

From Membership to Partnership, the EU and its Relations with the UK after Brexit: the Fisheries Dimension

Dr Thomas Appleby

Associate Professor in Property Law, University of the West of England, Bristol

Abstract

Fishing in European waters has been a contentious issue since the sixteenth century and was a key factor in the development of the international law of the sea itself. At the time the UK joined the EU and shared its waters with Member State vessels it also lost access to its traditional fishing grounds off Iceland. The Common Fisheries Policy developed a centralised approach based around historic fleet size rather than productivity of Member States' waters. Controls were centered around technical measures, reduction in capacity and quota. These worked: the collapse of fish stocks was halted and started to recover a little. However many stocks are still potentially illegally allocated beyond scientific levels, and fishing continues unmanaged in the EU's suite of offshore marine protected areas. The management institutions need greater transparency and stronger adherence to the law. There is scope to build a future relationship between the EU and the UK: the UK and some of its overseas territories needs the EU market, many stocks are shared, and the parties will need to agree on scientific approaches. However, it is likely that the UK is due a greater allocation of stocks than the current system. As we approach the endgame of the Brexit negotiations it is important that both sides reflect that fishing represents less than 0.1% of their economies and over-politicisation of a small sector will not help either party in the context of the larger negotiations. The CFP, which the UK helped to create, has started to rebuild stocks and that upward trajectory needs to continue; it will only do so through collaboration.

Key words

Brexit Fisheries Competence Environment

Introduction

Pascal Lamy, former leader of the World Trade Organisation famously said: 'Brexit is like trying to get an egg out an omelette' The UK was a member of the EU almost from the inception of the Common Fisheries Policy (CFP); it shares responsibility for many of its strengths and weaknesses. The history of the UK membership is thus the history of the CFP itself. This article charts key issues in the

development of the CFP, how those issues affected relations between the UK and the EU, and posits how a new relationship can learn from the mistakes of the past. Attempts by the British to protect UK ownership of British flagged vessels led to the *Factortame* case and the setting aside of a UK Act of Parliament.

The History

Since the seventeenth century, the years of Welwood, Selden and Grotius, debate has raged over *mare clausum* and *mare liberum*: control of the coastal state verses freedom of the seas. Most commentators cite Grotius' desire to break the monopoly of the Portuguese in the Far East as the inspiration for his legal theory¹ of freedom of the seas. But as important was the large Dutch herring fleet operating in the North Sea at the time, much to the frustration of the Scots and English, who wished to control their adjacent waters for their own vessels.² Over time, the UK adopted the *mare liberum* principle and it was a British convened treaty, the London Fisheries Convention of 1964, which permitted signatory nations to fish in each others' waters according to historic fishing patterns.³

When Iceland declared territorial waters to 12 nautical miles in 1958, the UK backed its fishers' rights to continue operations in Icelandic waters. There were various attempts at settlement, but cod stocks were collapsing and a serious threat from Iceland to leave NATO and pivot toward the Soviet Union meant Iceland was able to extend its claim first to 50 then in 1975 to 200 nautical miles.⁴ A year later, the dispute was finally resolved in Iceland's favour. At a stroke, the UK had lost access to grounds its fishers had enjoyed for 500 years.

5 years before the loss of the Cod Wars the UK joined the EU which also had a significant impact on UK fisheries over the same short period. In June 1970, the day before the United Kingdom, the Republic of Ireland, Norway and Denmark began formal accession talks, the original six members of the European Economic Community (EEC) passed Regulation (EC) 2141/70. This gave fishing vessels registered in one Member State access rights to the maritime zone of any other member state. The original six had much more to gain from this arrangement than the candidate countries, as the candidates had significant coastal waters. Moreover, it was potentially an expansion of competence for the EEC itself, since the Treaty of Rome referred to agriculture, but was silent on fisheries.⁵ Shared

¹ Robin Churchill & A. V. Lowe, *The Law of the Sea*, 4 (3rd ed., Juris Publishing 1999).

² Alison Reiser, *Blue Legalities*, 201 (Editors Irus Baverman & Elizabeth R. Johnson Duke University Press 2020).

³ Fisheries Convention (9 March / 10 April 1964). T.S. No. 35.

⁴ Sverrir Steinsson, *The Cod Wars: A Re-analysis*, Eur. Security vol. 25(2) 256-275 (2016).

⁵ Christopher Barclay, *The EU Common Fisheries Policy. Research Paper 96/6*. (House of Commons Library, 16 January 1996).

access became part of the *acquis* of the existing Member States, so the candidates were put in a weak negotiating position. After some of the most fractious negotiations in the whole enlargement process (and Norway's ultimate withdrawal), a 10 year derogation for waters inside the 12 mile limit was agreed. The perceived failures of UK's negotiators in its accession and general problems with the EU's Common Fisheries Policy (CFP) were core issues in public campaigns in the UK for Brexit.⁶

By the Hague Resolution of September 1976,⁷ EEC Ministers agreed to extend fishing limits to 200 nautical miles from 1 January 1977, and that the fishing rights of non-Community vessels in these areas would be decided by the Community as a whole.⁸ Extending fishing limits did not resolve all the issues. Portugal and Spain were entering accession talks and it was important that existing Member States settled internal management before the vast Spanish distant water fleet was permitted access to Member States' waters. In an effort maintain the balance of Member States' fishing fleets quota (known as 'total allowable catch' (TAC)) was divided among Member States in a manner that was not too disruptive to Member States' fleets. 'Relative stability' as it became known was a political calculation based on past catches, dislocation of distant water fleets from the declaration of exclusive fishing zones by third States, and the regional importance of fishing. This exceptionally difficult calculation has remained more or less unchanged ever since.⁹ The principle of relative stability did not maintain the size of Member States' fleets but meant that the pain (or profit) was shared between Member States through a fixed proportion of TAC every year, though the amount of permissible landings fluctuated every year.¹⁰

There was also the nature of the EEC's competence to be settled. The 1972 Treaty of Accession for the Denmark, Ireland, Norway and the UK¹¹ contained the following wording:

From the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

⁶ Vote Leave, *The CAP and CFP are wasteful and bureaucratic*. http://www.voteleavetakecontrol.org/briefing_food.html (accessed 6 July 2020).

⁷ Council Resolution of 3 November 1976 on certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from 1 January 1977, 1981 O.J. (C105/1).

⁸ Christopher Barclay, *The EU Common Fisheries Policy*, 96/6 House of Commons Research Paper (16 January 1996).

⁹ n.1, 9.

¹⁰ Heather Stewart, *UK sea fisheries policy-making since 1945*, 69 (Phd Thesis Edinburgh University 2018).

¹¹ Art. 102, Accession Treaty of the Kingdom of Denmark, Ireland, the kingdom of Norway and the united kingdom of Great Britain and Northern Ireland, O.J. (L 73) 27.3.

The Commission had failed to implement effective management measures and so the UK brought in its own. In the case of *Commission v United Kingdom (the Sea Fisheries Case)*¹² The Court of Justice of the European Communities (CJEC) held:

‘The statement of the Court that Member States have, at the latest within the period laid down by Article 102 of the Act of Accession, a duty to use all political and legal means to ensure the participation of the Community in the international fisheries conventions *implies* [my emphasis] that after that date Member States no longer have the necessary power to participate themselves.’¹³

The CJEC had used the doctrine of *effet utile* rather than a textual interpretation of the Treaty to find that the EEC had exclusive competence in the conservation of marine biological resources and strike down British regulations, even though the Commission had not put forward appropriate management measures.¹⁴ The finding has since been criticized as an example of ‘competence creep.’¹⁵ It also demonstrates the problem, particularly in the early years of the UK’s accession, that the EEC (and Member States) did not have the institutions capable of delivering the technical management measures necessary to control fisheries in their newly extended waters. Moreover, since this was a court appointed, rather than negotiated expansion of European controls, Member States’ political institutions were not aligned with this level of European integration, nor was there a proper negotiation as to whether this was desirable, or even practical in terms of subsidiarity.

The remainder of fisheries policy (all marine fisheries issues, which do not relate to the conservation of marine biological resources, such as aquaculture and freshwater fisheries) are shared competence.¹⁶ This fine division of competences over the same area creates practical problems. The main means of fisheries control is via regulation rather than directive. So even where there is shared competence European law tend to be based on a command and control model, rather than the looser, more aspiration model utilizing Member State agencies demonstrated in other areas of environmental regulation where there is shared competence. It makes sense to have a supranational control mechanism to agree and implement quota controls to rebuild stocks, but it when it comes to the protection of spawning grounds or seabed habitat within a Member State’s exclusive economic zone, there is a reasonable argument to leaving that to the Member State; Member States already

¹² Case 804/79.

¹³ *Ibid*, 1055.

¹⁴ Christophe Hillion, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, 224–233 (Editors M.P. Maduro & L. Azoulai Hart Publishing 2020).

¹⁵ n.10, 97 *et seq.*

¹⁶ Article 4(2)(d) Treaty of Functioning of the European Union.

undertake such regulation for other offshore industries. As long as those actions are non-discriminatory (which are of course protected elsewhere in the European corpus of law)¹⁷ then it would avoid duplication of effort and the EU institutions having to create detailed legal instruments; EU instruments could create higher level objectives and instead leave the Commission free to undertake its policing function, an operation it has undertaken very successfully.

It was stated in the *Sea Fisheries Case*.

‘The links between the internal and external powers of the Community are particularly close in the fisheries sector. The great proportion of Community fishery resources has come within Community jurisdiction because of the Community decision to extend fishing limits to 200 miles. In no other area of law is the jurisdiction of Member States based so completely on a Community measure; in no other area have measures adopted by the Community such an immediate and direct impact on the rights of citizens of non-member countries and on the relations of the Community with those countries.’¹⁸

This statement was as true for citizens of Member States as it was for non-members.

Factortame

The early years of UK accession settled the basic framework of exclusive competence, relative stability and TAC allocation. The principle of relative stability is itself a derogation from European principles and in particular competition law. It follows that if regional importance of fishing is one of the three key components of relative stability, Member States’ businesses selling their vessels (and thus quota allocation) to foreign companies undermines relative stability itself. However, if citizens of other member states could not invest in UK companies this breached, Articles 7 (discrimination against nationals of other Member States, Article 52 (freedom of establishment) and Article 221 (financial participation in other Member States’ companies) of the Treaty of Rome. These are some of the key founding principles of European law. The stage was therefore set for the immovable object of relative stability to meet the irresistible force of European competition law; unfortunately, the UK Government found itself trapped between the two. This was partly a mistake of its own making, instead of seeking to control the allocation of quota to fishing vessels the UK administrations had allocated quota free to British vessels based on their track record. At the same time Spain had been disbarred from EEC waters and Spanish reflagged a number of its vessels by transferring them to British domiciled, Spanish owned

¹⁷ Art. 101, Treaty of Functioning of the European Union O.J. C 326.

¹⁸ n.12, 1056.

companies.¹⁹ Those Spanish-owned British vessels (which ironically contributed to British track record)²⁰ became the subject of some local controversy and the Conservative Government under Mrs Thatcher sought to exclude them from the British register under the Merchant Shipping Act 1988. The resulting *Factortame*²¹ case took on extraordinary importance because it not only settled the primacy of competition law for this aspect of relative stability, it also had the effect of overriding an Act of Parliament and demonstrating the supremacy of European over Member State law.

European law did permit the maintenance of an 'economic link' licence condition to vessel licences which continues to this day. The condition means that: 50% by weight of catch must be landed into UK ports; 50% of the total crew man days at sea were accounted for by crew normally resident in UK coastal areas; proof of certain routine expenses on UK goods and services; and donating quota to the under ten fleet, or a combination of those factors.²² However, even with the development of the economic link, Spanish and Dutch fishing businesses in particular, were able gain access to the UK (and French) industry, though acquisition (a practice known as 'quota hopping') in a way which was never exploited properly by their British counterparts. There were multiple reasons for this including the larger scale of the Spanish and Dutch businesses but ultimately many fishing businesses saw themselves as based in traditional communities, and that foreign expansion was thus an anathema. The result was the Spanish and Dutch fully engaged in the opportunities of international integration through the EEC, while fishing businesses in the UK and France felt more integrated to their territorial unit. For the UK territoriality together with its tradition of foreign inward investment has led to significant foreign ownership of quota, with reports estimating that 55% of English quota was held by foreign owned companies.²³

UK Producer Organisations and Fishing Quota

The UK had traditionally operated on the basis of a public right to fish²⁴ and open access to all comers. Overfishing, consequential stock collapse and the adoption of TAC by Member States, has resulted in

¹⁹ Thomas Appleby, Emma Cardwell & Jim Pettipher, *Fishing rights, property rights, human rights: The problem of legal lock-in in UK fisheries*, 6(1), *Elementa: Science of the Anthropocene* 40 (2018).

²⁰ For an interesting commentary see of the parties involved see: Thomas Cooper Law <https://web.archive.org/web/20140116105900/http://www.thomascooperlaw.com/factortameabout.html> (accessed 20 August 2020) John Couceiro *Factortame – A Client's Perspective* <https://www.daqc.co.uk/wp-content/uploads/sites/22/2018/05/Factortame-A-Clients-Perspective.pdf> (accessed 20 August 2020)

²¹ Case C-213/89.

²² Department of the Environment Food and Rural Affairs *Changes to the assessment economic link conditions* <https://www.gov.uk/government/news/changes-to-the-assessment-economic-link-conditions> (accessed 20 August 2020).

²³ Oliver Barnes & Chris Morris, *Brexit trade deal: Who really owns UK fishing quotas?* (BBC News 16 May 2020).

²⁴ Thomas Appleby, *The Public Right to Fish: Is it Fit for Purpose?* 16(6) *J. Water L.* 201-205 (2005).

a fundamental change to the system. Understandably, UK politicians did not want to be seen to be directly responsible for mass redundancies in the UK fishing fleet, instead the UK chose to limit access via its vessel licensing system. At first, vessel licences were issued to all-comers, but since 1993²⁵ no new licences have been issued, and a trade and aggregation of existing licences has been permitted. The licensing system was area based and enabled great flexibility for regulators to draw up real-time detailed measures. Quota was distributed to the vessel owners on the basis of historic landings, at firstly weekly, but later annually. For the larger fishing businesses quota were administered by Producer Organisations (POs), who managed quota on behalf of all their Members and were thus able to trade quota internally and allow the administration to step back from day to day management.²⁶ POs were established initially under European regulation to assist groups of fishing businesses in the marketing of fisheries products.²⁷ In the UK, however, these organisations took on this more administrative role but quota management stretched legal objectives of the POs.²⁸ This was problematic, as Stewart²⁹ states:

‘It created an imbalance for the POs in terms of responsibility and power. This imbalance came from the government’s decision not to devolve powers of control such as the POs request to limit and vary the fishing licences of members. While the government’s reluctance to devolve control (and keenness to devolve responsibility) is understandable – it was the body ultimately responsible for ensuring that the UK as a fishing fleet and Member States did not breach EU law – the decision regarding control of licences worked to undermine the efficacy of PO management in the UK as the POs as management organisations were left with too few powers to control their members. Membership rules were the main vehicle for this, with expulsion from the PO a key stick. However, POs had themselves been reluctant to carry out such sanctions as expelled members would take with them their track records/FQAs and the PO would have a reduced amount of quota to allocate.’

Stewart was writing from an economic point of view, but from a legal perspective, this placed extreme stress on the administrative system and It would be exceptionally unusual for a group of private

²⁵ A. Hatcher & A. Read, *Case Studies on the Allocation of Transferable Quota Rights in Fisheries* vol. 411, 1-14 (Editor R. Shotton Food and Agriculture Organization of the United Nations 2001).

²⁶ n.10, 85 *et seq.*

²⁷ See for instance: EU Regulation 104/2000 of 17 December 1999 on the common organisation of market and fishery products O.J. (L17/22) (now superceded).

²⁸ See Art. 7, Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 O.J. (L354).

²⁹ n.10, 120.

individuals to be empowered to write their own legislation. POs are also required to comply with competition law and not abuse their market position,³⁰ but it is difficult to see how a private organisation (albeit one created by European legislation) can manage balance all the competing interests of its members without clear and transparent checks and balances. This is made yet more complex by the UK Government's legal position, which maintains on the one hand that the UK fishery is owned by the Crown for the benefit of the public,³¹ but which has also allocated quota free to be then managed by the POs, who have successfully claimed that quota is a private property right.³² So the UK system has attempted to grant private bodies law-making powers they cannot have, while at the same time accidentally creating property rights, when there is no express power to do so.³³ On a more pragmatic note, UK administrators have managed to pass off the difficult decisions elsewhere: the European institutions had the hard job of agreeing TAC,³⁴ while the POs then had the task of implementing any reductions in quota.

Quota distribution is the most important administrative measure for most stocks. Its origin stems from a complex mix of EU and domestic legislation. Whether by accident or by design this laissez faire approach to quota management and development of an informal transferable quota market has led not just to foreign entrants to the UK sector, but also to considerable concentration of quota in fewer and fewer hands.³⁵ A report on quota and Brexit by the New Economics Foundation stated: 'one of the starkest divides in the UK fishing industry is that while small-scale vessels (under 10 metres) make up 77% of the UK fishing fleet, they hold only 1.5% of the quota.'³⁶ Quota distribution is largely a UK competence, but among the eyes of many in the sector, the cause of this unpopular inequity has been conflated with EU regulation.³⁷

Effectiveness of the Common Fisheries Policy

The CFP started in the context of stock collapse and overfishing made more complicated by the exclusion of some of the Member States' distant water fishing fleets from their traditional grounds. After over 40 years there is substantive evidence that since the turn of the century commercial stocks

³⁰ n.28, Art. 14.

³¹ Lord Gradiner, Hansard, House of Lords, col.312 (Off. Rep. 22 June 2020).

³² *United Kingdom Association of Fish Producer Organisations v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin).

³³ Indeed privatising the Crown fishery without statutory authority is expressly not permitted, see *Malcolmson v O'Dea* (1863) 10 HLC 592.

³⁴ Art.43(3), Consolidated version of the Treaty on the Functioning of the European Union O.J. (C 326).

³⁵ n.19.

³⁶ Anon., *Not in the Same Boat: The Economic Impacts of Brexit across UK Fishing Fleets* 47 (New Economics Foundation, undated)

³⁷ Fishing for Leave, *Primary Points*, §6 <https://ffl.org.uk/primary-points/> (accessed 20 August 2020).

have started to improve in the North East Atlantic.³⁸ The primary instrument of TAC has had a positive effect and there has been as noticeable recovery of European stocks since the CFP reforms of 2013, led by the North East Atlantic, with catch rates rising from 8.5 to 9.4 million tonnes across the EU between 2013 and 2017.³⁹ There has been: more active regional management through Advisory Councils; multiannual plans for some stocks; enhanced community enforcement; legal requirements to fish to maximum sustainable yield; and an obligation to land all catch.^{40 41}

This gradual upward trend, which is to be applauded, after years of a succession of stock collapses, still demonstrates considerable weakness. North East Atlantic stocks are still in an impoverished state compared to their historic levels.⁴² There has been an overreliance on demersal trawling using bottom-towed fishing gear, with the result that many commercial stocks exhibit features of fishing down the food web.⁴³ This is the process where larger fish are over-exploited, so their prey becomes the target. Demersal trawling is also associated with high bycatch and discard rates. Under the 2013 reforms demersal trawling should have been reduced because of the introduction of the landing obligation,⁴⁴ which required all catch to be landed in North European waters by 2016 and set against quota. The discard ban was promoted by the UK Government,⁴⁵ after a campaign by led by British celebrity chef Hugh Fearnley-Whittingstall.⁴⁶ This proved difficult to implement for demersal fishing vessels because of their high bycatch, and limitations on quota for ‘choke’ species.⁴⁷ In some sense these difficulties were exactly the point, the idea behind the discard ban was to drive fishing practice away from activities with high bycatch to those, which were more selective.⁴⁸

³⁸ Paul G. Fernandes, Robin M. Cook, *Reversal of Fish Stock Decline in the Northeast Atlantic*, vol. 23 (5) *Current Biology* 1432-1437 (2013).

³⁹ Rainer Froese, Henning Winker *et al.*, *Status and rebuilding of European fisheries*, vol. 93 *Marine Policy* 159-170 (2018).

⁴⁰ Regulation (EU) No 1380/2013 of the European Parliament and of the 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 O.J. (L 354).

⁴¹ M. Aranda, C. Ulrich *et al.* *Research for PECH Committee — EU fisheries policy – latest developments and future challenges*, (European Parliament, Policy Department for Structural and Cohesion Policies 2019).

⁴² R. Thurstan, S. Brockington & C. Roberts, *The effects of 118 years of industrial fishing on UK bottom trawl fisheries*. 1 *Nat. Commun.* 15 (2010).

⁴³ Daniel Pauly, Villy Christensen, *et al.* *Fishing Down the Food Web* 6 *Science* 860-863 (February 1998).

⁴⁴ n.28, Art. 15.

⁴⁵ Department of Environment, Food and Rural Affairs, *UK fishermen see next phase of the discard ban take effect* <https://www.gov.uk/government/news/uk-fishermen-see-next-phase-of-the-discard-ban-take-effect> (accessed 28 August 2020).

⁴⁶ Hugh Fearnley-Whittingstall's River Cottage, *Hugh's Fish Fight*. <https://www.rivercottage.net/campaigns/hughs-fish-fight> (accessed 28 August 2020).

⁴⁷ A.R. Baudron, & P.G.Fernandes, *Adverse consequences of stock recovery: European hake, a new “choke” species under a discard ban?*, 16(4) *Fish and Fisheries* 563-575 (2014).

⁴⁸ European Commission *Discarding and the landing obligation* https://ec.europa.eu/fisheries/cfp/fishing_rules/discards_en (accessed 20 August 2020).

TAC too, has proved to have major flaws. The reformed CFP required for strict limits on European TAC:

In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks.⁴⁹

The environmental NGO, ClientEarth, noted in 2019 that still more than 36% of TAC was allocated beyond MSY, even when the precautionary approach to fisheries management (also a legal requirement)⁵⁰ had been discounted.⁵¹ In 2007, environmental NGO WWF attempted to take a case to the CJEC over excessive cod TAC allocation, but the case failed because of *vires* issues.⁵² Now that we have passed the 2020 deadline, it will be interesting to see how the Council allocates TAC this year and whether there are legal ramifications.

One further hurdle to rebounding Atlantic stocks is the CFP's failure to enact meaningful marine nature conservation measures in many EU waters. The Habitats Directive is a very powerful piece of European environmental law, drafted in part by Stanley Johnson, father of the UK Prime Minister, when he was a Commission official.⁵³ Since the *Waddenzee* case in 2002⁵⁴ it has been accepted that fishing is a 'plan or project' under Article 6 of the Habitats Directive.⁵⁵ This brings significant legal obligations for such plans or projects, which affect European Marine Sites (EMS) protected by the Directive:

- Article 6(1) requires the establishment of: 'necessary conservation measures'... 'which correspond to the ecological requirements of the natural habitat types in Annex 1 and the species in Annex 2 present on the sites'.
- Article 6(2) requires the avoidance of: 'deterioration natural habitats and the habitats of species as well as the disturbance of the species for which the areas have been designated'.
- Article 6(3) set out procedures to be followed in cases where a plan or project is likely to have a significant effect on the site, either individually or in combination with other plans or

⁴⁹ n.28, Art. 2(2).

⁵⁰ Ibid.

⁵¹ ClientEarth, *Taking stock - are TACs set to achieve MSY?* (Client Earth November 2019).

⁵² *WWF-UK Ltd v Council of the European Union* [2007] Case T-91/07.

⁵³ Stanley Johnson, *My son is wrong on Brexit, the EU is good for the environment*, London Evening Standard, (19 April 2016)

⁵⁴ *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw* Case C-127/02.

⁵⁵ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora O.J. (L206).

projects. Such plans or projects shall be subject to an ‘appropriate assessment’ of its implications for the site in view of the site’s conservation objectives. In light of the conclusions of the assessment, the competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned. Such an assessment must include: ‘an explicit and detailed statement of reasons, capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned’.

The Habitats Directive has been translated into national law in territorial waters,⁵⁶ where the CFP delegated authority back to Member States for most fisheries management matters. This has meant a realignment for Member States’ fisheries management institutions, as the Directive applied to all ‘competent authorities’ (ie public bodies). For the English Inshore Fisheries and Conservation Authorities, implementing the Habitats Directive became a significant proportion of their work.⁵⁷ Despite the doom-laden warnings from some in the UK fishing sector⁵⁸ landings in UK waters having continued to rise, and areas where bottom-towed fishing gears are banned have seen socio-economic as well as environmental benefits.⁵⁹

Managing the Habitats Directive Offshore

For offshore waters, there is a clash of competences between the exclusive competence of fisheries policy and the shared competence in environmental matters. In theory, Member State’s implementation of the Habitats Directive through the establishment of European Marine Sites (EMS) could enable them to use their own legislative mechanisms to protect the EMS from harm by all Member States’ vessels, this would accord with international law for foreign flagged vessels in protected waters.⁶⁰ Instead, a process has been set up under Article 11(1) of the Basic Regulation of the CFP, which states:

Member States are empowered to adopt conservation measures not affecting fishing vessels of other Member States that are applicable to waters under their sovereignty or jurisdiction

⁵⁶ n.28, Art. 11(1).

⁵⁷ Jean-Luc Solandt, Thomas Appleby & Miles Hoskin, *Up Frenchman's creek: A case study on managing commercial fishing in an English special area of conservation and its implications* 25(4) *Env. L. Management* 133-139 (2013).

⁵⁸ National Federation of Fishermen’s Organisations *Federation in intense dialogue over marine protected areas* 4th September 2019. <https://nffo.org.uk/news/federation-in-intense-dialogue-on-marine-protected-areas.html> (accessed 20 August 2020).

⁵⁹ Siân E. Rees, Emma V. Sheehan, *et al.* *Emerging themes to support ambitious UK marine biodiversity conservation*, 117 *Marine Policy* 103864 (2020).

⁶⁰ *Request for an advisory opinion submitted by the sub-regional fisheries Commission submitted to the Tribunal Advisory Opinion (Fishery Advisory Opinion)* [2015] ITLOS 21, [108].

and that are necessary for the purpose of complying with their obligations under Article 13(4) of Directive 2008/56/EC, Article 4 of Directive 2009/147/EC or Article 6 of Directive 92/43/EEC [the Habitats Directive], provided that those measures are compatible with the objectives set out in Article 2 of this Regulation, meet the objectives of the relevant Union legislation that they intend to implement, and are at least as stringent as measures under Union law.

The CFP has interfered with the established dynamic of shared competence by creating its own process for the implementation of environmental legislation in Member States' exclusive economic zones (EEZs) set out in Article 11(2) and (3):

Where a Member State ("the initiating Member State") considers that measures need to be adopted for the purpose of complying with the obligations referred to in paragraph 1 and other Member States have a direct management interest in the fishery to be affected by such measures, the Commission shall be empowered to adopt such measures, upon request, by means of delegated acts in accordance with Article 46. For this purpose, Article 18(1) to (4) and (6) shall apply *mutatis mutandis*.

The initiating Member State shall provide the Commission and the other Member States having a direct management interest with relevant information on the measures required, including their rationale, scientific evidence in support and details on their practical implementation and enforcement. The initiating Member State and the other Member States having a direct management interest may submit a joint recommendation, as referred to in Article 18(1), within six months from the provision of sufficient information. The Commission shall adopt the measures, taking into account any available scientific advice, within three months from receipt of a complete request.

The problems with these subsections is translate the 'must' language of the Habitats Directive into 'may' language, while at the same time potentially bringing the application of some of the most important environmental law into the exclusive competence of the EU. Predictably, Member States have not been able to agree any joint recommendations, and (as a terrible example to Member States) no management measures have been taken for offshore EMS. The Dogger Bank Special Areas of Conservation, which cover over 18,000 km² and straddles UK, Dutch and German waters are the subject of a complaint from a group of European environmental NGOs, as no action has been taken to bring in fisheries management measures for an important habitat to protect it from one of the most

damaging marine activities.⁶¹ It has been argued⁶² that Member States are still liable for non-compliance with the Habitats Directive, but this demonstrates the complicated muddle around the CFP, where it starts to legislate in areas where it does not have the tools or the transparency.

Electric Pulse Fishing

One further controversy affecting UK waters was the development of electric ‘pulse’ fishing in the North Sea. In an effort to reduce fuel consumption from demersal trawling the EU, led by the Dutch fleet, pioneered the addition electric ‘tickler’ chains to demersal gear; this had the effect of stunning fish into the net, requiring less impact with the seabed, because it could be attached to lighter gear. However, electric fishing is banned in European waters. A derogation,⁶³ for the limited use of pulse trawling in the Southern North Sea, was introduced in 2007 for ‘scientific research’ and renewed annually.⁶⁴ In March 2013 the principle of derogation was integrated into EU law,⁶⁵ and in 2015 the Netherlands began a five year process under Article 14 of the Basic Regulation⁶⁶ which permitted pilot projects which looked to avoid, minimise and eliminate unwanted catch. There were two key problems with this process. First, these scientific experiments and pilot projects, like all fishing, were permitted to take place in EMS in the North Sea, this caused a complaint to the Commission from UK environmental NGO, the Blue Marine Foundation.⁶⁷ Second, over time, the Dutch fleet widely adopted pulse technology, before any scientific study could attest to its safety.⁶⁸ These led to a broadening realisation that claims of a pilot project and scientific study were a sham to mask commercial exploitation. The result was that a campaign, led by French environmental NGO, the Bloom

⁶¹ WWF *Incomprehensible proposal would allow illegal fishing in North Sea nature reserve* 24 June 2019 https://www.wwf.eu/what_we_do/oceans/?uNewsID=348901 (accessed 20 August 2020).

⁶² Thomas Appleby & James Harrison, *Taking the Pulse of Environmental and Fisheries Law: The Common Fisheries Policy, the Habitats Directive, and Brexit*, vol. 31(3) J. Env. L. 443–464 (2019).

⁶³ Under Art. 43, Council Regulation (EC) 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms O.J. (L125).

⁶⁴ Council Regulation (EC) No 41/2006 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required O.J. (L15).

⁶⁵ Regulation (EU) No 227/2013 of the European Parliament and of the Council of 13 March 2013 amending Council Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms and Council Regulation (EC) No 1434/98 specifying conditions under which herring may be landed for industrial purposes other than direct human consumption O.J. (L78)

⁶⁶ n.28.

⁶⁷ Ben Webster, *Dutch devastate marine life with electric shock fishing* (The Times 1 October 2018).

⁶⁸ Kait Bolongaro, *The Franco-Dutch fish fight over pulse trawling* (Politico 2 June 2018).

Association, succeeded in convincing the European Parliament that technology needed to be phased out.⁶⁹⁷⁰

In May 2020, the International Council for the Exploration of the Sea (ICES), a leading intergovernmental scientific panel, advised:

‘ICES advice is that the change from conventional beam trawling to pulse trawling, when exploiting the total allowable catch (TAC) of North Sea sole (*Solea solea*), does contribute to reducing the impacts of the sole fishery on the ecosystem and environment.’⁷¹

This finding does not necessarily reflect on the legal requirements of the Habitats Directive, as even a reduced impact may not be permissible under the strict requirements of its Article 6 procedures. Nor does it necessarily reflect on the wisdom of exploiting demersal fisheries *per se*, it may just be a case of pulse being less bad. The confusion demonstrates the necessity for the scientific testing to predate the commercial exploitation in this sort of controversial activity, the need to follow rules set out in the legislation and the need for transparency and public buy-in for the scientific and commercial development of the resource.

The EU Distant Water Fleet

The UK lost much of its distant water fleet in the Cod Wars and the European fleet is led by Spain, France, Lithuania and the Netherlands with a much smaller UK presence.⁷² This may have permitted the UK a certain objectivity in its stance when engaged in distant water fisheries policy-making, as a fishing nation whose civil service understood the technicalities of the legislation without having to broker its own commercial vested interests. There are, however, two areas where UK policy took a more active interest: the position of the UK Overseas Territories (UKOTs) and Crown Dependencies (CDs), and negotiations over the Treaty Biodiversity Beyond National Jurisdiction (BBNJ) at the United Nations.

⁶⁹ Gerardo Fortuna, *EU approves ban on electric pulse fishing from 2021* (Euractiv 14 February 2019).

⁷⁰ Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, O.J. (L198).

⁷¹ International Council for the Exploration of the Sea, *Pulse trawling advice released, 20 May 2020* <https://www.ices.dk/news-and-events/news-archive/news/Pages/PulseTrawlAdvice.aspx> (accessed 20 August 2020)

⁷² Natacha Carvalho, Michael Keatinge & Jordi Guillen, *The 2018 Annual Economic Report on the EU Fishing Fleet* 196 (JRC Science for Policy Report 2018).

Except for Gibraltar, none of the UKOTs or CDs were members of the EU. However, under the *Overseas and Associate Decision*⁷³ Overseas Countries and Territories (OCTs) have been able to enjoy increasing relationships with the EU. For the Falkland Islands, in particular, this closer relationship and reduction of tariff barriers has led to the EU becoming its biggest market for fish, meat and other agricultural products, with the EU market being worth some £180, million per annum, with an estimated 70 percent of the Falklands' GDP being dependent on access to EU markets.⁷⁴ The EU nationals also negotiated access to the Falklands fishery for its vessels, principally through joint ventures.⁷⁵

Under the principle of 'undivided realm'⁷⁶ the UK Government or the Crown represents the UKOTs and CDs in areas where they have not been granted autonomy. The arrangement for each UKOT and CD is different, but in many cases this means that the UK Government has an obligation to represent the best interests of the UKOT or CD, while at the same time, as a Member of the EU it had a duty of 'sincere co-operation',⁷⁷ to act in unity with other Member States. On the face of it, this represented a conflict of interests, but in practice this meant that the UK could adopt an independent position, but only insofar as it represented the limited interests of the UKOT or CD and the UK was not using this independent voice to run its own competing policy. This additional role gave the UK greater lobbying power to influence the EU position. An example is the British Indian Ocean Territories (BIOT), where the UK has declared its entire waters a marine protected area⁷⁸ and only had a small distant water fleet. In a rare insight into international fisheries negotiations at the Indian Ocean Tuna Commission (IOTC), the then UK Secretary of State for the Environment, Michael Gove, claimed:⁷⁹

The UK is committed to promoting effective worldwide measures for fish conservation. The UK is also an advocate for science-based management and for promoting wider conservation objectives relating to the protection of corals, sponges and other susceptible forms of

⁷³ Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision') O.J. (L344).

⁷⁴ Peter Clegg, *Brexit and the Overseas Territories: Repercussions for the Periphery* 105(5) Round Table 543-555 (2016).

⁷⁵ Falkland Island Government Fisheries Department *History* <https://www.fig.gov.fk/fisheries/overview/history> (accessed 20 August 2020).

⁷⁶ Ian Hendry and Susan Dickson *British Overseas Law* 23 (Hart Publishing 2011).

⁷⁷ Peter van Elsuwege, *The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law*. (10.1007/978-3-030-05782-4_13 2019)

⁷⁸ Thomas Appleby, *The Chagos marine protected area-A battle of four losers?*, vol. 27(3) J. Env. L. 529–540 (2015).

⁷⁹ Michael Gove, Explanatory Memorandum on the Agreement for the Establishment of the Indian Ocean Tuna Commission *UK Agreement for the Establishment of the Indian Ocean Tuna Commission Command Paper No. 42* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777517/MS_6.19_Indian_Ocean_Tuna_EM.odt (accessed 20 August 2020).

vulnerable marine ecosystems. The UK has actively influenced the EU position on these important issues in the IOTC.’

Exclusive competence over the distant water fleet has also led to development by EU of sustainable fisheries partnership agreements.⁸⁰ These are very controversial instruments,^{81,82} the strong bargaining power of the EU, together with the ability to pay for access is used as leverage for access to the distant water fleet to third states waters. Heredia and Oanta commented:

‘The financial compensation agreements are those signed by the EU with third-country coastal states that agree to cede part of the exploitation of their fisheries resources, with no reciprocal right of access to EU waters, in exchange for the payment of a sum by the Union, as well as payment of a fee by those private ship owners that enjoy the right of access to the coastal states’ waters. This financial compensation is frequently accompanied by other considerations, such as access to the European market at lower tariffs.’⁸³

This is a complicated arrangement and while it is clear that those few EU Members with distant water fleets benefit, the benefits for other EU fishing states and the European public are not so clear: the EU market is being used as a protectionist tool to benefit some very localised businesses, while the tariff barriers make it hard for those countries to develop their own fleets and potentially supply the EU consumer with cheaper fish.

Exclusive competence for fisheries has also led to a de facto unified EU voice for its members in the negotiations for the United Nations Treaty on BBNJ. Even though environmental legislation is shared competence, the Treaty may impact on the regional fisheries management bodies set up under the United Nations Convention on the Law of the Sea (UNCLOS).⁸⁴ As a result, political difficulties have arisen: ‘in distinguishing between the exclusive and shared competences of the EU in regard to the conservation of biological resources and the protection of the environment, at both a substantial and institutional level.’⁸⁵

⁸⁰ n.28, Art. 31.

⁸¹ Philipp Nagel & Tim Gray, *Is the EU’s Fisheries Partnership Agreement (FPA) with Mauritania a genuine partnership or exploitation by the EU?*, vol 56 *Ocean & Coastal Management* 26-34 (2012)

⁸² Catherine Gegout, *Unethical power Europe? Something fishy about EU trade and development policies* vol. 37(12) *Third World Quarterly*, 2192-2210 (2016).

⁸³ José Heredia & Gabriela Oanta, *The Sustainable Fisheries Partnership Agreements: Fisheries And/Or Development*, vol. 19 *Spanish Yearbook of Int. L.* 61-85.

⁸⁴ Art. 118, United Nations Convention on the Law of the Sea.

⁸⁵ P. Ricard *Global Challenges and the Law of the Sea*, 377-399 (Editors: M. Ribeiro, F. Loureiro Bastos F & T Henriksen Ssuidpringer 2020).

Only a handful of EU Member States benefit from the commercial exploitation of global fish stocks, and yet all stand to suffer from the loss of global biodiversity due to overfishing and its broader impacts on the marine environment. The overarching question is whether the entire EU position should be led from the position of trying to retain access to the resource or conserve it, the relative position within the hierarchy of competences may lead to an implicit (but probably erroneous) assumption that the commercial fishing interests would benefit the EU public more than conservation.

Opportunity for Reform

Fisheries played a disproportionate role in the UK's decision to leave the EU; the CFP supplied a narrative, which supported a sense that the UK had been hard done by. The last minute inclusion of shared access as part of the *acquis* back in the 1970s provided a sentiment, which echoed down the generations. The CFP exhibited too many examples of centralisation and competence creep at the expense of the UK, which fanned the flames of Euroscepticism. Fishing represents only 0.1 per cent of UK gross value added and for most EU member states, fishing amounts to 0.1% or less of their economic output,⁸⁶ and yet this economically insignificant industry is once again dictating the relationship between the UK and its nearest neighbours, potentially to the detriment almost all the citizens of the UK and EU Member States. Eurosceptic UK politicians over-emphasised fisheries as an exemplar of the need for Brexit and the EU negotiators responded by making access to UK waters and maintenance of existing relative stability TAC arrangements a condition of the entire UK / EU future relationship,⁸⁷ in essence this would mean the continuation of the most contentious parts of the CFP. It is submitted that this negotiation position was deeply flawed on both sides, because the CFP itself has fundamental systemic weaknesses. Instead of supporting the continuation of the *status quo*, there should be a recognition of the role these flaws in the CFP played in the UK's departure, and an appetite for reform. Brexit is the biggest single disaster to befall the EU in its history and there is a credible argument that the CFP is a major cause of it, that alone should be enough for a serious investigation and reform of the CFP and DG MARE. In reviewing UK and EU relations a number of key failings stand out.

First, the UK approach of the adoption of zonal attachment (based around where fish live, not historic landings) is the correct for process for allocation of stocks under UNCLOS, and with climate change shifting stocks northward increasingly Member States are having to swap allocations to permit their vessels to have the right TACs.⁸⁸ Under this process, it is likely the UK would receive a substantially

⁸⁶ Anand Mennon & Christopher Huggins, *Fisheries and Brexit* (The UK in a Changing Europe 12 June 2020).

⁸⁷ Elena Ares, *Fisheries: UK-EU future relationship negotiations* 8927 (House of Common Library Briefing Paper 19 June 2020).

⁸⁸ n.39.

larger allocation of TAC for many stocks.⁸⁹ Maintenance of the status quo is unlikely to recognise the true value of the stocks being surrendered by the UK in return for the access rights to the market for its fishers and it also compounds the problem of discards as fishing businesses do not have the quota for stock in their waters. In short, after serving a useful political purpose relative stability, based on landings nearly 50 years ago, when stocks were in a very different shape, is out of date.⁹⁰

Second, there is a question as to whether the CFP requires exclusive competence. It was the CJEC which decided the point rather than diplomacy, and this question of competence has never been properly settled on the basis of subsidiarity. The tools of fisheries management are not distinguishable from other environmental management mechanisms, and yet environmental legislation in the EU has been far less contentious, though its competence is shared. Exclusive competence brings with it real difficulties in terms of EU governance. Technical management is via the EU institutions, but where that management goes amiss, it is far harder for the Commission to investigate failures as the Commission cannot easily investigate itself easily, not can it infract itself. The result is that lapses, which would have led to infraction proceedings against Member States, have been ignored. The CJEC was happy to hear *the Waddenzee* case, but 18 years later, there has been no sign of implementing the same laws in the areas of EU exclusive competence when it comes to the over-allocation of quota or failure to manage of EMS. Exclusive competence has led to fisheries exceptionalism, which has not been healthy.

Third, there is a real issue of transparency. There is evidence that the relationship between the sector and DG MARE is too close: the Dutch fleet managed to use a scientific exemption to undertake large-scale commercial fishing and there has been widespread consolidation of the fleet (not just in the UK) but across the EU.⁹¹ Yet with the reduction in employed fishers benefiting from the policy, and consolidation of ownership, the case for subsidising the fleet should diminish as should its political importance.

Fourth, external policy benefits ever fewer EU Member States than operations within EU waters, over-exploitation on the high seas and in the developing world is a major international concern. Leading marine biologists took the unusual step of writing to DG MARE because of their concerns over the potential collapse of yellowfin tuna in the Indian Ocean, where the EU has the largest fleet.⁹² With

⁸⁹ P.G. Fernandes & NG Fallon, *Fish distributions reveal discrepancies between zonal attachment and quota allocations* 13(3) Conservation Letters 12702 (2020).

⁹⁰ Ibid.

⁹¹ Eurostat, *Fisheries Statistics 2019* https://ec.europa.eu/eurostat/statistics-explained/index.php/Fishery_statistics (accessed 20 August 2020).

⁹² Callum Roberts, *Letter: EU policy fails to tackle exploitation in fishing* (Financial Times, 18 March 2020).

BBNJ negotiations ongoing, the EU will have to decide whether it is going to promote conservation or exploitation and lead by example.

Fifth, there is the question whether the EU is really gaining from the current arrangement. The subsidy given to the EU fleet only benefits the fishing nations, and the subsidy given to the distant water fleet benefits even fewer Member States. The CFP itself is of very marginal economic interest. The united position to date regarding access to UK waters in return for access to the EU market may not survive a sustained pressure from a UK negotiating team, if agreement can be reached in all other areas.

From Membership to Partnership

There is plenty of scope for future collaboration between the UK and EU, indeed it is a requirement of UNCLOS.⁹³ The UN Fish Stocks Agreement requires signatories (including the EU and UK) to cooperate with other coastal states⁹⁴ (and on the high seas) over a significant range of activities for straddling stocks and highly migratory species inter alia: adoption of management measures, use of best scientific evidence, the precautionary approach, environmental impact assessment, discard minimisation, biodiversity protection, artisanal fisheries and enforcement.⁹⁵ It is difficult to see how such a broad range of interests can be managed without some further formal co-operation.

UK fishing businesses will continue to need access to European markets, and EU vessels and supply lines are equipped to access UK waters, but the detail of these negotiations needs to be left to the negotiators, who can properly evaluate the relative positions, rather than the 'red top' newspapers in the UK, France or Spain, with artificial red lines. If negotiations fail, there is scope for the imposition of tariffs and the closure of the EU market to UK fishery products. Other markets may be found for UK fish, either in the UK domestic market or the far East and trade would probably find its way around such barriers, but such an approach would lead to a shock for both parties and it is likely that blow would fall on those with the least financial capital to be able to trade through the challenges.

If zonal attachment rather than relative stability can be agreed, this brings the chance for more aspirational fisheries management in the North East Atlantic. The UK Fisheries Bill⁹⁶ contains a facility for the establishment of longer term, fisheries management plans, these could mesh well with

⁹³ Art. 63, United Nations Convention on the Law of the Sea.

⁹⁴ Art.3(2) 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.

⁹⁵ Ibid, Art. 5.

⁹⁶ Cl. 6, Fisheries Bill [HL] <https://services.parliament.uk/bills/2019-21/fisheries.html> (accessed 20 August 2020)

European legislation such as the Marine Strategy Framework Directive⁹⁷ and mark a shift away from a stock by stock assessed fishery based on historic landings, to one which was based on ecosystem recovery and a more appropriate allocation mechanism.⁹⁸ This is not the place to posit how such a system would look, but there needs to be flexibility in the system to allow for change and a forum to draw in best practice from around the world, a step removed from current negotiation practice dominated by interests benefiting from the status quo.

The UK and EU will still need to collaborate on scientific research. However, TAC is allocated it is important that both parties use the same approach, but there are also benefits from marine biological research, fisheries economics and the social sciences for collaborative approaches. Similar collaborations will also be required for policing and other data sharing.

The UKOT and CDs will each want their own relationship with the EU, following the loss of their status of OCTs. The UK Government will have to take steps to replace that loss of access to resources. But the personal relationships between the UKOTs and the EU will not be lost. The Falkland Islands will be keen to retain ongoing relations, access to EU market, and European investment in its fishing businesses.

The UK will continue to send delegates to the Regional Fisheries Management Organisations, but its representation in bodies such as the IOTC or negotiations for the BBNJ Treaty, but they will no longer be subject to the duty of sincere cooperation. It is hoped that shared values, particularly over environmental concerns, will continue to align their interests without the need for legal requirements

Final Word

From an objective view both sides in the negotiations have acted poorly. After the Brexit referendum result, with the UK in a state of political turmoil there was scope for conciliatory gestures from the EU instead there was an insistence of the UK exercising its notice under Article 50⁹⁹ before exit negotiations could begin. On the face of it, this gave EU negotiators the upper hand in any future negotiations, but it also had the effect of forcing the hand of Prime Minister Theresa May, when there was still a chance of a second referendum. In pure technical terms, the British could have retracted that notice¹⁰⁰ but by that time it was too late, politicians in the UK had been setting out their own rosy

⁹⁷ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) O.J. (L164).

⁹⁸ Paul Kemp, Rainer Froese & Daniel Pauly *COVID-19 provides an opportunity to advance a sustainable UK Fisheries Policy in a post-Brexit brave new world*, 120 Marine Policy 104114 (2020).

⁹⁹ Treaty of Lisbon, O.J. 2007/C 306/01

¹⁰⁰ *Wightman and Others v Secretary of State for Exiting the European Union* Case C-621/18

view of the future relationship, as had politicians in Europe, but neither view was remotely the same. Red lines were drawn by people too far away from the negotiating table. Among those red line was an insistence that the UK remain effectively a silent partner in the CFP on the basis of access to market in exchange for access to waters on the European side, while in the UK 'regaining control of our waters' was a battlecry for Brexit. Both these stances make little sense. From a UK perspective, it is tempting to view the history of the CFP as a legal instrument imposed on it. While it is true that the UK lost (or traded away) its fishery in a number of diplomatic battles, the UK was an early member of the EU and contributed considerably to the CFP as it now stands. Such law is very often the art of the possible, and during the period of UK membership a workable legal architecture had to be constructed to manage: shared fisheries after the adoption of UNCLOS; the creation of EEZs; the Spanish accession; and the reversal of ongoing stock collapse. In these matters, despite the earlier criticism in this article, the CFP was successful. In its essence, the EU is a forum to settle competing Member States interests. Now that the UK is no longer a member of that forum, it is hoped, that as we finally approach the end of the negotiation process the spirit of collaboration can be reignited albeit in a different form: fish stocks are shared and need to be managed collectively. In age where most environmental stories have reflected escalating bad news, the UK and EU collectively, have started to deliver fish stock recovery in the North East Atlantic. That recovery needs to continue.