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# Brexit: The Implications for the Fishing Industry



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## Introduction

Whatever the outcome regarding other aspects of the negotiations, a Brexit would mean the UK will no longer be part of the Common Fisheries Policy (CFP). The “Fishing for Leave” campaign promised that Brexit would deliver “a golden opportunity to regain 70 per cent of the UK’s fisheries resources and rejuvenate a multi-billion pound industry for the nation – becoming as sustainable and successful as Norway, Iceland and Faroe”.<sup>1</sup> This paper examines the prospects for delivering on this commitment.

The Leave campaign’s claim echoes a long-held criticism from sections of the fishing industry that the UK received a raw deal under the CFP, which can now be rectified. This criticism is based on the fact that, having determined that the seas generated by its Member States formed a single “Community pond” to which all EU vessels had access, the EU allocated fishing quotas between Member States according to each country’s historic fishing record. Because much of the UK fleet prior to the mid-1970s fished outside what is now its Exclusive Economic Zone (EEZ), notably in what are now Icelandic waters, and vessels from continental countries fished in what are now UK waters (though were at the time international waters), a quota allocation based on historic track records was inevitably less favourable to the UK than if they had been allocated by another method, such as in proportion to stocks “contributed” by each country’s EEZ. This “unfairness” was made all the more painful since UK vessels were excluded from Iceland’s EEZ.

This situation can be rectified post-Brexit, it is argued, by utilising the leverage provided by the UK’s control of its EEZ to restrict access by EU vessels to its waters, to secure a better deal on quotas, or some mix of the two. This paper explores the credibility of that claim.

## The legal position

Within the EU, regulation of fisheries management to ensure sustainability of fish stocks is decided collectively by the EU Member States. The CFP’s key conservation measures are limits on fishing (Total Allowable Catches or TACs); technical rules on for example minimum net mesh sizes; “closed areas”; and, most recently, a ban on discarding fish at sea. The TACs are divided between the Member States (“quotas”) according to a fixed key based on historic fishing patterns (the principle of “relative stability”). Vessels from all EU Member States have access to all Member States’ seas beyond 12 miles from their coastlines. In addition some Member States enjoy limited access to the zones between 6 and 12 miles from other countries’ coasts. The CFP also provides limited support for marketing of fishery products and

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<sup>1</sup> Fishing for Leave, ‘Fishing for Leave resumes the fight’, 14 September 2016

provides funding to the industry through the European Maritime and Fisheries Fund. Fishery products are traded between Member States free of tariffs and customs controls, with UK exports, including salmon, totalling some £950 million in 2014-15.

Outside the EU, UK fisheries policy would still be governed by the UN Convention on the Law of the Sea (UNCLOS).<sup>2</sup> This provides that the UK, as a “coastal state”, has the right to control all fisheries activity within its EEZ – extending to 200 nautical miles from the coast or to the median line with another country. This includes determining TACs and other conservation measures and controlling access by foreign vessels to its zone. UK vessels would have no automatic right to fish in EU waters or to benefit from EU fisheries agreements with third countries. However, UNCLOS requires coastal states responsible for shared stocks<sup>3</sup> to “seek... to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks”.<sup>4</sup> The overwhelming majority of UK commercial fish stocks are shared with other countries, primarily EU countries and Norway. The rules on trade in fishery products, including tariffs and possible tariff-rate quotas, would depend on the outcome of negotiations. Norway currently faces tariffs on its fish exports to the EU despite being a member of the European Economic Area (EEA).

Within the UK, fisheries management is fully devolved to Scotland, Northern Ireland and Wales. However, responsibility for international agreements rests with the UK Government. Given the importance of the fishing industries in Scotland and Northern Ireland in particular, the Government would be expected to consult very closely with the devolved Governments in any international negotiations, as indeed they do currently in CFP negotiations.

### **What do fishermen want?**

Representatives of the fishing industry are already setting out their demands. The National Federation of Fishermen’s Organisations (NFFO), for example, are calling for:

- measures to address historic injustices in quota distribution and to control how many non-UK vessels fish in our waters, and how and where they fish;
- a sensible bilateral arrangement that will allow fair access arrangement for our vessels fishing in EU waters and EU vessels fishing in UK waters – but the principle of equal access to UK waters will be dead;
- access to EU markets;
- at least the same fishing opportunities in third country waters that our fleets enjoy today; and
- at least the same level of financial support.<sup>5</sup>

The Scottish Fishermen’s Federation (SFF) stress the importance of “Fairer and more appropriate shares of catching opportunities for the Scottish fishing industry within our own waters”.<sup>6</sup>

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<sup>2</sup> Notably Part V, arts. 61-67

<sup>3</sup> *I.e.* stocks occurring within two or more coastal states

<sup>4</sup> *Op. cit.* art. 63

<sup>5</sup> See National Federation of Fishermen’s Organisations, ‘Policy on Brexit’, 12 July 2016

<sup>6</sup> See Scottish Fishermen’s Federation, ‘Scottish Fisheries Post-Brexit: A Sea of Opportunities’, 13 September 2016

These positions were elaborated on in evidence given by the NFFO and SFF to the House of Lords Sub-Committee on Energy and Environment, where considerable divergences between the two organisations emerged.<sup>7</sup> The SFF's starting point was that the UK's quota shares should initially remain static but access to UK waters only be granted subsequently as a matter of negotiation. When pressed, they revealed that if such an approach involved giving up access to Norwegian waters the industry could do without it.<sup>8</sup> The NFFO, by contrast, emphasised the importance of retaining access for UK vessels to French, Irish and Norwegian waters and therefore the importance of balanced negotiation on quotas and access. They also acknowledged the likelihood that negotiating links would be made between access to markets (tariffs) and access to waters.<sup>9</sup>

On process, the SFF were keen for the Scottish Government to lead in negotiations in relation to Scottish waters.<sup>10</sup> The NFFO considered the UK should negotiate on all elements.<sup>11</sup>

### **The Government's position**

As on other aspects of Brexit, the Government has yet to reveal its position. However, in comments to the NFFO<sup>12</sup> and to the House of Lords Sub-committee on Energy and Environment, George Eustice, DEFRA Minister for Fisheries (and a Leave advocate), indicated he saw Brexit as an opportunity to "go back to first principles" in deciding on quota shares.<sup>13</sup> The Government was carrying out scientific analysis to underpin its negotiating position on this basis. He suggested that whilst many quotas (e.g. in the North Sea) could be considered fair, some others, for example in the English Channel and Celtic Sea, appeared anomalous. But the Government would also retain certain key principles and policies of the CFP, notably the commitment to fishing in accordance with "maximum sustainable yield" and the ban on discards at sea. On process, he made clear the UK would negotiate as a single entity, led by HM Government with close involvement of the devolved governments, and would engage in negotiations in an "honourable and constructive way".

### **The EU's and Norway's positions**

For obvious reasons, neither the EU, Norway nor other coastal states have expressed a view yet.<sup>14</sup> However, it is reasonable to assume two things:

- 1) on process, they will be looking for agreements similar in structure and coverage to those the EU already has with Norway and other northern third countries. This would imply a need to negotiate three agreements in parallel: a UK-Norway agreement concerning UK fishing in north Norwegian waters; a UK-EU-Norway agreement covering stocks shared between the three; and a UK-EU agreement covering all other

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<sup>7</sup> House of Lords Committee on the European Union, *Revised transcript of evidence taken before the Select Committee on the European Union, Energy and Environment Sub-Committee: Inquiry on 'Brexit: Fisheries'*, 7 September 2016

<sup>8</sup> *Ibid.*, pp. 23-30

<sup>9</sup> *Ibid.*, pp. 27-33

<sup>10</sup> *Ibid.*, p. 24

<sup>11</sup> *Ibid.*, pp. 24-25

<sup>12</sup> National Federation of Fishermen's Organisations, 'Brexit offers 'opportunity for radical change' says UK fisheries minister', 9 September 2016

<sup>13</sup> See House of Lords Committee on the European Union, *Revised transcript of evidence taken before the Select Committee on the European Union, Energy and Environment Sub-Committee: Inquiry on 'Brexit: Fisheries'*, 14 September 2016

<sup>14</sup> Iceland and Faroes are also coastal states sharing stocks with the UK, for which agreements will be required, either bilaterally or through the North East Atlantic Fisheries Commission

stocks shared between them.<sup>15</sup> Current agreements cover the setting of TACs (which are then divided in accordance with relative stability) for shared stocks, exchanges of quota, reciprocal access to each other's EEZs and co-operation on conservation and enforcement; and

- 2) on substance, their objectives will be to ensure the interests of their fishermen do not suffer as a consequence of the UK's decision to leave the EU.

### **Prospects for securing change**

Leaving aside the question of financial support, which is a domestic matter, what are the prospects for securing the goals summarised from the NFFO position above:

- improved quota for UK vessels;
- fairer reciprocal access for UK and EU vessels fishing in each other's waters;
- access to EU markets; and
- maintenance of UK fishing rights in third country waters (Norway primarily)?

#### *1) Overall*

The agreements will be negotiated as a package, not least because current fisheries arrangements reflect a complex balance of interests both within and between countries. Access to waters and quota distribution are interlinked and, together with third country agreements, form the essential compromise that has underpinned European fisheries management since 1983. Any attempt to disentangle them seems certain to fail. Agreement will need to embrace all elements.

In addition, all sides are effectively condemned to reach agreement, not so much by the requirements of UNCLOS as by their collective need to ensure effective conservation of the shared stocks. Should agreement not be reached and the UK subsequently take what the EU considered to be an excessive amount of individual stocks, the EU has power to impose an import ban on the species concerned. The UK could in theory take equivalent powers. But a fisheries trade war is no more in the interests of the parties than is overfishing of the stocks.

#### *2) Quota allocation*

The Government has indicated it wishes to address this question from first principles on the basis of an analysis of spawning grounds, biomass distribution and fish migration to assess what share of each stock might reasonably be due to the UK. There is a precedent for this approach in the long running dispute with Iceland over mackerel. However, EU policy on quota distribution is based on a wholly different principle, namely "relative stability". This concept is founded not on scientific analysis but on historic fishing patterns, mainly but not exclusively between 1973 and 1978 (before 200 mile limits were introduced by EU Member States). It is hard to see the EU accepting any other basis for negotiation of the UK's quota allocation when relative stability is so fundamental to its policy, has survived successive legal challenges, has been long championed by the UK,

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<sup>15</sup> The EU and Norway will also need to agree on other stocks shared between themselves in which the UK has no interest

and when ignoring it would result in reductions in its own fishing opportunities. In other words, the EU will insist that the UK's existing shares of catches should not change merely because it has left the Union. There are moreover some legal doubts about the extent to which, under international law, the current fishing rights of foreign fishers could be abolished.<sup>16</sup>

Outside the EU the UK will have greater leverage in the setting of annual TACs for shared stocks. This could help it to secure negotiated and mutually beneficial adjustments in specific areas, much like the annual "swaps" that Member States now undertake each year, especially if matched concessions on access were agreed. But a wholesale attempt to replace such a well-established principle as relative stability will meet implacable opposition.

### 3) *Reciprocal access*

The UK will automatically gain control of access to its EEZ following Brexit, and the EU's automatic right to fish in UK waters will end. The converse is also true in respect of UK fishing in EU waters. Overall, though not in all fisheries, other Member States are more dependent on fishing in UK waters than the UK is on fishing in theirs. The key question is what will happen on the ground, which will need to be determined in the agreements.

Following the EU-Norway model, the agreements would allocate the amount of each stock that a party could fish in each other's waters. The EU and Norway can both be expected to demand amounts equivalent to their (recent) historic catches in UK waters and to offer the UK access to their waters on the same basis. Provided all three sides recognise the legitimate interests and rights of each other's fishermen to access their historic fishing grounds, this could form the basis of a negotiation compatible with the NFFO's (though not the SFF's) stance. There may also be scope for trade-offs between quota allocation and access rights. However, should the UK seek to achieve a material reduction in other Member States' historic access to UK waters, this must almost certainly lead to stalemate and blocked negotiations unless the UK were willing to compensate the fishermen concerned by making equivalent concessions elsewhere, *e.g.* over quota allocations. A UK attempt unilaterally to exclude EU fishermen from their traditional fishing grounds could well result in international litigation. Moreover, in the event of no agreement being reached, the UK would need to consider whether it could realistically prevent access by EU vessels across its lengthy median line.

### 4) *Access to EU markets*

Whilst it is not wholly certain that trade in fishery products will be negotiated as part of fisheries negotiations, the likelihood is that it will, as the EU (in particular) will want it that way and DEFRA (rather than the Department for International Trade) has been given responsibility within Government to lead on fisheries trade negotiations. Trade in fishery products in both directions is high relative to the size of the industry, though the UK is significantly more dependent on exports to the EU than the reverse. UK production of salmon, Norway lobster (langoustine) and scallops are the main high value exports of a total of exports to the EU

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<sup>16</sup> Oliver Bennett, *Brexit: What next for UK fisheries?*, House of Common Library Briefing 16/7669, 27 July 2016; see also Leonardo Bernard, *The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation*, "Securing the Ocean for the Next Generation" LOSI Conference Paper, 15 July 2013

amounting to some £1 billion in 2014 and £921 million in 2015.<sup>17</sup> The UK imports primarily cod, salmon and tuna, its main suppliers being Iceland and China, with imports from the EU amounting to just under £850 million in 2014 and £842 million in 2015.<sup>18</sup>

Given that the UK largely “exports what it catches and imports what it eats”, it is in both UK fishermen’s and consumers’ interests for barriers to trade to be minimalised. The only EU countries exporting more than £100 million to the UK are Germany, Denmark and Sweden, only one of which (Denmark) has a major interest in access to UK waters. Some countries, e.g. France and Spain, would welcome the opportunity to restrict access of UK fish exports to their markets. This suggests the EU would have a strong incentive to use access to markets as a negotiating lever, should the talks become difficult in other areas of the negotiation.

#### 5) *Maintain fishing rights in third country waters*

The EU-Norway agreement includes an exchange of fishing rights through which EU vessels gain access to Arcto-Norwegian cod and other (non-shared) stocks in north Norwegian waters. UK vessels<sup>19</sup> benefit especially from the cod allocation, 9300 tonnes this year (compared to 13000 tonnes for the North Sea as a whole). The Norwegian *quid pro quo* is access to specific amounts of certain EU stocks, the bulk of which are *not* allocated to the UK. The UK thus benefits very well from this arrangement. However, following Brexit, unless the UK is able to persuade the EU to continue the current arrangements, it will be obliged itself to compensate Norway in order to retain access to Arcto-Norwegian cod. Persuading EU countries to maintain what for them is a highly disadvantageous arrangement, whilst simultaneously demanding concessions on quota and access to UK waters could be a tall order. Equally, finding compensation from within its own waters, particularly if Norway asks for stocks in Scottish waters, could also prove difficult.

### **Quota hopping**

There may be calls for new rules to be introduced to end (or reverse) the ownership by companies from other member states of UK-flagged fishing vessels and associated fishing licences, so-called quota-hopping. Such rules were declared by the European Court of Justice to be contrary to the EU Treaties so long as the UK is a Member State. However, neither of the major fishermen’s organisations has called for this (their membership now includes foreign-owned businesses) and the Fisheries Minister told the House of Lords Select Committee on 14 September that the Government had not yet given thought to the matter.<sup>20</sup> The UK would no longer be bound by the ECJ rulings if it pursued this course. However, any decision would need to be taken against the background of wider government policy towards foreign ownership of UK businesses.

### **Conclusion**

The implementation of new fishing policies for the UK will be a complex task. Brexit will undoubtedly give the UK and devolved Governments some new flexibilities especially

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<sup>17</sup> Salmon exports are primarily from salmon farms and not therefore a concern of the marine fishing industry but they are certainly important to the Scottish economy as a whole and will therefore weigh heavily in the minds of Ministers

<sup>18</sup> See Marine Management Organisation, *UK Sea Fisheries Statistics 2015*, 29 September 2016

<sup>19</sup> English registered (though Icelandic-owned)

<sup>20</sup> *Supra* n. 13



concerning the setting of technical rules. But the claims of the Leave campaign quoted at the beginning of this paper are unrealistic. This paper demonstrates that, whilst there will undoubtedly be some scope over time to advantage the UK industry's situation incrementally, change on the scale promised by the Leave campaign is not possible. It will not be achieved by agreement: the EU (and Norway) would have no incentive to acquiesce to such an outcome. But nor could the UK realistically impose such a solution: the UK has limited capacity to enforce the exclusion of many hundreds of Belgian, French, Irish, Danish, German, Dutch, Spanish and Norwegian vessels from its huge EEZ without a substantial increase in enforcement resources, and such action would pose a major risk for UK bilateral relations with these countries. Moreover, the UK's own industry needs access to other EU countries' and Norway's waters. In addition, any breakdown in talks would result in overfishing and imposition of tariffs, or even bans, on fish exports, both of which would significantly damage UK fishing interests.

Thus on the critical issues of quota allocation, reciprocal access to waters and reciprocal access to markets, the prospects for negotiating any significant improvement compared to the *status quo* look slim. Indeed the UK's vulnerability on tariff protection in particular and perhaps on Arcto-Norwegian cod, and differences in priorities between different parts of the UK industry, could make the task for UK negotiators an uphill struggle. However, acknowledging that failure to agree – and with it the threat of walking away from the negotiations – is not a viable option, the “honourable and constructive approach” promised by the DEFRA Minister has to be correct.


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