

6 Fisheries Enforcement in a Post-Brexit World

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Introduction

Brexit was heralded as a step towards a status that would allow the United Kingdom (UK) to exist as an “independent coastal state” with “full control” over its fisheries.¹ However, fisheries management often requires substantial international cooperation to be effective in achieving the peaceful and sustainable utilisation of ocean resources.² Although advanced forms of international decision-making might be interpreted as a “loss” or “weakening” of sovereignty, the complex realities of marine fisheries management make participation in international law and policy frameworks an unavoidable commitment for any responsible State with an interest in the long-term conservation of fish stocks. As a coastal State, the UK is the custodian of a significant and diverse wealth of marine living resources (MLRs). Managing them sustainably requires participation in shared international frameworks with important implications for enforcement.

As outlined in earlier chapters,³ prior to Brexit, UK fisheries management was to a great extent carried out through the EU Common Fisheries Policy (CFP). The principle of non-discrimination on grounds of nationality, a fundamental principle of European Union (EU) law, underpins the CFP. As a consequence, EU fisheries are managed on the basis of equal access, save for certain derogations that generally apply to the coastal waters of EU Member States.⁴ The legal bases of the CFP are reviewed and updated periodically, and at the time of writing Regulation (EU) No 1380/2013 of the European parliament and the Council on the Common Fisheries Policy is the legal instrument that configures its latest iteration.⁵ This regulation modifies and develops

1 *Sustainable Fisheries for Future Generations in July 2018*, Cm. 9660 (2018), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722074/fisheries-wp-consult-document.pdf> accessed 1 July 2021.

2 See Chapter 4.

3 See Chapters 1, 2 and 3.

4 EU Regulation 1380/2013 permits coastal States to apply restrictions within the 12 nm area, and in some cases beyond it, until 2022.

5 Regulation (EU) 1380/2013 OJ 2013 L354/22.

other EU legal instruments that are important in the context of control and enforcement, such as Regulation (EC) 1224/2009 (the Control Regulation),⁶ and Regulation (EC) 1005/2008 (the Illegal, Unreported and Unregulated Fishing [IUU] Fishing Regulation).⁷ These regulations are currently under review, but at the time of writing they are in force and directly applicable to EU member States (MS).⁸

These and other instruments integrate a complex legislation framework that directs and conditions MS action in a broad range of activities that are directly relevant to fisheries control and enforcement. In particular, areas such as access to fishery resources, the regulation of fishing effort, technical measures concerning vessel characteristics and gears, the monitoring and verification of fishing activities and documentation of captures are shaped by the CFP. Even though EU MS are responsible for establishing and applying their own sanctioning mechanisms, infractions and sanctions are also influenced by the CFP across the EU, particularly since the introduction of a points sanction system.⁹ On the other hand, MS inspections, and control and enforcement efforts, are to a significant extent pooled with and coordinated by EU institutions, such as the European Fisheries Control Agency (EFCA).¹⁰

Although certain aspects of the UK control and enforcement system have always diverged from EU parameters due to differences in implementation, and in particular in respect of inshore fisheries catch monitoring,¹¹ much of its control and enforcement framework still largely reflects EU fisheries legislation, much of which has been retained domestically.¹² Beyond this is the case that

- 6 Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 OJ L 286 29.10.2008.
- 7 Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999.
- 8 For more information on the review of the EU fisheries compliance and control framework, see <https://ec.europa.eu/oceans-and-fisheries/fisheries/rules/enforcing-rules/control-regulation_en> accessed 1 July 2021.
- 9 See <https://ec.europa.eu/oceans-and-fisheries/fisheries/rules/enforcing-rules/infringements-and-sanctions_en> accessed 21 July 2021.
- 10 Regulation (EU) 2016/1624 OJ L 251/1, repealed by Regulation (EU) 1052 OJ L 295/1.
- 11 See <www.gov.uk/guidance/record-your-catch> accessed 22 July 2021.
- 12 For further information, see <www.gov.uk/government/publications/fishing-regulations-the-blue-book/section-aa-statutory-instruments-amending-retained-eu-legislation> accessed 22 July 2021.

the UK is no longer bound to EU treaties,¹³ and it must now operate by reference to a different framework of international obligations. In this chapter, we explore global and regional legal frameworks applicable to the UK as a coastal State,¹⁴ setting out the specific obligations to which it is bound via global and regional agreements to which it is a party.

The analysis commences by outlining the key provisions established by the United Nations Convention on the Law of the Sea (LOSC or Convention)¹⁵ in respect of coastal State obligations relevant to fisheries control and enforcement. The LOSC is a global international agreement subscribed by the majority of the world's coastal and fishing States. The chapter then outlines obligations under the United Nations Fish Stocks Agreement (UNFSA),¹⁶ and the Port State Measures Agreement (PSMA),¹⁷ global international agreements that contain important obligations concerning fisheries enforcement, to which the UK is a party.

Our analysis also includes a brief outline of relevant international guidelines set out in the UN Food and Agriculture Organization (FAO) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) with regard to the control of illicit activities. A focus is also placed on regional and bilateral instruments, focusing in particular on the legal obligations emanating from the Trade and Cooperation Agreement that the UK and the EU subscribed on 30 December 2020.¹⁸ It then proceeds to discuss key aspects of domestic legislation, and briefly illustrates the application of the previously outlined legal obligations via events which recently occurred in Rockall.

13 In particular, see Articles 3 and 4 of the Treaty on the Functioning of the European Union, in respect of competence distribution, Article 13 regarding respect for animal life, and Articles 38 and 43 on agricultural and fisheries policies.

14 Not including Overseas Territories or Crown Dependencies.

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

16 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.

17 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Adopted 24 November 1993, in force 24 April 2016, 55 ILM 1157.

18 See also, for example, Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway, London, 30 September 2020, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927151/CS_Norway_1.2020_UK_Norway_Framework_Agreement_on_Fisheries.pdf> accessed 20 June 2021; Framework Agreement on Fisheries between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Faroes, Copenhagen, 29 October 2020, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933792/CS_Faroe_Islands_1.2020_UK_Faroes_Framework_Agreement_on_Fisheries.pdf> accessed 5 July 2021.

International Legal Obligations Concerning Fisheries Enforcement

This section outlines the relevant international legal framework applicable to the UK as a coastal State in respect of fisheries enforcement. We commence with the LOSC, which sets out the legal basis for the utilisation of the ocean and its natural resources. The LOSC has been developed and is supported in its implementation by a number of other treaties that deal specifically with, *inter alia*, fisheries enforcement. In particular, the UNFSA and PSMA are significant for the UK, and the key obligations they contained are outlined in this section.

The UN Convention on the Law of the Sea

The LOSC in its Article 192 contains a general obligation 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.¹⁹ Although this provision is placed in Part XII, which is principally focused on pollution, it has been progressively interpreted by international courts and tribunals to include fisheries.²⁰ The due diligence nature of this general obligation implies the need for ongoing effort,²¹ via the exercise of prescriptive and enforcement jurisdiction.²² This requires not only the establishment of adequate legal frameworks for the protection of MLRs, but also the effective oversight and control of fishing activities in accordance with domestic legislation. The exercise of due diligence needs appropriate procedures for competent authorities, in order to ensure compliance by fishing actors with applicable legal duties, and to identify and respond to infractions via enforcement action. In Parts II and V, the LOSC outlines the framework of obligations that State parties must incorporate into their domestic law in matters concerning fishing activity control and enforcement, and diligently implement. The responsibility to ensure that fishing activities are consistent with the normative objectives of the Convention

19 *Request for an Advisory Opinion Submitted by The Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015 (*Fisheries Advisory Opinion*), para. 120; *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, para. 940; Chapter 7.

20 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures Order of 27 August 1999, ITLOS Reports 1999, p. 280 para. 70; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, PCA Case No. 2011–03, paras. 320 and 583; *South China Sea Arbitration* (n 19), para. 945; see also N Bankes ‘Legislative and Enforcement Jurisdiction of the Coastal State with Respect to Fisheries in the Exclusive Economic Zone’ in Ø Jensen (ed.) *The Development of the Law of the Sea Convention – The Role of International Courts and Tribunals* (Edward Elgar, 2020), at pp. 73–103.

21 See *Fisheries Advisory Opinion* (n 19), para. 129; *Responsibilities and Obligations of States with respect to activities in the Area*, Advisory Opinion 1 February 2011, ITLOS Reports 2011, paras. 108–12; *South China Sea* (n 19), para. 726.

22 N Bankes (n 20).

when the activity occurs *within* the jurisdiction of a coastal State falls primarily on that State.²³ This includes obligations involving the exercise of control and enforcement in both the territorial sea and the Exclusive Economic Zone (EEZ) of that State.²⁴

According to the LOSC Article 3, States have “the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention”. Article 4 specifies that the “outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea”. The EEZ is, according to Article 55 of the LOSC, “an area beyond and adjacent to the territorial sea”, and Article 57 states it “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”. The LOSC establishes different regimes in the territorial sea and the EEZ for enforcement purposes.

Although the coastal State must respect the right of innocent passage of vessels flagged to third States in the territorial sea as defined in Article 18 of the Convention, Article 19 specifically excludes from the concept of innocent passage activities of foreign vessels that are “prejudicial to the peace, good order or security of the coastal State”. Article 19(2)(i) specifically identifies fishing activity as belonging to the category of prejudicial activities. Hence, other than for the non-discrimination requirements of Articles 24 and 25, in the territorial sea the coastal State can exercise all rights emanating from its sovereignty in matters concerning the control of fishing vessels that are operating within the 12 nautical mile limit.²⁵ As Article 27 makes clear, coastal States can exercise enforcement jurisdiction, whether of an administrative or criminal nature, in matters involving fishing activity that contravenes the laws established by that coastal State.

In the 200 nautical miles of the EEZ (or other appropriate delimitation in accordance with the LOSC Article 74 with regard to an opposite coast), the LOSC establishes a *sui generis* system based on sovereign rights.²⁶ In Article 56 (1)(a) the LOSC establishes the coastal State’s “sovereign rights for the purpose of exploring and exploiting, conserving and managing” fisheries resources; in subparagraph (b) it establishes their jurisdiction for the purposes of protecting and preserving the marine environment. The exercise of these rights and associated powers must, however, be carried out with due regard to the rights of other States with regard to navigation and the peaceful utilisation of the sea, in accordance with Articles 56(2) and 58. The exercise of enforcement jurisdiction must mirror the legal obligations established to bind persons to the intended conservation and management objectives of the State and ensuring control of fishing activities. The legal bases for the establishment of a domestic legal

23 *Fisheries Advisory Opinion*, (n 19) para. 106.

24 UNCLOS (n 15), Art. 62(4); *Fisheries Advisory Opinion* (n 19), para. 104.

25 *Ibid.*, Art. 27.

26 See N Bankes (n 20), at pp. 73–103.

framework for fisheries conservation and management in the EEZ are set out in LOSC Articles 61 and 62.

Article 61 sets the power of the coastal State to set the total allowable catch (TAC) in the EEZ, which it then conditions with a series of cooperation and conservation obligations, and the requirement to base conservation and management measures on a scientific basis. Under Article 62, any surplus in the TAC is to be made available to other States, albeit without undermining the necessary conservation measures established for the protection of the stocks. This provision is specific to the EEZ, and is not replicated in the context of the territorial sea. The LOSC Article 62(3) establishes the parameters whereby the coastal State should grant access to foreign fishers. Amongst the set criteria, this provision specifically identifies factors for the coastal State to consider, including “the significance of the living resources of the area to the economy of the coastal State concerned” and “the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks”. Article 62(4) sets out a non-exhaustive list of measures that the coastal State must take in respect of the management of the resources of the EEZ, which foreign fishermen must comply with. This list includes tools that are essential to the oversight of fishing activity by coastal State authorities, such as licensing, activity and catch reporting, monitoring, landing and enforcement procedures.

The enforcement jurisdiction of the coastal State implies that, where there have been breaches of domestic law, the competent authorities of the coastal State may perform inspections at sea and in port, carry out arrests, and undertake judicial proceedings in accordance with the applicable provisions of their domestic legal framework.²⁷ Nevertheless, the coastal State must abide by the restrictions established by the Convention in respect of prompt release, prohibition of prison sentences for breaches of fisheries law (except where there is agreement with the flag State) and the prompt notification to the flag State of measures taken in respect of infractions concerning arrests or detention.²⁸

The importance of these competences, powers and duties cannot be overestimated, being essential for the successful conservation and management of the living resources in waters under the jurisdiction of the coastal State. The fisheries control and enforcement framework established by the LOSC is mandatory on the coastal State.²⁹ Nevertheless, foreign flag States are not exonerated from responsibility when it comes to control over the fishing activities of their vessels in the foreign EEZ. As indicated by the LOSC Article 58(3), flag States whose vessels operate in waters under the jurisdiction of the coastal State must observe due regard for the rights and duties of that coastal State. Indeed, flag States have subsidiary obligations to ensure that vessels entitled to fly their flag comply with the laws and regulations of the coastal State in

27 UNCLOS (n 15), Art. 73(1) and 73(3); *Fisheries Advisory Opinion* (n 19), para. 105.

28 UNCLOS (n 15), Art. 73.

29 *Fisheries Advisory Opinion* (n 19), para. 96.

all matters concerning the conservation and management of fisheries located in the EEZ.³⁰

Lastly, the LOSC Article 63 establishes a number of obligations in respect of straddling species occurring in the EEZ that are relevant for the exercise of control and enforcement functions. Firstly, there is a duty to seek to agree, “either directly or through appropriate subregional or regional organizations (...) the measures necessary to coordinate and ensure the conservation and development of such stocks”, whether the species straddle the EEZs of two or more States, or the EEZ and the high seas. In respect of highly migratory species, Article 64 obligates the “coastal State and other States whose nationals’ fish in the region for the highly migratory species listed in Annex I (to) cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone”. The UK also has specific obligations as a coastal State in respect of anadromous and catadromous fish species under the LOSC Articles 66 and 67. These cooperation obligations are significant in a control and enforcement context: as subsequent sections discuss, they form the legal bedrock for a management and control system that is rooted in international agreement in fundamental ways. As part of this system, the UK must manage stocks and control fishing activities pertaining to these categories by reference to global and regional agreements in which other States with fishing interests and the EU are also participants.

Global Fisheries Instruments

The significance of the LOSC obligations for compliance and enforcement is further brought to light by the UNFSA, a global agreement to which the UK is a party. Particularly important for enforcement are the provisions contained in Article 7, and Articles 20 and 21. Although the UNFSA is principally concerned with the conservation and management of straddling and highly migratory species, it sets out a blueprint for internationally shared fisheries that refines and develops the obligations established by the LOSC. Firstly, it is self-evident that enforcement is carried out by reference to the applicable legal framework. In this respect, UNFSA Article 7(2)(c) clarifies that States need to take into account previously agreed measures established in regional or sub-regional fisheries management organisations. The effect of this provision contributes towards the harmonisation of measures across groups of States whose vessels fish for certain stocks, or in whose waters such stocks occur. Article 20 establishes a cooperation framework for enforcement, seeking the coordination of activities across coastal and flag States. This cooperation framework is refined by Article 21, which in its paragraph 11 also establishes a list of concepts that State parties to the UNFSA must incorporate into their domestic legal

30 *Ibid.*, para. 105.

frameworks as serious infractions. Articles 21, 22 and 23 commit parties to participating and implementing enforcement measures adopted by regional or subregional organisations of which the State is a member.

The UK is also a party to the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA). The PSMA elaborates on a principle first established in Article 23 of the UNFSA: the right and duty of the port State to take non-discriminatory measures to evaluate the legality of arrivals, and to make sure that they do not undermine regional or subregional cooperation measures. Such measures can include inspections, as well as the prohibition of landings and transshipments. The PSMA elaborates on these provisions. It outlines the minimum standards for the port control of foreign-flagged fishing vessels. Article 6 outlines parties' information exchange obligations. Other obligations include designating ports that vessels may request access to,³¹ requesting detailed information, as specified in Annex A of the PSMA,³² and denying port access to vessel suspected of participating in IUU fishing.³³ Further, parties are required to engage in specific information exchange procedures,³⁴ as well as deny access to ports when a vessel is suspected of having breached applicable legislation, or regional or subregional conservation and management measures. The PSMA also contains requirement for States to publicise ports in which foreign-flagged vessels may be permitted to enter.³⁵

Another fisheries instrument that, despite being non-binding, has been important to the development of enforcement approaches in both the UK and the EU is the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU). The IPOA-IUU contains a definition of IUU fishing in its paragraph 3, which is partially replicated in Article 2 of Regulation 1005/2008. Whilst the designation "IUU fishing" is convenient to assess activities that may contravene the conservation and management and other measures adopted by regional fisheries management organisations, breaches of applicable legal obligations taking place within the EEZ or the territorial sea of the UK are "illegal fishing" events, whether the breach is carried out by a national or foreign vessel.

The influence of the IPOA-IUU has been wide, and also covers a broad range of additional areas that are critical for successful enforcement action. They have been largely reflected in EU legislation, particularly in the Control Regulation and the IUU Fishing Regulation. These regulations have been incorporated into the domestic legislation of the UK, they continue to be relevant to the domestic operation of port and coastal State controls. Of

31 PSMA (n 17), Art. 7.

32 PSMA *ibid.*, Art. 8 and Annex A.

33 Or those on an IUU vessel list of a regional fisheries management organisation; Art. 8 bis (3).

34 PSMA (n 17), Art. 14.

35 FAO IPOA-IUU, <<http://www.fao.org/fishery/ipoa-iuu/legal-text/en>> accessed 1 July 2021, para. 57.

particular significance for enforcement are measures concerning monitoring, surveillance, inspection, authorisations, regular and special licences and permits, effort regimes and technical measures, transshipment control, electronic and manual catch data recording and reporting, and proportionate and effective sanctions regimes.³⁶

Regional and Bilateral Fisheries Agreements

As discussed earlier in this book, the Trade and Cooperation Agreement (TCA) has set out the cooperation parameters between the UK and the EU in respect of the regulation of fisheries in which both parties have an interest.³⁷ The TCA, which has replaced previous fisheries arrangements with the EU and its MS,³⁸ reflects the zonal framework of the LOSC whereby the territorial sea is demarcated by a 12-nautical mile limit, etc. The TCA affirms the parties' sovereign rights to explore, exploit, conserve and manage MLRs in their waters through Article 493 and establishes that such activities "should be conducted pursuant to and in accordance with the principles of international law, including [the LOSC]".³⁹

The TCA deals with control and enforcement in fisheries matters in several articles. Firstly, in Article 404 on "[t]rade and sustainable management of marine biological resources and aquaculture", the parties highlight their commitment to good fisheries governance within the parameters established in the LOSC and its satellite fisheries treaties, as well as the voluntary instruments of the FAO Code of Conduct for Responsible Fisheries, which incorporates the IPOA-IUU. This provision establishes an obligation on the parties to promote good fisheries governance by participating in regional fisheries bodies, and specifically in the regional fishery management organisations (RFMOs) in respect of which both parties have fishing interests. Article 496 in its paragraph 2 considers the need for both parties to implement and comply with the multilateral obligations to combat IUU fishing emanating from the North-East Atlantic Fisheries Commission (NEAFC), the Northwest Atlantic Fisheries Organization (NAFO) and Recommendation 18-09 of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as well as the

36 Although they are less significant in the context of inshore fisheries and the operation of vessels under 10 metres.

37 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, pp.14-1462. A detailed overview and legal analysis of the TCA is given in Chapters 2 and 3.

38 Not just in matters concerning the CFP at large, but also in respect of more specific arrangements. See, for example, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning Fishing in the Bay of Granville, with Exchanges of Notes and Declaration (St. Helier, 4 July 2000), 2269 UNTS 87.

39 TCA *ibid.*, Art. 493; see Chapter 3.

PSMA. There is also under paragraph 3 a duty of notification when measures that affect the vessels of the other party are adopted.

The TCA also sets out conditions for reciprocal access, and deals with other related matters. Article 497 of the TCA (“Authorisations, compliance and enforcement”) indicates that access by EU and UK vessels to the other’s waters is conditional.⁴⁰ Firstly, each party must communicate which vessels seek authorisation to fish, and it is for the other party to issue such authorisations or licences.⁴¹ Further, Article 497 stipulates “[e]ach Party shall take all necessary measures to ensure compliance by its vessels with the rules applicable to those vessels in the other Party’s waters, including authorisation or license conditions”.⁴² Article 500 of the TCA, called “Access to waters”, in conjunction with Article 497, and Article 502, sets out the parameters for access, which include waters between 6 and 12 nm from the baselines of ICES marine regions IV c and VII d–g (see Figure 5.1) for qualifying vessels.⁴³ “Qualifying vessels” in this context means a vessel of either party that fished in the aforementioned ICES regions between the years 2012 and 2016.⁴⁴

In Article 508, the TCA establishes a Specialised Committee on Fisheries, which is the forum for discussion and cooperation in respect of a number of areas concerning the management and governance of fisheries shared by the parties. According to paragraph (f), the Committee can consider compliance measures such as joint control, monitoring and surveillance programmes, and other mechanisms of control and enforcement, as appropriate. Another important area for control and enforcement, namely the designation of landing ports, is dealt with in paragraph (i). The Specialised Committee on Fisheries is able to adopt decisions and recommendations in these and other areas relevant to fishery management. Compliance measures can be the subject of joint review.

The UK now participates in the above-mentioned RFMOs, and in the Indian Ocean Tuna Commission (IOTC), and the North Atlantic Salmon Conservation Organization (NASCO).⁴⁵ Membership in RFMOs requires the assimilation of monitoring, compliance and enforcement measures in respect of the stocks and areas they manage.⁴⁶ This implies participation in and funding of programmes and data collection and sharing, and monitoring control and surveillance tools that are key for enforcement, and that concern vessel activity and catch, as well as access to fishing grounds. For instance, vessels fishing in

40 *Ibid.*, Art. 497; See Chapter 3.

41 *Ibid.*, Art. 497(1).

42 *Ibid.*, Art. 497(2); see Chapter 3, text preceding (n 21).

43 *Ibid.*, Art. 500(4)(c).

44 *Ibid.*, Art. 500(4).

45 See G A Oanta, ‘Resolving the United Kingdom and European Union Membership of Regional Fisheries Management Organisations Post Brexit’ 1 (2021) *International Journal of Marine and Coastal Law* 1–13; Chapter 8.

46 See in addition Chapter 3 subheading ‘Chapter Two (Conservation and sustainable exploitation)’; Chapter 8.

the NEAFC Convention Area and landing NEAFC regulated resources are obliged to complete a Port State Control 1 (PSC1) form if they wish to land their catch in the UK. This is submitted electronically by the vessel Master to the flag State, and then forwarded to the port State (in this case the UK). The implementation of measures adopted by these RFMOs for the conservation and management of regulated stocks must be articulated domestically in accordance with other international obligations, as applicable.⁴⁷

By virtue of Article 511, the TCA supersedes any previously existing agreements or arrangements with respect to “fishing by Union fishing vessels in the territorial sea adjacent to the Bailiwick of Guernsey, the Bailiwick of Jersey or the Isle of Man and with respect to fishing by United Kingdom fishing vessels registered in the Bailiwick of Guernsey, the Bailiwick of Jersey or the Isle of Man in the territorial sea adjacent to a Member State”. Nevertheless, this is only the case whilst the TCA remains applicable: it is explicitly stated that such agreements or arrangements can be called upon again by the parties in the event that the relevant provisions of the TCA should cease to apply.

The UK has also made commitments in respect of fisheries compliance in a series of bilateral instruments. In the course of 2020 the UK has entered into a bilateral agreement with the Faroe Islands,⁴⁸ and another one with Norway.⁴⁹ In the Norway agreement compliance, control and enforcement are dealt with in Article 6. The binding provisions are rather weak, with paragraph 1 establishing that the parties will take “all necessary measures to ensure that, when fishing in the area of jurisdiction of the other Party, vessels flying its flag comply with all conservation and management measures, other terms and conditions, and all rules and regulations governing fishing activities in that area”. Paragraph 2 contains a tentative provision whereby parties may agree to further deepen their cooperation in operational compliance matters, such as vessel licensing and data exchange, and vessel monitoring, control and surveillance. Finally, paragraph 3 states that such arrangements may be formulated by way of protocols or guidance documents.⁵⁰ These provisions are largely

47 See NEAFC EPSC, Designated Ports and Contracts, <<https://psc.neafc.org/designated-contacts#GBR>> accessed 2 July 2021.

48 Framework Agreement on Fisheries between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Faroes (Copenhagen, 29 October 2020), <<https://www.gov.uk/government/publications/uknorway-framework-agreement-on-fisheries-cs-norway-no12020>> accessed 23 July 2021.

49 Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway (London, 30 September 2020), <<https://www.gov.uk/government/publications/ukfaroes-framework-agreement-on-fisheries-cs-faroe-islands-no12020>> accessed 23 July 2021; see Chapter 4.

50 For further information on the Norway agreement, see R Barnes, ‘Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway’ (2021) 36 *International Journal of Marine and Coastal Law* 155–164.

replicated in Article 5 of the agreement with the Faroe Islands. In addition, the UK has entered into a memorandum of understanding with Iceland,⁵¹ in which the parties set out arrangements to work together on fisheries matters via a mechanism they have called “the Fisheries Dialogue”. Compliance, control and enforcement issues are dealt with in paragraph 1 of the memorandum, which refers specifically to monitoring, control and enforcement, but is otherwise open-ended.

Fisheries Enforcement across the UK

As discussed in Chapter 5, fisheries regulation and enforcement are a devolved competence across the four nations of the UK. Prior to Brexit, much of the enforcement activity by the competent authorities within the UK was ensuring compliance with the CFP. Currently, according to the Fisheries Act 2020, fishing within British fishery limits (the UK EEZ) is prohibited by foreign vessels unless authorised by a licence.⁵² The power to grant fishing licenses to foreign vessels corresponds to the Scottish and Welsh Ministers, the Northern Ireland Department or the Marine Management Organisation (MMO). Such licences enable fishing within the specified parameters in their respective maritime areas (i.e. licences granted by the MMO do not authorise fishing within the Scottish, Welsh or Northern Irish zones)⁵³ However, in practice the United Kingdom Single Issuing Authority (UKSIA), a body of the MMO, acts on behalf of the UK sea fish licensing authorities of England, Scotland, Wales and Northern Ireland, and grants access to non-UK fishing vessels to enable them to fish within the UK EEZ.⁵⁴ EU MS submit vessel applications to the European Commission, who then submit them to UKSIA on their behalf.⁵⁵

In accordance with the Fisheries Act, foreign fishing vessels are not permitted to enter UK waters with the purpose of fishing unless they have been granted authorisation and are duly licensed. The Act is clear that in this eventuality, or when fishing without a licence occurs, or the fishing activities contravene the

51 Memorandum of Understanding Between the United Kingdom of Great Britain and Northern Ireland and the Government of Iceland on Enhancing Cooperation on Fisheries, <<https://www.gov.uk/government/publications/fisheries-memorandum-of-understanding-between-the-uk-and-iceland>> accessed 23 July 2021.

52 Fisheries Act 2020, <<https://www.legislation.gov.uk/ukpga/2020/22/contents/enacted>> accessed 2 July 2021, s 12, s 16.

53 *Ibid.*, s 17.

54 See United Kingdom Single Issuing Authority (UKSIA), <<https://www.gov.uk/guidance/united-kingdom-single-issuing-authority-uksia#foreign-vessels>> accessed 2 July 2021; note that the responsibility for the administration and management of UK vessel licensing with the UK EEZ rests with the UK fisheries authorities (Marine Scotland, Department of Agriculture and Rural Affairs in Northern Ireland, the Welsh Government and the MMO).

55 *Ibid.*

parameters established in the licence, the master, owner and where applicable the charterer of the fishing vessel will be committing an offence.⁵⁶ If convicted, whether in England, Scotland, Wales, or Northern Ireland, the persons who have committed the offence may be liable for a fine, or may have the catch and/or gear with which the offence was committed forfeited, and in some cases may be disqualified from holding a licence for a specified period.⁵⁷ The Fisheries Act also makes clear that offences can be committed by bodies corporate, and in such cases both the body corporate and the person to whom the offence is attributable and who is an officer or member, or a partner,⁵⁸ of such body corporate can be guilty of the offence.

In England, fisheries enforcement is divided between the national role of the MMO and ten Inshore Fisheries and Conservation Authorities (IFCAs) who take a regional role. IFCAs are overseen by the Department for Environment, Food and Rural Affairs and hold responsibilities to achieve both conservation objectives and sustainable exploitation of inshore fisheries.⁵⁹ Operating within the English territorial sea, IFCAs have the power to both create⁶⁰ and enforce⁶¹ byelaws, along with other national legislation within the geographical area of each IFCA district.⁶² IFCAs may appoint fishery and conservation officers who engage in monitoring of fishing activities and enforcement of conservation measures.⁶³ Enforcement activities involve sea patrols and catch inspections to ensure catch is above the legal minimum landing size and not subject to any restrictions at the national or local level.⁶⁴ The Sea Fishing (Enforcement) Regulations apply to the whole of the UK and give officers the power to enforce national fisheries conservation measures.⁶⁵

In Scotland, fisheries enforcement is the responsibility of Marine Scotland, a directorate of the Scottish Government and responsible for the monitoring, control and enforcement of fishing within the Scottish zone (see Table 5.1 in Chapter 5). Established in 2009, Marine Scotland is responsible for inspections at sea and in Scottish ports, and reporting infractions of marine and fishing legislation to the relevant prosecuting authorities. Marine Scotland has three marine protection vessels that undertake fisheries patrols, enforcement and inspections, as well as two surveillance aircraft. Relevant legislation includes the

56 Fisheries Act 2020 (n 52), s 12(3), 14(6) and 16(6), and Paragraph 1(4) of Sch 3.

57 *Ibid.*, s 19.

58 If in a Scottish partnership.

59 Marine and Coastal Access Act 2009, c. 23, <<https://www.legislation.gov.uk/ukpga/2009/23/contents>> accessed 2 July 2021, ss 149–150.

60 *Ibid.*, ss 155–158.

61 *Ibid.*, ss 165–166.

62 See Map of IFCAs in England, <www.association-ifca.org.uk/Content/ifca.map.pdf> accessed 17 July 2021.

63 *Ibid.*, ss 165–166.

64 *Ibid.*, ss 165–166.

65 Sea Fisheries, The Sea Fishing (Enforcement) Regulations 2018, N. 849, <www.legislation.gov.uk/uksi/2018/849/contents> accessed 2 July 2021.

Fisheries Act 2020,⁶⁶ the Aquaculture and Fisheries (Scotland) Act 2013,⁶⁷ Marine (Scotland) Act 2010⁶⁸ and the Marine and Coastal Access Act 2009.⁶⁹ Importantly, the Aquaculture and Fisheries (Scotland) Act provides that *any* British sea fishing officer has the power to enforce sea fishing legislation in the Scottish enforcement area (Scotland or the Scottish zone), and in relation to any Scottish fishing vessel “wherever it may be”.⁷⁰ Officers have the power to detain vessels if there are reasonable grounds to suspect an offence,⁷¹ release vessels,⁷² inspect, seize, retain and dispose of fishing gear and other objects.⁷³ In addition, officers may seize fish, which can then be sold by the Scottish Ministers.⁷⁴

A Brief Illustration: Rockall

Rockall is a small uninhabitable islet,⁷⁵ and in accordance with the LOSC generates a 12 nm territorial sea, over which the UK has full jurisdiction.⁷⁶ Rockall is in a location, roughly equidistant to the Republic of Ireland and the UK.⁷⁷ In the UK, Rockall is familiar to many due to the shipping forecast and weather reports, and in that respect the islet carries some cultural significance.⁷⁸ Historically, Rockall has been a cosmopolitan maritime enclave, with fisheries, merchant mariners and explorers from Western Europe utilising its water in various ways.⁷⁹

Rockall was incorporated as part of the County of Inverness in 1972 by the Island of Rockall Act, and “the law of Scotland shall apply accordingly”.⁸⁰ This

66 Fisheries Act (n 52) offences and penalties for breaches of licences or access provisions are found in ss 19–22; Sch 4.

67 Aquaculture and Fisheries (Scotland) Act 2013, <https://www.legislation.gov.uk/asp/2013/7/pdfs/asp_20130007_en.pdf> Part 3 concerns sea fisheries and enforcement thereof.

68 Marine (Scotland) Act 2010, <<https://www.legislation.gov.uk/asp/2010/5/part/7>> Part 7 contains specific provisions on enforcement, see ss 151–155 on duties, liabilities of, and offences in relation to, marine enforcement officers.

69 Marine and Coastal Access Act 2009 (n 59).

70 Aquaculture and Fisheries (Scotland) Act 2013 (n 67) s 35.

71 *Ibid.*, s 36.

72 *Ibid.*, s 37.

73 *Ibid.*, ss 39–42.

74 *Ibid.*, ss 43–44.

75 See G S Holland and R A Gardiner, ‘The first map of Rockall’, *The Geographical Journal* 141 (1975) 94–98.

76 UNCLOS, Art. 121(1).

77 V Lowe, ‘The United Kingdom and the Law of the Sea’ in Treves and Pineschi (eds.) *The Law of the Sea: The European Union and Its Member States* (Martinus Nijhoff, 1997), at p. 521.

78 See, for example, ‘Rockall’ in N Compton, *The Shipping Forecast: A Miscellany* (Ebury Publishing, London, 2016), at pp. 171–175.

79 R Derrig, ‘An Irish Claim to Rockall’ (2021), <<https://www.ejiltalk.org/a-n-irish-claim-to-rockall/>> accessed 2 July 2021.

80 Island of Rockall Act 1972, c.2, <<https://www.legislation.gov.uk/ukpga/1972/2>> accessed 3 July 2021.

Act was amended by the Local Government (Scotland) Act 1973, bringing Rockall in to the Western Isles local government council.⁸¹ As part of Scotland, Rockall fisheries are administered by Scotland,⁸² but Ireland also claims a right of access to Rockall for its fishers based on the history of the islet as a site where fishers and sailors of many nationalities have converged over the centuries, as well as the fact the islet is contiguous to the Irish mainland.⁸³ Nevertheless, according to most academic commentary, UK sovereignty over Rockall appears solid *de jure*, as well as *de facto*,⁸⁴ and the UK has included Rockall within its EEZ,⁸⁵ without Ireland raising a formal complaint.⁸⁶ Rockall was of interest to the UK during the Third UN Conference on the Law of the Sea in Caracas 1974 when States debated the maritime space that could be generated by low-tide elevations, rocks and islands.⁸⁷ At that conference, “[t]he promise of jurisdiction over seabed mineral or fisheries could well serve to stimulate or exacerbate disputes over islands. Indeed, it is arguable that this has already begun to happen.”⁸⁸ This quote is still relevant in the present day.⁸⁹

As mentioned above, prior to Brexit, the UK EEZ was managed under the CFP. Regulation 1380/2013 allows States to restrict fishing by foreign vessels within the 12 nm territorial sea. Under Article 5(2) of that regulation, EU vessels that had traditionally fished in the 12 nm area from ports in coasts adjacent to it were permitted to still 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. With the UK’s withdrawal from the CFP, the competent authorities (see above) in the UK are entitled to

81 Local Government (Scotland) Act 1973, c. 65, <<https://www.legislation.gov.uk/ukpga/1973/65/contents>> accessed 2 July 2021, s 241(2), Sch 27 para. 202.

82 Island of Rockall Act 1972 (n 80), 2. 1.

83 See C R Symmons, *Ireland and the Law of the Sea* (Blackrock, 1993) at p. 35.

84 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 22 April 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 22 April 2021; *contra* R Derrig, ‘An Irish Claim to Rockall’ (n 79).

85 The Exclusive Economic Zone Order 2013, <<https://www.legislation.gov.uk/uksi/2013/3161/contents/made>> accessed 3 July 2021.

86 S.I. No 86/2014 – Maritime Jurisdiction (Boundaries of Exclusive Economic Zone) Order 2014.

87 See J R Stevenson and B Oxman, ‘The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session’, 69 (1975) *The American Journal of International Law* 1–30.

88 J R Stevenson and B Oxman *ibid.*, at p. 25.

89 See M Shaw, ‘The Regime of Islands’ in Ø Jensen (ed.) *The Development of the Law of the Sea Convention – The Role of International Courts and Tribunals* (Edward Elgar, 2020), at pp. 14–47.

exercise prescriptive and enforcement jurisdiction in the territorial sea around Rockall under Articles 2 and 3 of the LOSC.⁹⁰ In principle, this means that access to fisheries in the territorial sea can only take place via the procedures agreed internationally between the UK as coastal State and third States or the EU. If granted, any fishing activity must be carried out in accordance with the licences assigned to individual vessels, and in accordance with the provisions established in the Fisheries Act 2020.

The waters around Rockall are home to complex fisheries with a transnational dimension,⁹¹ which attract considerable interest,⁹² being important not only to vessels from the UK and Ireland, but also to fleets from other EU MS and beyond, to the Icelandic and Russian fleets, for example. Cases where enforcement responses have been prompted are recent: just a few hours into Brexit, the Scottish marine protection vessel *Jura* had stopped Irish fishing vessel *Northern Celt* from entering Rockall waters beyond the 12 nm of the UK territorial waters.⁹³ This action resulted in a diplomatic incident between Ireland and the UK, and even prompted calls for Ireland to step up claims over Rockall.⁹⁴ Unfortunately, this incident has not been the only one in the short history of Brexit fisheries so far.⁹⁵

Conclusions

The above illustration brings to light the relevance that the international legal framework in matters of control and enforcement possesses, furnishing the coastal State with a balanced framework of competences, rights and obligations, and fostering international cooperation with neighbouring coastal States and flag States alike. The content of this chapter shows how the transition undertaken by the UK from EU MS and CFP participant to independent coastal State does not extricate it from a complex framework of international commitments, which specify what may be considered illegal fishing, and shape and condition control and enforcement responses.

90 R Collins (n 84).

91 See ME Certification Ltd, 'Marine Stewardship Council (MSC) Public Comment Draft Report SFSAG Rockall haddock on behalf of Scottish Fisheries Sustainable Accreditation Group (SFSAG)' (2018), <<https://cert.msc.org/FileLoader/FileLinkDownload.aspx/GetFile?encryptedKey=CeswdM1Ypz5E+5Ds/wS7etIJq119rb7OA/2C/Tl8ByCY9J4r+/4BmSShcOMmEM/6>> accessed 22 May 2021.

92 See Chapter 4.

93 See V Kearney, 'Donegal Vessel Blocked from Fishing around Rockall by Scottish Patrol Boat' RTE (2021) <<https://www.rte.ie/news/brexit/2021/0105/1187865-rockall-fishing/>> accessed 22 April 2021.

94 See *Irish Examiner* 'Irish Examiner View: Time for Ireland to Claim Rockall' 7 January 2021 <<https://www.irishexaminer.com/opinion/ourview/arid-40202453.html>>.

95 See, for example: <<https://www.bloomberg.com/news/articles/2021-06-28/fresh-brexit-fish-spat-averted-as-jersey-extends-french-amnesty>> and <<https://www.ft.com/content/f58eb8b0-c5fd-4ba5-b387-189f2f194f4b>>.

Whilst this framework permits and obliges independent coastal States such as the UK to ensure that there is a domestic legal system that ensures sustainable management of fishing resources in the waters under the jurisdiction of the coastal State, it also fosters a deeper level of cooperation, especially at the regional level. The UNFSA requires cooperation with RFMO measures, including for compliance purposes, and the PSMA sets out procedures to combat IUU fishing. The control and enforcement provisions contained in these agreements, and in the IPOA-IUU, are largely replicated in CFP legislation, much of which has been retained by the UK. Yet, as a new relationship is being forged with the EU and MS with fishing interests neighbouring the UK, new agreements have emerged. The TCA and the bilateral agreements that the UK has entered since 2020 provide additional framework upon which to base this new relationship.

The confrontation at Rockall and other examples of discontent that have followed since Brexit suggest that these agreements and the legal foundations that they contain for control and enforcement should not be underestimated.⁹⁶ Control and enforcement are needed to ensure and maintain sustainability, but they can also both foster and defuse conflict. Further, the cooperative framework of the LOSC and its satellite treaties strongly shows that no State exists in isolation, and that the international context always involves a balancing of interests. Indeed, this is the case with the UK, which although no longer a part of the CFP, nevertheless remains a trading partner of the EU.⁹⁷ Consequently, the UK is unlikely to remain impermeable to legal evolution in the EU in all matters involving fisheries governance, including compliance, control and enforcement.⁹⁸ Whether the TCA and the new agreements entered into by the UK and the control and enforcement policies developed on the legal bases they provide are sufficient to ensure sustainability and conflict-free oceans in the UK and its neighbouring waters is yet to be seen.

96 See R Barnes and M Rosello, 'Fisheries and Maritime Security: Understanding and Enhancing the Connection' in Evans and Galani (eds.) *Maritime Security and the Law of the Sea* (Edward Elgar, 2020), at pp. 48–82, 80.

97 For more information on trade data, see <<https://www.seafish.org/insight-and-research/market-supply-data-and-insight/seafood-trade-and-brexit/>> accessed 22 July 2021.

98 This is likely to be the case in particular with regard to the review of Council Regulation 1005/2008, the EU IUU Regulation, which specifically aims to foster minimum IUU fishing control standards and mechanisms vis-à-vis third countries that export fish products to the EU.