9 and 10. Two such plans, those for the North Sea and Western Waters, are of particular interest to the UK. For those plans, see Regs 2018/973 and 2019/472, OJ 2018 L179/1 and Reg. 2019/472 OJ 2019 L83/2.

19 The landing obligation was introduced by Art. 15 of Reg. 1380/2013 (n 12) with effect from 2015, but did not become fully operational until 2019.

20 On which, see Reg. 1380/2013 (n 12), Arts. 13, 19 and 20.

21 On which, see *ibid.*, Arts. 36–39 and Reg. 1224/2009, OJ 2009 L343/1.

From the EU Referendum to the Trade and Cooperation Treaty: A Fisheries Perspective

Following its success in the 2015 UK General Election, the new Conservative government decided to hold a referendum in June 2016 on whether the UK should remain within the EU or leave. The referendum resulted in a 52–48 majority in favour of ‘leave’. Much of the UK fishing industry had campaigned enthusiastically in favour of ‘leave’, seeing it as an opportunity to throw off the shackles of the CFP, with its principles of relative stability and equal access, and obtain a much greater share of the catch in UK waters. Salmon farmers and shellfish producers, however, were much less enthusiastic, fearing that the UK’s departure from the EU would mean the loss of obstacle-free access for the then sizeable export of their products to other EU Member States.²²

The withdrawal of a Member State from the EU is governed by Article 50 of the Treaty on the European Union (TEU).²³ The 27 members of the EU other than the UK (EU-27) interpreted its somewhat ambiguous provisions to mean that an agreement on the terms of withdrawal, such as the division of EU assets and liabilities, should be negotiated first. Only when such an agreement had been concluded could negotiations begin on an agreement on the UK’s future relationship with the EU. Accordingly, negotiations began on a withdrawal agreement, eventually resulting in the conclusion, in November 2018, of the Agreement on the Withdrawal of the United Kingdom from the European Union, together with an accompanying Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom.²⁴ However, despite three attempts to do so, the then Prime Minister, Theresa May, failed to persuade the House of Commons to approve the Agreement and Declaration. That led May to resign. She was succeeded as Prime Minister by Boris Johnson. He engaged in fresh negotiations with the EU, those negotiations resulting in October 2019 in the conclusion of a revised Withdrawal Agreement and Political Declaration.²⁵ The main difference between Johnson’s Agreement and May’s concerns arrangements for Northern

22 In 2018 such exports were worth around £870 million: see Marine Management Organisation, *Sea Fisheries Statistics 2019*, Section 4: Trade, <www.gov.uk/government/statistics/uk-sea-fisheries-annual-statistics-report-2019> accessed 1 July 2021; see further Chap. 1.

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

24 The Agreement on the Withdrawal of the United Kingdom from the European Union, together with an accompanying Political Declaration setting out the Framework for the Future Relationship between the European Union and the United Kingdom, <www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration> accessed 1 July 2021.

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

Ireland. The House of Commons approved the revised Withdrawal Agreement by a large majority on 9 January 2020, and the UK formally left the EU on 31 January 2020.

Articles 126 and 127 of the 2019 Withdrawal Agreement established a transition period following the UK's departure from the EU, which was due to end on 31 December 2020 unless extended for one or two years by mutual agreement. During that period, the UK would remain generally subject to EU law, including that relating to the CFP. Article 130 of the Agreement provided that the UK would be consulted over any TACs adopted during the transition period and that allocation of those TACs would continue to be determined by the principle of relative stability. Paragraphs 71–74 of the Political Declaration on the framework of the future relationship stated that while 'preserving regulatory autonomy', the EU and UK should cooperate with each other, and other States, to ensure fishing at sustainable levels and to develop non-discriminatory measures for the conservation, rational management and 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 1 July 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.

While negotiations on the first Withdrawal Agreement had been taking place, the UK government published a White Paper on *Sustainable Fisheries for Future Generations* in July 2018.²⁶ This set out the government's vision as to how fisheries in UK waters would be managed after the UK had left the EU. The core principles of management would be sustainability and an ecosystem approach. In addition, the White Paper outlined the proposed form that future fisheries relations between the UK and the EU should take.²⁷

Following the UK's departure from the EU, negotiations began on an agreement on future relations between the UK and the EU. Each party published its proposals for the form that such relations should take as far as fisheries were concerned. The UK's proposals were set out in a draft agreement published in May 2020,²⁸ which reflects and builds on the proposals in the government's 2018 White Paper. Under the draft agreement, the parties would conduct negotiations each year over TACs for fish stocks that were 'shared', defined as stocks that are found in the waters of both the UK and EU. Very

the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf> accessed 1 July 2021.

- 26 *Sustainable Fisheries for Future Generations* (The White Paper) July 2018, Cm. 9660 (2018), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722074/fisheries-wp-consult-document.pdf> accessed 1 July 2021.
- 27 *Ibid.*, at 8 and 18–19.
- 28 UK government, Draft Working Text for a Fisheries Framework Agreement between the UK and EU, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886009/DRAFT_Fisheries_Framework_Agreement.pdf> accessed 2 July 2021.

many of the stocks of chief commercial interest found in UK waters are of this character. Annual negotiations would also cover the allocation of TACs between the parties, based on the principle of zonal attachment,²⁹ and access to each other's waters. The draft agreement is broadly similar to the EU's agreement with Norway,³⁰ which the UK government saw as a suitable model.³¹

The EU, however, had very different ideas about its future fisheries relations with the UK. The negotiating directives adopted by the Council of Ministers in February 2020 to direct the European Commission in its negotiations with the UK stated that the EU should seek to maintain the status quo on allocation and access, while proposing cooperation over the sustainable management of stocks that had now become shared between the EU and the UK.³² In March 2020 the European Commission added further detail to the EU's proposals in the section of fisheries in its Draft Agreement on the New Partnership with the UK.³³

Not surprisingly, given how far apart the parties' initial negotiating positions were, fisheries proved to be one of the thorniest issues in the negotiations on the future relationship agreement.³⁴ Negotiations became so protracted that it proved impossible to conclude the separate fisheries agreement envisaged by the Political Declaration by the deadline specified. Eventually, however, with both sides making considerable concessions, agreement was reached on the fisheries elements, along with all the other elements, of the future relationship agreement on Christmas Eve 2020, just one week before the expiry of the transition period. The agreement, the Trade and Cooperation Agreement (TCA) as it is formally entitled,³⁵ was signed on 30 December 1, and entered provisionally into force on 1 January 2020.

The Regaining of Fisheries Management Autonomy by the UK

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.³⁶ It was

29 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. See also Annex C of the government's White Paper (n 26), where the concept of zonal attachment is discussed.

30 See (n 8).

31 See White Paper (n 26), at 8 and 18.

32 Council of the EU, doc. 5870/20 ADD 1 REV 3 of 25 February 2020, paras 86–91, <www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf> accessed 1 July 2021.

33 Draft Agreement on the New Partnership with the UK, <<https://ec.europa.eu/info/sites/default/files/200318-draft-agreement-gen.pdf>> accessed 1 July 2021; the fisheries provisions are at 93–98.

34 For a detailed account of the fisheries negotiations, see R Churchill at * at the beginning of this chapter.

35 See (n 1).

36 *Ibid.*, Art. 496(1).

politically important for the UK government to have this principle recognised explicitly in the TCA, given its attachment to the idea of Brexit as representing the regaining of lost sovereignty by the UK and once again becoming an ‘independent coastal State’. This phrase is both a tautology, as States are by definition independent, and 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 before and since, it did not cease to be ‘independent’.³⁷ Nevertheless, the phrase has been widely used in official UK publications and is even found in the TCA itself.³⁸

The regaining of its fisheries management autonomy represents a significant challenge for the UK. Prior to 2021, it had not engaged in fisheries management for nearly 40 years, apart from the enforcement of EU measures and the adoption of some local measures permitted by the basic regulations of the CFP. Its principal fisheries legislation dated from the period 1966–1981 and was unsuitable for the new world of sustainable, precautionary and ecosystem-based management. Once it became clear that it would be leaving the EU, the UK had to set about creating the necessary administrative and legislative framework to enable it to exercise its new powers of fisheries management. The legislative framework is now provided by the Fisheries Act 2020.³⁹ The Act sets out the objectives of UK fisheries management, and confers a duty on ministers to implement those objectives and the powers necessary to do so. Day-to-day management is carried out by the Marine Management Organisation, an executive non-departmental public body, sponsored by the government ministry responsible for fisheries, the Department for Environment, Food and Rural Affairs. In exercising its fisheries management responsibilities, the Organisation works closely with the relevant bodies of the devolved administrations in Northern Ireland, Scotland and Wales, fisheries being a devolved matter.⁴⁰

37 See further A Serdy, ‘The 2018 Fisheries White Paper, the Fisheries Act 2020 and Their International Legal Dimension’ (2021) 10(1) *Cambridge International Law Journal* 73 at 76–77. He suggests that the reference to ‘coastal’ in the phrase reflects the change in the position of the UK from having had significant distant-water fishing interests up to the mid-1970s to the position today, where UK vessels fish predominantly in UK waters.

38 See (n 1), for example, Preamble, recital 19; Art. 494(1); and Annex 38, preamble.

39 Fisheries Act 2020, <www.legislation.gov.uk/ukpga/2020/22/contents/enacted> accessed 1 July 2021; for commentary on the Act, see E Ares, *Fisheries Act 2020*, House of Commons Library Briefing Paper No. 8994 (2020), <<https://researchbriefings.files.parliament.uk/documents/CBP-8994/CBP-8994.pdf>> accessed 2 July 2021.

40 Further details on how management responsibilities are shared between the constituent parts of the UK are beyond the scope of this chapter. For discussion of this issue, see chap. 5 of this book and the White Paper, (n. 26), pp. 21–2 and 26–8.

Constraints on the UK's Fisheries Management Autonomy Resulting from the Trade and Cooperation Treaty

Although the UK has regained regulatory autonomy for fisheries management in its waters, that autonomy is subject to a number of wide-ranging constraints laid down by the TCA. The principal constraints concern the objectives and principles of fisheries management; obligations of non-discrimination, proportionality and prior notification; the joint management of many stocks; and the access of EU vessels to UK waters. The details of these constraints, which also apply to the EU *mutatis mutandis*, will be examined in turn.

Objectives and Principles of Fisheries Management

Article 494 of the TCA sets out various objectives and principles of fisheries management. There is a degree of ambiguity in the TCA about both the normativity of these objectives and principles and the fish stocks to which they apply. As regards the latter, Article 494(1) and (2) state that the objectives apply to 'shared stocks', whereas according to Article 494(3), only two of the nine principles listed there explicitly apply to 'shared stocks', the remainder applying to stocks generally. Article 496 also refers to the objectives and principles set out in Article 494 in the context of 'any [fisheries management] measures', without limiting such measures to those applicable only to shared stocks. In practice, the ambiguity over whether the TCA's objectives and principles apply only to the management of shared stocks is of limited significance because of the TCA's definition of 'shared stocks'. According to that definition, "'shared stocks" means fish, including shellfish, of any kind that are found in the waters of the Parties, which includes molluscs and crustaceans'.⁴¹ This is a somewhat odd, and grammatically cumbersome, definition. It does not state explicitly that a shared stock has to be found in the waters of *both* parties, as is generally understood to be necessary under international fisheries law.⁴² In any case, most stocks found in UK waters (with the exception of most stocks of shellfish) are also found in the waters of the EU (and in some cases Norway) and are therefore 'shared' as that term is generally used in international fisheries discourse.

As mentioned, the TCA is also ambiguous about the normativity of the objectives and principles set out in Article 494. As regards objectives, Article 494(1) provides that the parties (i.e., the UK and EU) 'shall cooperate with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits'. Article 494(2) goes on to provide that the parties 'share the objective of exploiting shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels

41 TCA (n 1), Art. 495(1)(c).

42 D R Rothwell and T Stephens, *The International Law of the Sea* (Oxford: Hart, second edition, 2016) 327.

that can produce the maximum sustainable yield'. Article 496 also addresses the objectives in Article 494, paragraph 1 stipulating that 'each Party shall decide on any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and (2)'. None of the three provisions actually lays down an *obligation* to give effect to a particular objective: they are all essentially hortatory. In substantive terms, there is also some potential inconsistency between the objectives of environmental sustainability and the achievement of 'economic and social benefits' if the latter means that measures may be adopted in order to allow fishers to take increased catches for short-term economic gain, even if that impacts negatively on the sustainability of stocks.

Normatively, the position with the principles of management listed in Articles 494(3) is more straightforward, both that provision and Article 496(1) stipulating that the parties are required to do no more than 'have regard' to them. However, even that stipulation is a little misleading, as closer inspection of the TCA reveals that three of the principles in Article 494 – those providing that conservation and management measures should be based on the best scientific advice, principally that of ICES (principle (c)), that fisheries management measures should be non-discriminatory (principle (f)) and that fisheries data should be shared (principle (g)) – are made legally binding by later provisions of the TCA.⁴³ Moreover, the principle of ensuring compliance with fisheries management measures (principle (h)) is effectively legally binding, as any non-compliance by one party entitles the other party to take remedial measures under Article 506.⁴⁴ There is also a specific, if limited, obligation to ensure compliance in Article 497(2).⁴⁵ The remaining five principles that are not otherwise made legally binding include: (a) 'applying the precautionary approach to fisheries management';⁴⁶ (b) 'promoting long-term sustainability (environmental, social and economic) and optimum utilisation of shared stocks', which largely repeats the objective in Article 494(1); (d) 'ensuring selectivity in fisheries to protect juvenile and spawning aggregations of fish and to avoid and reduce unwanted bycatch'; (e) 'taking due account of and minimising harmful impacts of fishing on the marine ecosystem and taking due account of the need to preserve marine biological diversity'; and (i) 'ensuring the timely implementation of any agreed measures into the Parties' regulatory frameworks'.

In practice, the objectives and principles in Article 494 provide quite limited constraints on the UK's fisheries management autonomy. Indeed, from an environmental perspective, one might wish that they placed rather greater constraints on that autonomy. In any case, the TCA's provisions on objectives and principles do not go beyond the fisheries management objectives of the Fisheries Act 2020.⁴⁷ Indeed, the Act goes further in some respects, notably in

43 TCA (n 1), see Arts. 496(2) and 507.

44 For discussion of this provision, see Serdy (n 2).

45 See TCA (n 1). See further the text following note 69 .

46 For comment on this principle, see Serdy (n 2).

47 See Fisheries Act 2020 (n 39), c. 22, s. 1.

requiring an ecosystem-based approach to management,⁴⁸ something that is not explicitly called for by the TCA, although it is to some extent covered by principle (e) above.

Obligations of Non-discrimination, Proportionality and Prior Notification

A more significant restriction on the UK's fisheries management autonomy are certain obligations of form and procedure. First, Article 496(2) lays down an obligation on each party not to apply measures to the fishing vessels of the other party in its waters unless it also applies the same measures to its own vessels. Second, Article 494(3)(f) provides that a party's measures must 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 EU 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; or as Lord Diplock, a former senior British judge once graphically put it: 'you must not use a sledgehammer to crack a nut when a nutcracker will do'. Strictly speaking, proportionality under the TCA is a principle rather than an obligation, but in practice the victim of an allegedly disproportionate fisheries measure could invoke EU or UK administrative law to challenge it before an appropriate court. Third, Article 496(3) of the TCA provides that the measures of one party that 'are likely to affect the vessels' of the other party must be notified to the other party before they are applied, 'allowing sufficient time for the other Party to provide comments or seek clarification'.

Joint Management of Stocks

A far-reaching constraint on the UK's fisheries management autonomy are various obligations of joint management for many stocks, most importantly the 76 stocks listed in Annex 35. Although these stocks are nowhere identified or described in the TCA as 'shared stocks', it is likely that they are, both as that term is used in international fisheries discourse and as defined in the TCA.

The main tool for joint UK–EU management of Annex 35 stocks is the setting each year of total allowable catches (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'. The reference to 'socio-economic aspects' suggests that the scientific advice, which is primarily to be provided by ICES, may be departed from to set larger TACs than recommended by ICES in order to obtain short-term economic gain for the fishing industry. If that happens in practice to any degree, as it has in the past,⁴⁹ stocks will be fished above safe biological levels and the TCA's objective of sustainability ignored. If the parties have failed to agree on TACs by 20 December preceding the year to

48 See *ibid.*, s. 1(4) and (10).

49 See *infra* (n 77).

which TACs are intended to apply, each party must set ‘a provisional TAC corresponding to the level advised by ICES, applying from 1 January’.⁵⁰ Provisional TACs continue to apply until the parties reach agreement on definitive TACs.

Given that the TCA did not come into force provisionally until 1 January 2021, it was too late for the timetable envisaged for the setting of agreed TACs for 2021 to apply. Nevertheless, the parties held talks to agree TACs for 2021, although agreement was not reached until June 2021.⁵¹ In the meantime, each party had set provisional TACs, as required by Article 499 of the TCA.⁵²

The setting of TACs is the only management measure prescribed by the TCA for Annex 35 stocks. In the case of the EU, those TACs will be supplemented by the measures outlined earlier in this chapter, such as technical conservation measures, the landing obligation and so on. Those measures will apply to EU waters and, to some degree, to EU vessels fishing in UK waters. However, the TCA does not oblige the UK to adopt any comparable measures for its vessels fishing in its waters. Nevertheless, the UK has done so, in the first instance by rolling over into UK law those EU fisheries measures that were in force on the date that it left the EU.⁵³ Amendments may subsequently be made to those measures: that has already been done to a degree,⁵⁴ and no doubt will happen further as time goes by. The TCA imposes no constraints on the non-TAC measures for Annex 35 stocks that the UK may decide to adopt other than the general constraints on the UK’s management authority identified above. One might have thought that a degree of harmonisation of EU and UK measures would be desirable in order to avoid the risk of one party’s conservation and management measures undermining the other party’s measures. However, the TCA does no more than provide that the parties’ annual consultations on TACs ‘may also cover ... measures for fisheries management, including, where appropriate, fishing effort limits’.⁵⁵ Such measures were in fact discussed during the 2021 consultations.⁵⁶

50 TCA (n 1), Art. 499(2).

51 Written Record of Fisheries Consultations between the United Kingdom and European Union for 2021, 11 June 2021 (hereafter EU–UK Written Record 2021), <https://ec.europa.eu/oceans-and-fisheries/news/sustainable-fisheries-commission-signs-first-ever-annual-agreement-fishing-united-kingdom-2021_en> accessed 1 July 2021.

52 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 1 January to 31 July 2021. The UK does not appear to have published provisional TACs. Instead, it has published the UK’s share of provisional TACs, <www.gov.uk/government/publications/fishing-opportunities-for-british-fishing-boats-in-2021> accessed 2 July 2021.

53 Under the European Union (Withdrawal) Act 2018, c. 16, <www.legislation.gov.uk/ukpga/2018/16/contents/enacted> accessed 2 July 2021, s. 3.

54 See, for example, Fisheries Act 2020 (n. 39), Schedule 11, para. 11.

55 TCA (n 1) Article 498(4). Such measures are also among the matters that the Specialised Committee on Fisheries, established by Art. 8(1)(q) of the TCA (n 1), may discuss: see Art. 508(1)(d).

56 See EU–UK Written Record 2021 (n 51), para. 12.

The UK and the EU together share a number of commercially important stocks in the North Sea with Norway. They are listed in table A of Annex 36. The management of those stocks is obviously not directly addressed by the TCA as Norway is not a party to it. Instead, it is envisaged that such management will take place under a new trilateral agreement to be negotiated.⁵⁷ Pending the conclusion of such an agreement, the three parties reached an ad hoc agreement in March 2021, which establishes TACs for the stocks concerned for 2021 and each party's share of those TACs.⁵⁸ Although the management of such stocks is not in principle governed by the TCA, the latter is not without some relevance. First, Article 505(5) provides that the UK and EU 'shall approach the management of those stocks ... in accordance with objectives and principles set out in Article 494'. Second, Article 499(2) provides that should the three parties be unable to agree on TACs for any future year, the EU and UK are to set provisional TACs in the way described above. These two articles also apply to certain stocks of mackerel and blue whiting listed in table B of Annex 36, which the UK and EU together share with a number of third countries, including the Faroe Islands, Iceland and Norway.

Access of EU Vessels to UK Waters

A further constraint on the UK's fisheries management autonomy concerns its competence to determine how many and which EU vessels may fish in its waters. Where the parties have agreed on TACs for Annex 35 stocks, the TAC for each stock is shared between the UK and the EU according to the percentage shares set out in Annex 35, which vary from stock to stock.⁵⁹ Where the parties have been unable to agree on TACs and thus have unilaterally set provisional TACs (as explained above), each of them must also set its share of the provisional TAC, which must not exceed its share as set out in Annex 35.⁶⁰

The EU will allocate its share of agreed (or provisional) TACs for Annex 35 stocks between its Member States in the form of quotas, according to the principle of relative stability. Those States will in turn distribute their quotas to vessels having their nationality. That raises the question of what access a vessel holding such a quota in respect of an ICES Statistical Area that includes UK waters will have to those waters. During the period 2021–2026 inclusive, that access will essentially be the same as it was under the CFP before Brexit (as outlined earlier in this chapter), except that in those parts of the 6–12-mile zone around the coasts of Scotland and the north of England where vessels from some EU Member States had access before Brexit, they no longer have

57 Agreed Record of Fisheries Consultations between the European Union, Norway and the United Kingdom for 2021, 16 March 2021, <https://ec.europa.eu/oceans-and-fisheries/fisheries/international-agreements/northern-agreements_en> accessed 2 July 2021, para. 8. See also Chapters 3 and 4 in this book.

58 *Ibid.*, Table 1.

59 TCA (n 1), Art. 498(3).

60 *Ibid.*, Art. 499(7).

such access.⁶¹ From 2027 onwards the terms of access are to be discussed in the annual consultations between the UK and EU on TACs. Where agreement has been reached on TACs for Annex 35 stocks, each party must grant the vessels of the other party access to fish in its waters in the relevant ICES 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 at a level that is reasonably commensurate with the Parties’ respective shares of the TACs.’⁶² EU vessels will also have access on the same basis for any quotas they hold under arrangements between the UK, EU and third countries such as Norway.⁶³ Where the parties have not been able to agree on TACs, the TCA contains complex provisions on provisional access, the details of which are beyond the scope of this chapter.⁶⁴

In addition to access to fish for Annex 35 stocks, EU vessels will be able to fish in UK waters ‘for non-quota stocks ... at a level that at least equates to the average tonnage fished by’ EU vessels in UK waters during the period 2012–2016.⁶⁵ ‘Non quota stocks’ 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. Such stocks include most species of shellfish, sardines, red mullet and lemon sole. The TCA has little to say about such stocks. Apart from the provisions on access and the definition section, the only other reference is to the Specialised Committee on Fisheries developing ‘multi-year strategies for the conservation and management of non-quota stocks’.⁶⁶

The TCA also provides that each party shall grant access to vessels of the other party to fish for the 12 stocks listed in table F of Annex 36 ‘at a level that is reasonably commensurate with the Parties’ respective shares of the TACs’.⁶⁷ The stocks listed in table F are ones ‘that are only present in one Party’s waters’, for which TACs are set unilaterally by the party concerned. Nevertheless, table F, reflecting past practice, provides for a fixed percentage share of these stocks for the other party.⁶⁸

61 *Ibid.*, Annex 38.

62 *Ibid.*, Art. 500(3) and (4).

63 *Ibid.*, Annex 38, Art. 2(1)(a), for the period 2021–27; and Art. 500(4)(a), for the period thereafter.

64 *Ibid.*, Art. 500(5) and (6); for a detailed discussion of these provisions, see Serdy (n 2).

65 *Ibid.* (n 1) Annex 38, Art. 2(1)(b), for the period 2021–2027; and Art. 500(4)(b), for the period thereafter.

66 *Ibid.*, 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 51), para. 13.

67 *Ibid.* (n 1), Annex 38, Art. 2(1)(a), for the period 2021–2027; and Art. 500(4)(a), for the period thereafter.

68 See also EU–UK Written Record 2021 (n 51), para. 7 and table 2.

Where EU vessels have access to UK waters in the ways described above, the EU must send the UK a list of vessels for which it seeks authorisations or licences to fish, and the UK ‘shall issue’ such authorisations or licences, seemingly without any discretion.⁶⁹ Under Article 497(2) the EU must ‘take all necessary measures to ensure compliance by its vessels with the rules applicable to those vessels’ in the UK’s waters. When granting access to its waters from 2027 onwards, the UK will be able to take into account the compliance of individual or groups of EU vessels with its rules during the previous year, and the measures taken by the EU to address any non-compliance.⁷⁰ Also from 2027 onwards, the parties may agree ‘further specific access conditions’ during their annual consultations on access.⁷¹

An Assessment of the Changes Made by the Trade and Cooperation Agreement

This chapter will conclude by attempting to assess the changes made by the TCA. This will be done from two perspectives: that of fisheries management in UK waters, and that of the UK fishing industry. As regards the former, the UK’s departure from the EU and CFP means that it has in principle become responsible for the management of the fish stocks found in its waters. However, that newly regained fisheries management autonomy is subject to a number of significant constraints prescribed by the TCA. Thus, the UK is required to: pursue the objectives and principles of fisheries management set out in the TCA; ensure that any fisheries management measures that it may adopt are non-discriminatory vis-à-vis EU vessels, proportionate and notified to the EU before their adoption; set TACs for the 76 stocks listed in Annex 35 jointly with the EU; and allow EU fishing vessels much the same access to its waters as they enjoyed before Brexit, at least until 2027.

It remains to be seen whether the UK’s management of the fish stocks found in its waters, both when undertaken alone and when exercised together with the EU, or with the EU and Norway, will meet the goal of sustainability prescribed both by the TCA and the Fisheries Act 2020. The TACs for Annex 35 stocks agreed by the UK and EU for 2021 will need to be studied carefully to assess how far they conform to ICES scientific advice – an exercise that is beyond the scope of this chapter – and thus what kind of pointer that they offer to the future. For comparison, it appears that the TACs agreed by the UK, EU and Norway in 2021 for the six most commercially important North Sea stocks are in line with ICES’ advice.⁷²

There is certainly scope for the new post-Brexit management regime to improve on the EU’s past record of fisheries management in UK waters.

69 TCA (n 1), Art. 497(1).

70 *Ibid.*, Art. 500(7).

71 *Ibid.*, Art. 500(2).

72 Agreed Record (n 57), paras 12–17.

According to a report by the environmental NGO, Oceana, published in January 2021, of 104 stocks audited (of which 82 are shared by the EU and the UK, or by the EU, the UK and Norway), only 35.6 per cent (43.9 per cent of shared stocks) were healthy in terms of stock size; 20.2 per cent (15.9 per cent of shared stocks) were in a critical condition, and there was insufficient data to make a judgement about the remainder, 'leaving them at greater risk of unsuitable management decisions'.⁷³ In terms of exploitation status, 37.5 per cent (42.7 per cent of shared stocks) were exploited sustainably, while 28.8 per cent (25.6 per cent of shared stocks) were overfished: in relation to the remainder, there was insufficient data to reach a conclusion.⁷⁴ It is noteworthy that the record for shared stocks is a little better than for stocks found only in UK waters. Of the ten most commercially important stocks for UK fishers (eight of which are shared), three (north-east Atlantic mackerel, North Sea haddock and west of Scotland nephrops) were in a healthy state and sustainably exploited. Of the remainder, two (North Sea whiting and north-east Atlantic blue whiting) had a healthy stock size but were being overfished; one (North Sea herring) was in a critical condition but being sustainably exploited; two (North Sea cod and southern North Sea crab) were overexploited and consequently their biomass was below safe biological reference points; and for two of the ten stocks (North Sea monkfish and English Channel scallops), there was inadequate data.⁷⁵ Similar findings have also been made by the Marine Management Organisation for 13 'key' stocks found in UK waters.⁷⁶

It has been argued that the main reason why the EU does not have a better record of management for the fish stocks in the north-east Atlantic (including those found in UK waters) is because it has frequently 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.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 fact that it took the EU and the UK

73 Oceana, *UK Fisheries Audit* (2021), <https://europe.oceana.org/sites/default/files/oceana_uk_fisheries_audit.pdf> accessed 2 July 2021, pp. 7, 27 and 30–31.

74 *Ibid.*

75 *Ibid.*, at 45. Commercial importance was based on landings by UK vessels. Thus, not all the stocks are found exclusively in UK waters. This is especially the case with blue whiting – see Chapter 4.

76 Marine Management Organisation, *Stocks and their Level of Exploitation* (2020), 9–23, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920035/2019_Main_stocks_and_their_level_of_exploitation.pdf> accessed 2 July 2021. 'Key' stocks are not defined. In places they are referred to as the 'main' stocks in UK waters. There is a fair degree of overlap between these stocks and Oceana's ten stocks.

77 Oceana (n 73), *passim*; and the New Economics Foundation, *Landing the Blame: Overfishing in the North-East Atlantic 2020*, <https://neweconomics.org/uploads/files/LtB_NE_Atlantic_2020.pdf> accessed 2 July 2021. The latter estimates that between 2001 and 2019 60 per cent of TACs, on average, exceeded ICES advice: see pp.1–2.

78 Oceana (n 73), at 10 and 71–73.

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 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 the EU on its own has done in the past. It is concerning that while it was a member of the EU, the UK is said to have been one of the Member States that regularly pushed for TACs to exceed ICES advice.⁷⁹

Other reasons for the EU's inadequate management record in the north-east Atlantic include poor compliance with its measures, driven in part by excess capacity in EU fishing fleets. Following Brexit, the UK is in a position to improve compliance both by better enforcement and by eliminating excess capacity from its fishing fleet. Whether it will do so remains to be seen.

Turning now to an assessment of the changes made by the TCA from the perspective of the UK fishing industry, the latter is not a monolithic entity with a single set of interests.⁸⁰ The focus here will be on the marine capture side of the industry rather than on processing and mariculture. The TCA confers two significant benefits on UK fishers. First, there will be a gradual increase during the period 2021–2026 in the UK's share of TACs for 53 of the 76 Annex 35 stocks and of the stocks listed in tables A and B of Annex 36 (those shared with Norway and other north-east Atlantic countries), compared with its pre-Brexit shares under the CFP. Most of those increases are slight and will be distributed unevenly between different sectors of the industry.⁸¹ Stocks where there are significant increases include Celtic Sea haddock, North Sea haddock, hake, herring, sole and whiting, and nephrops in ICES Area 7.⁸²

According to the UK government, the increase in quotas equates to a transfer of 25 per cent by value of the EU's pre-Brexit catch in UK waters to the UK, which is worth £146m, and the share of the total catch taken in UK waters taken by UK vessels rising to around two-thirds.⁸³ Nevertheless, that increase is significantly less than the UK fishing industry had been hoping for.

The second benefit of the TCA for UK fishers is the ending of the access of some EU vessels to the 6–12-mile zone around Scotland and the north of England. That means that inshore fishermen in those areas will no longer face competition from EU vessels. That change is in theory balanced by the loss of

79 New Economics Foundation (n 77), p. 2.

80 See further Chapter 1 of this book.

81 See further B Stewart, 'What does the Trade Deal mean for Fisheries', <<https://ukandeu.ac.uk/fisheries-trade-deal/>> accessed 2 July 2021.

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

83 UK government, *UK–EU Trade and Cooperation Agreement: Summary* (2020), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf> accessed 2 July 2021, para 125.

access of UK fishers to two of the five areas of the 6–12-mile zone off the coasts of EU Member States where previously they had the right to fish. However, it appears that in practice those rights were little exercised, so that the changes made by the TCA in access to the 6–12-mile zone represent an overall gain for UK fishers. However, that gain is less than the UK industry had been hoping for, and indeed had been led by the UK government to expect, which was an end to fishing by EU vessels in the whole of the UK's 6–12-mile zone.

While UK fishers have obtained some modest benefit from the TCA in terms of increased quotas and reduced access to the 6–12-mile zone, they have also suffered a major setback. That setback results, not from the fisheries provisions of the TCA, but from its trade provisions. Because consumer demand for fish in the UK is concentrated on a limited number of species (principally white fish), UK fishers have traditionally exported a significant proportion of their catch, around half of it going to the EU.⁸⁴ Before Brexit, such exports were free of tariffs, quantitative restrictions and other non-tariff barriers under the rules of the EU's internal market. However, following the 2016 referendum on EU membership, the UK government decided that the UK would leave the internal market. That was not an inevitable consequence of Brexit: it is possible for a State to be within the internal market even though it is not a member of the EU, as shown by the examples of Iceland, Liechtenstein and Norway. Instead of continuing UK participation in the internal market, the TCA has replaced it with a free trade area between the UK and the EU. That means that goods, including fishery products, may continue to be exported from the UK to the EU free of tariffs and quantitative restrictions. However, they are now subject to the EU's non-tariff trade measures. In the case of fisheries, those measures include a requirement to provide documentation showing that the fishery product in question complies with the rules of origin prescribed by the TCA and is not the product of illegal, unreported or unregulated fishing. Exports must also comply with the EU's sanitary and phytosanitary regulations, and such compliance must be certified and documented.⁸⁵ Completing the required documentation and obtaining the necessary veterinary certification represent considerable extra costs for UK exporters of fishery products.

When introduced at the beginning of 2021, the EU's non-tariff measures had a dramatic, and adverse, impact on UK exports of fishery products to the

84 Marine Management Organisation, *Sea Fisheries Statistics 2019, Section 4: Trade*, <www.gov.uk/government/statistics/uk-sea-fisheries-annual-statistics-report-2019> accessed 2 July 2021. See also Popescu and Scholaert (n 14), pp. 8–9 and Chapter 1 of this book.

85 For a summary of these measures, see Popescu and Scholaert (n 14), pp. 11–12. The Marine Management Organisation has produced guidance to UK exporters on these matters: *Exporting or Moving Fish from the UK*, <www.gov.uk/guidance/exporting-or-moving-fish-from-the-uk> accessed 2 July 2021. See also Chapter 1 of this book.

EU. There were considerable delays at UK/EU border ports while the requisite documentation was inspected, causing much fresh fish to deteriorate and no longer be marketable.⁸⁶ 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.⁸⁷ These developments caused a decline of 79 per cent in exports of fishery products to the EU during January 2021, compared with the position 12 months earlier,⁸⁸ and a decline of 52 per cent for the first quarter of 2021.⁸⁹ That led the UK government to establish a fund of £23 million to compensate exporters who had suffered losses.⁹⁰ At the time of writing (July 2021), it remained to be seen how much of the decline in UK exports has been caused by teething problems while exporters and customs officials adjust to the new documentary requirements, and possibly also by the Covid-19 pandemic, and how much of the decline is long-term.

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 Brexit, the UK fishing industry was eligible for, and received, significant financial assistance from the European Maritime and Fisheries Fund (EMFF). With the departure of the UK from the EU, the eligibility of the UK fishing industry for such funding 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.⁹¹ Until the details of that package have been revealed, it is impossible to know how it will compare with the funding that the industry formerly received from the EMFF.

There is little doubt that overall the UK fishing industry is worse off after Brexit, very much contrary to what it had been led to expect by the UK government. The disappointment at what the TCA means for the industry has

86 For example, journey times, by lorry and ferry, from the exporting UK seller to the importing EU buyer that had previously taken around 16 hours were now taking two to three days: see *Channel 4 News*, 4 February 2021, <www.channel4.com/programmes/channel-4-news> accessed 2 July 2021; and *The Guardian*, 14 January 2021, <www.theguardian.com/theguardian/2021/jan/14> accessed 2 July 2021.

87 *The Fishing Daily*, 3 February 2021, <<https://thefishingdaily.com/latest-news/eu-bans-the-importing-of-live-class-b-bivalve-molluscs-from-uk/>> accessed 2 July 2021. See also UK government, 'Export of Live Bivalve Molluscs', <<https://deframedia.blog.gov.uk/2021/03/26/export-of-live-bivalve-molluscs/>>.

88 *The Guardian*, 5 February 2021, quoting a report from the Office for National Statistics.

89 BBC, 'UK food and drink exports to the EU almost halve in first quarter', <www.bbc.co.uk/news/business-57518910> accessed 2 July 2021.

90 Department for Environment, Food and Rural Affairs, Press Release, 19 January 2021, <www.gov.uk/government/news/new-financial-support-for-the-uks-fishing-businesses-that-export-to-the-eu> accessed 2 July 2021.

91 Department for Environment, Food and Rural Affairs, Press Release, 25 February 2021, <www.gov.uk/government/news/additional-support-for-uk-fish-and-shellfish-exporters-to-the-eu> accessed 2 July 2021.

been expressed in no uncertain terms by the leaders of various fisher organisations in the UK.⁹² In the longer term, the UK government could improve the situation for the industry if, through careful management, both on its own and in collaboration with the EU, it restored those fish stocks in UK waters with an unsatisfactory status to a level that would support the maximum sustainable yield, a goal that is stipulated not only by the TCA,⁹³ but also by both UK and EU law.⁹⁴

92 For samples of such views, see Stewart (n 81); *Fishing News*, 11 January 2021, <<https://fishingnews.co.uk/news/boris-brex-it-betrayal/>> accessed 2 July 2021; Press Releases of the National Federation of Fishermen's Organisations (the main organisation representing English fishers) of 26 December 2020 and 4 and 15 January 2021, <www.nffo.org.uk/category/news/?tag=brexit> accessed 2 July 2021; and Press Releases of the Scottish Fishermen's Federation (the main organisation representing Scottish fishers) of 24 and 29 December 2020 and 15 January 2021, <www.sff.co.uk/news/> accessed 2 July 2021.

93 TCA (n 1), See Art. 494(2).

94 See, respectively, the Fisheries Act 2020 (n 39), s. 1(3) and Reg. 1380/2013 (n 12), Art. 2(2). According to the latter, the goal should have been achieved by 2020 at the latest. As is evident from what was said above (see text at notes 74–77), that did not happen.