POSSIBLE EU FISHERY RIGHTS IN UK WATERS AND POSSIBLE UK FISHERY RIGHTS IN EU WATERS POST-BREXIT

An Opinion prepared for the Scottish Fishermen's Federation

by

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November 2016

Introduction

I was contacted by Mr Bertie Armstrong, Chief Executive of the Scottish Fishermen's Federation, by email on 6 October and asked to provide an opinion on the following three questions:

- Whether or not the (reciprocal) historic fisheries access rights in coastal waters would survive Brexit
- Whether or not any fisheries access rights for non-UK EU Member States have accrued in the UK's EEZ (and vice versa) over the course of the operation of the CFP
- Whether or not the concept of 'geographically disadvantaged' States under Article 70 of UNCLOS applies to any individual Member States of the EU

I answer each of these questions in turn, and then provide a summary of my answers at the end of this opinion (pp. 23-25).

Question 1: Would (reciprocal) historic fisheries access rights in coastal waters survive Brexit?

1. The rights referred to in this question are those set out in Article 5 and Annex I of the current basic regulation on the Common Fisheries Policy (CFP), Regulation 1380/2013.[1] Article 5(1) provides that 'Union fishing vessels shall have equal access to waters and resources in all Union waters other than those referred to in paragraphs 2 and 3, subject to the measures adopted under Part III.' A 'Union fishing vessel' is defined in Article 4(1)(5) of the Regulation as 'a fishing vessel flying the flag of a Member State and registered in the [European] Union'; while 'Union waters' are defined in Article 4(1)(1) as 'waters under the sovereignty or jurisdiction of Member States', in other words the internal waters, territorial seas and exclusive economic zones (EEZs) of EU Member States. The right of equal access set out in Article 5(1) is, as mentioned, subject to the exceptions in paragraphs 2 and 3. Paragraph 3 is not relevant in the present context. Paragraph 2 provides that in the zone extending to 12 nautical miles[2] from the baseline from which a State measures its maritime zones, an EU

[1] Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, *Official Journal of the EU* (OJ), 2013 L354/22.
[2] Hereafter all references to miles in this opinion are to nautical miles.

Member State may restrict fishing until the end of 2022 to 'fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States and the arrangements contained in Annex I.' I am not aware of fishing vessels from other EU Member States having a right to fish in the UK's 12-mile zone on the basis of 'existing neighbourhood relations'. However, there are extensive areas of the UK's 12-mile zone where vessels from other EU Member States may fish on the basis of Annex I. These areas all refer to the 6-12 mile zone from the baselines, and comprise 15 stretches of coast where French vessels may fish, six where German vessels may fish, five for Belgian vessels, three for Dutch vessels and two for Irish vessels. Several of the areas where French, German, Dutch and Irish vessels may fish are off the coast of Scotland. In many cases vessels are restricted to fishing for specified species of fish. There are also five areas in the 6-12 miles zone off the coasts of other EU Member States where UK vessels may fish: two off Ireland, and one each off France, Germany and the Netherlands.

2. To understand what the possible significance (if any) of the rights set out in Annex I of Regulation 1380/2013 will be post Brexit, and therefore to answer Question 1, it is necessary to trace the historical antecedents of those rights, going as far back as the late 1950s and early 1960s.

3. The First and Second UN Conferences on the Law of the Sea, held in 1958 and 1960 respectively, failed to reach agreement on the breadth of the territorial sea or on a right for a coastal State to establish an exclusive fishery zone, although at the Second Conference a proposal for a 6-mile territorial sea with a further 6-mile exclusive fishery zone (EFZ) beyond failed by only one vote to obtain the two-thirds majority necessary for its adoption. In response to the unilateral establishment of 12-mile EFZs elsewhere in the world following the Second UN Conference, 16 West European States held a diplomatic conference in 1963-64 with the aim of establishing a regional system of EFZs. The result was the adoption in 1964 of the European Fisheries Convention.[3] The Convention was ratified by 12 States (Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Sweden and the UK), and came into

[3] UN Treaty Series Vol. 581, p. 57; UK Treaty Series 1966, No. 35.

force in 1966. The Convention provided that its parties could establish a 12-mile EFZ, measured from the baseline. Articles 3 and 4 provided that vessels from other parties to Convention that had 'habitually fished' within the outer six miles of a coastal State's EFZ between 1953 and 1962 could continue to fish there, although they were 'not [to] direct their fishing effort towards stocks of fish or fishing grounds substantially different from those which they have habitually exploited.' In accordance with the Convention, the UK duly established a 12-mile EFZ in 1964 by means of the Fishery Limits Act. Section 1(3) of the Act provided that for the purpose of giving effect to 'any Convention' (including therefore the European Fisheries Convention), ministers could make orders designating those foreign countries whose vessels were permitted to fish in the outer six miles of the EFZ, and the areas and species for which such vessels could fish. Orders were made under this section designating Belgium, France, Germany, Ireland and the Netherlands.

4. Very importantly in the present context, Article 10 of the Convention provided that: 'Nothing in the present Convention shall prevent the maintenance or establishment of a special regime in matters of fisheries' as between Member States of the EEC. The then EEC duly took advantage of that provision when it adopted its first fisheries regulation, Regulation 2141/70, in 1970.[4] Article 2 of the Regulation provided for the equal access of vessels from one EEC Member State to 'maritime waters coming under [the] sovereignty or within [the] jurisdiction' of any other EEC Member State. As an exception, Article 4 of the Regulation authorized the Council to limit access for a five-year period to certain zones within the 3-mile limit from the baseline to the local population of the area concerned if it was essentially dependent on coastal fishing. Regulation 2141/70 was adopted on the eve of the opening of negotiations with the UK, Denmark, Ireland and Norway on their applications to become members of the EEC. The four applicant States took strong objection to the equal access principle in the Regulation because it was contrary to their fisheries interests. Negotiations over this issue were therefore hard-fought and protracted. Eventually a compromise was reached on a temporary derogation to the equal access principle. This was set out in Articles 100 and 101 of the Act of Accession attached to the Treaty of Accession by which the

[4] Council Regulation (EEC) No 2141/70 laying down a common structural policy for the fishing industry, OJ Special Edition 1970 (III) 703.

UK, Denmark and Ireland became members of the EEC.[5] (Norway did not in the end become a member because of a negative vote in the referendum on membership). Articles 100 and 101 provided for a 10-year derogation (i.e. until the end of 1982) from the equal access principle in the inner six miles of Member States' 12-mile EFZs, extended to the whole of the 12-mile limit in certain specified regions (including much of the UK coast) where the local population was heavily dependent on fishing. Those provisions were without prejudice to the special rights which EEC Member States (old and new) enjoyed with respect to other Member States on 31 January 1971. Those rights were not further specified, but clearly included those emanating from the European Fisheries Convention, at least as far as the new Member States were concerned. The derogation from the equal access principle in the Act of Accession was extended for a further 10-year period (i.e. until the end of 1992) by Regulation 170/83,[6] although on that occasion the derogation was applied to the 12-mile limit off all, rather than selected, coasts of Member States and the rights of vessels of one Member State to fish in parts of the 6-12 mile zone off other Member States were set out in detail in Annex I of the Regulation. In the case of the UK, the rights of other Member States to fish in parts of its 6-12 zone very largely equated to those set out in the designation orders made under the Fishery Limits Act 1964 in implementation of the European Fisheries Convention (see para. 3 above). Subsequently, the derogation from the equal access principle and its associated fishing rights in the 6-12 mile zone have been extended for further successive 10-year periods by Regulations 3760/92,[7] 2371/2002,[8] and, most recently, Regulation 1380/2013.

5. The purpose of this rather lengthy historical exposition is to show that as a result of Article 10 of the 1964 European Fisheries Convention the source of the rights of the five EU Member States concerned (Belgium, France, Germany, Ireland and the Netherlands) to fish in parts of the 6-12 mile zone off the UK, is, and has been since the beginning of 1973, EU law, currently in the shape of Article 5(2) and Annex I of Regulation 1380/2013, **not** the European Fisheries Convention. When the UK leaves

[5] OJ 1972 L73/14.
[6] Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources, Art. 6, OJ 1983 L24/1.
[7] Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture, Art. 6 and Annex I, OJ 1992 L389/1.
[8] Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, Art. 17(2) and Annex I, OJ 2002 L358/59.

the EU, Regulation 1380/2013 will, of course, no longer apply to the UK and the five Member States will accordingly lose their entitlement to fish in the 6-12 mile zone off the UK under that Regulation. In the same way, UK vessels will lose their current entitlement to fish in the 6-12 mile zones off parts of Belgium, France, Germany and Ireland. It is, of course, always possible that Regulation 1380/2013 might continue to apply on some kind of transitional basis following the UK's departure from the EU, but I will not speculate on that possibility.

6. Absent, or following, any such possible transitional arrangement, is there any legal basis on which EU Member States could argue that they were entitled to continue to fish in the 6-12 mile zone off the UK coast in line with the arrangements currently set out in Annex I of Regulation 1380/2013? In theory, two possible arguments could be put forward. First, EU Member States might seek to revive and invoke their rights under the 1964 European Fisheries Convention. Alternatively, they might seek to argue that by virtue of having fished habitually in the areas concerned since at least 1953 (it will be recalled that under the 1964 Convention it was a condition for enjoying access to the 6-12 mile zone that vessels had habitually fished there between 1953 and 1962 – see para. 3 above), a period of more than 60 years, they had acquired historic rights independent of the Convention and EU law. I examine each of these possible arguments in turn.

The possible revival of rights under the European Fisheries Convention

7. The first argument, reverting to the European Fisheries Convention, depends on whether the Convention is still in force, and if so, whether the UK, Belgium, France, Germany, Ireland and the Netherlands are still parties to it. Article 15 of the Convention provided that it was to be of 'unlimited duration'. Nevertheless, Article 15 also provided that after the Convention had been in force for 20 years, in other words after 1986, any State party could denounce the Convention and withdraw from it on giving two years' notice. According to the website of the Foreign and Commonwealth Office,[9] which is the depositary for the Convention, no State party has yet exercised this option. Thus, it might seem that the Convention is still in force and all the States concerned still parties to it. However, it may be argued that the Convention has either been terminated in

[9] http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=2459, accessed 17 November 2016.

accordance with Article 59 of the Vienna Convention on the Law of Treaties, 1969 (VCLT)[10] as a result of the subsequent adoption and entry into force of the UN Convention on the Law of the Sea (UNCLOS),[11] or is no longer applicable in accordance with Article 30(3) of the VCLT as a result of UNCLOS. I now examine each of these possibilities.

8. Article 59(1) of the VCLT provides: 'A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.' In order to sustain an argument that the European Fisheries Convention (EFC) has been terminated by UNCLOS in accordance with Article 59 of the VCLT, it is necessary to show that the conditions set out in Article 59 have been satisfied.

9. The first condition is that all the parties to the earlier treaty are parties to the later treaty. In the present case that condition is satisfied. All the parties to the EFC are parties to UNCLOS. It is true that not all parties to UNCLOS are parties to the EFC, but Article 59 does not explicitly require all parties to the later treaty to be parties to the earlier treaty; nor, according to Aust, one of the leading contemporary authorities on the law of treaties, is that an implicit requirement of Article 59.[12] The second condition of Article 59 is that the later treaty relates to the same subject matter as the earlier treaty. Again, that condition is satisfied. The subject matter of the EFC is the extent of a coastal State's fisheries jurisdiction and the rights of other States to fish within such limits. Those matters are also dealt with by UNCLOS, particularly in its provision in Part V on the exclusive economic zone (EEZ), although the subject matter of UNCLOS is, of course, about much more than that, but that is irrelevant.

10. The third, and final, condition is that the later treaty appears to be intended to govern the subject matter of the earlier treaty or, alternatively, that the provisions of the later

[10] UN Treaty Series, Vol. 1155, p. 331.
[11] UN Treaty Series, Vol. 1833, p. 3.
[12] See A Aust, *Modern Treaty Law and Practice* (3rd edition, Cambridge University Press, 2013), p. 258.

treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. As regards the first alternative, it appears that UNCLOS is intended to govern the subject matter of the EFC. The relationship between UNCLOS and earlier treaties is dealt with in Article 311 of UNCLOS. The provision that is relevant in the present context is paragraph 2, which reads: 'This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.' In its award, given in July this year, the tribunal in the *South China Sea Arbitration* commented on this provision. In its view a prior treaty 'will not be incompatible with the Convention [i.e. UNCLOS] where [its] operation does not conflict with any provision of the Convention . . . Where [it is] not incompatible with [the provisions of UNCLOS], Article 311(2) provides that [its] operation will remain unaltered. Where [the earlier treaty is] incompatible . . . the Convention will prevail over [it].'[13] Thus, the question is whether the EFC is compatible with UNCLOS or conflicts with its provisions. In my view the EFC is incompatible, and does conflict, with UNCLOS. First, the EFC permits its Member States to establish a 12-mile EFZ, thus implicitly prohibiting an EFZ of any greater width. That means that under the EFC the waters beyond the 12-mile limit remained high seas where all States had the freedom to fish. UNCLOS, by contrast, empowers its parties to establish a 200-mile EEZ within which they have sovereign rights to explore, exploit, conserve and manage the living resources.[14] The high seas thus begin beyond the 200-mile limit.[15] Second, whereas the EFC gave States that had habitually fished in the 6-12 mile zone off its parties' coasts an indefinite right to continue to do so, UNCLOS does not give any other State the right to fish in a coastal State's EEZ apart from a qualified right for landlocked and geographically disadvantaged States (discussed under Question 3 below). UNCLOS thus appears to be incompatible with the EFC. This is supported by the finding of the tribunal in the *South China Sea* case that historic fishing rights are incompatible with a coastal State's EEZ rights under UNCLOS.[16] A third way in which

[13] *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, para. 238, available at http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf accessed 14 November 2016.
[14] Art. 56(1) of UNCLOS.
[15] Art. 86 of UNCLOS.
[16] Award, paras. 239-62. See also the discussion in para. 16 of this opinion below.

UNCLOS is incompatible with the EFC arises from the fact that the 6-12 mile zone is now part of a coastal State's territorial sea. UNCLOS permits its parties to establish a territorial sea with a maximum breadth of 12 miles,[17] an option that all the parties to the EFC have exercised.[18] Under Article 2 of UNCLOS a State has sovereignty over its territorial sea. Other States have no rights in the territorial sea apart from a right of innocent passage for their ships. It is true that Article 2(3) of UNCLOS provides that a State's sovereignty over its territorial sea is to be exercised not only subject to UNCLOS but also 'to other rules of international rules.' It might be argued that such 'other rules' include the EFC. However, to read 'other rules of international law' as including treaties that are otherwise incompatible with UNCLOS would be to nullify the operation of Article 311(2) of UNCLOS and be inconsistent with the approach of the tribunal in the *South China Sea* case. In any case the reference to such 'other rules' must be to rules that are still in force after the entry into force of UNCLOS. But the argument here is that the EFC did not survive the entry into force of UNCLOS. Furthermore, there is no provision equivalent to Article 2(3) in relation to the EEZ. It would be quite anomalous for prior inconsistent rules still to be applicable in the territorial sea but not in the EEZ. In my view, therefore, the first alternative of the third condition laid down in Article 59 for an earlier treaty to be terminated by a later treaty is satisfied in the case of the EFC and UNCLOS. However, for the sake of completeness I will consider whether the second alternative is also satisfied. That requires that the provisions of the later treaty are so far incompatible with the earlier treaty that the two treaties are incapable of being applied at the same time. It will be evident from the immediately preceding discussion that this is indeed the case with the EFC and UNCLOS. Thus, my overall conclusion on this question is that UNCLOS has terminated the EFC in accordance with Article 59 of the VCLT.

11. Nevertheless, in case I am wrong, I will consider Article 30(3) of the VCLT, which deals with the relationship between earlier and later treaties relating to the same subject matter where the later treaty has not terminated the earlier treaty in accordance with Article 59. Article 30(3) provides that in this situation, if all the parties to the earlier

[17] UNCLOS, Art. 3.
[18] See UN, *Table of Claims to Maritime Jurisdiction*, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf, accessed 17 November 2016.

treaty are also parties to the later treaty, 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.' The tribunal in the *South China Sea* case sees Article 311(2) of UNCLOS (discussed above) as reflecting Article 30(3) of the VCLT.[19] As to whether the conditions for the application of Article 30(3) are satisfied in the present case, it was shown in paragraphs 9 and 10 above that the EFC and UNCLOS deal with the same subject matter, that all the parties to the EFC are also parties to UNCLOS, and that the provisions of the EFC are incompatible with those of UNCLOS. Thus, the conditions of Article 30 are satisfied, and the EFC no longer applies.

12. It follows from the above discussion that the EFC has either been terminated by UNCLOS in accordance with Article 59 of the VCLT (my preferred view) or is no longer applicable in accordance with Article 30 of the VCLT and Article 311(2) of UNCLOS. In practice, it makes little difference which is the position. Either way, EU Member States will not have a right to fish in the 6-12 zone off the UK pursuant to the European Fisheries Convention once the UK has left the EU.

13. Some people might try to counter my conclusions about the consequences for the EFC of Articles 30 and 59 of the VCLT and Article 311(2) of UNCLOS by arguing that since EU Member State established 200-mile EFZs or EEZs at the beginning of 1977, and even after the entry into force of UNCLOS in 1994, EU Member States have continued to fish in the UK's 6-12-mile zone, thus showing that the EFC can co-exist quite happily with the EEZ and UNCLOS. Such an argument would be misconceived. All the parties to the EFC are members of the EU. As I have been at pains to emphasize in paragraphs 3-5 above, the **only** source of the rights of EU Member States to fish in the 6-12 mile zone off other EU Member States has, since the beginning of 1973, been EU law, not the EFC. Nevertheless, those who object to my conclusions about the demise of the EFC might seek to pursue their argument further by pointing out that in some situations other than within the EU States have the right to fish within the 12-mile zone off the coasts of other States that have established 200-mile EEZs, so this must show that such fishing is compatible with the EEZ and thus UNCLOS. That argument is also misconceived. I think that it will be found that in all such cases there is an express

[19] Award, para. 238.

agreement concluded after the establishment of the EEZ that expressly preserves earlier fishing rights. For example, Denmark, Norway and Sweden have a mutual right for their vessels to fish in the 12-mile zones of each other in the Skagerrak and Kattegat. That right was originally granted under a trilateral agreement between the three States concluded in 1966,[20] and not under the EFC, as Norway never became a party to it. Following the establishment of 200-mile EFZs/EEZs in the late 1970s, the rights under the 1966 agreement were expressly preserved by bilateral treaties between the three States.[21] That is obviously quite a different situation from that of the EFC, which, following the establishment of 200-mile EEZs and the entry into force of UNCLOS, has never been preserved expressly (or, I would argue, impliedly), either by treaty or EU law. Indeed, there is at least one instance where a bilateral treaty on fishing concluded in implementation of the EFC was impliedly terminated by a later treaty following the establishment of 200-mile EEZs. This is a bilateral treaty of 1967 between France and Spain, implementing the EFC,[22] which was impliedly terminated by a 1980 Agreement on Fisheries between Spain and the then EEC,[23] concluded before Spain became a member of the EEC. That Agreement states that it is intended to 'establish the principles and rules which will govern, *in all respects*, the fishing activities of either party in the fishing zones of the other,'[24] and also that it does not affect a 1959 treaty between France and Spain, the only earlier treaty referred to expressly in the Agreement, thus implying that all other earlier treaties are replaced. That is confirmed by a declaration made by the Spanish Government when initialling the Agreement that 'the provisions of the Agreement replace the provisions of agreements concerning fishery relations to which the member States of the EEC and Spain are parties.'[25] My reading of the EEC-Spain Agreement is supported by the case law of the European Court of Justice, which has held that the Agreement 'replaced the prior international obligations existing between certain Member States and Spain,'[26] and was 'substituted'

[20] Agreement between Denmark, Norway and Sweden on Reciprocal Access to Fishing in the Skagerrak and Kattegat, 1966, UNTS Vol. 605, p. 313.
[21] Agreement on Fisheries between the EEC and Norway, 1980, OJ 1980 L226/48; Agreement on Fisheries between the EEC and Sweden, 1980, OJ 1980 L226/2; and Fisheries Agreement between Norway and Sweden, 1976, Norwegian Government document St. prp. No 92 (1976-77). The first two agreements relate, respectively, to fishing within Denmark's 12-mile zone by Norway and Sweden (before the latter became a member of the EU in 1995).
[22] General Fisheries Agreement, 1967, UN Treaty Series, Vol. 712, p. 365.
[23] Agreement on Fisheries, 1980, OJ 1980 L322/4.
[24] Art. 1(1) of the 1980 EEC-Spain Agreement (emphasis added).
[25] The Declaration is reproduced in COM(78) 643.
[26] Case 181/80, *Procureur Général v. Arbelaiz-Emazabel* [1981] ECR 2961 at 2982.

for the previous legal regime.[27] While clearly referring to the 1967 France-Spain treaty, the Court's wording is wide enough also to include the EFC. What this short survey of practice demonstrates is that there can be no presumption that earlier treaties giving a right for foreign vessels to fish within a coastal State's then 12-mile EFZ have survived the establishment of EEZs and the entry into force of UNCLOS.

14. Finally, it must be pointed out that there is a simple way to avoid any argument about whether the European Fisheries Convention is still in force or applicable, and that would be for the UK to exercise its option under Article 15 and denounce the Convention (see further paragraph 7 above).

Historic rights

15. I turn now to the argument that those EU Member States that have had the right to fish in parts of the 6-12 mile zone off the UK since the establishment of the UK's 12-mile EFZ in 1964 have acquired an historic right to the same effect under international law independently of the European Fisheries Convention or EU law. The question of historic rights in maritime areas was considered extensively, and for the first time by a judicial body comprehensively, by the arbitral tribunal in its Award in the *South China Sea* case, delivered in July this year. The tribunal defined 'historic rights' as 'describ[ing] any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances.'[28] The formation of historic rights in international law, according to the tribunal, 'requires the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States.'[29] In my view those requirements have not been fulfilled in the case of EU Member States fishing in the 6-12 mile zone off the UK. Although there has been continuous practice going back more than 50 years to 1964,[30] that practice has not been acquiesced in by the UK but rather has taken place

[27] Joined Cases 180 and 266/80, *Tome v. Procureur de la République* and *Procureur de la République v. Yurrita* [1981] ECR 2997 at 3016. See further on the European's Court law on the EEC-Spain Agreement R R Churchill and N G Foster, 'European Community Law and Prior Treaty Obligations of Member States: The Spanish Fishermen's Cases' (1987) 36 *International and Comparative Law Quarterly* 504 at 507.
[28] Para. 225 of the Award.
[29] Para. 265 of the Award. The tribunal refers to an authoritative UN study as support for this proposition.
[30] Practice before the establishment of the UK's EFZ in 1964 will not be relevant, because at that time the 6-12 mile zone formed part of the high seas, where all States had the freedom to fish. Thus, fishing by EU Member State in the 6-12 mile zone at that time was simply the exercise by those States of their freedom to fish on the

with its express consent. Initially the practice took place pursuant to the designation by the UK of the EU Member States concerned by orders made under the Fishery Limits Act 1964 in implementation of the European Fisheries Convention. Since 1973 the practice has been pursuant to EU law, to the creation of which the UK expressly consented, initially by being a party to the 1972 Treaty and Act of Accession and then from 1983 by participating as a member of the Council which adopted the subsequent regulations giving access. There is a fundamental difference between a State tolerating a practice in its waters passively through acquiescence, and giving express permission for that practice to take place. It may be helpful to explain this distinction with an analogy from English land law (which does not apply in Scots law). Supposing that I own a field. If I give someone permission to take a short cut across my field, that person has a contractual right to cross the field, a right that could be terminated in accordance with the contract. However, if people take a short cut across my field for 20 years without asking my permission and I do not object (i.e. I acquiesce), a right of way has been created that will attach to the land, regardless of whether I remain the owner, and that cannot be terminated in accordance with principles of contract law.

16. Even supposing for the sake of argument that EU Member States had acquired historic rights in parts of the 6-12 mile zone off the UK, those rights would not have survived the entry into force of UNCLOS in 1994. According to the arbitral tribunal in the *South China Sea* case, historic rights that arose before 1994 did not survive the entry into force of UNCLOS if those rights were incompatible with the provisions of UNCLOS.[31] Specifically, the tribunal found that historic fishing rights were incompatible with a coastal State's sovereign rights under Part V of UNCLOS to explore, exploit, conserve and manage the living resources of its EEZ.[32] *A fortiori* will there be incompatibility with a coastal State's sovereignty in its territorial sea, which (as pointed out in para. 10 above) is where the 6-12 mile zone off the UK is now located, as other States have no right to fish in the territorial sea without the express consent of the coastal State. Furthermore, I have argued in paragraph 10 above that the European Fisheries

high seas, and not the assertion of a right in UK waters. See further paras. 268-270 of the Award in the *South China Sea* case.

[31] Award, paras. 235-8 and 278.

[32] Award, paras. 239-262.

Convention, which gives rights to fish in the 6-12 zone identical to the alleged historic rights being considered here, is incompatible with UNCLOS.

Conclusions to Question 1

17. Historically the rights that five EU Member States (Belgium, France, Germany, Ireland and the Netherlands) have to fish in the 6-12 mile zone off parts of the UK coast derive from the European Fisheries Convention, 1964. Legally, however, the only source of those rights is, and has been since 1973, EU law. When the UK leaves the EU, vessels from the five EU Member States will no longer have the right to fish in the UK's 6-12 mile zone under EU law. Should those States assert that they have continued access to that zone on the basis that their rights under the European Fisheries Convention have revived, that assertion may be countered by arguing that that the Convention is incompatible with UNCLOS and therefore has been terminated in accordance with Article 59 of the Vienna Convention on the Law of Treaties, or, at the very least, rendered inapplicable by Article 30(3) of the Vienna Convention and Article 311(2) of UNCLOS. Should that argument fail to convince, the UK Government would be advised to denounce the European Fisheries Convention in accordance with its Article 15. EU Member States may also seek to claim that regardless of, and independently from, the Convention and EU law, they have acquired an historic right to fish in the 6-12 mile zone of the UK as a result of more than 50 years of practice. Such a claim may be rebutted by pointing out that the conditions necessary for the creation of historic rights have not been satisfied as the UK has not acquiesced in such practice, but rather has expressly agreed that vessels from the States concerned may fish in its 6-12 mile zone. In any case, even if historic rights had been created, in the light of the Award in the *South China Sea* case, such rights must be regarded as incompatible with UNCLOS and therefore as not having survived its entry into force. The same arguments could, of course, be equally applied to the UK should it claim a continuing right, after its departure from the EU, to fish in the 6-12 mile off the coasts of those four EU Member States (France, Germany, Ireland and the Netherlands) to which it currently has access.

Question 2: Have any fisheries access rights for non-UK EU Member States accrued in the UK's EEZ (and vice versa) over the course of the operation of the CFP?

18. Question 1 dealt with possible fisheries access rights to the 6-12 mile zone off the UK, in other words what since 1987 has been the outer six miles of the UK's territorial sea. Question 2 deals with possible fisheries access rights within the UK's exclusive economic zone (EEZ). The inner limit of the UK's EEZ coincides with the outer limit of the UK's territorial sea, i.e. the line 12 miles from the UK's baselines, and extends in theory to 200 miles from those baselines. In practice, for reasons of geography, the full 200-mile limit is possible only off parts of the west coast of Scotland. Elsewhere, because of the presence of other States within 400 miles of the UK, the EEZ extends only as far as the boundaries that have been agreed with the UK's neighbours: proceeding anti-clockwise from the south, they are France, Belgium, the Netherlands, Germany, Denmark, Norway, the Faroes Islands and Ireland. In most cases those boundaries are constituted by lines equidistant between the baselines of the UK and those of its neighbours. The UK's EEZ has been in existence only since March 2014.[33] Before that, the area currently embraced by the EEZ was the UK's exclusive fishery zone, created by the Fishery Limits Act 1976.

19. To answer Question 2, I begin by explaining the basis on which fishing vessels from other EU Member States currently have access to the UK's EEZ. As will become apparent, that basis is relevant to the question, which I consider next, of the basis (if any) on which such vessels might continue to have access to the UK's EEZ under international law post Brexit. The answer to that question is essentially the answer to Question 2.

20. I begin, then, with the basis for the current access of fishing vessels from other EU Member States to the UK's EEZ under the CFP. As explained in paragraph 1 above, Article 5(1) of Regulation 1380/2013 provides that EU fishing vessels enjoy a right of equal access to all EU waters (including therefore the EEZ), other than waters within the 12-mile zone, subject to measures adopted under Part III of the Regulation. Such

[33] Section 41 of the Marine and Coastal Act 2009 provided for the establishment of an EEZ, but that section was not brought into force until 2014: see the Marine and Coastal Act 2009 (Commencement No. 6) Order, SI 2013/3055 and the Exclusive Economic Zone Order 2013, SI 2013/3161.

measures include 'the fixing and allocation of fishing opportunities'.[34] For much of the life of the CFP, the main form of fishing opportunity has been quotas allocated to individual Member States, but in recent years opportunities in the form of effort have come to play an increasing role. Article 4(1)(21) of Regulation 1380/2013 defines 'fishing effort' as 'the product of the capacity and the activity of a fishing vessel'. In more concrete terms, an example of a fishing opportunity in terms of effort is a limit on the number of days that a vessel may spend at sea.[35] Fishing opportunities are allocated between EU Member States on the basis of the principle of relative stability in the case of existing fisheries, and on the basis of the interests of Member States when new fishing opportunities arise.[36] Relative stability is described in Recital 35 at the beginning of Regulation 1380/2013 as giving Member States 'a predictable share of the stocks'. Where a Member State has a fishing opportunity in the form of a quota (which is its share of the total allowable catch (TAC) for a particular fish stock), the right of equal access means that its vessels may fish for that quota anywhere in the area to which the quota relates. In the North Sea and north-east Atlantic (including therefore the waters around the UK), TACs and quotas are usually set, not in terms of EU Member States' EEZs, but in terms of the statistical areas used by the International Council for the Exploration of the Sea (ICES), a regional intergovernmental organization primarily concerned with fisheries research. For example, the North Sea broadly equates to ICES statistical area IV. Vessels of a Member State having a quota of, say, haddock in this area may fish for it anywhere in this area in accordance with the right of the equal access, whether that is in the EEZ of the UK, the EEZ of Denmark or the EEZ of some other EU Member State. While the principle of relative stability means that a Member State will have a fixed share of the TAC for any particular stock (e.g. haddock in ICES area IV), the actual size of its share (i.e. its quota) varies over time because the level at which the TAC is set is in practice not constant but changes from time to time, depending on the state of the stock (e.g. the size of its spawning stock biomass) and scientific advice for its management. Furthermore, although a TAC is allocated between EU Member States in fixed proportions on the basis of relative stability, over the 30 odd years that the system of TACs and quotas has been operating under the CFP, those

[34] Art. 7(1)(e) of Regulation 1380/2013.
[35] For further discussion of fishing effort as a form of fishing opportunity, see R Churchill and D Owen, *The EC Common Fisheries Policy* (OUP, 2010), pp. 164-6.
[36] Art. 16(1) of Regulation 1380/2013.

proportions have been adjusted to some degree.[37] Where fishing opportunities take the form of effort, they also tend to be set in terms of ICES or some other defined area, and not for particular Member States' EEZs.

21. From this discussion it is evident that a number of other EU Member States have a somewhat ill-defined right to fish in the UK's EEZ. If they have been allocated a fishing opportunity that may be exercised in an ICES statistical area or in some other defined area, and all or part of that area happens to be in waters that are part of the UK's EEZ, they have a right to fish in that part of the EEZ. Does the fact that certain EU Member States have been able to do since the EU's fisheries management system, with its provision for allocated fishing opportunities, was first established at the beginning of 1983, mean that they have acquired some form of historic right that would survive the departure of the UK from the EU and consequently the end of the application of the EU's fisheries management system to the UK and UK waters? In answering this question, I leave aside the issue of whether the opportunities that other EU Member States have had to fish in the UK's EEZ (and its predecessor EFZ) since 1983 are sufficiently precise to be capable of being characterised as rights. Assuming for the sake of argument that they are, they will nevertheless not amount to ***historic*** rights in international law. As I explained in paragraph 15 above, the creation of an historic right requires practice coupled with acquiescence on the part of the State in whose waters such practice takes place. In the present case fishing by other EU vessels in the UK's EEZ since 1983 has not taken place with the acquiescence of the UK, but under the express authority of EU law in whose creation the UK has participated through its membership of the Council. If they are not historic rights, it is difficult to see on what other possible basis rights might have been created.

22. Even if they were historic rights, they would not survive the UK's departure from the EU. As pointed out above in paragraph 16 above, historic fishing rights are incompatible with a coastal State's sovereign rights in its EEZ under UNCLOS, according to the tribunal in the *South China Sea* case. It is true, as the tribunal pointed out,[38] that Article 62(3) of UNCLOS refers to access to a coastal State's EEZ by States

[37] Churchill and Owen, note 35 above, p. 153.
[38] Award, para. 242.

whose vessels have 'habitually fished' in the area, but this is in the context of access by other States to that part of the allowable catch that is in excess of the harvesting capacity of the coastal State's own fishing vessels, known as the surplus. Article 62(2) provides that a coastal State must permit other States to fish for any surplus that may exist, but gives it a broad discretion in deciding which other States shall be given access. One of the factors that a coastal State must take into account is 'the need to minimise economic dislocation in States whose nationals have habitually fished in its zone.' Both the UK and all other EU Member States are parties to UNCLOS. As explained in paragraph 28 below, the EU has the exclusive competence, in place of its Member States, to negotiate a fisheries access agreement with a third State, which is what the UK will become following its departure from the EU. Thus, once the UK has left the EU, if it has a surplus for any stocks in its EEZ, it must consider (but no more than that) whether to give vessels from the EU access to that surplus under an access agreement with the EU if the EU will suffer 'economic dislocation' as a result of its vessels no longer being able to exercise their current fishing opportunities. Clearly this falls a long way short of a right to fish in the UK's EEZ post Brexit. What has been said in this paragraph will apply, *mutatis mutandis*, to access by UK vessels to the EEZs of EU Member States post Brexit.

23. My answer to Question 2 can be simply and unequivocally stated. Other EU Member States have not accrued any rights to fish in the UK's EEZ that will survive the UK's departure from the EU. If it can be shown that the EU will suffer economic dislocation when its vessels that have habitually fished in the UK's EEZ are no longer able to do so post Brexit, the UK should consider giving the EU access to that part of the allowable catch surplus to the UK's harvesting capacity. The same will apply, *mutatis mutandis*, to fishing by UK vessels in the EEZs of other EU Member States.

24. Of course, post Brexit it would be always open to the UK to permit EU vessels to fish in its EEZ in exchange for the access of British vessels to the waters of other EU Member States. However, that is a completely different matter from the issues in Question 2, and accordingly I will not speculate on the likelihood or desirability of such a possibility.

Question 3. Does the concept of 'geographically disadvantaged' States under Article 70 of UNCLOS apply to any individual Member States of the EU?

25. Before answering this question directly, it is necessary to put it into its context. As pointed out briefly in paragraph 22 above, Article 61(1) of UNCLOS provides that a coastal State must establish the 'allowable catch' of the fish stocks found in its EEZ. Article 62(2) goes on to stipulate that a coastal State must 'determine its capacity to harvest the living resources' of its EEZ: where it does not have the capacity to harvest the whole of the allowable catch, it must 'give other States access to the surplus of the allowable catch'. In other words, a coastal State must permit fishing vessels from other States to fish for that part of the allowable catch that its own fishing vessels do not have the capacity to take. Where there is a surplus, a coastal State is given a broad discretion in deciding which other States' fishing vessels are to be given access to it. However, that discretion is limited by Articles 69 and 70, which provide, in parallel, that landlocked States and geographically disadvantaged States have 'the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the [EEZs] of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned.' The terms and modalities of such participation are to be established by the States concerned through bilateral, sub-regional or regional agreements, taking into account various specified factors, including the need to avoid effects detrimental to fishing communities or industries in the coastal State, the extent to which a landlocked or geographically disadvantaged State already has access to the EEZs of other coastal States and the consequent need to avoid any one of these coastal States becoming unduly burdened, and the nutritional needs of the respective States (UNCLOS, arts. 69(2) and 70(3)).

26. It is obvious what a landlocked State is. Much less obvious is what a geographically disadvantaged State is. Article 70(2) defines such a State, for the purposes of the provisions of UNCLOS outlined in the previous paragraph, as coastal States (1) 'whose geographical situation makes them dependent upon the exploitation of the living resources of the [EEZs] of other States in the sub-region or region for adequate supplies of fish for the nutritional needs of their population or parts thereof', or (2) which can claim no EEZ of their own.

27. Applying the provisions of UNCLOS outlined above to the question that I am asked, one preliminary point should be emphasized. The right of geographically disadvantaged States to fish in the EEZ of another State applies only where there is a surplus in that EEZ. Post Brexit it would seem likely that UK fishing vessels would have the capacity to take the whole of the allowable catch for most stocks found in the UK's EEZ, so that it is unlikely that there would be much, if any surplus, to which geographically disadvantaged States would have access. Parenthetically, it should be noted that I deal in this opinion only with the UK's obligations under UNCLOS to give EU vessels access to its EEZ on the basis of Article 70. Thus, I do not consider other possible legal or policy reasons for such access, such as under the UK's discretionary powers to decide which States, other than landlocked and geographically disadvantaged States, should be given access to any surplus; or, regardless of whether there is a surplus, giving EU vessels access in return for the access of UK fishing vessels to the EEZs of EU Member States.

28. Under EU law, the EU has exclusive competence, in place of its Member States, to negotiate and conclude agreements with third (i.e. non EU Member) States providing for the access of EU vessels to fish in such States' EEZs. That position is so well established, not least by 40 years of uncontested practice, that it is not necessary to provide any authority here to support it.[39] Thus, if post Brexit (when the UK will become a third State), the EU wishes its vessels to have access to fish in the UK's EEZ, it will be for the EU to seek to negotiate an access agreement with the UK, not individual EU Member States. That means that if there were any question of the provisions of Article 70 being applicable, it would be the EU as such that would have to be shown to be geographically disadvantaged. It would be irrelevant to consider whether any individual EU Member States were geographically disadvantaged, and to do so would be tantamount to denying the EU's exclusive competence to conclude fisheries access agreements. It would be akin to the USA arguing that it should have access as a landlocked State to part of any surplus in Canada's EEZ on the basis of that some individual US states in the same region as Canada (e.g. North Dakota, Wyoming, Vermont) were landlocked.

[39] For discussion of the relevant authority, see Churchill and Owen, note 35 above, pp. 304-313 and 331.

29. So Question 3 should really be asking whether the EU as such can be said to be geographically disadvantaged within the meaning of Article 70(2) of UNCLOS. Clearly it would not fall under the second limb of the definition as there are extensive areas of EEZ off the coasts of EU Member States. As for the first limb, could the EU argue that its geographical situation makes it dependent upon the exploitation of the living resources of the UK's EEZ for adequate supplies of fish for the nutritional needs of its population or parts thereof? Vessels from some other EU Member States certainly catch significant quantities of fish in the UK's EEZ. I have not been able to discover any precise figures, probably because catches are generally recorded as being taken in particular ICES statistical areas rather than in a specific Member State's EEZ. However, it would be surprising if the EU met the test of geographical dependency on the basis of the volume of catches by vessels from other EU Member States in the UK's EEZ. First, the EU is heavily dependent on imports of fish from third States to meet consumer demand for fish in the EU, being only 45 per cent self-sufficient.[40] Second, fish accounts for only 7 per cent of the total protein intake of those living in the EU.[41] These figures suggest that if the EU can be said to be dependent at all within the meaning of Article 70(2) of UNCLOS, that dependency relates to third States, not the UK.

30. For the sake of completeness, I will consider whether any individual Member States are geographically disadvantaged States, even though I believe this question to be irrelevant and inappropriate. It will be recalled that Article 70 of UNCLOS applies only to geographically disadvantaged States in the 'same subregion or region' as the coastal State concerned. UNCLOS does not contain a definition of a sub-region or region and no consensus has emerged as to their meaning. As far as the UK is concerned, I do not think that it can be plausibly maintained that EU Member States that border only the Baltic Sea (Estonia, Finland, Latvia, Lithuania and Poland), the Black Sea (Bulgaria and Romania) or the Mediterranean Sea (Croatia, Cyprus, Greece, Italy, Malta and Slovenia) are in the same region as the UK. Nor can Portugal plausibly be said to be said to be in the same region, and possibly not Spain either. That leaves Belgium, Denmark, France, Germany, Ireland, the Netherlands, Sweden and possibly Spain as

[40] European Commission, *Facts and Figures on the Common Fisheries Policy* (2016), p. 49, available at https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/pcp_en.pdf, accessed 17 November 2016.
[41] Ibid., p. 47.

being in the same region as the UK. None of these States satisfies the second limb of the UNCLOS definition of a geographically disadvantaged State as all have claimed an EEZ.[42] For the same reasons as for the EU as a whole, I doubt very much whether any of these States are nutritionally dependent on fish catches in the UK's EEZ. Some of these States, such as Sweden and Spain, have quite limited fishing opportunities in the areas covered by the UK's EEZ and in three of these States (Belgium, Germany and Ireland) fish account for a lower proportion of protein intake than the EU average.[43]

31. My conclusion to Question 3, therefore, is that neither the EU as a whole nor, even though their consideration is irrelevant, individual EU Member States in the same region as the UK can be said to be geographically disadvantaged within the meaning of Article 70(2) of UNCLOS. Thus, after the departure of the UK from the EU, the EU will not be able to claim access to an appropriate part of that portion of the allowable catch surplus to the harvesting capacity of the UK (if any) in the UK's EEZ under Article 70(1) of UNCLOS.

[42] See *Table of Claims*, note 18 above.
[43] *Facts and Figures*, note 40 above, p. 47.

Summary of Answers to the Three Questions

Question 1: Would (reciprocal) historic fisheries access rights in coastal waters survive Brexit?

This question is concerned with the rights that five EU Member States (Belgium, France, Germany, Ireland and the Netherlands) currently have to fish in the 6-12 mile zone off parts of the UK. Historically those rights derive from the European Fisheries Convention, 1964. Legally, however, the only source of those rights since 1973 has been EU law, set out at the present time in Article 5(2) and Annex I of Regulation 1380/2013. When the UK leaves the EU, the UK will no longer be bound by that Regulation and therefore vessels from the five EU Member States will cease to have the right to fish in the UK's 6-12 mile zone. Should those States assert that they have continued access to that zone on the basis that their rights under the European Fisheries Convention have revived, that assertion may be countered by arguing that that the Convention is incompatible with UNCLOS and therefore has been terminated in accordance with Article 59 of the Vienna Convention on the Law of Treaties, or, at the very least, rendered inapplicable by Article 30(3) of the Vienna Convention and Article 311(2) of UNCLOS. Should that argument fail to convince, the UK Government would be advised to denounce the European Fisheries Convention in accordance with Article 15 of that Convention, which permits denunciation on giving two years' notice at any time after 1986. EU Member State may also seek to claim that regardless of, and independently from, the Convention and EU law, they have acquired an historic right to fish in the 6-12 mile zone of the UK as a result of more than 50 years of practice. Such a claim may be rebutted by pointing out that the conditions necessary for the creation of historic rights have not been satisfied as the UK has not acquiesced in such practice, but rather has expressly agreed that vessels from the States concerned may fish in its 6-12 mile zone. In any case, even if historic rights had been created, in the light of the Award in the *South China Sea* case, such rights must be regarded as being incompatible with UNCLOS and therefore as not having survived its entry into force in 1994.

The same arguments could, of course, be equally applied to the UK should it claim a continuing right, after its departure from the EU, to fish in the 6-12 mile off the coasts of those four EU Member States (France, Germany, Ireland and the Netherlands) to which it currently has access.

Question 2: Have any fisheries access rights for non-UK EU Member States accrued in the UK's EEZ (and vice versa) over the course of the operation of the CFP?

This question is concerned with the opportunities that certain other EU Member States have under EU law at the present time to fish in parts of the UK's EEZ, i.e. beyond the 12-mile limit, and whether the exercise of those opportunities has resulted in any rights accruing to the Member States concerned that will survive the UK's departure from the EU. In my opinion, no such rights have accrued. The only basis for claiming that rights have accrued would be if it could be shown that historic rights had been created. However, the conditions necessary for the creation of historic rights have not been satisfied. The exercise of EU fishing opportunities has not been as a result of acquiescence by the UK but rather has been expressly authorized by EU law, in whose creation the UK has participated through its membership of the Council. On the departure of the UK from the EU, that authorization will cease. Even supposing for the sake of argument that the exercise of fishing opportunities had resulted in the creation of historic rights, once the UK gains full control of its EEZ following its departure from the EU, such rights would terminate, as according to the Award in the *South China Sea* case, such rights are incompatible with a coastal State's sovereign rights over the living resources in its EEZ under UNCLOS. At most, the UK will have to consider whether to give the EU access to that part of the allowable catch surplus to the UK's harvesting capacity if it can be shown that the EU will suffer economic dislocation when its vessels that have habitually fished in the UK's EEZ are no longer able to do so following the UK's departure from the EU. The same will apply, *mutatis mutandis*, to fishing by UK vessels in the EEZs of other EU Member States.

Question 3. Does the concept of 'geographically disadvantaged' States under Article 70 of UNCLOS apply to any individual Member States of the EU?

The EU has the exclusive competence to conclude agreements for the access of its vessels to the EEZs of third (i.e. non EU Member) States. Question 3 is therefore concerned with whether the EU could obtain access for its vessels, in accordance with Article 70 of UNCLOS, to an appropriate part of any surplus allowable catch in the UK's EEZ, following the UK's departure from the EU (when the UK will become a third State), on the basis that it was geographically

disadvantaged. In my view the EU is not geographically disadvantaged within the meaning of Article 70(2) of UNCLOS as there are extensive areas of EEZ off the coasts of its Member States and the EU will not be dependent, following the UK's departure from the EU, on catches by its vessels in the UK's EEZ to meet its nutritional needs. It is not appropriate to consider whether any individual EU Member State is geographically disadvantaged for the purposes of Article 70 of UNCLOS because that would be tantamount to denying the EU's exclusive treaty-making capacity. Even if such consideration were appropriate, it would be limited to Member States in the same region as the UK. For the same reasons as the EU, no Member State in this region is geographically disadvantaged within the meaning of Article 70 of UNCLOS. Thus, after the departure of the UK from the EU, the EU would not be able to claim access, under Article 70(1) of UNCLOS, to an appropriate part of that portion of the allowable catch surplus to the UK's harvesting capacity (if any) in the UK's EEZ.

Overall Conclusion

Under the law as it currently stands, EU vessels will no longer have any rights to fish in UK waters once the UK has left the EU. Nor will the EU be able to claim access for its vessels to the UK's EEZ under Article 70 of UNCLOS as the EU is not geographically disadvantaged. If the EU could show that it will suffer economic dislocation when its vessels that have habitually fished in the UK's EEZ are no longer able to do so following the UK's departure from the EU, the UK will have to consider (but no more than that) whether to give the EU access to that part of the allowable catch surplus to the UK's harvesting capacity (if any). The situation just outlined will apply, *mutatis mutandis*, to fishing by UK vessels in the EEZs of other EU Member States. Of course, it is always possible that on leaving the EU, the British Government would decide to permit EU vessels to fish in its EEZ for policy reasons, such as being in exchange for the access of British vessels to the waters of other EU Member States or as part of a regime for the management of stocks that the UK and the EU will share. But that is quite different from the current legal position, where EU vessels will have no access rights post Brexit.