

8 Disentanglement from the EU

Consequences for the UK's Role in International Fisheries Organisations

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Introduction

As has been elaborated throughout this book, the UK is no longer part of the Common Fisheries Policy (CFP) and finds itself a so-called “independent coastal state”. The UK must now independently participate in the same organisations and agreements that the EU previously participated in on the UK's behalf. This includes, for example, the specialised agency of the United Nations for international fisheries, the Food and Agriculture Organization (FAO) of the United Nations. Additionally, by way of the CFP, the European Commission represents EU Member States' interests at the intergovernmental bodies for management of fisheries on the high seas. These are known as regional fisheries management organisations (RFMOs), which manage straddling and highly migratory stocks (see Chapter 7) on the high seas in a specific geographical area, or for a specific species.¹ Presently, the Commission participates in five tuna RFMOs² and 11 non-tuna RFMOs.

Up until 31 January 2020, the UK was represented on behalf of the EU in RFMOs. Since the UK now finds itself outside of the CFP, the UK Government is faced with the choice of which RFMOs it should choose to become a member of as an “independent coastal state”. The UK would need to apply for membership to these organisations as a Contracting Party in its own right, should it wish for vessels flying the UK flag to fish with the RFMOs' regulatory area or for species managed by a particular RFMO. At the time of writing, the UK has already done so for several RFMOs.³ This chapter will explore the legal consequences of the UK's departure from the EU within international fisheries management structures. Based on its fishing interests (see Chapter 1), there are five RFMOs of interest. These are: the North-East

1 See FAO Regional Fisheries Bodies Map Viewer, <www.fao.org/figis/geoserver/factsheets/rfbs.html> accessed 1 July 2021.

2 The Commission for the Conservation of Southern Bluefin Tuna (CCSBT) is geographically non-specific.

3 See A Serdy, ‘The 2018 Fisheries White Paper, the Fisheries Act 2020 and their legal dimensions’ 10 *Cambridge International Law Journal*, 73–95.

Atlantic Fisheries Commission (NEAFC),⁴ the Northwest Atlantic Fisheries Organization (NAFO),⁵ the International Commission for the Conservation of Atlantic Tunas (ICCAT),⁶ the Indian Ocean Tuna Commission (IOTC)⁷ and the North Atlantic Salmon Conservation Organization (NASCO).⁸ After first outlining the legal developments concerning these issues post-Brexit, this chapter specifically looks at these RFMOs, and then makes some inferences for the UK moving forward in international fisheries. It is important to note that the UK is party to several other RFMOs,⁹ and could join other RFMOs if it so wished, by virtue of its territories outside of the EU¹⁰ (but these will not be considered here).

Regional Fisheries Management Organisations: Consequences for the UK

The key international fisheries instruments, United Nations Convention on the Law of the Sea (UNCLOS) and the UN Fish Stocks Agreement (UNFSA) provide for regional coordination to manage fish stocks on the high seas for conservation and cooperation.¹¹ As previously discussed, this coordination is

- 4 Originally established by the North-East Atlantic Fisheries Convention (signed 24 January 1959, entered into force 27 June 1963) 486 UNTS 157, replaced by the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, 1982 (adopted 18 November 1980, in force 17 March 1982) 1285 UNTS 129.
- 5 Established by the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (adopted 24 October 1978, entered into force 1 January 1979) 1135 UNTS 369.
- 6 International Convention for the Conservation of Atlantic Tunas (Rio Convention) (adopted 14 May 1966, entered into force 21 March 1969) 673 UNTS 63.
- 7 Established by the Agreement for the Establishment of the Indian Ocean Tuna Commission (adopted 25 November 1993, entered into force 27 March 1996) 1927 UNTS 329.
- 8 Established by the Convention for the Conservation of Salmon in the North Atlantic Ocean (opened for signature 2 March 1982, entered into force 1 October 1983) 1338 UNTS 33.
- 9 For example, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), created by the Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS 47.
- 10 For example, the Western and Central Pacific Fisheries Commission (WCPFC), created by the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (adopted 5 September 2000, entered into force 19 June 2004) 2275 UNTS 43.
- 11 United Nations Convention on the Law of the Sea, adopted 10 December 1982, UNTS 1833, ILM 1261 (entered into force 16 November 1994), Arts. 117–118; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), 2167 UNTS 3 (concluded 4 August 1995, entered into force 11 November 2001), Art. 8.

achieved primarily through RFMOs, which are the intergovernmental bodies through which straddling and highly migratory fish stocks are managed within a specific geographical area, or for a specific species. RFMOs are considered to be “at the forefront of international efforts to achieve the conservation and sustainable utilisation of fish stocks”.¹² One of their key functions is to facilitate inter-State coordination through conservation and management measures (CMMs), for example through setting of total allowable catches (TACs) and quota allocation in their convention area or for species they manage. As discussed in Chapters 6, 7 and 8, the UK and the EU have an obligation to protect and preserve the marine environment, and to cooperate in doing so.¹³ As Oanta notes, “[t]his duty includes, among others, the promotion of sustainable fisheries and international fisheries governance in the framework of relevant RFMOs of which they are members.” This is enshrined in Article 8.8 of Title XI of the TCA,¹⁴ which “further reinforces the commitments of both parties to conserve and sustainably manage marine biological resources and aquaculture”.¹⁵

In leaving the CFP, the UK was at risk of finding itself outside the RFMOs it held fishing interests in, and so had to consider which RFMOs it should re-join. Indeed, “to avoid legal hiatus [the UK] needed to do so by the end of the transition period on 31 December 2020, until this date the UK remained under the CFP, including the relative stability principle for quotas”.¹⁶ The Withdrawal Agreement, in its Article 130 titled “Specific arrangements relating to fishing opportunities,” provided that during the transition period, the UK “shall be consulted in respect of the fishing opportunities related to the [UK], including the context of the preparation of relevant international consultations and negotiations”.¹⁷ The UK was also permitted to “provide comments on the Annual Communication on fishing opportunities, the scientific advice from the relevant scientific bodies and the proposals from the European Commission for fishing opportunities for any period falling within the transition period”.¹⁸

12 J Harrison, *Making the Law of the Sea* (Cambridge University Press, Cambridge: 2011), at 226.; see also J Harrison, ‘Key challenges relating to the governance of regional fisheries’ in R Caddell and E Molenaar (eds.) *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing, Oxford: 2011), at pp. 79–102.

13 See also G Oanta, ‘Resolving the United Kingdom and European Union membership of regional fisheries management organisations post Brexit’ 36 (2021) *The International Journal of Marine and Coastal Law* 1–13.

14 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, Brussels and London, 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).

15 G Oanta (n 13), at 3.

16 A Serdy (n 3).

17 The EU–UK Withdrawal Agreement (2019), <https://ec.europa.eu/info/relation-s-united-kingdom/eu-uk-withdrawal-agreement_en> accessed 1 July 2021, Art. 130(1).

18 *Ibid.*, Art. 130(2).

Importantly, the Withdrawal Agreement aims to allow the UK to “prepare its future membership in relevant international fora”; this would be operationalised through the EU, in exceptional circumstances, inviting the UK “to attend, as part of the Union’s delegation, international consultations and negotiations referred to in paragraph 1 of this Article, to the extent allowed for Member States and permitted by the specific forum”.¹⁹

Further, the Withdrawal Agreement aimed to help buy the UK some time in order to apply to the necessary organisations without being outside the RFMOs it had an interest in.²⁰ As discussed in Chapter 6, after the end of the transition period, the EU’s international agreements are no longer applicable to the UK.²¹ Article 129(1) of the Withdrawal Agreement states that “during the transition period, the [UK] shall be bound by the obligations stemming from the international agreements concluded by the Union, by [Member States – MS] acting on its behalf, or by the Union and its [MS] acting jointly”.²² As also discussed in Chapter 6, since 1973 and before February 2020 the UK and EU had “mixed” membership status in some international organisations. There were three scenarios here. First, the UK and EU had joint or cumulative membership in certain international organisations. Second, in some organisations, the EU was the sole member and so the UK’s fishing interests were represented by the EU. Third, “both the UK and the Union were members, but the former acted only in respect of the fishing interests of its overseas territories”.²³ The UK Government explained its intention to become a member of the several RFMOs in the explanatory notes of the Fisheries Bill but did not clarify which ones.²⁴ Further guidance published in February 2019 highlighted four of the five RFMOs mentioned above (NEAFC omitted).²⁵ However, the UK was “already a member in its own right of two of these RFMOs [IOTC and ICCAT] by virtue of territories outside the EU”.²⁶

The Withdrawal Agreement permitted the UK to “negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period unless so authorised by the Union”.²⁷ On 3 April 2020 the UK requested permission from the EU to become a party to the constitutive treaties of the five RFMOs mentioned

19 Ibid., Art. 130(3).

20 Ibid., Art. 130(4).

21 Ibid., Art. 129(1).

22 Ibid., Art. 129(1).

23 G Oanta (n 13), at 3.

24 UK Government, *Fisheries Bill [HL] Explanatory Notes*, <<https://publications.parliament.uk/pa/bills/lbill/58-01/071/5801071en.pdf>> accessed 1 July 2021.

25 Department for Exiting the European Union, ‘Guidance: Fisheries’ (5 November 2019), <<https://www.gov.uk/government/publications/international-agreements-if-the-uk-leaves-theeu-without-a-deal/fisheries>> accessed 1 July 2021.

26 A Serdy (n 3), at 79; Department for Exiting the European Union *ibid.*

27 Withdrawal Agreement (n 17), Art. 129(4).

above during the transition period.²⁸ The EU authorised this request on 18 September 2020, granting the UK authorisation to express its consent in its own capacity to be bound by certain international agreements to be applied during the transition period of the CFP. This allowed the UK “to take part in decision-making within these bodies on all matters taking effect in or after 2021, such as quotas”.²⁹ Serdy notes that this decision can be understood for ICCAT “since the UK could not otherwise represent the British Isles and Gibraltar as a coastal State before the transition period’s end, but not for the IOTC, as other territories are the basis of its eligibility for membership of the latter”.³⁰ Indeed, whether the UK needed to request authorisation in the first place is questionable, as Article 129(4) could be interpreted as only applying to the negotiation, signature and ratification of new treaties, rather than existing treaties.³¹ However, since RFMOs negotiate quotas a year in advance, i.e. quotas for 2021 would be negotiated and set by the end of 2020, the EU would be in a “conflicted position if it were still negotiating these on the UK’s behalf. Hence it was vital for the UK to take the requisite treaty action to achieve membership of [aforementioned RFMOs] in time to negotiate quotas its own interest, and not obvious what reason the EU could have for seeking to prevent this without risking accusations of bad faith.”³²

To summarise, as a consequence of Brexit, the UK has found itself in the position where it has had to apply for membership of three of the five RFMOs it holds fishing interests in where it was previously represented as part of the EU. Through the Withdrawal Agreement, the UK was given time during the transition period to apply to the necessary organisations without being outside the regulatory framework of the RFMOs it had an interest in. The next section will go through these five RFMOs in turn.

North-East Atlantic Fisheries Commission (NEAFC)

NEAFC is the intergovernmental organisation responsible for the management of fisheries in the high seas in the North-East Atlantic.³³ As discussed in Chapter 1, several species managed by NEAFC are of interest to the UK.

28 COM (2020) 489 final, Proposal for a Council Implementing Decision on the authorisation of the United Kingdom to express its consent to be bound, in its own capacity, by certain international agreements to be applied during the transition period in the area of the Union’s common fisheries policy, Brussels, 7 September 2020, at 1–2.

29 A Serdy (n 3), at 80; Council Implementing Decision (EU) 2020/1305 of 18 September 2020 authorising the United Kingdom to express its consent, in its own capacity, to be bound by certain international agreements to be applied during the transition period in the area of the Union’s common fisheries policy (2020) OJ L305/27, recital 6 and Art. 1.

30 A Serdy (n 3), at 80.

31 *Ibid.*, at 80.

32 *Ibid.*, at 81.

33 *Supra* (n 4).

NEAFC adopts CMMs based on the latest scientific advice provided by ICES. NEAFC CMMs take “due account” of fishery impacts on marine ecosystems, as well as the conservation of marine biodiversity (see Chapter 7). NEAFC exercises an environmental protection component through the protection of vulnerable marine ecosystems, such as deep-sea sponges and corals from bottom fishing. Contracting parties are the EU, Iceland, Norway, the Russian Federation and Denmark (Faroe Islands and Greenland).

As pointed out by Serdy, it is interesting that NEAFC was the only RFMO mentioned in the UK Government’s White Paper (the policy document that sets out the UK Government’s aims for its future relationship with the EU after Brexit).³⁴ The UK applied to become a party to NEAFC’s constitutional treaty, and became a Contracting Party on 7 October 2020, the same day as it submitted its application.³⁵ This not only demonstrates Article 1(1) of the Implementing Decision (EU) 2002/1305 in action, but “suggests that the approval must have been pre-negotiated”.³⁶ There is no evidence publicly available to confirm this, but Oanta was also surprised at the fact the UK was able to negotiate accession to NEAFC in such a short space of time.³⁷ Since the UK has had fishery disputes with Iceland over mackerel since 2009, and Norway several years ago, this could in theory have jeopardised the UK’s accession.³⁸ However, the UK clearly has a “real interest” in the fisheries of the North-East Atlantic, considering it is a coastal State within that area.³⁹ NEAFC’s headquarters are found in London, and the UK is the depository of its convention.⁴⁰

As a new member, the UK may have issues with quota allocation in NEAFC (and the other RFMOs discussed in this chapter, for that matter). For example, NEAFC adopted in 2003 “Guidelines for the Expectation of Future New and Contracting Parties with Regard to Fishing Opportunities in the NEAFC Regulatory Area”.⁴¹ These guidelines state that “Non-Contracting Parties of NEAFC should be aware that presently and for the foreseeable future, stocks regulated by NEAFC are fully allocated, and fishing opportunities for new

34 UK Government Department for Exiting the European Union, *The future relationship between the United Kingdom and the European Union* 12 July 2018, <<https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>> accessed 2 July 2021; A Serdy (n 3).

35 NEAFC, *The United Kingdom Becomes 6th Contracting Party to NEAFC* 7 October 2020, <<https://www.neafc.org/news/34327>> accessed 2 July 2021.

36 A Serdy (n 3), at 81.

37 G Oanta (n 13), at 5–6.

38 *Ibid.*, at 6.

39 UNFSA (n 11), Art. 8(3).

40 Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries (n 4), Art. 22.

41 NEAFC, ‘Guidelines for the expectation for future new and contracting parties with regard to fishing opportunities in the NEAFC regulatory area’ (2003) <<https://www.neafc.org/becomingacp>> accessed 10 May 2021.

members are likely to be limited to new fisheries (stocks not currently allocated)".⁴²

Northwest Atlantic Fisheries Organization (NAFO)

The EU is a founding member of NAFO and has represented its MS in this forum from the beginning.⁴³ The UK joined NAFO as the 13th Contracting Party in September 2020,⁴⁴ through Article XXIII (4) of NAFO's Convention. According to Oanta, it was necessary for the UK to join NAFO so as to not lose access to fisheries resources within NAFO's management jurisdiction; though it is not yet apparent whether the UK's fishing interests will conflict with the EU or Canada.⁴⁵ NAFO quotas were allocated to EU MS as fishing opportunities fixed by the EU for 2020,⁴⁶ including UK vessels to catch, for example, cod and herring.⁴⁷ This is in line with the Withdrawal Agreement, outlined above (with the UK remaining a part of the CFP during the transition period).

In terms of quota allocation for 2021, the UK and EU have agreed to divide the EU quota for Atlantic cod in the NAFO regulatory area for 2021 found in Table D Annex 36 of the Trade and Cooperation Agreement (TCA) (see Chapter 2), with the UK being allocated a 16.34% share, and the EU allocated the remaining lion's share.⁴⁸ The TCA requires both parties to notify NAFO of their divided quota shares (any changes are to be discussed multilaterally at the meeting of the Contracting Parties to NAFO).⁴⁹

International Commission for the Conservation of Atlantic Tunas (ICCAT)

ICCAT is the intergovernmental organization responsible for the collective management of tuna species in the North and South Atlantic, the Mediterranean, and the Black Sea,⁵⁰ with 52 contracting parties and five "cooperating non-parties". The UK was already a member of ICCAT prior to Brexit on account of having several island territories in the Convention area that exist

42 Ibid.

43 Council Regulation (EEC) No 3172/78, OJ L 378/1 30.12.1978.

44 NAFO, 'NAFO Hosts 42nd Annual Meeting Virtually and Welcomes United Kingdom as a NAFO Contracting Party' Press Release of 25 September 2020, <https://www.nafo.int/Portals/0/PDFs/press/PressRelease_AM2020.pdf> accessed 2 July 2021.

45 G Oanta, 'Resolving the United Kingdom and European Union membership of regional fisheries management organisations post Brexit' *The International Journal of Marine and Coastal Law* 36 (2021) 1–13 at 4.

46 Council Regulation (EU) 2020/123, OJ L 25/1 30.1.2020.

47 Ibid., Annex 1B.

48 TCA (n 14), Annex 36, Table D.

49 TCA ibid., Art. 505(2)–(3).

50 See ICCAT, Convention Area, <<https://www.iccat.int/en/>> accessed 7 September 2020.

outside the EU⁵¹ (Ascension Island, Bermuda, the British Virgin Islands, Saint Helena and Tristan da Cunha, and the Turks and Caicos Islands). In spite of already being a member, the UK alerted the United Nations Food and Agriculture Organization (FAO) – the depository of the Rio Convention – on 21 October 2020, stating that it would be party to ICCAT on the basis of the British Isles and Gibraltar.⁵² Serdy notes the fact that the return of Atlantic bluefin tuna to UK waters, likely due to climate change,⁵³ would allow the UK to argue for a quota allocation for the stocks under the ICCAT allocation guidelines⁵⁴ (although, when a member of the EU the UK was not allocated bluefin quota).⁵⁵ At present, the UK prohibits fishing for Atlantic bluefin in its EEZ.⁵⁶

As a member of ICCAT, the EU allocates quotas between its MS and sets minimum conservation reference sizes,⁵⁷ and prior to Brexit it did not allocate a quota for bluefin to the UK.⁵⁸ On the basis of the TCA, for 2021, the UK has been allocated a slither of four ICCAT quotas; with regard to bluefin tuna, the UK has been allocated 0.25% of the quota, with the EU taking the remaining 99.75%.⁵⁹ Indeed, considering the ban on fishing for this stock in UK waters, this comes as no surprise, but if this stock becomes of interest to the UK, any changes must be discussed as “a matter for the relevant multilateral fora”.

Bluefin Tuna: Emerging Challenges

Despite the potential issue above, the UK’s approach appears to be aiding the recovery of the Atlantic bluefin tuna stock. For example, the International

51 See ICCAT, *ICCAT geographical definitions* 2016.02.EN, <www.iccat.int/Data/ICCAT_maps.pdf> accessed 2 July 2021.

52 See ICCAT, *Adherence by the United Kingdom of Great Britain and Northern Ireland* 28/X/2020 <<http://extwprlegs1.fao.org/treaty/docs/CSL000252.pdf>> accessed 2 July 2021.

53 T W Horton et al., ‘Evidence of increased occurrence of Atlantic bluefin tuna in territorial waters of the United Kingdom and Ireland’ *ICES Journal of Marine Science* (2021), <10.1093/icesjms/fsab039> accessed 2 July 2021.

54 ICCAT, ‘Compendium: Management Recommendations and Resolutions Adopted by ICCAT for the Conservation of Atlantic Tunas and Tuna-Like Species’ (2020), <https://www.iccat.int/Documents/Recs/COMPENDIUM_ACTIVE_ENG.pdf> accessed 2 July 2021; A Serdy (n 3), at 84.

55 See, for example, ICCAT, Recommendation 17–07, *Amending the Recommendation 14–04 on Bluefin Tuna in the Easter Atlantic and Mediterranean* (2017), para. 5.

56 See Marine Management Organisation, *Bluefin tuna in the UK* 12 June 2020, <<https://www.gov.uk/government/news/bluefin-tuna-in-the-uk>> accessed 2 July 2021.

57 See, for example, Commission Regulation (EU) 2016/1627, OJ L 252/1, Arts. 14 and 15.

58 See, for example, Council Regulation (EU) 2018/120, OJ L 27/1, Annex ID.

59 TCA (n 14), Annex 36, Table C; UK allocations for the three other ICCAT stocks in question are albacore tuna (North Atlantic): 1.52%, blue shark (North Atlantic): 0.10%, and swordfish (North Atlantic): 0.10%.

Union for Conservation of Nature revised their listing of the Atlantic bluefin tuna from “endangered” to “near threatened” in 2015, and the Marine Stewardship Council has certified some bluefin tuna fisheries in the North Atlantic as sustainable.⁶⁰ The latest report from ICCAT indicates that there has been an increase in abundance in the Atlantic bluefin tuna stock.⁶¹ This has prompted ICCAT to replace the management plans for the stock from conservation to exploitation – by moving from a “recovery management plan” for eastern Atlantic bluefin to a “multi-annual management plan” in 2020.⁶²

It may be unlikely that other ICCAT members would be willing to pass up a share of their quota to the UK should the UK not intend to make use of it.⁶³ Indeed, “[t]o overcome this, it may be necessary for the UK to affirm that, once given a stock recovery threshold is reached, it will use the quota for fishing”.⁶⁴ However, one small point is that ICCAT does grant contracting parties the right to allocate quota for the “purpose of sport and recreational fishing” and permits recreational and sport fishing of bluefin tuna in the Eastern Atlantic and Mediterranean from 16 June to 14 October annually.⁶⁵ Marketing of bluefin tuna in recreational and sport fishing is prohibited, recreational fisheries can operate for the purposes of “tag and release”.⁶⁶ This is problematic for some EU MS not allocated a tuna quota; however, with the UK outside the EU, it could be a benefit for the recreational sea fishers who are interested in catching bluefin tuna.⁶⁷

Indian Ocean Tuna Commission (IOTC)

The IOTC is a tuna RFMO in the Indian Ocean. Operating under the auspices of the FAO, membership is open to any State that is a member of FAO, or non-members of FAO but members of the United Nations, on the condition they are “situated wholly or partly within the [management] Area” or

60 International Union for the Conservation of Nature (IUCN) *Atlantic Bluefin Tuna*, <<https://www.iucnredlist.org/species/21860/97778482>> accessed 2 July 2021; Marine Stewardship Council, *Recent History of Atlantic Bluefin Tuna*, <<https://www.msc.org/species/tuna/recent-history-of-bluefin-tuna>> accessed 2 July 2021.

61 ICCAT, *2019 SCRS Report*, <https://www.iccat.int/Documents/SCRS/ExecSum/BFT_ENG.pdf> accessed 2 July 2021.

62 ICCAT, *Recommendation by ICCAT Amending the Recommendation 18–02 Establishing a Multi-Annual Management Plan for Bluefin Tuna in the Eastern Atlantic and the Mediterranean* 19–04, <www.iccat.int/Documents/Recs/compendiopdf-e/2019-04-e.pdf> accessed 2 July 2021.

63 A Serdy (n 3), at 84.

64 *Ibid.*

65 ICCAT (n 62), paras. 39–47.

66 *Ibid.*

67 D Diz, M Lennan and K Hyder, ‘Assessment of governance structures and legal instruments for recreational sea fishing and its inclusion in broader fisheries governance’ Report for Centre for Environment, Fisheries and Aquaculture Science (forthcoming – on file with authors).

whose vessels fish for stocks managed by IOTC in the management area.⁶⁸ The UK maintains its membership of the IOTC on the basis of its claim to sovereignty over the Chagos Archipelago, or so-called British Indian Ocean Territory (BIOT), and has been a member of the IOTC on behalf of the BIOT since 31 March 1995. The EU has been a member since 27 October 1995,⁶⁹ and France since 3 December 1996 on account of its overseas territories in the region. Since the UK's fishing interests are only represented on behalf of the BIOT with this set up, in order to have its fishing interests represented, the UK expressed interest in acceding to the IOTC and being represented not just on behalf of BIOT on 3 April 2021.⁷⁰ The EU granted permission for the UK to apply for “full” membership of the IOTC during the transition period.⁷¹

The UK deposited an instrument of accession to the Agreement for the Establishment of the IOTC in 2020, the Agreement entering into force (for the UK) on 22 December 2020.⁷² This was not without controversy. The republic of Mauritius maintains a sovereignty claim over the Chagos Archipelago, and the consequences of its separation from Mauritius as the UK's “bargaining chip” for Mauritian independence and in February 2019 was the subject of an Advisory Opinion of the International Court of Justice.⁷³ That Advisory Opinion determined that the UK's continued occupation of the Archipelago constitutes and internationally wrongful act. Furthermore, “the process of decolonisation of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago”⁷⁴ and that the UK has the obligation to “bring to an end its administration of the Chagos Archipelago as rapidly as possible”.⁷⁵ On that basis, Mauritius formally requested that this issue be formally discussed at the 24th IOTC session, stating Mauritius “is the sole State lawfully entitled to exercise sovereignty rights over the Chagos Archipelago and its maritime zone”.⁷⁶ Mauritius argued its position based on this Advisory Opinion, as well as United Nations General Assembly Resolution 73/295 of May 2019 which:

68 Constitution of the Food and Agricultural Organization of the United Nations, Art. XIV in *Basic Texts of the Food and Agriculture Organization of the United Nations* Vols. I and II (2015) at 3–16, <<http://www.fao.org/3/mp046e/mp046e.pdf>> accessed 2 July 2021.

69 Council Decision 95/399/EEC OJ L 236/24.

70 COM (2020) (n 28), at pp. 1–2.

71 Implementing Decision (EU) 2020/1305, OJ L 25/1, Art. (1)(d).

72 IOTC Circular 7 January 2021, ‘The United Kingdom of Great Britain and Northern Ireland Joins IOTC’, <<https://iotc.org/documents/united-kingdom-great-britain-and-northern-ireland-joins-iotc>> 2 July 2021.

73 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* 2019 ICJ Rep 95.

74 *Ibid.*, para. 183(3).

75 *Ibid.*, para. 183(4).

76 Sixth Meeting of IOTC Technical Committee on Allocation Criteria, Statement by the Republic of Mauritius, 15–16 September 2020, <https://iotc.org/sites/default/files/documents/2020/09/Statement_by_Mauritius_under_Item_2_6th_IOTC_TCAC_fv.pdf> accessed 2 July 2021, para 4; see also The Chairperson's Report of the 6th

[c]alls upon the United Nations and all its specialized agencies to recognize that the Chagos Archipelago forms an integral part of the territory of Mauritius, to support the decolonization of Mauritius as rapidly as possible, and to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of the “British Indian Territory”.

The UK, in response to the Mauritian request, argued that it had sovereignty over the Chagos Archipelago and was unequivocally entitled to be a member of IOTC on that basis.⁷⁷

The IOTC decided that discussion of the Mauritian issue would take place at the 25th session (June 2021) due to the Covid-19 pandemic.⁷⁸ In the meantime, a case was brought to a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) by Mauritius concerning the maritime boundary between Mauritius and the Maldives on the basis of Mauritius’s sovereignty over the Chagos Archipelago. The substantive part of this case concerns Mauritius’s claim for delimitation of the maritime boundary between the Chagos Archipelago and the Maldives. The Maldives raised preliminary objections to this case, including the question of whether the Special Chamber had jurisdiction to delimit a maritime boundary in the circumstances where a third State, the UK, maintained a sovereignty claim over the Archipelago. The objections were heard in October 2020 and the Special Chamber delivered its judgment on 28 January 2021.⁷⁹ The Special Chamber held that, on the basis of the ICJ’s Advisory Opinion:

Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of the decolonization of Mauritius is completed. In the Special Chamber’s view, to treat Mauritius as such State is consistent with the determinations made ... in the *Chagos* advisory opinion which were acted upon by UNGA resolution 73/295.⁸⁰

The Chamber found it had jurisdiction on this basis, and the case will now proceed to the merits phase, and the Chamber may delimit a maritime

Technical Committee on Allocation Criteria, 15–16 September 2020, IOTC-2020-TCAC06-R, Appendix 2, pp. 15–17, <https://www.iotc.org/sites/default/files/documents/2020/10/IOTC-2020-TCAC06-RE_0.pdf> accessed 2 July 2021.

77 Chairperson’s Report *ibid.*

78 Sixth Meeting of IOTC Technical Committee on Allocation Criteria (n 76), para 5.

79 *Dispute Concerning the Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) Preliminary Objections* Judgment of 28 January 2021 ITLOS Reports 2021; Mitchell Lennan acted as assistant to Counsel for the Republic of Maldives in this case and may do so as it proceeds to the merits. His views, and the views expressed in this chapter, do not necessarily reflect the views of the Republic of Maldives.

80 *Ibid.*, at para. 250.

boundary between the two States.⁸¹ Indeed, several compelling legal developments are happening in this area that may affect, *inter alia*, the UK's membership of the IOTC. The latest development in the implementation of the UNGA Resolution 73/295 outside of the IOTC framework at the time of writing is the UN Universal Postal Union council recommendation, by reference to the above judicial decisions, that stamps issued by BIOT should no longer be recognised by UN Member States.⁸²

The IOTC met to discuss Mauritius's request, as well as the FAO's plan to implement paragraph 6 of UNGA Resolution 73/295,⁸³ in their 25th session in the second week of June 2021.⁸⁴ At time of writing, a decision has not been made on this issue.

North Atlantic Salmon Conservation Organization (NASCO)

NASCO was established by the Salmon Convention in 1984. The main aim of NASCO is the conservation and enhancement of salmon stocks based on the best scientific evidence available to it. NASCO prohibits fishing for salmon on the high seas, and beyond the 12 nm territorial sea of contracting parties, but cannot adopt decisions regulating the management of salmon within parties' 2 nm territorial seas. NASCO does, however, have the power to adopt decisions regulating fishing of salmon within the jurisdiction of one State party where it affects salmon that originate in the rivers of another party.

Prior to Brexit, NASCO had six contracting parties: the EU, Canada, USA, Russian Federation, Denmark (Faroe Islands and Greenland) and Norway. NASCO's headquarters are located in Edinburgh; however, up until 2020 the UK was not a party as it was not an eligible signatory of the Convention of Salmon in the North Atlantic Ocean listed in Article 17(1). However, Brexit presented "the UK this opportunity, for the first time, as paragraph 3 of the same Article opens the Convention to accession 'subject to the approval of the Council, by any other State that exercises fisheries jurisdiction in the North Atlantic Ocean or is a State of origin for salmon stocks subject to this Convention'".⁸⁵ Similar to NEAFC, the UK was clearly eligible based on it exercising fisheries jurisdiction in the North Atlantic. The UK had engaged with NASCO in early 2019, indicating it wished approval from NASCO's Council to accede to the Convention only on the condition that the UK left the EU

81 *Ibid.*, at para. 354(6).

82 See *The Guardian*, 'UN favours Mauritian control over the Chagos Islands by rejecting UK stamps' 16 May 2021, <<https://www.theguardian.com/world/2021/may/16/un-favours-mauritian-control-over-chagos-islands-by-rejecting-uk-stamps>> accessed 2 July 2021.

83 IOTC, 'Implementation of paragraph 6 of the UNGA Resolution 73/295' IOTC-2021-S25-07(E).

84 IOTC, '25th Session of the Indian Ocean Tuna Commission', <<https://www.iotc.org/meetings/25th-session-indian-ocean-tuna-commission>> accessed 2 July 2021.

85 Serdy (n 3), at 81–82.

without a Withdrawal Agreement. The request was made again without that condition on 6 July 2020. The Council of NASCO, “agreed that the decision on whether to approve the UK’s accession to the Convention would be taken, by email, in accordance with Article 6 of the Convention, once the European Council publishes its Decision authorising the UK to join during the transition period”.⁸⁶ As discussed above, the EU authorised the UK to do so in September 2020, and as permitted by Article 1(1) of that EU Decision, the UK deposited its instrument of accession on 27 November 2020 and became the seventh contracting party to NASCO.⁸⁷

Finally, while the NASCO Council could have vetoed the entry of the UK as a seventh contracting party, it was not in the best interests of the other parties. This is because, as described above, NASCO does not have the power to regulate the fishing of salmon within the jurisdiction of one State party (or non-party) where it affects salmon that originate in the rivers of another party (or non-party). This means that for the contracting parties the UK being outside of the obligations of NASCO’s Convention “would expose salmon spawned in their own rivers, and passing through the UK’s EEZ on their migratory path to and from the Atlantic Ocean, to being caught there by UK-licensed vessels”.⁸⁸ Serdy also argues that in the process of the UK joining the organisation, the Secretariat of NASCO did not consult the existing contracting parties on the conditions of Articles 129 and 130 of the Withdrawal Agreement. Indeed, this may “simply be because the other members were relieved at the prospect of a seamless transition in the UK’s status to shield them from exposure to the turmoil engulfing many other aspects of the Brexit negotiations, and cared little for the attendant legal niceties”.⁸⁹ The authors, based on the issues laid out throughout this book, are inclined to agree, and it is not surprising that a “seamless transition” was the most attractive option.

Moving Forward

International fisheries participation within RFMOs for the UK in a post-Brexit may see delegations in negotiations in RFMOs with considerably more freedom as a member in its own right, and will not have to maintain an EU

86 NASCO, ‘Report of the September 2020 Inter-Sessional Meeting of the Council of the North Atlantic Salmon Conservation Organization’, <https://nasco.int/wp-content/uploads/2020/10/CNL_IS2018_Report-of-the-September-2020-Inter-Sessional-Meeting-of-the-Council-of-the-North-Atlantic-Salmon-Conservation-Organization.docx.pdf> accessed 2 July 2021, para. 4.8.

87 NASCO, ‘Decision of the Council of the North Atlantic Salmon Conservation Organization on the Accession of the United Kingdom of Great Britain and Northern Ireland on the Convention for the Conservation of Salmon in the North Atlantic Ocean’, <https://nasco.int/wp-content/uploads/2020/11/CNL2057_Decision-of-the-Council-of-NASCO-on-the-Accession-of-the-UK-to-the-NASCO-Convention.pdf> accessed 1 July 2021.

88 Serdy (n 3), at 82.

89 *Ibid.*, at 82.

position. However, the UK may have issues in negotiating allocation of catch or effort quotas within the RFMOs where it is a new or “returning” member outside of the EU, since RFMOs are not always eager to allocate new participants a share of quota. It is not yet apparent on what basis the UK will approach negotiating quotas for the abovementioned RFMOs, which could be either “(a) the continuity with any existing or previous UK membership of the RFMO and the catch history before and during its EU Membership, or (b) the fact that a given stock resides in or migrates through UK waters”.⁹⁰ Further, it is expected that the EU would argue that quotas awarded to it by any of the above five RFMOs discussed are solely theirs and should not change simply because the UK has departed. To avoid this and end up in an unfortunate situation, the UK may need to make a consistent claim across these five RFMOs that it is entitled to a portion of the EU quota, based on the level at which the UK participates in that fishery. Future multilateral negotiations within these RFMOs will prove interesting to follow, especially to see which approach each party takes and the extent to which they cooperate in these fora. Finally, perhaps the most interesting outcome will be the decision of the IOTC on the outcome of Mauritius’s request to discuss the legitimacy of the UK’s membership of that organisation.

90 *Ibid.*, at 85.