

9 A Synoptic Overview of Expert Opinion on Fisheries in a Post-Brexit World¹

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Why is (Almost) Everybody Complaining?²

Complaints emanate from two sides. On the UK side, the small-scale fleets are complaining as the Brexit bonus has not arrived and their main market, i.e., the EU, has become difficult to export to. The UK white fish fleets (cod, haddock, etc.) are complaining as their quota situation has deteriorated significantly when compared to the pre-Brexit period. Markedly, the UK fleet lost the extra quota that came with The Hague Preferences (part of the relative stability linked to the CFP) and with the quota swaps with the fishing industry with respect to the continent. Until now these quota exchanges have not been possible. In addition, the processing and export industry all over the UK are struggling with the fact that the UK Government chose to leave the Single Market and the Customs Union, which makes it difficult to comply with the rather complicated red tape that comes with being a third country that wants to export to the EU single market. It is worth giving particular mention to the British bivalve sector (mussels), which because of the sudden impossibility to export to the EU, is currently imploding. On top of these issues there are strong signals that the UK's independent new fisheries policy might be greener than many fishermen had anticipated.

Complaints have been raised throughout the EU fisheries and seafood industry; the pelagic sector because of the loss of mackerel and herring, the Irish fleets because of the loss of access in the Irish Sea and in the waters off

1 Based on the outcome of the Workshop titled 'Legal Challenges Faced by Coastal and Fishing Communities, Brexit and the New British Fisheries Policy' jointly organised by the City Law School, the International Law and Affairs Group, the Institute for the Study of European Law, the London Universities Maritime Law and Policy Research Group and the World Maritime University.

2 This section takes from the keynote address delivered by Gerard van Balsfoort (European Union Fisheries Alliance/EUFA, Européche) during the workshop under the same title.

West Scotland, and the Danish industrial fleet for the loss of Norway pout and sand-eel. The UK has indicated that they would like to phase out the sand-eel fishery, conducted almost entirely by Danish vessels in UK waters.

At this point, it is difficult to project whether the situation will improve. This realisation of interdependency on all these levels has been translated in the position that the EU has taken during the Brexit negotiations. From the Political Declaration that gave guidance to the negotiations on the future relationship and in all subsequent negotiation mandates for Michel Barnier formulated by the Council, the linkage of the wider trade agreement to the fisheries dossier has always been a central element. And this linkage has also found its way into the Fish Chapter of the Trade and Cooperation Agreement (TCA).³ And this linkage will also emerge in 2025 or 2026 when discussions revolving around reciprocal, bilateral access arrangements for the years after 2026, as agreed in the TCA, will take place.

The EU fishing industry is aware that the EU Single Market is the largest seafood importing market in the world. To this end, the EU has been able to connect this huge EU market to the bilateral fisheries negotiations with the UK in the Brexit deal. The EU plans on utilising the “market attractiveness” negotiating fisheries agreements with the coastal States in the Northeast Atlantic to remind us that mutual interdependency continues to exist and that constructive attitude by all coastal States is very much needed.

At this stage, it is too early to determine how the post-Brexit era will develop. The UK as the new coastal State could be struggling to find its place. That being said, it is necessary to become a constructive coastal State and support collaborative approaches in the pursuit of effective management of our many shared fish stocks. It is opined that it may take time before the UK will be a stable force in the Northeast Atlantic part of the seas. From the EU standpoint, it is important to maintain the positive force as it was observed during pre-Brexit times. It is therefore important to remind all neighbouring coastal States that access to the EU single market comes at a price. And that price is being collaborative and constructive – also for the needs of the EU fishermen.

Jersey and Fisheries⁴

On the day of local elections in part of the UK on 6 May 2021, the UK sent gunboats to the waters around Jersey. Why this show of force, and is it compatible with the trade remedies’ provisions in the TCA?

Article 502 TCA contains “specific access arrangements: relating to Jersey, Guernsey and the Isle of Man”. Post-Brexit, it is possible for the French

3 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, OJ L 444, 31 December 2020 (TCA), pp. 14–1462.

4 This section takes from the speech delivered by Catherine Barnard (University of Cambridge) in session 1 of the workshop.

fishermen to fish in the waters of the Channel Islands. The dispute in May concerned licences granted by the Jersey authorities. Based on historic fishing patterns, Jersey granted licences to 41 larger vessels but not to 17 smaller vessels that did not have the necessary satellite tracking equipment.

Faced with an escalating situation in these contested waters, the European Commission held a video conference and said that the (general) dispute resolution mechanism under Part Six of the TCA should be applied. This has a three-stage process: (1) political consultation, which, if unsuccessful, is followed by (2) an arbitration tribunal. If the tribunal finds in favour of the claimant, the losing party is obliged to pay compensation. Refusal to pay compensation means that the losing party may be subject to tariffs.

In addition to the general dispute resolution mechanism (DRMs) there are separate and specific DRMs for fisheries:

- Article 501 TCA concerns disputes over “access to waters”. Unlike the general DRM, if the political consultations fail the complaining party can go straight for remedies (compensatory measures and suspension of access and preferential tariffs for fish) and only then can the matter be considered by the Arbitration Tribunal.
- Article 506(1) TCA deals with any breach of the heading on fisheries. Here again the model, more or less, follows the model under Article 501 where the remedy is applied before the matter is considered by the Arbitration Tribunal. The remedies range from suspension of access to waters and suspension of preferential tariffs on fish to suspension of preferential tariffs in respect of other goods, to suspension of all obligations under Heading One of the TCA (trade) which automatically triggers suspension under Heading Three (road transport).

Finally, there is an express remedial provision in respect of a breach of Article 502 on the Channel Islands and the Isle of Man. Article 506(2) broadly maps the dispute resolution under Article 506(1), but in terms of what can be done the first mechanism is suspending access to the relevant waters around the Channel Islands and Isle of Man.

It is unclear how the general DRM relates to the specific DRMs. Generally, the law favours specific remedies over general mechanisms but it is early days and none of this has been tested.

Rockall: Northwest Moderate Becoming Rough⁵

Perhaps due to the United Kingdom’s history as a maritime power, its fishing industry has a political importance that significantly transcends its economic weight. Something similar occurs with Rockall, a small and remote sea rock

⁵ This section takes from the speech delivered by Mercedes Rosello (Leeds Beckett University) in session 1 of the workshop.

that has emblematic significance as a site of UK sovereignty, as well as being valued for its fish. Indeed, although friction over Rockall involves a variety of interests, at least one international dispute gravitates around access to fisheries: the Republic of Ireland disputes UK sovereignty over Rockall, and claims freedom of access for its fishermen.

The UK exercises *de facto* sovereignty over Rockall, and its position also appears valid *de jure*.⁶ Sovereignty over an islet has consequences at sea: according to the United Nations Convention on the Law of the Sea (UNCLOS),⁷ islets like Rockall attract a 12 nautical mile (nm) territorial sea, in which the coastal States with corresponding sovereignty can exercise full prescriptive and enforcement jurisdiction.

When UK fish stocks were managed under the Common Fisheries Policy (CFP) of the European Union (EU), they were subject to the equal access and relative stability principles, and pooled with those of other Member States. EU Regulation 1380/2013 permits coastal States to apply restrictions within the 12 nm area, and in some cases beyond it, until 2022. Yet, under Article 5(2) of the Regulation, EU vessels that had traditionally fished in the 12 nm area from ports in adjacent coasts could continue to have access. Irish vessels that had traditionally operated in Rockall had thus continued to fish there undisturbed whilst the UK was a Member State of the EU.

Following Brexit the CFP has been replaced by the UNCLOS framework and the 2020 EU–UK Trade and Cooperation Agreement. Under the UNCLOS, coastal State sovereignty in the territorial sea has very few caveats, and unlike in the EEZ the coastal State has here no obligation to share surplus stock.⁸ The TCA permits some EU vessels that meet certain criteria to continue to have access in some areas. Specifically, Article 500(c) of the TCA sets out parameters for access to waters between 6 and 12 nm in the areas comprised by ICES regions IVc and VIIId–g, none of which concern Rockall. Accordingly, access to fisheries in the Rockall 12 nm area can now only take place with agreement from the UK, as coastal State with sovereignty over the islet.

Rockall is home to valuable fish stocks, which are not only of interest to UK fishing vessels, but also to others, including Russian, Icelandic, Irish and wider EU fleets. In any context in which economically attractive stock may be vulnerable to being captured in furtive or otherwise illicit ways, the risk of illegal, unreported and unregulated (IUU) fishing needs to be considered. In fully

6 See R Collins, ‘Sovereignty has “Rock-all” to do with it ... or has it? What’s at stake in the recent diplomatic spat between Scotland and Ireland?’ 2019, <<https://www.ejiltalk.org/sovereignty-has-rock-all-to-do-with-it-or-has-it-whats-at-stake-in-the-recent-diplomatic-spat-between-scotland-and-ireland/>> accessed 1 June 2021; J Harrison, ‘Unpacking the Legal Disputes over Rockall’, 2019, <<https://spice-spotlight.scot/2019/06/18/guest-blog-unpacking-the-legal-disputes-over-rockall/>> accessed 2 June 2021.

7 United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, 1833 UNTS 3.

8 UNCLOS *ibid.*, Article 62(1).

regulated areas such as the territorial sea of the UK, however, only a potential designation of *illegal fishing* is relevant.

In summary,⁹ fishing within the UK's territorial sea around Rockall can only be carried out upon authorisation granted by the competent fisheries authorities in the UK. Any fishing activity carried out without a valid licence would constitute illegal fishing. If access is granted, all licence conditions must be observed, otherwise illegal fishing will also occur. Should any non-UK vessels be granted access, their flag States will need to cooperate with the UK in ensuring compliance with licence conditions and the applicable legal framework. They should also undertake timely investigation and appropriate information sharing in the event of a suspected infraction.

Brexit as an Opportunity to Assist in Sustainability in the Fisheries Sector: Engaging Coastal Communities on a Bottom-Up Approach¹⁰

Commercial fisheries, either as industrial or artisanal, are activities that provide welfare to the society, but these activities would not be carried out if they were not profitable. In the UK, the regional structures for fisheries have allowed its development as economic and social motors at local level. However, the impact of fisheries in the UK's Gross Domestic Product (GDP) is limited. This means that in any negotiation process dealing with larger economic drivers to reach a satisfactory trade agreement, fishing would run the risk of being used as a bargaining chip or left to the end of the process, as it happened during the Agreement between the EU and the UK.

However, the possibility of real control of the Exclusive Economic Zones (EEZs) and the waters under jurisdiction as an extension of the country combined with historic "fish wars" provide a different impression. The events of May 2021 in the waters under the jurisdiction of Jersey are examples of how fishermen will grapple for resources. This has the potential of occurring again at local levels, until there are clear mechanisms to understand how quotas are going to be established and sea fishing licences granted to foreign fishing vessels. In addition, the exploration and exploitation of renewable energy resources in British waters, i.e., in the already harmed Dogger Bank, may have an impact in catches and local communities. Finally, the negotiations between the UK and the EU after the five-year period may lead to some unknown consequences that will allow the UK to choose between adding more quota to British fishing vessels or protecting the stocks, providing an excellent

9 Save for exceptional cases involving possible traditional fishing rights. However, the academic literature is pessimistic about the viability of such rights. See, in particular, V Schatz, 'Access to Fisheries in the United Kingdom's Territorial Sea after Its Withdrawal from the European Union: A European and International Law Perspective' (2019) 9(3) *Goettingen Journal of International Law* 457–500.

10 This section takes from the speech delivered by Miguel Núñez Sánchez (Spanish Ministry of Transport, Mobility and Urban Agenda) in session 1 of the workshop.

opportunity to restore the maximum sustainable yields. Notwithstanding the mere fact that this also provides the UK with the possibility to fully rule their waters, it offers an excellent opportunity to consider how these developments may affect the sustainability of the affected communities and the country.

Since the promulgation of the White Paper entitled “Sustainable fisheries for future generations” in 2018 up to the adoption of the “Fisheries Act” in 2020, there has been continuous advocacy for the use of the term sustainability. Upon examination of the Fisheries Act it is then interpreted that fisheries activities need to be conducted sustainably. The wording used in the Fisheries Act gives a higher weighting to the environmental and ecologic pillar of sustainability, referring to the fact that fisheries is a key activity providing nutrition to humankind, bearing in mind that sustainability needs to be provided in different dimensions.¹¹ The Fisheries Management Plans in their power to depart from proposals in the Joint Fisheries Statement need to consider circumstances that are capable of being relevant and include changes relating to available evidence concerning social, economic or environmental elements of sustainable development. The question would then be how to measure or consider these changes affecting sustainability into the sovereign waters of the UK and in fisheries, and whether this can be extrapolated to enhance the role of the UK at international fora.

Firstly, fishing out of UK waters on board British flagged ships needs to be sustainable, complying with both UK legislation and the requirements by the nation that granted the fishing licences. Since the UK is a developed nation, these fishing vessels should be a paragon, because if these activities are not carried out in a sustainable manner it may result in poverty or imbalance to the coastal states. This is one of the potential consequences of industrial fisheries, carried out in EEZs when the means to control of the activity are not coordinated.¹²

Secondly, fisheries in UK waters need to be sustainable, when carried out by UK-flagged or foreign-flagged fishing vessels. In this regard, the sea fishing licences granted by the UK should also take into consideration how the flag States intend to implement sustainability. At UK level there is a duty to protect local fishermen and their communities, because if fish stocks go down, partly due to the activity of large commercial fishing vessels, local fishermen dedicated to artisanal fisheries will have to consider other alternatives that might result in a lower income and higher risks.

11 M Nunez, L Perez-Rojas, L Sciberras and E Silva, ‘Grounds for a safety level approach in the development of long-lasting regulations based on costs to reduce fatalities for sustaining industrial fishing vessel fleets’ 113 (2020) *Marine Policy* 10386, <<https://doi.org/10.1016/j.marpol.2019.103806>>.

12 D J McCauley, C Jablonicky, E H Allison, C D Golden, F H Joyce and D Kroosma, ‘Wealthy countries dominate industrial fisheries’ 4 (2018) 8 *Science Advances*, eaa2161. DOI: 10.1126/sciadv.aau2161.

All of the above implies the need to provide measurable sustainability in the economic, societal and environmental dimensions and working through cooperative approaches to guarantee the future of the sector. At the national level there will be new opportunities when the devolved quotas may be redistributed in the UK and help boost local economies. At the international level the UK can enhance its role at UN agencies dealing with fisheries activities, such as the Food and Agriculture Organization (FAO), the International Labour Organization (ILO) and the International Maritime Organization (IMO), whose missions are related to food, health and working conditions, safety and marine environmental pollution prevention, respectively, where the European Commission has been claiming exclusive competence, assisting in the development of a framework to contribute towards the Sustainable Development Goals of 2030 (SDGs).

In terms of drawback, the UK Fisheries Governance regime may find it difficult to frame detailed policy at the national level due to the particular emphasis on biological and ecosystems indicators that might not address the essential issue of managing fisheries in all dimensions. The UK Administrations need to strike the right balance with a high coordination effort since the risk of devolving powers to different administrations may lead to different interpretations of sustainability in Scotland, Wales or Northern Ireland.

In the UK, the responsibilities pertaining to the sector are spread across a number of ministries, e.g., safety under the Maritime and Coastguard Agency (MCA), Department for Transport. This helps avoid paternalistic approaches, which may occur when responsibility falls under one Ministry of Fisheries. As an example, the White Paper mentions the need to consider fishermen's safety, and the exemplary tasks carried out by the MCA and the Marine Accident Investigation Branch (MABI) have been outstanding for the last 30 years. Their role will be now equally important; however, it seems that the financial assistance to achieve a good management in all dimensions will be shared among administrations at national or regional level. In this regard, if the focus is mainly on fisheries, the social aspects of the industry have the potential of being overlooked. Once this point is reached, silos are created and the possibility to develop a very much needed capacity becomes more difficult. It would also affect the way to integrate sustainability in the overall picture of ocean governance from the coastal communities to the limit of the EEZs.

In the implementation of a holistic approach, which includes the Fisheries Act of 2020 as a main element, considering the special focus needed on coastal fishing communities, and the administrations' needs, a bottom-up approach using performance indicators would allow measuring the level of sustainability within UK waters. This enables the UK to take into account the above-mentioned challenges in a harmonised manner, avoiding silos as much as possible and being able to measure sustainability at national level. As an example of how this could be achieved, one could turn to the readily available indicators such as the Fish Performance Indicators (FPIs) developed by Anderson et al., which are

used by the World Bank in relation to different communities both in developed and developing countries.¹³ This approach helps to evaluate how management approaches interact with resource, community and market conditions not only to assure stock health, but also to create economic and community benefits, considering also the environment. This approach could also be used by the UK to assist FAO, ILO and the IMO in measuring sustainability at international fora.

The FPIs stress that data availability is a problem and needs to be substituted with qualitative analysis carried out by suitable experts. To serve its purpose the qualitative analysis could be converted into quantitative indicators by the UK at a later stage. The FPIs are divided into enabling factors, which act as inputs, and assess the country to determine output indicators as a result of the evaluation of the community, with a total of 68 indicators using a scale of 1 to 5. These indicators offer a sound assessment instrument for measuring the fishery-derived benefits created not only in the fish stock in the water, but also in the harvest and post-harvest sectors and fishing communities in accordance with the World Bank's emphasis on the triple bottom line and the importance of an integrated ecosystem management approach that can be used to measure the achievement of the respective goals under the United Nations 2030 Agenda for Sustainable Development Goals (SDG 2030).

Figure 9.1 was developed in relation to the implementation of national requirements and FAO/ILO/IMO conventions, which are also connected with the SDG 2030 after a suitable analysis of all Inter Agency Expert Group on SDGs (IAEG-SDGs) Tier I, II and III indicators. In addition to the above outputs, there was a need to consider the suitable inputs or enablers. In this regard, Figure 9.2 was developed as a simplification of the PFIs for the purpose of this chapter.

The inputs or enablers are primarily related to the countries themselves and also allow for the translation into indicators for a top-bottom approach. The concepts of spatial management, level of chronic pollution and governance quality together with the GDP allow for a better connection to SDGs, such as SDG 17 (partnership for the goals), which could measure the collaboration between the UK and the devolved authorities.

Bearing in mind the above, the sustainability of the UK fisheries sector could be established integrating the local communities around the country. The process would need to be iterative so that the inputs representing the performance of a country in terms of sustainability reflect the status of the individual communities.

13 J L Anderson et al., 'The Fishery Performance Indicators: A Management Tool for Triple Bottom Line Outcomes' (2015A), PLOS, <<https://doi.org/10.1371/journal.pone.0122809>> accessed 12 December 2019; see also J L Anderson et al., 'Economic, environmental and social evaluation of Africa's small fisheries' (2015B), World Bank, wbGROUP report N 955557-glb.

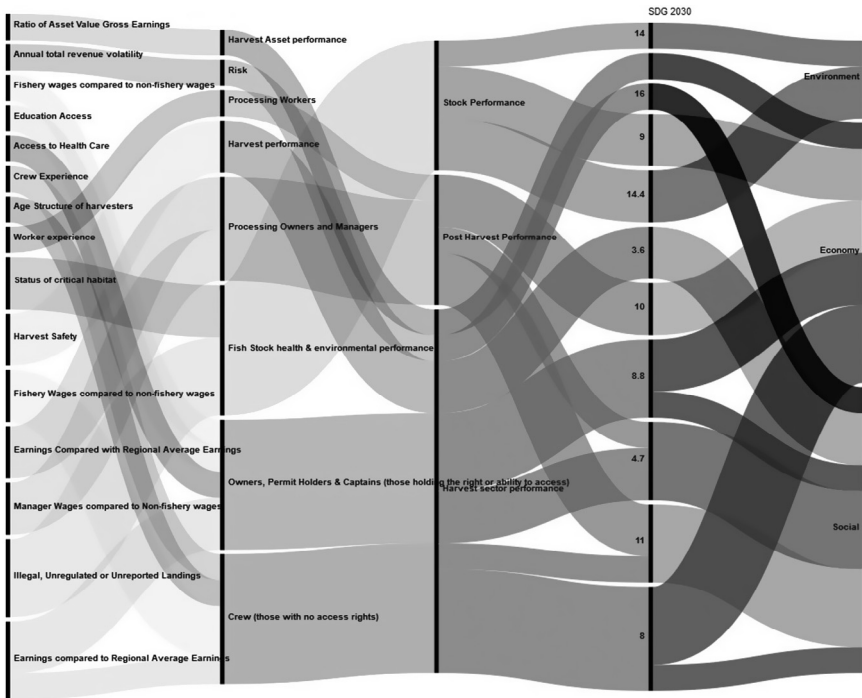


Figure 9.1 Output indicators with alluvial flow towards SDG 2030.
 Source: Copyright Miguel Núñez Sánchez

Once these metrics for the high seas sustainability have been selected, there are some inputs for consideration that will catalyse conditions to incentivise socio-ecologically sustainable fisheries. In this regard the effort from the UK should be focused in the achievement of high markings of these indicators, and this needs to be done through careful coordination without creating an unnecessary burden on UK fishermen. Finally, the UK may promote its achieved sustainability in fisheries and be consistent with the Fisheries Act.

Options for Change Post-Brexit: Where Next?¹⁴

The UK has a number of key objectives for fisheries post-Brexit. However, although change is possible, we need to be realistic and honest about the extent of changes. Much will depend upon goodwill and the ability to compromise in light of the wider fishing and trade interests at stake, as the challenges of negotiating Brexit and the first rounds of annual fisheries negotiations post-Brexit have shown. In the second part of this contribution, the author outlines

14 This section takes from the speech delivered by Richard Barnes (University of Lincoln, University of Tromsø) in session 1 of the workshop.

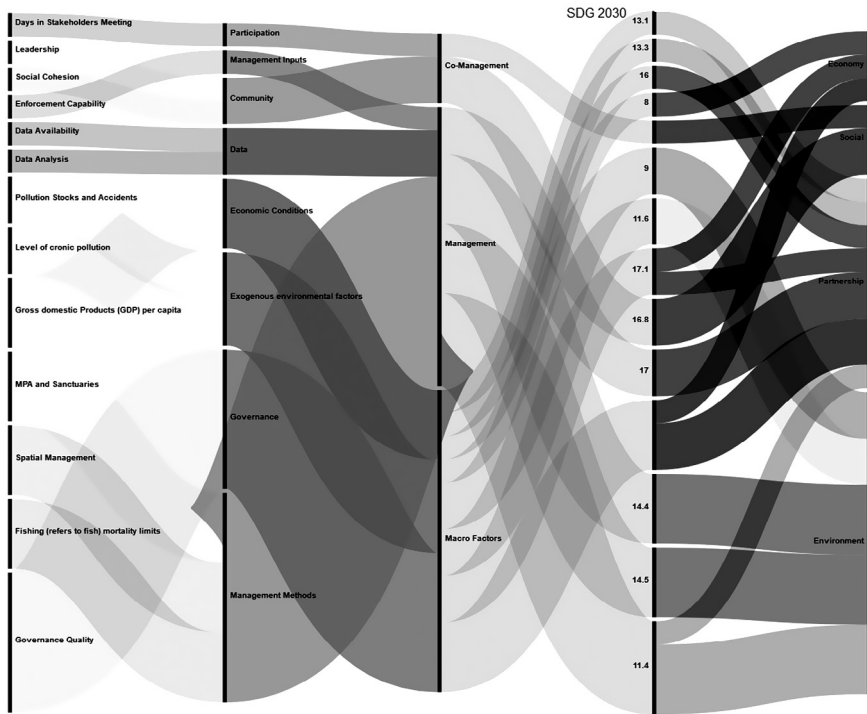


Figure 9.2 Input indicators (enablers) with alluvial flow towards SDG 2030.
 Source: Copyright Miguel Núñez Sánchez

some key lessons from Brexit and fisheries negotiations to show how key structural factors continue in fisheries management. In the third part, the author examines the avenues and barriers for change, focusing specifically on key elements of the TCA and the Fisheries Act 2020.

Future Fisheries Goals

There is no single statement of UK fisheries’ overarching goals post-Brexit, but key goals can be derived from a range of instruments and commitments revealed in policy and regulatory fora.¹⁵ These include, first and foremost, a fisheries management regime that is both sustainable and responsive to the local needs of UK fishing interests; in other words, improving the quality of the

15 See, for example, Defra, Sustainable fisheries for future generation (July 2018, Cm 9660); House of Lords European Union Committee, Beyond Brexit: Food, environment, energy, and health. 22nd Report of Session 2019–21 (23 March 2021, HL Paper 247); APPG on Fisheries, ‘The Brexit Deal: How it affects fisheries’, 7 January 2021, <<https://www.fisheriesappg.org/blog/2021/1/7/the-brex-it-deal-how-it-affects-fisheries>> accessed 7 January 2021.

resource base and making better use of it. This also includes reducing the environmental and carbon footprint of the catch and seafood trade sectors, and improving food security across the fisheries sector. If nothing else, Brexit failed to deliver on quota and hamper market access, so addressing these failings will be critical to support the British finishing industry. This means increasing quota, including regular access to quota in third State waters, e.g., Norway.¹⁶ Alongside this is the acute need to alleviate or mitigate barriers to seafood export.¹⁷ Finally, some stability is required. It is only reasonable that a regulatory regime provides a stable environment within which to conduct fishing and trade. Fishermen and exporters need to plan and invest. Without having a reasonably clear sense of what regulatory demands or barriers may be placed upon them, this will be impossible.

In summary, the objectives of regulatory autonomy, a better resource base, more quota, easy access to markets and stability are ongoing goals. These are much the same as before Brexit.

Recent Lessons

The general consensus is that Brexit failed to deliver the expected fisheries windfall that was promised prior to Brexit, and maintained as an objective through the negotiations.¹⁸ The expected windfall gains of taking back control fell short of what the industry expected in terms of increased quotas.¹⁹ In addition to this, the export of fish to the EU is now slower and more difficult. For some seafood, e.g., live bivalve molluscs, this has been seriously curtailed.²⁰

I suggest that there are four important lessons to be taken from the deal, and these should be borne in mind when we think about how best to achieve the ambitions that we have for the future management of fisheries in the UK. First, we need to be realistic. This deal seems poor because of the unrealistic expectations generated by politicians and a refusal to acknowledge the wider trade-

16 Notably, the UK and Norway failed to reach agreement on access and quota for 2021: See Defra in the Media, <<https://deframedia.blog.gov.uk/2021/04/30/fisheries-negotiations-with-norway-concluded/>> accessed 6 June 2021; see Environment, Food and Rural Affairs Committee, *Seafood and Meat Exports to the EU*, Eighth Report of the Session 2019–21 (29 April 2021, HC 1189).

17 See Environment, Food and Rural Affairs Committee, *Seafood and Meat Exports to the EU* *ibid.*

18 R Barnes, G Carpenter, B Stewart, S Walmsley and C Williams, ‘The Brexit deal and fisheries – has reality attached the rhetoric?’ unpublished manuscript on file with author.

19 See, e.g., SFF, ‘Brexit deal falls far short of commitments and promises’, 29 December 2020, <<https://www.sff.co.uk/brexit-deal-falls-far-short-of-commitments-and-promises/>> accessed 6 June 2021; NFFO, ‘A letter to the prime Minister, Boris Johnson’ 15 January 2021, <<https://www.nffo.org.uk/a-letter-to-the-prime-minister-boris-johnson/>> accessed 6 June 2021.

20 See Environment, Food and Rural Affairs Committee, *Seafood and Meat Exports to the EU* (n 17).

offs that would be needed to secure a trade deal. There was much rhetoric about the sea of opportunity, and potential gains of hundreds of thousands of tonnes of fish. However, the reality is quite different. I am currently working on a paper that shows that the overall change in quota is much lower than initially expected when you look at predicted landed weight and value – i.e., fish that are actually caught and not just quota on paper.²¹ Whilst the headline figure remains a return of 25% of quota from the EU share enjoyed under the CFP, the reality is around 14% and 10% gain, respectively.

Second, although the UK sought to achieve the status of “independent coastal state”, with the theoretical power to management exclusively its fisheries, this ambition was both a political and legal mirage.²² The UK has always been an independent coastal State – but through political choice decided to manage this by way of cooperation under the CFP as part of the deal to be a member of the EU. It remains the case that most stocks in UK waters are shared, and so there was always going to be some degree of shared management or shared decision-making over access and quotas.²³ This is both a practical reality and a legal requirement – with duties to cooperate under the UNCLOS²⁴ and the United Nations Fish Stocks Agreement 1995,²⁵ and reinforced through regional fisheries agreements – including those entrenched in the Trade and Cooperation Agreement 2021.²⁶

Third, fisheries cannot be separated from wider trade relationships. The UK sought to detach fisheries from trade, but the asymmetrical nature of the negotiations, and the overarching importance of securing some kind of trade deal meant that fisheries would always form part of a wider package deal. Indeed, it is arguable that fisheries are more firmly wedded to trade measures now than they were under the CFP, since it is explicitly linked to trade measures in the TCA. Here unilateral changes to agree access/quota measures, or a general failure to comply with the TCA provisions on fisheries, may result in a range of retaliatory trade measures.²⁷

Finally, it has become all too clear that negotiating change in fisheries is a difficult and time-consuming process. Agreement on the detail of fisheries was only reached at the last minute.²⁸ And post-Brexit agreements on TAC/quotas

21 R Barnes, G Carpenter, B Stewart, S Walmsley and C Williams (n 18).

22 See *The UK in a Changing Europe, Fisheries and Brexit* (June 2020), <<https://ukandeu.ac.uk/wp-content/uploads/2020/06/Fisheries-and-Brexit.pdf>> accessed 6 June 2021.

23 *Ibid.*

24 UNCLOS (n 7).

25 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, adopted 4 August 1995, in force 11 December 2001, 2167 UNTS 3.

26 TCA (n 3), Heading Five: Fisheries.

27 TCA *ibid.*, Arts. 501 and 506.

28 N Morris, ‘Brexit deal was delayed by last minute blunder over fishing quotas’, *iNews*, 25 December 2020, <<https://inews.co.uk/news/brexit/trade-deal-delayed-last-minute-blunder-fishing-quotas-808459>> accessed 7 June 2021.

between the UK and EU have taken five months to determine.²⁹ And the UK/Norway failed to agree any TACs and quotas for 2021. Although this may become easier over time and as new compromises are reached, there will be continuing challenges presented in efforts to change the status quo. Framework agreements are easy.³⁰ However, agreeing the detail on specific catch levels and quota is far more challenging.

In summary, this points towards the importance of the following principles when moving forward: cooperation, a holistic approach and the need for compromise and realism.

Avenues and Barriers to Change

Options for the development of fisheries management exists under the Fisheries Act, the Trade and Cooperation Agreement and other agreements. However, any such change within an individual legal arrangement must be sensitive to constraints that exist within related arrangements. For example, whilst wide powers to manage fisheries exist under the Fisheries Act, these must be consistent with UK's international commitments under the TCA, and measures adopted by the Specialised Committee on Fisheries. In short, we cannot ignore the interconnectedness of issues and legal regimes.

Given the general dissatisfaction with the fisheries settlement, there are four areas where one might expect pressure for change: access, quotas, flagging and new technical regulations.

First, access to waters. Although the Fisheries Act restricts the access of foreign fishing vessels to UK fishery limits, access is permitted when vessels are licensed or access is permitted under an international agreement.³¹ Although the power of exclusion exists, this is restricted by the TCA, which establishes rights of access into UK waters for EU vessels.³² Access to waters is contingent upon the outcome of annual negotiations and generally follows from the agreed distribution of fishing opportunities. However, such negotiations should normally result in access to EEZ to catch fish in accordance with the share of stocks set out in the TCA, which is now locked in. For non-quota species access continues to be in line with the level of catch during a reference period 2012–2016, and for waters between 6–12 m, access is at a level that qualifying vessels enjoyed as of 31 December 2020.³³

29 NFFO, UK-EU Fisheries Agreement for 2021, 7 June 2021, <<https://www.nffo.org.uk/uk-eu-fisheries-agreement-for-2021/>> accessed 7 June 2021.

30 See R Barnes, 'Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway' 36 (2021) *International Journal of Marine and Coastal Law* 1–10.

31 Fisheries Act 2020, <<https://www.legislation.gov.uk/ukpga/2020/22/contents/enacted>> accessed 8 June 2021, ss. 12, 13 and 17.

32 TCA (n 3), Article 500, Specific access arrangements relating to the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man under Art. 502.

33 TCA (n 3), Art. 500(4).

Second, if access follows quota, then can quota be changed and so impact access? Under the Fisheries Act, there is the power to determine quota.³⁴ However, this only concerns domestic distribution of quota and the UK discretion to determine quota exclusively is again circumscribed by the TCA. It is generally understood that the TCA fixed quota shares for a five-year period, which will gradually restore around 15% of quota in UK waters to UK vessels.³⁵ At the end of this period, it is claimed that the UK can further adjust quota. However, this runs counter to the text of the TCA. The use of the term “onwards” to describe fishing quota at the end of the five-year transition period suggests that the division of quota settled in 2026 will continue as long as the TCA remains in force. It also runs counter to the wider objective of stabilising fishing and trading rights after an adjustment period. There is no provision in the TCA that supports any unilateral changing of quota beyond 2026. This is a matter to be determined in annual negotiations. If one side seeks to unilaterally determine quota at variance to existing levels, then this requires that party to notify the other party of changes to the level and conditions of access. However, this is subject to retaliatory measures.³⁶

There is nothing to prevent ad hoc exchanges of quota in the TCA. This was common practice under the CFP, where adjustments of quota were often made to accommodate variations in bycatch. In theory, this could be done in return for payments for reductions in quota or to enable quota swaps. However, there is yet no mechanism to enable this under the TCA. We will have to await the outcome of decisions by the Specialised Committee on Fisheries to see if and how this is possible. The Specialised Committee has a wide mandate to adopt conservation and management measures.³⁷

Third, there may be scope to change UK rules on the flagging of fishing vessels. The EU principle of free movement meant that EU citizens and businesses were able to register fishing vessels in the UK and take advantage of opportunities to secure UK fishing quota.³⁸ Foreign ownership of UK vessels remains permitted under the Merchant Shipping Act and Regulations. In theory, it is open for the UK to change the conditions for the registration of vessels in the UK, to restrict ownership by EU companies and persons, and exclude foreign ownership of quota.³⁹ Indeed, this has been advocated by some in the industry.⁴⁰

34 Fisheries Act 2020 (n 31), s. 23.

35 This is set out in the TCA (n 5), Annexes 35 and 36.

36 TCA (n 3), 501 and 506, described as compensatory and remedial measures, respectively.

37 TCA (n 3), Art. 508.

38 See R Churchill and D Owen, *The EC Common Fisheries Policy* (Oxford University Press, 2010), pp. 202ff.

39 See European Parliament, *Research for PECH Committee – Common Fisheries Policy and Brexit* (June 2017), <[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU\(2017\)601981_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU(2017)601981_EN.pdf)> accessed 8 June 2021.

40 See UK to toughen economic link requirement, <<https://mag.hookandnet.com/2021/04/09/2021-04flagships/content.html>> accessed 9 June 2021.

Moreover, under the TCA, the UK reserved the right to introduce new conditions that could restrict flagging of vessels to British companies or nationals, or require that the crew of a UK-flagged vessel be British nationals.⁴¹ Additionally, the UK reserves the right to limit licences granting the right to fish in UK territorial waters to UK-flagged vessels. Although this power exists, it would be surprising if the UK made any radical changes to ship registration for two reasons. First, it would run counter to the idea of global Britain and the idea that the UK wants to seek foreign investment in the UK industry. Second, and perhaps more compellingly, such changes could amount to a de facto and de jure removal of legitimately held quotas. As we have seen in the past, any such changes would likely result in legal challenge.⁴²

A final point is to note that under both the Fisheries Act and the TCA, the UK enjoys extensive powers to set management and other technical measures for fisheries in its waters. However, it is unlikely that such powers can be exercised as freely as the UK might desire. First, measures must be consistent with existing bodies of law and given that much of the CFP remains part of domestic law, future domestic fisheries law will develop under the long shadow of a EU law for a time.⁴³ In order to ensure smooth transition to any new rules, changes will be mostly evolutionary. Second, it would be impractical for the UK and EU to adopt widely divergent regulatory regimes. Indeed, as the EU Scrutiny Committee recently observed, the EU is revising its Control Regulation, and this means UK vessels fishing in EU waters will need to comply with any changes.⁴⁴ This may include remote electronic monitoring, CCTV and controls on pre-notification of landings, and it will entail costs. However, it will also give rise to practical problems if different standards apply to vessels depending upon whether they are in UK or EU waters. Third, to maintain access to EU markets, UK catch will still have to comply with EU health and safety standards. The UK is now a third country and it will have to meet the EU's robust conditions for access to its markets.⁴⁵ As such, future regulation of fisheries needs to be sensitive to wider developments in EU fisheries regulations.

Brexit represents a significant failure to deliver on over-inflated political promises. It also represents a high watermark in ignorance of the wider legal, economic and political realities that shape fisheries management. This points towards the importance of the following principles or approaches when considering change: *cooperation, holistic approaches, compromise and realism*. Whilst

41 UK reservation No 13 'Fishing and Water' TCA (n 3), at p. 1583.

42 See *United Kingdom Association of Fish Producer Organisations v. Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin).

43 This was done under the European Union (Withdrawal) Act 2018, c. 16, <<https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted>> accessed 9 June 2021.

44 House of Commons European Union Scrutiny Committee, *Second Report of Session 2021–22* (26 May 2021, HC 121-ii), part 4.

45 See House of Lords European Union Committee (n 15).

there is scope to change and improve fisheries post-Brexit, failure to accept these principles or approaches can only compound the problems Brexit delivered for the fishing industry.

Key Difficulties Facing the English Fishing Industry Post-Brexit⁴⁶

The fishing industry is prone to uncertainty and risk. Every year plans are made and investments are planned within a context where the data underlying policy decisions is often out of date or lacking. This gap increases risk and also stresses the need to mitigate those risks. Whilst a framework of stability is important, flexibility is essential.

For most people, the obvious manifestation of all this is the difficulty that is now attached to exporting to the EU. Exports are very important to the UK fishing industry since the UK largely exports what it catches and consumes what it imports. As of 1 January 2021, largely due to the lack of a Sanitary and Phytosanitary Agreement (SPS Agreement), approximately 10% has been added to the cost of exporting, which means that UK fish are less competitive and may take longer to arrive. From an extremely low point, volumes have been rising over the first quarter of the year, both because of a relaxation in Covid-19 restrictions and the gradual reopening of some hospitality operations.

Larger companies have been doing better – both because of their larger resources and because their logistics are simpler. Smaller fishermen have not done as well. They have been particularly badly hit by the Covid-19 closures, although direct sales have increased. Coping with a lot of paperwork is not their forte (and there is a shortage of agents). In addition, finding any hauler who is willing to take on groupage deliveries is problematic at the present time. While the situation may well improve – the UK is talking of digitisation of the whole customs process by October 2022, which would reduce the possibility of errors and therefore delays – the profitability of exports has been reduced, leaving the industry in a less positive position to respond to Covid-19 and other challenges.

One of the major drivers for Brexit in the fishing industry was the belief that it would lead to a greater share of fishing opportunities. The TCA, revealed on 24 December 2020, in fact, provided far less than was expected, meaning that there was less available to mitigate the market effects. In addition, for the first time, non-quota stocks were brought into the agreement. These had traditionally been seen as an escape valve for the fishing industry when fishing opportunities for pressure stocks (quota stocks) were reduced. In fact, England is now responsible for 55% of the value of total landings. The TCA introduces tonnage limits on the non-quota stocks that are fished in each other's waters. Whilst these are to be based on the period 2012–2016, the UK would prefer

46 This section takes from the speech delivered by Elizabeth Bourke (National Federation of Fishermen's Organisations) in session 2 of the workshop.

the period 2016–2019 when prices were increasing, as were volumes of exports. There are also difficulties over the evidence base since there was no obligation to report landings for the small-scale coastal fleet, and under the CFP vessels were not obliged to carry REM under 12 metres. These matters are unlikely to be resolved before 2022–2023.

For quota stocks the problems lie with the provision assigning the exchange of quota to the State level – although it is understandable why the State should wish to have control over any extra quota, but at the same time giving up quota for dubious benefit (political or otherwise) is not universally popular. In the past, as stocks moved northwards – there are calls for the realignment of management areas – fishing patterns changed and generations of fishermen changed their target fisheries and gears and vessels, and as a result, in the UK, the quota held by boats no longer matched their operations. As a result, the producer organisations (POs) organised exchanges of quota among themselves, registering them with the MMO for approval, and at times they undertook exchanges with POs in other Member States. These exchanges could take place at any time of the year, and in the case of Norway were negotiated at the time of the Annual Agreement in December so that they could take effect at once and take advantage of the seasonality of cod in Norwegian waters.

Under the TCA exchanges and transfers will only take place towards the end of the year when it becomes clear that they will not be fished: this ignores the whole problem of seasonality. It has become clear that operating this provision causes problems – both for the UK and for certain Member States. It is likely that, once it has been constituted, the issue will be delegated to the Specialised Committee on Fisheries: but it is unlikely that it will be resolved immediately, so an important flexibility has effectively been lost at least until 2022 (and possibly 2023).

The concentration at State level is an important indication of the UK's insistence on “taking back control” and regulatory autonomy as an independent coastal State – ICS.

The CFP was a major cause of dissatisfaction with the EU among UK fishermen, largely because of its inflexibility and also because it seemed to pay little attention to the feasibility of implementation. Although much of the CFP was passed into retained legislation, the Fisheries Act 2020 was supposed to provide a semi-blueprint for future fisheries management. In fact, it provides more of a menu than a blueprint and was based on the assumption that the UK would be receiving many more fishing opportunities and would therefore be faced with the luxury of choice as to what it would do.

Of particular interest to the fishing industry is the provision relating to over-quota landings and the possibility of adopting something more similar to the Norwegian system, taking away any profit but allowing mixed fisheries to continue. The elaborate list of the possibilities as to how additional quota may be apportioned appears somewhat hollow now – especially to the inshore fleet. In addition, the possible introduction of UK landing requirements of 70% as

outlined in the Economic Link consultation are likely to have an impact on profitability, whilst it is unclear how far they could aid in the regeneration of coastal communities.

The reality is that 2026 seems a long way away and that the fishing industry has been downgraded in importance: the fishing industry does not fit the technical/digital/green image that the Government now seeks to project. The policy announcements concerning Highly Protected Marine Areas and whole site closures, 40 GW of offshore wind farms, floating wind farms, and the proliferation of cables (which are not always sufficiently buried) mean that displacement is likely, and, whether or not fishing opportunities are available, they may well not be accessible – particularly to the small-scale coastal fleet.

In addition, the absence of a clear dispute mechanism means that relations with the Devolved Administrations over the Joint Fisheries Statement and the Fisheries Management Plans are likely to be difficult. It is possible, however, that the Government will use affirmative resolutions should the Devolved Administrations seek to change any primary legislation.

The elaboration of a new Fisheries Management Plan will need to try and satisfy a number of very different interests with very little slack to accommodate them. At the same time, the paradigm has shifted and politics has become more important in the UK at the same time trust has diminished among the fishing community. This begs the question: what happens in 2026?

Always assuming that things do not fall apart over the Northern Ireland Protocol, the provisions of the TCA relating to fishing opportunities are set to expire in 2026 and the question inevitably arises as to what, if anything, will take its place. It is clear that the EU does not envisage any change – that in fact any alteration could lead to countervailing measures. On the other hand, the UK fishing industry cannot wait for more change. By then, however, there may have been other changes in relation to the following:

- A more cooperative ambience may prevail and the schism over convergence and divergence may have had time to cool;
- Climate change and the green agenda may have led to improved cooperation;
- The small-scale coastal fleet may have declined due to problems over markets and access;
- Coastal communities will need to have started to find alternative types of jobs – although offshore windfarms and turbines will not require the same level of maintenance, employment and skills as the oil industry in the past; and
- The final question is what all these changes will have done to prices for fisheries products and what sort of profitability can be expected for the remaining vessels in the future, because, essentially, we want our fleet to have a future.

A Critique of the Fisheries Act 2020 as a “Gold Standard Model” for Sustainability⁴⁷

As part of the preparation for the post-Brexit future, the Department for Environment, Food and Rural Affairs (Defra) published in 2018 a White Paper,⁴⁸ which laid out the proposed changes to fisheries policy and introduced for consultation a draft Fisheries Bill that would be the means for delivering these. In the foreword, Michael Gove made the point that, as an independent coastal State, the UK would be free to: “promote a more competitive, profitable and sustainable fishing industry ... setting a gold standard for sustainable fishing around the world”.⁴⁹

The Bill, described as being a “significant change to the way fisheries are managed in the UK”, had a number of specific provisions that would achieve this change by, *inter alia*, enabling the UK to: take back control of access to its waters, with equal access for UK vessels throughout; improve environmental protection, making use of scientific advice; introduce quota schemes, reducing discards; and develop policy statements ... *applying sustainability principles and objectives*.⁵⁰

The Fisheries Act 2020 received Royal Assent on 23 November 2020. It is the sustainability principles that should be at the heart of the legislation, but closer examination shows that these are, in reality, paid only lip service as opposed to the political objectives of resource access and allocation, which are the main concern of the legislation. The critical issues of sustainable resource use that this paper identifies are: the sustainability objective; the relevance of precautionary principle; and the use of the concept of maximum sustainable yield (MSY) as the guarantor of sustainable management.

The Sustainability Objective

Section 1 (1) of the Bill lists the “Fisheries Objectives”, which are intended to be the focus of the “Fisheries Statements”, which will lay out how these objectives are to be achieved. Each of these is seen as equal with the other. The objectives are:

- a the sustainability objective;
- b the precautionary objective;
- c the ecosystem objective;
- d the scientific evidence objective;
- e the bycatch objective;
- f the equal access objective;

47 This section takes from the speech delivered by Seán Marriott (University of Lincoln) in session 2 of the workshop.

48 Defra (n 15).

49 Defra (n 15), at 6.

50 Defra (n 15), at 16.

- g the national benefit objective; and
- h the climate change objective.

During its passage through Parliament, a number of amendments were proposed. Amongst these was Lord Krebs's amendment, proposing that: "The sustainability objective is the prime fisheries objective" (passed by 310–251 votes).⁵¹ In proposing his amendment, he said: "the Bill as drafted allows for the possibility of short-term economic and social factors overruling environmental sustainability in making trade-offs".

In challenging the amendment, Lord Gardiner of Kimble, for the Government, stressed that the wording of the Objectives Section: "gives equal weight to environmental, social and economic considerations. That follows the concept of the three pillars of sustainable development, a concept that is well established in international law and practice."⁵²

The "Three Pillars" argument was repeated later, in the Commons, by Victoria Prentice, for Defra, and the amendment was rejected.

The theoretical equivalence assigned to the eight Fisheries Objectives of the Act become a critical issue in relation to Section 7, which grants power to the "policy authorities" to depart from proposals in a Joint Fisheries Statement when making a fisheries management plan (under Section 6). Subsection 7 (4) allows for a change to a plan where there is a "relevant change of circumstances"; subsection 7 (7) lists these "relevant changes"; of particular significance is subsection 7 (7) (d): "available evidence relating to the social, economic or environmental elements of sustainable development."

This provides for the possibility of the sustainability objective being overturned by short-term political considerations relating to economic and social pressures.

The original criticism of the basis of sustainability remains: the policy objectives do not sit on three equal pillars; they sit on eight. It is clear that the Government has chosen to present these objectives as part of the sustainable development discourse, where the subject of sustainability is development. But the subject of natural resource sustainability is the resource, not its development. The analogy is not three equal pillars holding up sustainability but rather a triangle of forces, at the apex of which rests sustainable development. But the base of the triangle is the sustainable resource upon which the others rest. If the resource fails, then so do the economic and social objectives.

There is a clear contrast between the UK Act and the Australian *Fisheries Management Act* 1991 (as amended at 2017) where, under Section 3A, titled *Principles of ecologically sustainable development*, subsections (c) and (d), it states:

51 E Ares, *Fisheries Act 2020*, House of Commons Library Briefing Paper No 8994 1 December 2020, <<https://researchbriefings.files.parliament.uk/documents/CBP-8994/CBP-8994.pdf>> accessed 8 June 2021, at. 12.

52 E Ares *ibid.*, at pp. 12–13.

- a the principle of inter-generational equity ... the environment is maintained or enhanced for the benefit of future generations
- b the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

It is these principles that are missing from the Fisheries Act.

The Precautionary Principle

Under Section 1 (3), the Act defines the precautionary principle as:

- a the precautionary approach to fisheries management is applied; and
- b exploitation of marine stocks restores and maintains populations of harvested species above biomass levels capable of producing maximum sustainable yield.

This wording is a curious choice because it fails to make explicit the key point of the principle that the “absence of adequate scientific information should not justify postponing or failing to take management measures”;⁵³ the wording here is taken from the 2013 Common Fisheries Policy Regulation, which bases its definition on Art. 6 of the 1995 *United Nations Fish Stocks Agreement* (FSA).⁵⁴ The reference to the FSA is crucial because, in fisheries terms, the FSA is the key document for defining the precautionary principle. Annex II of the FSA specifies the precautionary reference points “as a guide for fishery management”, and it is made clear that these are stock-specific. Again, comparison with the Australian *Fisheries Management Act* 1991 is instructive. Under Section 17 (5C), it is a requirement that fishery management plans (FMPs): “for a fishery affecting straddling fish stocks, highly migratory fish stocks or ecologically related fish stocks ... must set out stock-specific reference points”.

The absence of any mention of reference points in the Fisheries Act 2020, particularly within the sections dealing with management plans – instead the Act only provides, under subsection 6(2)(c) for “*an indicator or indicators to be used for monitoring the effectiveness of the plan*”. This is inadequate especially for stocks being managed at MSY.

53 Regulation 1380/2013 of the European Parliament and of Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, Art. 4(8).

54 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 (n 25).

Maximum Sustainable Yield

There is insufficient space here to rehearse the arguments against using MSY as the principal management tool.⁵⁵ Suffice it to say that the MSY for virtually all the stocks – or straddling or migrating – within the UK EEZ must be entirely theoretical. In any event the prospect of the EU ever choosing to set a total allowable catch (TAC) that would allow these stocks to recover their “natural” MSY is barely within the realms of the possible. Any FMP made under the Fisheries Act 2020 should take a more realistic and ecologically risk-weighted level. I have been developing a new approach that I call *Available Surplus*, which can be defined as the available surplus production of a stock’s biomass, without compromising its reproductive capacity, at prevailing environmental conditions, and subject to various caveats, including Art. 6 of the FSA.

In any event, the choice of MSY argues that Defra have not moved their sustainability sympathies in concert with current resource management thinking, let alone with ecosystem-based management.

Final word

The Fisheries Act 2020 is undoubtedly a suitable vehicle for short-term policy statements, but it is not designed, even intended, as a “gold-standard” model for fishery management. It is as functionally a model for the political control of fisheries as the CFP, and as likely to be similarly incapable of sustainable management.

The Act should be seen as an opportunity lost for creating a model for sustainable fisheries management legislation.

Perspectives from Northern Ireland⁵⁶

For the Northern Ireland fishing industry and its dependent coastal communities there are many expected and unexpected consequences emerging from the UK’s exit from the EU. A number of these are common to many economic sectors that were highly integrated into European systems, such as access to labour, international collaborations and industry participation in decision-making. Issues of particular importance to the fisheries sector are quota share, access and trade. Below I present a Northern Ireland perspective on these three issues.

55 For a clear explanation of the issues, see B Mesnil, ‘The Hesitant Emergence of Maximum Sustainable Yield (MSY) in Fisheries Policies in Europe’ 36 (2012) *Marine Policy* 473.

56 This section takes from the speech delivered by Rod Cappell (Poseidon Aquatic Resource Management) in session 2 of the workshop.

Quota

Fish stocks that are managed with quota make up 77% of the total tonnage of landings by the UK fleet and two-thirds of the value.⁵⁷ Some commercially important fisheries are not managed by quota, including scallops, the UK's third most valuable fishery, and other important shellfish species like crab and lobster. It is also worth noting that the dependence on quota species differs between the nations of the UK: there is a high dependence on quota species in Scotland and Northern Ireland (NI), but for England it is about 50/50 quota to non-quota and less than that in Wales. The national fleets most dependent on quota were very disappointed by the modest UK quota increases resulting from the TCA, particularly in comparison to the proportion of total catches that are caught in UK waters.

A remaining concern for the Northern Irish industry is how this new UK quota will be allocated between the devolved nations. The allocation between UK nations has only been resolved for 2021, with around 90% of allocation based on the existing quota holdings per nation. Northern Ireland operators hold 8.4% of UK fishing quota. By 2026, when the full agreed transition of EU quota to the UK is made, based on recent values, Northern Ireland could be allowed to catch an extra £20 million worth of fish each year.⁵⁸ That is a gain of around 30% in value terms as there are increases in the relatively valuable prawn fishery. But only around half the catch by the Northern Irish fleet is landed into Northern Ireland and that is because only 20% of Northern Ireland's quota holdings comprise fish and shellfish stocks in the Irish Sea. Eighty per cent of the fishing opportunities held by Northern Irish interests is quota for stocks in the West of Scotland, in the North Sea and in the South-West approaches.

Northern Ireland favours continuing the allocation based on existing quota holdings, but other administrations may push for alternatives, particularly if pressured by their industries who are still smarting from the TCA outcome. Any method that apportions additional quota by geographical area will disadvantage Northern Ireland, because it has a relatively small marine zone compared with other nations. There is no certainty of the basis for intra-UK allocation in future years. Beyond 2026, the allocation between the UK and EU is also uncertain as a new deal is to be negotiated.

57 Marine Management Organisation (MMO) 'UK Sea Fisheries Statistics 2019' (2019), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920679/UK_Sea_Fisheries_Statistics_2019_-_access_checked-002.pdf> accessed 10 April 2021.

58 Northern Ireland Fishermen's Federation submission to the Northern Ireland Assembly, Jan 2021, <<http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2021/01/19&rID=322769&hwcID=3221032&ID=25071&pg=3&evaid=12717&sesID=23&dID=0&init=I#3221032>> accessed 12 June 2021.

Access

The Northern Irish fleet has experienced the challenges of new access arrangements in terms of both access to fishing grounds and also access to ports to land your catch. Taking the first of these, access to fishing grounds, Northern Irish and Irish vessels have historically fished in each other's waters as part of a *Voisinage* agreement in place since the mid 1960s allowing mutual access out to 6 nm. There was some disruption to this between 2016 and 2019 under legal challenge, but mutual inshore access for smaller vessels remains in place.

Beyond the 6-mile limit, the TCA has attempted to maintain business as usual, at least until 2026, including historic fishing in the 6-to-12-mile zone. But boats now have to be licensed by the respective national authorities and Northern Irish vessels waited months to receive these licences from Irish authorities. Some of the larger potters had to remove gear from Irish waters and such delays could disrupt the usual seasonal fishing patterns.

Northern Irish vessels are also used to landing their catch into Irish ports, either adjacent to Northern Ireland or when they fish further afield. Ports must be officially designated as landing ports with enforcement officers available to carry out the necessary checks on those landings. Northern Ireland had designated seven of its ports to facilitate landings by EU-registered boats. Initially, Ireland had only designated its two largest fishing ports for landings by UK vessels: Killybegs and Castletownbere. The Irish Government has since designated five further ports, but that still doesn't cover all the ports that Northern Irish vessels previously landed to.

Generally, access appears to be moving towards 'business as usual', but there is little incentive for Member State agencies to prioritise the additional administration required for UK vessels and issues resulting from administrative delays may emerge as seasonal fisheries begin. Again, at the end of the adjustment period in 2026, the debate over access will start again.

Trade

The seafood trade has been hit with the double-whammy of Brexit and the Covid-19 pandemic. It's difficult to fully separate the impacts of the two. What we do know to be Brexit-related is the increased paperwork and checks required, which all amount to a cost for operators and administrations.

While not considered as exports or imports for Northern Ireland, the trade route between Northern Ireland and mainland Britain is the main seafood trade route. Fresh whitefish and nephrops are brought in, with landings of various species shipped out to buyers in Great Britain. This Northern Ireland–Great Britain trade was subject to extensive disruption in the first months of 2021 and it still faces additional costs with more paperwork and checks as a result of the Northern Ireland Protocol. Outside this substantial intra-UK trade, Northern Ireland is a net exporter of seafood, exporting £62m of seafood outside the

UK in 2019 and importing half that (£31m).⁵⁹ For exports to the EU, Northern Ireland's operators have a slight advantage over other British operators as Northern Ireland remains within the single market under the Northern Ireland Protocol. In practical terms, this means that there is less paperwork without the need for Export Health Certificates and Catch Certificates for landings into Northern Ireland being exported to the EU. However, a catch certificate is still needed if one lands outside of Northern Ireland, and if exporting via Great Britain then an export health certificate will be required.⁶⁰ Northern Ireland's operators have not totally avoided the additional administrative burden, but for direct EU exports they do have less paperwork and less risk of rejection or lengthy delays than their counterparts in Great Britain, a critical factor in exporting fresh seafood. A steep rise in shipping costs, which have been further compounded by the Covid-19 crisis and now recovery-fuelled inflation, mean that many input costs have risen significantly and there are also delays in supplies of gear and vessel parts, causing disruption.

Northern Ireland's unique status within the UK could be considered a benefit for an export-orientated seafood sector, but the extra costs for Northern Ireland–Great Britain trade reduces the benefits resulting from the Protocol, and there is mounting political pressure to change or remove the Protocol altogether. As with quota allocations and access, the trade challenges faced by the fisheries sector remain, and the future, even in the short term, is uncertain.

Brexit and Fisheries: An Irish Perspective⁶¹

Disruptor or partner?

The departure of the UK from the EU throws up many concerns and unknowns around what type of actor the UK will become in relation to fisheries management in the Northeast Atlantic. Will it seek to be a disruptor or pursue a path of being a partner in reaching fishery agreements with its neighbours?

For many coastal States in the Northeast Atlantic, fisheries represent a salient issue politically, economically, culturally and socially. It is a key reason why the Faroe Islands, Iceland and Norway never joined the EU, and why Greenland and the UK, to a lesser extent, left it.

It is this level of saliency, in particular the political perspective, that will likely shape the role the UK will take in the coming years. Like the tides, will the UK push and pull between being a disruptor or a partner?

59 DAERA *Fishing and Seafood Development Programme*, (2021) <<https://www.daera-ni.gov.uk/publications/fsdp>> accessed 12 June 2021.

60 DAERA, *Direct Landings - Journey Checklists* (2021) <<https://www.daera-ni.gov.uk/articles/direct-landings-journey-checklists>> accessed 21 June 2021.

61 This section takes from the speech delivered by Ciarán O'Driscoll (European Movement Ireland) in session 2 of the workshop.

However, while the jury is still out on what this role will be at present, the reality is that the UK is now another piece to many more puzzles that need to be solved around securing effective fisheries management. And when puzzles remain unsolved, waters do not settle, and it is fishing communities that suffer, where all too often sea fisheries is the sole economic pillar holding up a community.

For example, the dispute over mackerel in the early 2010s saw more than four years of failed negotiations between the various coastal States over setting TACs, before an agreement was reached. It brought considerable socio-economic instability in the Irish fishing industry due to the importance of the stock.

The Cost of Brexit

However, while many were anticipating losses as a result of Brexit, as by its nature Brexit is the upending of the status quo, they had not expected the level the financial losses in their share of stocks in UK waters.

Even Taoiseach Micheál Martin had admitted in December, after negotiations were concluded, that “there is a significant negative impact, particularly on the mackerel sector and prawns”.⁶²

One of the Irish fishing industry’s leading news publications, the *Marine Times*, carried a by-line in its January 2021 edition that “the government has failed the fishing industry in the Brexit negotiations, leaving it facing a potentially disastrous situation”.⁶³

The economic cost of Brexit was spelled out in a January 2021 report published by Ireland’s Department of Agriculture, Food and the Marine. With the assistance of the Marine Institute and An Bord Iascaigh Mhara, it estimated the losses Ireland would face under Brexit.⁶⁴

It is expected to see a loss of around €42 million by 2026 as a result of losing 15% in the transfer process under the EU–UK Trade and Cooperation Agreement, with mackerel from the West of Scotland, some €27.5m, accounting for bulk of losses.

62 H McGee, V Clarke and M Hilliard, ‘Brexit: Taoiseach concedes EU-UK deal will have negative impact on fishing industry’ (2020) *The Irish Times*, 28 December 2020, <<https://www.irishtimes.com/news/politics/brexit-taoiseach-concedes-eu-uk-deal-will-have-negative-impact-on-fishing-industry-1.4446471>> accessed 24 June 2021.

63 M McCarthy and T McSweeney, ‘Brexit deal will devastate fishing industry’, *Marine Times Newspaper*, January 2021, <https://www.marinetimes.ie/ereader2021/marinetimes_012021.pdf> accessed 24 June 2021, at p. 4.

64 Department of Agriculture, Food and the Marine, *Preliminary Analysis of Reduction of Fisheries Quota Shares under EU/UK Trade and Cooperation Agreement* (2021), <<https://www.gov.ie/en/publication/21e48-analysis-of-reduction-of-fisheries-quota-shares-under-euuk-trade-and-cooperation-agreement/>> accessed 23 June 2021.

For many in the industry, this is another example of the Irish fishing industry suffering because of Ireland's EU membership. Just as Brexit resulted in a "bad deal" for them, so too did joining the then European Economic Community in 1973.

And perhaps this is the greatest cost of Brexit for Ireland's fishing industry, a deeper sense of trust being lost and eroded between it and EU and Irish State actors, which will only further exacerbate important relations.

Seafood Processing and Brexit: Scottish Perspectives⁶⁵

From a Scottish fishermen and processing point of view, the aspiration has always been to restore the opportunity to grow market share and to re-grow the industry that has over the past four decades gone into decline. Brexit brought along a new vision and a new opportunity. The outcome was not what the fishermen nor what the processing sector had anticipated. There are ongoing debates as to what implications the Brexit outcome will have over the next five years. Much work lies ahead. It is important to remain steadfast while bearing in mind that this is a big political issue. So far what has been brought to our attention is the differing views and standpoints of the various people, depending on where respective folks reside in each of the political sectors. That being said, there has been no argument with regard to the oil and gas that remains in the North Sea to be shared equally across EU nations. This is broadly owing to the fact that oil and gas is far more valuable than fish stocks because the latter are renewable resources and will continue to renew time and time again.

The rules and regulations under the CFP might have looked feasible in theory. However, in practice, fishermen have faced difficulties adhering to those. They can be viewed as counterproductive as they did not deliver on the objectives in a fitting manner. This resulted in fishermen turning against CFP and all that it stood for in so far as it created problems exporting to the EU, which has not been easy to resolve given that no fair and equal political platforms were created on which the fisheries sector could conduct trade and continue business as usual. The sector now has to adhere to the new red tape and bureaucratic system that they are subject to whilst the EU counterparts enjoy the grace and favour of a "free and open market". A more amicable outcome needs to be negotiated to strike a balance that is currently missing. This begs the question: who suffers in all of this? The answer is simple. The folks who are at the front of the industry, the fishermen, the coastal communities and the communities that are entirely dependent on fisheries business.

The other outcome of Brexit was access to a migrant-led labour workforce. Over the years, the fisheries community has relied heavily on migrant labour. That pool is no longer readily available, partly because of Covid-19, and by

65 This section takes from the speech delivered by Jimmy Buchan (Scottish Seafood Association) in session 2 of the workshop.

and large due to Brexit, as it was viewed as diminishing future opportunities. This has certainly led to repatriation whereby migrant workers have repatriated to their native homelands to seek out new career opportunities. Moving forward, this has the potential to create problems. There will certainly be shortages of manpower to process UK catches.

On a positive note, the UK Government has hinted that more investments will be made in the fishing industry with a view to transposing the industry to a more vibrant and green industry. It remains to be seen where the capital investment will go. It is important to focus on the 2025–2026 outcome and whether there will be a continued interest to revisit such a divisive political problem in the future. A sustainable income from a sustainable resource is the backbone of the UK's trade and economy. Realism needs to accompany all future debates, negotiations, actions and delivery on the Government's part. Given the importance of the trade market, politicians ought to consider removing barriers and hurdles for the people engaged in business activities. In terms of fisheries, there is a product for sale, manpower to carry out product marketing and interested clients that are willing to purchase it. What needs to be ensured is that the product can pass through the political bottleneck and enter the market without external interruptions.