

7 Conservation of Fisheries Resources and Protection of the Marine Environment Post-Brexit

International Obligations

Mitchell Lennan, Jonatan Echebarria Fernández and Tafsir Matin Johansson

Introduction

As discussed throughout this book, despite leaving the EU and the CFP and becoming a so-called “independent coastal State,” the UK is still bound by various international environmental legal obligations. Post-Brexit UK remains party to over 40 international environmental treaties (or over 100 agreements when one considers protocols and amendments).¹ The UK Government has gone on record stating that it intends to remain bound by its international environmental obligations laid out in Multilateral Environmental Agreements (MEAs)² and that, “we will of course continue to honour our international commitments and follow international law”.³ The MEAs to which the UK is party concern an array of subjects including climate change, nuclear safety and access to information.⁴ To ensure regulatory stability, the UK Government has maintained a policy of retaining EU environmental law until the opportunity for regulatory evaluation presents itself.⁵ However, this regulatory evaluation and potential reshaping is limited by the UK’s obligations to treaties which it is

1 UK Environmental Law Association (UKLEA), *Brexit and Environmental Law: The UK and International Environmental Law* (London, UK, UKELA, 2017) at 5; R Macrory and J Newbiggin, *Brexit and International Environmental Law* (London, UK, Centre for International Governance Innovation, 2017), <<https://www.cigionline.org/static/documents/documents/Brexit%20Paper%20no.8.pdf>> accessed 1 May 2021.

2 Written statement to the House of Commons by Thérèse Coffey, Parliamentary Under Secretary of State for the Department for Environment, Food and Rural Affairs, in response to written questions from Caroline Lucas, MP, “Environment: Treaties: Written question – 9691” (asked on 8 September 2017, answered on 18 September 2017) [“Environment: Treaties”], <<https://members.parliament.uk/member/3930/writtenquestions?page=41>> accessed 1 May 2021.

3 Brexit White Paper, <<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>> accessed 1 May 2021.

4 UKLEA (n 1), Annex.

5 Brexit White Paper (n 3), at para. 2.7.

party. Therefore “international environmental law could be seen to provide an important underpinning of future national environmental obligations, rights and minimum standards”,⁶ as a “backstop beyond which we cannot fall in terms of environmental standards”.⁷

Because the EU has legal personality,⁸ and has the power to conclude international treaties if those treaties allow, or where concluding an agreement is necessary to achieve one of the EU’s policies, or the objective of the treaty.⁹ The exercise of the EU’s power in this regard depends on the legal competence the EU possesses on the subject of the treaty.¹⁰ Generally, there are three categories of international agreements relevant for our purposes:

- 1 International agreements exclusively within the EU’s competence and that only the EU can ratify;
- 2 International agreements where MS retain exclusive competence and may negotiate and ratify alone and without the EU’s involvement; and
- 3 International agreements where the subject “straddles” the competence of the EU and MS, and where the EU and MS will both be parties.

The first and third categories of agreement are of key interest for this chapter. As mentioned throughout this book, regional fisheries agreements and agreements on the conservation of marine biological resources fall under exclusive EU competence under the CFP, and so fall into category 1.¹¹ Prior to Brexit, the UK was party to any agreement in category 1 by way of Article 216(1) of the Treaty on the Functioning of the European Union, which binds MS to international agreements entered into by the EU. Obligations of those agreements are to be implemented through directly applicable EU regulations or by implementation of EU directives. However, *international* agreements relating to fisheries, such as UNCLOS or the UNFSA, were signed and ratified by the UK prior to the EU, and the external dimension of fisheries was only adopted

6 R Macrory and J Newbigin (n 1), at 1.

7 See also evidence of M Lee, House of Lords Select Committee on the European Union, Energy and Environment Sub-Committee, Brexit: environment and climate change (London, UK: 2016) at 156 [House of Lords], <<https://www.parliament.uk/globalassets/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-environment-climate-change/Brexit-Environment-Climate-Change-Written-Oral-Evidence-Volume.pdf>> accessed 1 May 2021.

8 Treaty on European Union, 7 February 1992, OJ, C 325/5, Art. 47.

9 Treaty on the Functioning of the European Union (TFEU), 13 December 2007 OJ, C 115/47, Art. 216.

10 G De Baer, *Constitutional Principles of EU External Relations* (Oxford, UK: Oxford University Press, 2008) at 10; see R Macrory and J Newbigin (n. 1); See also TFEU (n 9) Art. 216; *Commission of the European Communities v Council of the European Communities: European Agreement on Road Transport*, C-22/70, [1971] ECR, at 263.

11 TFEU (n 9), Art. 3(1).

by the EU as a pillar of fisheries policy in 2013.¹² After Brexit, the UK was still bound by these treaties.

Category 3 is the most common form of MEA; they are known as mixed agreements. These contain elements that fall within both the UK and EU's competence and as such both are party to said agreement. Mixed agreements "are frequently used to ensure member state support even in areas where the EU strictly appears to have exclusive legal competence"¹³ (45 agreements to which the UK is party fall under this category).¹⁴ On leaving the EU, the UK assumed the competences previously held by the EU and as such are bound automatically by these mixed agreements that the UK has signed and ratified.¹⁵

For reasons of space, and in keeping with the theme of this book, the UK's international obligations for the conservation and management of fisheries and the protection and preservation of the marine environment will be examined here.

The environmental component of fisheries resources management and regulation are interlinked and indivisible. Of special focus are the marine environmental protection obligations under international law applicable to fisheries, which the UK remains bound by despite Brexit. In particular, it outlines the obligations under the UN Convention on the Law of the Sea (UNCLOS),¹⁶ the UN Fish Stocks Agreement (UNFSA),¹⁷ the Convention on Migratory Species (CMS),¹⁸ the Convention on Biological Diversity (CBD),¹⁹ as well instruments adopted under the UN Food and Agriculture Organization (FAO). This is important as despite Brexit, there is still a layer of international obligations applicable to the UK and EU to ensure the conservation and sustainable exploitation of fish stocks. It should also be noted that generally, international fisheries instruments apply to recreational fisheries as well as commercial fisheries.²⁰

12 Regulation (EU) No 1380/2013 OJ L 354/22.

13 R Macrory and J Newbiggin (n 1), at 3; J Weiler, *The Constitution of Europe* (Cambridge, UK: Cambridge University Press, 1999) at 177; P Koutrakos and C Hillion (eds.) *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford, UK: Hart Publishing, 2010).

14 UKLEA (n 1), Annex.

15 R Macrory and J Newbiggin (n 1), at 4.

16 United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, 1833 UNTS 3. The UK acceded to UNCLOS on 24 July 1993.

17 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, 2167 UNTS 3. The UK acceded to UNFSA on 10 December 2001.

18 Convention on the Conservation of Migratory Species of Wild Animals (CMS), Bonn, 23 June 1979, 1651 UNTS 333. The UK became a party to the CMS on 1 October 1985.

19 United Nations Convention on Biological Diversity (CBD), Rio de Janeiro, 22 May 1992, 1760 UNTS 79. The UK became a party to the CBD on 1 September 1994.

20 D Diz, M Lennan and K Hyder, 'Assessment of governance structures and legal instruments for recreational sea fishing and its inclusion in broader fisheries

International Environmental Obligations in Fisheries Management and Conservation

UNCLOS

UNCLOS sets out the legal framework for ocean governance, establishing the rights and duties of States relating to all activities that occur at sea. The scope of the Convention is vast, and it was negotiated by consensus and in a holistic manner. UNCLOS is referred to either explicitly or implicitly by the other instruments covered in this chapter. These instruments should be interpreted and applied through UNCLOS, which lays out the rights and duties of States whose nationals engage in fishing activities in waters both within and beyond national jurisdiction. The UK has been a party to UNCLOS since 25 July 1997.²¹

Coastal State obligations have been laid out previously in Chapter 6. However, as a key reminder, UNCLOS in its Part XII explicitly requires all States to protect and preserve the marine environment. This is an obligation of conduct, one of “due diligence” applying to all maritime areas regardless of jurisdiction.²² Such obligations are *erga omnes* – meaning they are owed to, and enforceable by, any member of the international community.²³ The provisions covering marine living resources (MLRs), such as, for example, Conservation and Management Measures (CMMs) of both coastal States, “constitute an integral element in the protection and preservation of the marine environment”,²⁴ and failure to ensure respect of CMMs constitutes a violation of UNCLOS Part XII. Article 194(5) of UNCLOS establishes the obligation to protect and preserve rare or fragile ecosystems and habitats of depleted, threatened or endangered species as well as other forms of marine life. UNCLOS, however, does not provide criteria for identifying and managing such areas, and relies on other instruments to do so. These instruments, such as the CBD, complement UNCLOS by providing further guidance, including on minimum standards.

UNFSA

The rather vague provisions found in UNCLOS pertaining to straddling fish stocks and highly migratory (HM) fish stocks are further elaborated by

governance’ Report for Centre for Environment, Fisheries and Aquaculture Science (forthcoming – on file with authors).

- 21 See United Nations Treaty Collection, <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#10> accessed 2 May 2021.
- 22 *The South China Sea Arbitration* (The Republic of The Philippines v. The People’s Republic of China) Award of 12 July [2016], PCA Case No 2013–19, ICGJ p. 49.
- 23 See generally: *Case Concerning the Barcelona Traction, Light and Power Co., Ltd.* (Belgium v. Spain), Judgment of 5 February [1970] ICJ Reports 1970, p. 3.
- 24 *Request for an Advisory Opinion Submitted by The Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April [2015], ITLOS Reports 2015, p. 4 (*Fisheries Advisory Opinion*) at para. 120.

UNFSA.²⁵ In terms of geographic scope, Articles 5 (principles), 6 (precautionary approach) and 7 (compatible measures) are applicable both within and beyond national jurisdiction, while the rest apply to areas beyond national jurisdiction.²⁶ UNFSA should be interpreted and applied consistently with UNCLOS,²⁷ and it requires the application of the precautionary approach to fisheries,²⁸ an ecosystem approach;²⁹ and the protection of marine biodiversity.³⁰ Parties to UNFSA must comply with CMMs established by an RFMO or fisheries arrangement, or refrain from fishing altogether.

Convention on Migratory Species of Wild Animals (CMS)

The CMS is a global multilateral conservation treaty which aims to protect migratory species, and especially those species that are threatened, vulnerable or have unfavourable conservation status. Applying to areas within and beyond national jurisdiction, the Convention defines migratory species as: “the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries”.³¹ The UK has been a party to the CMS since 1985.³² The CMS lists species that are considered threatened or endangered in its Appendix I,³³ lesser threatened species in Appendix II.³⁴ With regard to fisheries, parties are expected to take measures to protect Appendix I species against bycatch.³⁵

Memoranda of Understanding (MoU) under the CMS

Like agreements for Appendix II species, parties to the CMS may outline specific measures necessary for the protection of migratory species through the adoption of memoranda of understanding (MoU). MoU are not legally binding; instead they guide States on how to implement the general obligations of

25 “Highly Migratory Fish Stocks” are listed in Annex I of UNCLOS.

26 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995; 2167 UNTS 3.

27 *Ibid.*, Art. 4.

28 *Ibid.*, Art. 5(c); Application of the precautionary approach is laid out in UNFSA Art. 6 and Annex II; See Rio Declaration on Environment and Development, 31 ILM 874. Concluded 13 June 1992, Principle 15.

29 UNFSA (n 17), Arts. 5(d–e).

30 *Ibid.*, Art. 5 (g).

31 *Ibid.*, Art. I(a).

32 See Convention on the Conservation of Migratory Species of Wild Animals, <<https://www.cms.int/en/country/united-kingdom>> accessed 4 May 2021.

33 *Ibid.*, Art. III (1).

34 *Ibid.*, Art. IV (3).

35 CMS COP Resolution 6.2 (1999).

the CMS in the context of specific species. For example, the Memorandum of Understanding on the Conservation of Migratory Sharks³⁶ has 48 parties, including the UK and EU, and lists 29 species of shark and ray in its Annex.³⁷ The MoU aims to achieve a favourable conservation status for migratory sharks based on the best available scientific information, accounting for the socio-economic value of species. The MoU outlines a Conservation Plan to improve understanding of migratory sharks, ensure fisheries for sharks are sustainable, protect critical shark habitat and migratory corridors, and enhance national, regional and international cooperation.³⁸

Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS)

ASCOBANS is an agreement to conserve all small cetaceans found in the Baltic, North-East Atlantic, Irish, and North Seas, which was adopted under the auspices of CMS.³⁹ The agreement applies to toothed whales (Odonotoceti) apart from the sperm whale. The UK has been party to ASCOBANS since 1993, and “appl[ies] in all UK waters in accordance with existing statutory protection for cetacean species”.⁴⁰ Parties are obliged to adopt CMMs listed in an Annex to the Agreement⁴¹ and also obliged to work towards the development of modifications of fishing gear and practices to reduce bycatches as well as preventing marine litter from fishing gear being discarded at sea.⁴² Through their own national legislation, parties must prevent the intentional taking and killing of small cetaceans and abide by the requirement to release at once any animal covered by the agreement that is caught alive and in good health.⁴³ ASCOBANS also requires the introduction of measures to reduce and minimise bycatch of listed migratory species⁴⁴ covered by ASCOBANS, such as the harbour porpoise, which is vulnerable to bycatch and vessel collision.

36 CMS Memorandum of Understanding on the Conservation of Migratory Sharks (MoU-Sharks), Bonn, 1 March 2010. The UK became a signatory on 18 June 2012.

37 Annex I of MoU Sharks listing species is available online here: <<https://www.cms.int/en/document/amendments-annex-1-sharks-mou-species-covered-mou-and-their-ranges>> accessed 7 September 2020.

38 MoU-Sharks *ibid.*, Art. 12.

39 Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS), Bonn, 13 September 1991/1772 UNTS 217. The UK became a party to ASCOBANS on 13 July 1993.

40 Joint Nature Conservation Committee, <https://jncc.gov.uk/about-jncc/careers/technical-support-analyst-202149/?gclid=CjwKCAjwz_WGBhA1EiwAUAXlcTyPv-Hmx0jyid72qT5hwu5hzz0Ehquc7PFtK0YuwWVysut_16b45xoCfFgQAvD_BwE> accessed 5 May 2021; see ASCOBANS *ibid.*

41 ASCOBANS *ibid.*, Annex.

42 *Ibid.*, Annex (1)(b).

43 *Ibid.*, para. 4.

44 *Ibid.*, Art. 2.2.

The Convention on Biological Diversity (CBD)

The UK ratified the CBD in June 1994. Two key objectives of the CBD are the conservation and sustainable use of biological diversity.⁴⁵ The CBD's provisions apply to terrestrial and marine biodiversity within a party's national jurisdiction; and to activities or processes regardless of where their effects occur under a State's jurisdiction or control, which must not harm the environment whether within or beyond national jurisdiction.⁴⁶ States are obliged to implement CBD provisions into their national law; cooperate on matters of mutual interest directly or through a competent international organisation;⁴⁷ and to adopt measures to minimise or avoid significant adverse impacts on biodiversity.⁴⁸ Importantly, CBD parties must read the obligations under the Convention consistently with UNCLOS,⁴⁹ which informs and strengthens its provisions relating to the marine environment.⁵⁰ This can be understood as an interpretative tool for the marine environmental provisions of UNCLOS Part XII.⁵¹

The CBD promotes *in situ*⁵² conservation, Article 8 provides an exhaustive "toolkit" of measures to be applied, case by case, to achieve conservation *in situ*,⁵³ including establishing protected areas or areas requiring special measures,⁵⁴ rehabilitating degraded ecosystems⁵⁵ and adopting legislation for protection of threatened species.⁵⁶ Articles 6–20 elaborate the general principles of the CBD⁵⁷ into binding commitments.⁵⁸ Building on those, parties had adopted commitments to establish and adequately manage ecologically representative systems of MPAs and other effective area-based conservation measures (OECMs) by 2020.⁵⁹ The UK has declared 372 MPAs or OECMs with varying levels of protection.⁶⁰ Moving forward beyond 2020, at the time of writing, the first draft of the Post-2020 Global Biodiversity Framework proposes to

45 CBD (n 19), Art. 1.

46 *Ibid.*, Arts. 3 and 4.

47 *Ibid.*, Art. 5.

48 *Ibid.*, Art. 10(b).

49 *Ibid.*, Art. 22.

50 *South China Sea Arbitration* (n 22), para. 908.

51 A Boyle and C Chinkin, *The Making of International Law* (Oxford: OUP, 2007), at 256–257.

52 CBD (n 19), Art. 2.

53 *Ibid.*, Art. 8.

54 *Ibid.*, Art. 8(a).

55 *Ibid.*, Art. 8(f).

56 *Ibid.*, Art. 8(k).

57 *Ibid.*, Art. 1.

58 P Birnie, A Boyle and C Redgwell, *International Law and the Environment* 3rd Ed. (Oxford: OUP, 2009), at 639 at 616.

59 CBD Decision X/2, *Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets* (2010) Aichi Biodiversity Target 11.

60 Joint Nature Conservation Committee, 'UK Marine Protected Area Network', <<https://jncc.gov.uk/our-work/uk-marine-protected-area-network-statistics/>> accessed 7 May 2021.

increase protection to 30% with at least 10% of protected areas under strict protection.⁶¹ Obligations relating to conservation and sustainable use of biological diversity apply to fisheries. For example, CBD parties are encouraged to review their national environmental laws and relevant legislation and consider appropriate institutional mechanisms relevant to integrated marine and coastal management.⁶² CBD parties have also indicated the necessity for further implementation and improvement of Ecosystem Approach to Fisheries.⁶³ In addition, CBD parties (including the UK) have committed to achieving Aichi Target 6, which outlines that by 2020 all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably and legally, applying ecosystem-based approaches, avoiding overfishing, with recovery plans for species which need them, and that fisheries have no significant adverse impacts on stocks, species and ecosystems are.⁶⁴ Clearly, the target for this has passed, and replacement targets have not yet been agreed at the time of writing. However, the UK reported despite the fact it had made insufficient progress overall, it had “made significant progress in introducing sustainable fisheries measures ... UK stocks are now showing signs of recovery following their historic over-exploitation”.⁶⁵

FAO Code of Conduct for Responsible Fisheries

There are several instruments related to fisheries adopted under the auspices of the FAO. For reasons of space, this section will only outline the Code of Conduct for Responsible Fisheries (the Code) and instruments adopted in its implementation. Instruments adopted to promote compliance with CMMs or prevent, deter, and eliminate IUU fishing, are not covered here for reasons of space.⁶⁶

Adopted in 1995 by FAO, the Code provides an international and national framework in the sustainable exploitation of aquatic living resources, while protecting the aquatic environment. The Code promotes sustainable use of fishery resources while protecting the aquatic environment and its biodiversity.

61 CBD, *First Draft of the Post-2020 Global Biodiversity Framework*, 6 January 2002 CBD/WG2020/2/3, <<https://www.cbd.int/conferences/post2020/wg2020-03/documents>> accessed 20 July 2021.

62 CBD Decision VIII/22, *Marine and Coastal Biological Diversity: Enhancing the Implementation of integrated Marine and Coastal Area Management* (2006).

63 CBD Decision X/2; CBD Decision XI/18, *Marine and Coastal Biological Diversity: Sustainable fisheries and addressing adverse impacts of human activities, voluntary guidelines for environmental assessment, and marine spatial planning* (2012), para. 2; see also: Decision XIII/2, *Progress towards the achievement of Aichi Biodiversity Targets 11 and 12* (2016).

64 CBD Decision X/2 *ibid*.

65 JNCC, *Sixth National Report to the United Nations Convention on Biological Diversity: United Kingdom of Great Britain and Northern Ireland. Overview of the UK Assessments of Progress for the Aichi Targets* (JNCC, Peterborough 2019), at 4.

66 On illegal fisheries and enforcement, see Chapter 6.

The Code is not legally binding, but is in part “based on relevant rules of international law”, and as such may be used to interpret other instruments related to fisheries.⁶⁷ Three key points on the Code are: i) Its application is not limited to the EEZ and the high seas, but also applies to internal waters, territorial seas and archipelagic waters; ii) Unlike the UNFSA, the guidance offered is not limited to aspects of conservation and management but also covers fisheries development, marketing, trade, energy use, food hygiene and quality, a safe working environment, marine pollution and integrated coastal zone management; iii) The Code is directed at States as well as persons, financial institutions and vessel-owners and charterers. States are also encouraged to prevent excess fishing capacity, adjusting capacity accordingly to avoid overcatch.⁶⁸

Article 2(d) of the Code of Conduct promotes the development of international agreements in furtherance of the Code’s objectives. So far, this has led to non-legally binding International Plans of Action (IPOAs) on Sharks, IUU fishing, management of fishing capacity, and seabirds. The FAO Fisheries Department has developed various technical guidelines for responsible fisheries in support of the implementation of the Code of Conduct. These instruments and technical guidelines assist governments, industry and fisheries in taking the necessary steps to implement the various obligations in the Code, for example, the International Guidelines on Bycatch Management and Reduction of Discards (Bycatch Guidelines).⁶⁹ While these are not binding on the UK *per se*, they are considered generally agreed international rules and standards that inform obligations under UNCLOS, to which the UK is bound to abide by.

Conclusion

The purpose of this chapter was to outline the international legal obligations and options for the conservation and management of fish stocks, and the protection and preservation of the marine environment after Brexit. Despite leaving the EU and the CFP, the UK is still bound by a framework of international environmental obligations, which will shape any future fisheries legislation or policy relating to the conservation and sustainable use of the marine environment. This is primarily because the UK was a party to the treaties discussed in this chapter as category 2 or 3, and, as mentioned in the introduction, the UK Government’s position is to maintain and uphold its international obligations with respect to the environment. With an aim to outline these obligations and examples of best practice, this chapter first outlined obligations under UNCLOS, the UNFSA and the CBD, among others, and then outlined key principles applicable to the UK in its fisheries management post-Brexit. Indeed,

67 FAO Code of Conduct for Responsible Fisheries (The Code), <<http://www.fao.org/docrep/005/v9878e/v9878e00.htm>> accessed 6 May 2021, Art. 1.1.

68 *Ibid.*, Arts. 6.3 and 7.1.

69 International Guidelines on Bycatch Management and Reduction of Discards (Bycatch Guidelines) (2010), <<http://www.fao.org/docrep/015/ba0022t/ba0022t00.pdf>> accessed 7 May 2021, paras. 9.1–4

since international law can exert influence over domestic legal systems, in particular the interpretation and development of national law, we see this demonstrated through the inclusion of some, but not all, key fisheries governance elements in the Fisheries Act 2020, as discussed in Chapter 5.