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**Access to Fisheries in the United Kingdom's Territorial Sea after its
Withdrawal from the European Union: A European and International
Law Perspective**

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Access to Fisheries in the United Kingdom’s Territorial Sea after its Withdrawal from the European Union: A European and International Law Perspective

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Abstract

This article approaches the question of post-Brexit access of European Union (EU) Member States to the United Kingdom's (UK) territorial sea fisheries by first discussing the pre-Brexit legal *status quo* under the *Common Fisheries Policy* (CFP) of the EU. Second, this article discusses the international legal framework for access to territorial sea fisheries that would apply if the UK withdraws from the EU in the absence of a future agreement. As Part II of the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) does not contain provisions on fisheries access, this analysis focuses on the role of the 1964 *London Fisheries Convention* (LFC), bilateral *voisinage* agreements between the UK and EU Member States, potential acquired historic fishing rights of EU Member States in the UK's territorial sea, and potential access rights derived from royal privileges. Next, this article addresses the relevance of the transitional arrangements contained in the latest draft withdrawal agreement of 2018, which was not, however, adopted by the UK. Finally, this article offers some conclusions as to the applicable legal framework for access of EU Member States to the UK's territorial sea fisheries absent a new fisheries agreement between the EU and the UK, and potential ways to proceed in the future regulation of this issue.

A. Introduction¹

An early monograph on the *Common Fisheries Policy* (CFP) of the European Economic Community (EEC) begins with the following statement made by Edward Heath, a former British politician, in 1964: "Her Majesty's Government made clear their interest in the settlement of common fisheries problems on a European basis."² The same year, the conclusion of the 1964 *London Fisheries Convention* (LFC)³ marked an important step in European cooperation on the regulation of international fisheries access. The conclusion of the LFC laid vital foundations for the initiation of the CFP within the EEC in 1970. Less than a decade after Heath's statement, on 1 January 1973, the United Kingdom (UK) became an EEC Member State – and at the same time subject to the CFP.⁴ As

¹ This article discusses the legal situation as of, and related developments until June 2019.

² M. Wise, *The Common Fisheries Policy of the European Community* (1984), 1.

³ *Fisheries Convention*, 9 March 1964, 581 UNTS 57.

⁴ This date marks the entry into force of the *Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom to the EEC and the EAEC*, 22 January 1972, L73 OJ [1972 Accession Treaty].

of June 2019, it is the unequivocal intention of Her Majesty's Government that the UK should withdraw from the EU, and from the CFP in particular.⁵ The UK's government notified its intention to initiate the procedure to withdraw from the EU on 29 March 2017, which means that the original withdrawal date on which the UK's EU membership would have ceased was 29 March 2019 at 00:00 CET.⁶ However, after the UK's parliament had voted against an adoption of the latest draft withdrawal agreement between the UK and the EU on 15 January 2019,⁷ on 5 April 2019 the UK formally asked for an extension of the withdrawal period.⁸ On 10 April 2019, the European Council extended the withdrawal period until 31 October 2019.⁹ In addition, a unilateral revocation of the UK's withdrawal from the EU remains legally possible.¹⁰

⁵ See generally Department for Environment, Farming and Rural Affairs, 'Sustainable Fisheries for Future Generations' (2018), available at <http://www.gov.uk/government/consultations/fisheries-white-paper-sustainable-fisheries-for-future-generations> (last visited 17 October 2019) [UK White Paper].

⁶ *Treaty on European Union*, 13 December 2007, Art. 5 (3), OJ 2012/C 326/01 [TEU].

⁷ H. Stewart, 'May Suffers Heaviest Parliamentary Defeat of a British PM in the Democratic Era', *The Guardian* (15 January 2019), available at <https://www.theguardian.com/politics/2019/jan/15/theresa-may-loses-brexit-deal-vote-by-majority-of-230> (last visited 17 October 2019). This means that a withdrawal from the EU without a withdrawal agreement establishing a transition period regulated with transitional arrangements has become significantly less likely. J. Elgot, 'No Second Vote on Brexit Deal Likely Before February, Says No 10', *The Guardian* (21 January 2019), available at <https://www.theguardian.com/politics/2019/jan/21/no-second-vote-on-brexit-deal-likely-before-february-says-no-10> (last visited 17 October 2019). For discussion of the content of the latest draft withdrawal agreement, see Section D.

⁸ Letter from Theresa May to Donald Tusk (5 April 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793058/PM_letter_to_His_Excellency_Mr_Donald_Tusk__1_.pdf (last visited 17 October 2019).

⁹ European Council Decision Taken in Agreement with the United Kingdom, Extending the Period under Article 50 TEU (10 April 2019), available at <https://www.consilium.europa.eu/en/press/press-releases/2019/04/10/20190410-european-council-decision-on-extension/> (last visited 17 October 2019). This also required an updated of the latest draft withdrawal agreement. See Council Decision XT 21027/19 of 11 April 2019, available at <https://data.consilium.europa.eu/doc/document/XT-21027-2019-INIT/en/pdf> (last visited 17 October 2019).

¹⁰ The Court of Justice of the European Union ruled on 10 December 2018 that the UK could in principle unilaterally revoke its notification of withdrawal before the withdrawal period has lapsed. See *Wightman v. Secretary of State for Exiting the European Union*, Case C-621/18, Judgment of 10 December 2018, para. 75, available at <http://curia.europa.eu/juris/documents.jsf?num=C-621/18> (last visited 17 October 2019). For discussion, see, e.g., O. Garner, 'Case C-621/18, Wightman v. Secretary of State for Exiting the

A key objective of the UK government's post-Brexit fisheries policy is “[t]o enable the UK to take back control of access to our fishing waters (territorial sea extending up to 12 nautical miles and our EEZ extending up to 200 nautical miles offshore) by allowing the UK to decide which countries’ vessels may fish in these areas.”¹¹ For this purpose, the UK government has prepared its 2018 UK Fisheries Bill, which contains clauses on access to fisheries in UK waters.¹² So far, access to fisheries in the exclusive economic zone (EEZ) of up to 200 nm has received more public attention than access to fisheries in the territorial sea of up to 12 nm.¹³ However, this article is exclusively devoted to territorial sea fisheries access as it remains important particularly for artisanal fishing by smaller vessels, and as the relevant legal questions have not been subject to in-depth scholarly discussion. Under Article 2(1) of the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS),¹⁴ coastal States enjoy sovereignty in their territorial sea, which also entails exclusive jurisdiction over, and exclusive rights to, marine living resources. These rights include the right to grant other States or those States’ nationals access to fisheries in their territorial sea. Where they have done so through the conclusion of bilateral or multilateral fisheries access agreements, or where historic fishing rights of other States exist, coastal States are under an obligation to respect these access rights.

This article approaches the question of post-Brexit access of EU Member States to the UK's territorial sea fisheries by first discussing the pre-Brexit legal *status quo* under the CFP. This analysis provides insights on which access arrangements would be terminated by the UK's withdrawal from the EU in

European Union: The European Court of Justice Confirms that Article 50 Notification Can be Unilaterally Revoked’, European Law Blog (11 December 2018), available at <https://europeanlawblog.eu/2018/12/11/case-c-621-18-wightman-v-secretary-of-state-for-exiting-the-european-union-the-european-court-of-justice-confirms-that-article-50-notification-can-be-unilaterally-revoked/> (last visited 17 October 2019).

¹¹ ‘UK White Paper’, *supra* note 5, 16.

¹² Clauses 7 and 8 of the Fisheries Bill 2017–19, 25 October 2018, available at <https://services.parliament.uk/Bills/2017-19/fisheries/documents.html> (last visited 17 October 2019). See further Department for Environment, Farming and Rural Affairs, ‘Explanatory Notes to UK Fisheries Bill’, 25 October 2018, 18, available at <https://services.parliament.uk/Bills/2017-19/fisheries/documents.html> (last visited 17 October 2019).

¹³ For a detailed analysis of post-Brexit access to EEZ fisheries between the UK and the EU, see V. J. Schatz, ‘The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union’, *International Journal of Marine and Coastal Law* (2019, pre-published), available at <https://doi.org/10.1163/15718085-23343067> (last visited 16 October 2019) [Post-Brexit EEZ Fisheries Access].

¹⁴ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3.

the absence of a future agreement that provides otherwise. Second, this article discusses the international legal framework for access to territorial sea fisheries that would apply in such a “no-deal” Brexit scenario. As Part II of UNCLOS does not contain provisions on fisheries access, this analysis focuses on the role of the LFC, bilateral voisinage agreements between the UK and EU Member States, potential historic fishing rights of EU Member States in the UK’s territorial sea, and potential historic rights of these States derived from royal privileges. Given that all of these potential legal sources of fisheries access are best understood in light of their historical context, which in some cases dates back as far as the 1600s, this part of the article devotes significant attention to tracing their historical origins. Next, this article discusses the relevance of the transitional arrangements contained in the latest draft withdrawal agreement of 2018, which was not, however, adopted by the UK. Nonetheless, the agreement sheds some light on potential transitional solutions which, at the time of writing, cannot be excluded entirely. Finally, this article offers some conclusions as to the applicable legal framework for access of EU Member States to the UK’s territorial sea fisheries absent a new fisheries agreement between the EU and the UK, and potential ways to proceed in the future regulation of this issue.

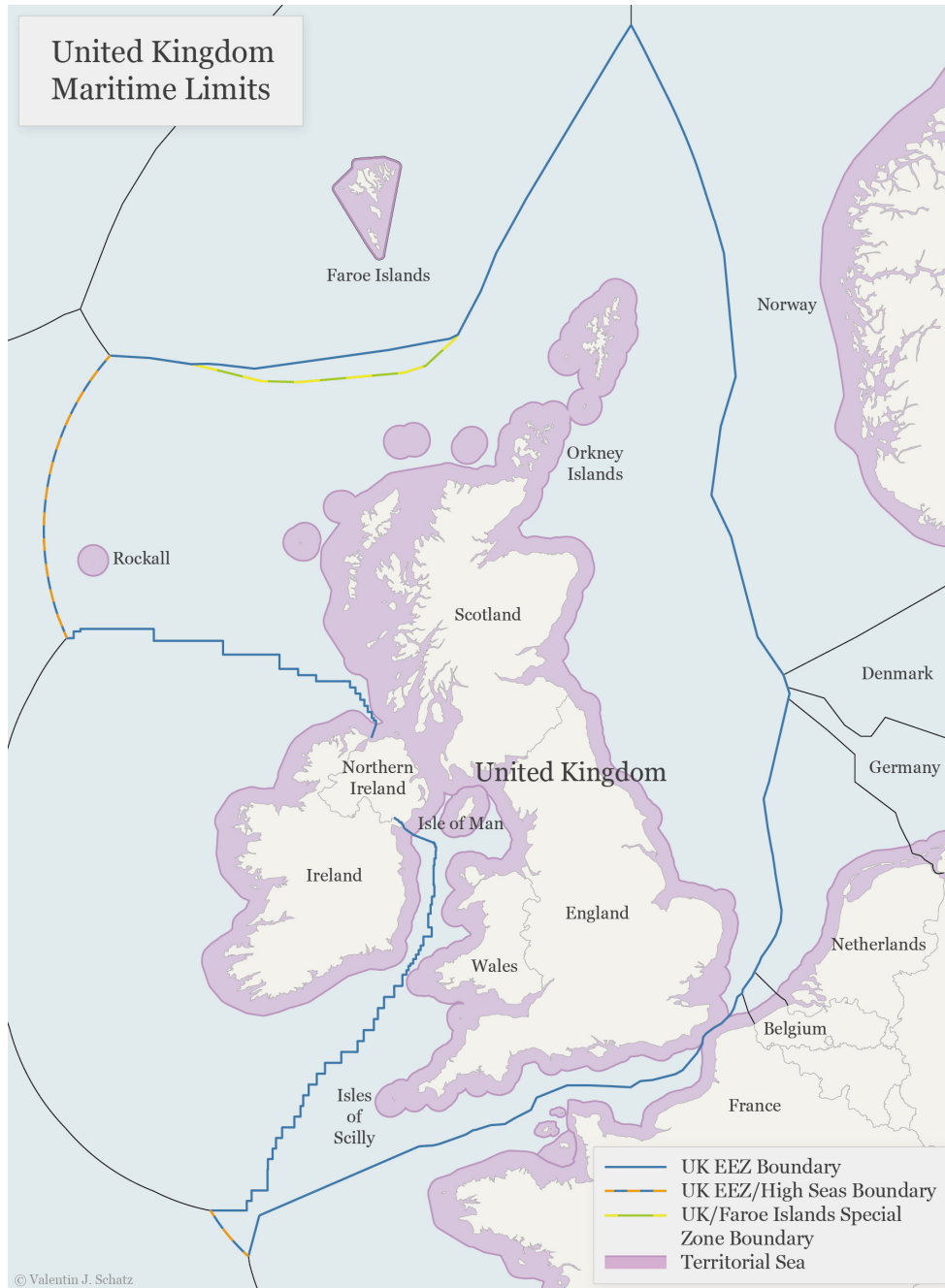


Figure 1: United Kingdom Maritime Limits in the North Sea (for purposes of illustration only)

B. Access to Fisheries Within 12 nm Under the CFP

As mentioned, the coastal State's sovereignty in the territorial sea naturally includes the right to grant other States access to the fisheries located therein. Usually, such access is granted on a consensual basis by way of fisheries access agreements, which provide for detailed rules on the extent of access granted and any applicable conditions. As shown below, consensual access arrangements applicable in the territorial sea have been incorporated into EU law on the basis of the CFP.¹⁵ The UK has been subject to these access arrangements since its accession to the EU on 1 January 1973. The following section first introduces the most fundamental rule concerning intra-EU fisheries access under the CFP, namely the principle of equal access, before discussing the rules for access within 12 nm, which are excluded from the application of the principle of equal access.

I. The Principle of Equal Access and the Allocation of Fishing Opportunities

Article 5 and Annex I of the Basic CFP Framework Regulation¹⁶ provide the legal framework for intra-EU fisheries access under the CFP. Pursuant to Article 5(1) of the Basic CFP Framework Regulation "Union fishing vessels shall have equal access to waters and resources in all Union waters".¹⁷ This rule is commonly referred to as the principle of equal access. Article 5(1) of the Basic

¹⁵ The legal basis for the CFP may be found in Art. 3(1)(d) of the *Treaty on the Functioning of the European Union*, 2012, OJ C 326/47 [26.10. 2012 TFEU], which provides for an exclusive competence of the EU in the area of "the conservation of marine biological resources under the common fisheries policy". The legal basis and procedures for the realization of the CFP on the basis of this exclusive competence are laid down in Arts. 38(1), 43(2) and 43(3) TFEU.

¹⁶ EP and Council Regulation 1380/2013 of 11 December 2013, OJ L 354/22 [CFP Framework Regulation].

¹⁷ Art. 4(1) of the Basic CFP Framework Regulation defines "Union waters" as "the waters under the sovereignty or jurisdiction of the Member States, with the exception of the waters adjacent to the territories listed in Annex II to the [TFEU]". In accordance with Art. 355(2) TFEU, Annex II of the TFEU lists overseas countries and territories to which the special provisions of Part IV of the TFEU on "association of the overseas countries and territories" apply. With respect to the UK, these are Anguilla, Cayman Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands and Bermuda. Art. 355(2) TFEU also states that the TEU and TFEU do "not apply to those overseas countries and territories having special relations with the [UK] which are not included in [Annex II]".

CFP Framework Regulation further provides that equal access is “subject to the measures adopted under Part III”, which include “measures on the fixing and allocation of fishing opportunities”.¹⁸ Article 16(1) of the Basic CFP Framework Regulation provides that the allocation of fishing opportunities is conducted on the basis of either the principle of relative stability for existing fisheries or on EU Member State interests for new fisheries.¹⁹ The detailed rules concerning the allocation of fishing opportunities are not discussed here because some parts of the Union waters, in particular those within 12 nm, are exempt from the application of the principle of equal access. The rules applicable in these waters are addressed in the next section.

II. Exception to the Principle of Equal Access for Waters Within 12 nm

Certain parts of EU waters can be excluded from the application of the principle of equal access. For the present purposes, the only relevant exception is that of Article 5(2) of the Basic CFP Framework Regulation, under which EU Member States may restrict access to fisheries located in their waters within 12 nm to fishing vessels “that traditionally fish in those waters from ports on the adjacent coast”.²⁰ Such restrictions require notification of, but not authorization by, the EU Commission.²¹ Under the current Basic CFP Framework Regulation, the right of EU Member States to restrict fisheries access to their waters of up to 12 nm will expire by 31 December 2022. However, nothing would prevent EU Member States from agreeing on an extension of this right for another period of ten years, as has been the case for the past decades.²²

With regard to Akrotiri and Dhekelia in Cyprus and with regard to the Channel Islands and the Isle of Man, see Art. 355(5)(b) TFEU.

¹⁸ Art. 7(1)(e) of the Basic CFP Framework Regulation.

¹⁹ Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13, with further references.

²⁰ Another exception is laid down in Art. 5(3) of the Basic CFP Framework Regulation. This exception addresses coastal waters up to 100 nm of “Union outermost regions” of EU Member States expressly listed in Art. 349(1) TFEU. None of these Union outermost regions belong to the UK.

²¹ Art. 5(2) of the CFP Framework Regulation.

²² See Art. 6 and Annex I of Council Regulation (EEC) 3760/92 of 20 December 1992, OJ L389/1, establishing a Community system for fisheries and aquaculture; Art. 17(2) and Annex I of Council Regulation (EC) 2371/2002 of 20 December 2002, OJ L358/59 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

Parts of the structure and logic of Article 5(2) of the Basic CFP Framework Regulation reflect provisions of the LFC.²³ In particular, the scope of Article 5(2) of the Basic CFP Framework Regulation is defined in spatial terms and not by reference to the classification of the relevant waters under the international law of the sea. The wording “waters [...] under their sovereignty *or jurisdiction*”²⁴ in Article 5(2) of the Basic CFP Framework Regulation clarifies that the principle of equal access would also apply if an EU Member State claimed a territorial sea of less than 12 nm, but still claimed an EEZ or a similar maritime zone such as an exclusive fisheries zone (EFZ) that involves exclusive fisheries jurisdiction. The original conception of the 12 nm fisheries limit was borrowed from the LFC, not from the limit of the territorial sea at the time.²⁵ Nowadays, most waters within 12 nm of EU Member States have been claimed as territorial sea. However, since a territorial sea of 12 nm does not exist *ipso iure* and *ab initio*, but rather has to be actively claimed by the coastal State,²⁶ full coverage of waters within 12 nm by territorial seas is not guaranteed. Indeed, until 2019, the UK had not claimed a full territorial sea for some of its territories, including some of the Channel Islands belonging to the Bailiwick of Guernsey. The UK extended the territorial sea of the islands belonging to the Bailiwick of Guernsey from 3 to 12 nm with effect on 23 July 2019.²⁷ Thus, the wording of Article 5(2) of the Basic CFP Framework Regulation ensures consistent application of the exception to the principle of equal access.

EU Member States may only restrict fishing in their waters within 12 nm under Article 5(2) of the Basic CFP Framework Regulation to fishing vessels “that traditionally fish in those waters from ports on the adjacent coast”.²⁸ Thus,

²³ See Section C. I.

²⁴ Emphasis added.

²⁵ K. van den Bossche, ‘EU Enlargements and Fisheries: A Legal Analysis: Steps Towards the Re-Nationalisation of EU Maritime Waters’, 64 *Jurisprudencija* (2005) 72, 124, 128. See also Section C. I.

²⁶ UNCLOS, Art. 3 . See also R. Barnes, ‘Article 2’, in A. Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS) – A Commentary* (2017), para. 15.

²⁷ Government of the States of Guernsey, ‘Bailiwick of Guernsey’s Territorial Seas Will be Extended on 23 July 2019’, available at <https://www.gov.gg/article/172632/Bailiwick-of-Guernseys-territorial-seas-will-be-extended-on-23-July-2019>. See Figure 2 below.

²⁸ This is similar, but not identical, to Art. 4(1) of the first Basic CFP Framework Regulation of 1970, which allowed an identical restriction of fishing “to the local population of the coastal regions concerned if that population depends primarily on inshore fishing”. In fact, the blueprint for this formulation may be found in Art. 100(1) of the 1972 Accession Treaty, which allowed restrictions of fishing “to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area”. But see A. Proelß,

the provision lacks a reference to “nationals” of the coastal State and at least in theory also includes fishers of other EU Member States.²⁹ In order to be a beneficiary of this provision, fishing vessels must fulfil two requirements. First, they must have fished traditionally in those waters – whatever that may mean.³⁰ Second, they must have done so from ports on the adjacent coast, which – again – is rather ambiguous wording.³¹

It has been suggested that this wording covers historic fishing rights of other EU Member States.³² However, Article 5(2) of the Basic CFP Framework Regulation contains an independent source of fisheries access under EU law for fishing vessels of other EU Member States if both requirements are fulfilled. The threshold is below that of historic fishing rights *sensu stricto* as it only requires traditional fishing activity, but not that historic fishing rights under public international law have accrued as a result of this traditional fishing activity.³³ On the other hand, the geographical requirement of Article 5(2) of the Basic CFP Framework Regulation is narrower in that the provision does not apply to traditional fishing activity from ports not located adjacent to the relevant waters regardless of whether this traditional fishing activity has given rise to historic fishing rights *sensu stricto*. In any event, it would be difficult to establish the existence of any historic fishing rights among EU Member States nowadays.³⁴ In practice, historic fishing interests of nationals of other EU Member States are protected through the “exceptions from the exception” to the principle of equal access addressed subsequently.

Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks (2004), 377, who appears to attribute the background of the provision to Art. 100(2)-(3) of the 1972 Accession Treaty. However, these provisions of the 1972 Accession Treaty constitute the blueprint for the exceptions to Art. 5(2) of the Basic CFP Framework Regulation discussed below. For an overview of the negotiation history of this provision, see Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 108–141.

²⁹ Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 132: “non-national principle”; R. R. Churchill, *EEC Fisheries Law* (1987), 125 [EEC Fisheries Law]; van den Bossche, ‘EU Enlargements and Fisheries: A Legal Analysis: Steps Towards the Re-Nationalisation of EU Maritime Waters’, *supra* note 25, 128.

³⁰ For an attempt of an interpretation, see Churchill, *EEC Fisheries Law*, *supra* note 29, 135.

³¹ *Ibid.*, 135–136, who comes to the conclusion that the original wording of this provision (“that geographical coastal area”) in Art. 100(1) of the 1972 Accession Treaty may in certain circumstances also include nationals of other EU Member States.

³² Proelß, *Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks*, *supra* note 28, 377–378.

³³ For a discussion of historic fishing rights in the present context, see Section C. III.

³⁴ Proelß, *Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks*, *supra* note 28, 377–378.

III. Exceptions to the Exception for Fisheries Within 12 nm

The exception for waters within 12 nm under Article 5(2) of the Basic CFP Framework Regulation is not absolute. There are two “exceptions from the exception”.³⁵ First, an exclusion of waters up to 12 nm from the application of the principle of equal access is “without prejudice to [...] the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned” (hereinafter the “Annex I exception”).³⁶ This exception reflects access arrangements contained in Article 3 LFC and, therefore, applies to the belt between 6-12 nm.³⁷ Second, an exclusion of waters within 12 nm from the application of the principle of equal access is “without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States” (hereinafter the “voisinage exception”).³⁸ This exception is inspired by Article 9(2) LFC³⁹ and applies to the belt between 0-6 nm from the coast. The following two sections address the relevance of each of these exceptions with respect to access to fisheries in the UK’s territorial sea.

1. Arrangements Under Article 5(2) and Annex I of the Basic CFP Framework Regulation

Many of the fisheries access arrangements under Article 5(2) in conjunction with Annex I of the Basic CFP Framework Regulation, which apply to the belt between 6-12 nm,⁴⁰ have their origin in access previously accorded under Article 3 LFC.⁴¹ Due to the incorporation of these arrangements into Annex I of the Basic CFP Framework Regulation, their legal source is currently EU law rather than the LFC.⁴² This has not always been the case. Pursuant to

³⁵ These exceptions have their source in Art. 100(2)-(3) of the 1972 Accession Treaty.

³⁶ Art. 5(2) Basic CFP Framework Regulation.

³⁷ On this, see R. Steiling, *Das Seefischereirecht der Europäischen Gemeinschaften* (1989), 91; Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 135 and 165–166. See also Section C. I.

³⁸ Art. 5(2) Basic CFP Framework Regulation.

³⁹ See also Section C. I.

⁴⁰ Churchill, *EEC Fisheries Law*, *supra* note 29, 137.

⁴¹ See also Section C. I.

⁴² R. R. Churchill, ‘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

Art. 100(2)-(3) of the 1972 *Accession Treaty*, the access provisions of the CFP did not prejudice pre-existing special fishing rights within 12 nm. Therefore, at this point in time, the LFC was still the actual source of the access rights in question.⁴³

There are also arrangements under Annex I of the Basic CFP Framework Regulation which have origins other than the LFC.⁴⁴ However, this last category of access arrangements is not relevant in the present context. The UK has granted five EU Member States fisheries access to certain areas of the UK's waters within 6-12 nm under Article 5(2) in conjunction with Annex I of the Basic CFP Framework Regulation: Belgium, France, Germany, Ireland, and the Netherlands.⁴⁵ Four of these States have in turn granted the UK fisheries access to certain parts of their waters within the 6-12 nm belt: France, Germany, Ireland, and the Netherlands.⁴⁶

Federation' (2016), 5, available at <http://www.sff.co.uk/wp-content/uploads/2017/03/Opinion-for-SFF-2016.pdf> (last visited 17 October 2019) [Possible Fishery Rights in EU Waters Post Brexit]; V. J. Schatz, 'Brexit and Fisheries Access: Some Reflections on the UK's Denunciation of the 1964 London Fisheries Convention', *EJIL: Talk! – Blog of the European Journal of International Law* (18 July 2017), available at <http://www.ejiltalk.org/brexit-and-fisheries-access-some-reflections-on-the-uks-denunciation-of-the-1964-london-fisheries-convention/> (last visited 17 October 2019) [Brexit and Fisheries Access]; Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13. But see T. Appleby & J. Harrison, 'Brexit and the Future of Scottish Fisheries: Key Legal Issues in a Changing Regulatory Landscape', *25 Journal of Water Law* (2017) 3, 124, 126; J. Phillipson & D. Symes, 'A Sea of Troubles: Brexit and the Fisheries Question', *90 Marine Policy* (2018), 168, 170.

⁴³ Cf. Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 136-137.

⁴⁴ Churchill, *EEC Fisheries Law*, *supra* note 29, 137 gives the example of access to Germany's coastal waters, which had not declared a 12 nm EFZ under the LFC. A modern day example would be the reciprocal access arrangement between Croatia and Slovenia, which "shall apply from the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009". This arrangement was incorporated into Annex I as a result of the EU's role in brokering said arbitration agreement in light of Croatia's accession to the EU. It aims to ensure that any maritime delimitation undertaken by the arbitral tribunal in that case does not result in any significant displacement and disturbance of existing fisheries in the area.

⁴⁵ Table 1. See also 'Explanatory Notes to UK Fisheries Bill', *supra* note 12, 6-7.

⁴⁶ Table 2.

Table 1: Access to the waters of the United Kingdom within 6-12 nm

State	Description
Belgium	unlimited access to five coastal areas in which demersal species and/or herring may be fished
France	unlimited access to a variety of (and in some cases all) species in fifteen coastal areas
Germany	unlimited access to herring (and in one case mackerel) in six coastal areas
Ireland	unlimited access to demersal species and nephrops in two coastal areas in the Irish Sea and off the west coast of Scotland
The Netherlands	unlimited access to herring in three coastal areas

Table 2: Access of the United Kingdom to EU Member State waters within 6-12 nm

State	Description
France	unlimited access to herring in a coastal area adjacent to the Belgian/French border
Germany	unlimited access to cod and plaice in the waters around Heligoland
Ireland	unlimited access to demersal species, herring and mackerel in one coastal area in the South of Ireland and unlimited access to these species as well as nephrops and scallops along the entire east coast of Ireland
The Netherlands	unlimited access to demersal species in a coastal area west to the Netherlands/German border

2. The “Voisinage Exception” Under Article 5(2) of the Basic CFP Framework Regulation

As for the “voisinage exception”, Article 5(2) of the Basic CFP Framework Regulation does not provide a definition of the term “existing neighbourhood relations between Member States”. Nonetheless, the wording of the exception points towards so-called “voisinage agreements” between EU Member States,⁴⁷

⁴⁷ With respect to Art. 100(2)-(3) of the 1972 Accession Treaty, which is the source of this exception, Churchill, *EEC Fisheries Law*, *supra* note 29, 133 and Steiling, *Das*

which are commonly described as “reciprocity agreements, in that [they involve] an exchange of benefits of the same type between the two contracting States which each grant each other fishing rights in the zones subject to their respective jurisdictions.”⁴⁸ As the Basic CFP Framework Regulation neither prohibits nor incorporates “existing neighbourhood relations”, voisinage agreements between EU Member States arguably have continued to serve as the legal source of these fisheries access rights in their own right, with the “blessing” of the Basic CFP Framework Regulation. This distinguishes them from the access arrangements stemming from the LFC, which were incorporated into Annex I of the Basic CFP Framework Regulation. As the EU Commission does not maintain an official list of such voisinage agreements and has to rely on EU Member States to notify existing agreements,⁴⁹ it is difficult to identify all agreements in force. In the present context, commentators have indicated that no voisinage agreements currently serve as a basis for fisheries access between the UK and EU Member States.⁵⁰ Upon closer inspection, however, there exist two voisinage agreements of the UK with France and Ireland, respectively.⁵¹

Seefischereirecht der Europäischen Gemeinschaften, *supra* note 37, 91 correctly note that it covers not only access arrangements under the LFC but also other agreements between EU Member States. See also W. Graf Vitzthum & S. Talmon, *Alles Fließt: Kulturgüterschutz und Innere Gewässer im Neuen Seerecht* (1998), 110 who mention rights arising from community law or treaty law. See also van den Bossche, ‘EU Enlargements and Fisheries: A Legal Analysis: Steps Towards the Re-Nationalisation of EU Maritime Waters’, *supra* note 25, 130 who expressly mentions existing neighbourhood relations. The exception for “existing neighbourhood relations” does not, however, include historic fishing rights as argued by Proelß, *Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks*, *supra* note 28, 377–378 with respect to the *Accession Treaty*, 1972, Art. 100(2)-(3). Neither its wording nor its drafting history reflect an intention to include historic fishing rights and there are no examples from EU Member State practice that would support such a view.

⁴⁸ *Filleting within the Gulf of St. Lawrence between Canada and France*, Award of the Arbitral Tribunal, 17 July 1986, XIX RIAA 225, para. 29. See further Section C. R. Symmons, ‘Recent Developments in Ireland: The Voisinage Doctrine and Irish Waters: Recent Judicial and Legislative Developments’, 49 *Ocean Development & International Law* (2018) 79, 79–80.

⁴⁹ Personal communication of the author with an official of the EU Commission (DG Mare).

⁵⁰ Churchill, ‘Possible Fishery Rights in EU Waters Post Brexit’, *supra* note 42, 3.

⁵¹ See also ‘Explanatory Notes to UK Fisheries Bill’, *supra* note 12, 6.

a. The UK/France Voisinage Agreement

The current voisinage agreement between the UK and France was concluded in 2000 (hereinafter “*Granville Bay Agreement*”).⁵² The *Granville Bay Agreement* is unquestionably a treaty under public international law. It regulates access to fisheries off the coast of the British Channel Islands, specifically the Bailiwick of Guernsey (consisting of the islands of Guernsey, Alderney, and Sark) and the Bailiwick of Jersey (consisting of the island of Jersey and some smaller uninhabited islands), which enjoy a degree of autonomy under UK constitutional law.⁵³ The *Granville Bay Agreement* and its annexes establish a legally binding fisheries regime for the waters around the Channel Islands and set up a Joint Management Committee and a Joint Advisory Committee to facilitate implementation and further cooperation. It also provides for reciprocal fisheries access between the UK and France in its area of application, which includes the territorial sea of the Channel Islands (part of which constituted EFZs before July 2019).⁵⁴

The UK could perhaps terminate the *Granville Bay Agreement* to exclude French fishers from its territorial sea in the Channel.⁵⁵ However, such a move should be carefully considered for political reasons. In order to fully understand the political sensitivity and legal complexity of UK-France fisheries relations in the waters of the Channel Islands, it is useful to take a look at the historical origins of the *Granville Bay Agreement*. The Channel Islands have for a long time been subject to sovereignty, delimitation, and fisheries disputes between the UK and France.⁵⁶ The two States concluded various bilateral agreements regulating

⁵² *Agreement Between the United Kingdom of Great Britain and Northern Ireland and the French Republic Concerning Fishing in the Bay of Granville*, 4 July 2000, 2269 UNTS 87.

⁵³ D. H. Anderson & R. N. Carlton, ‘France-United Kingdom (Guernsey) (1992), Report Number 9-3(5)’, in C. Lathrop (ed.), *International Maritime Boundaries* (2016) 2471, 2472. See also ‘UK White Paper’, *supra* note 5, 22.

⁵⁴ Figure 2.

⁵⁵ Although Art. 10 *Granville Bay Agreement* does not expressly provide for procedures of termination, it also does not exclude a termination – and it might fall within one of the two categories of Art. 56(1) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT].

⁵⁶ For an account of early fisheries disputes between the UK and France in the Channel, see, e.g., T. W. Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters: With Special Reference to the Rights of the Fishing and the Naval Salute* (1911), 607-620 [The Sovereignty of the Sea].

fisheries and the limits of fisheries jurisdiction between 1839 and 1965.⁵⁷ The concrete reasons for the conclusion of the current voisinage agreement can be traced back to 1 September 1992, when the government of the UK authorized the authorities of the Bailiwick of Guernsey to exercise fisheries jurisdiction up to a limit of 12 nm from the baselines (compared to 3 nm prior to that date).⁵⁸ As the territorial sea of Guernsey remained at 3 nm at the time (it was extended to 12 nm in 2019), the extension to 12 nm concerned fisheries jurisdiction only (see Figure 2). As this affected local French fishers, existing fishing practices were formalized through a voisinage agreement between the UK and France concerning access to fisheries within a 12 nm limit in the waters in the vicinity of the Channel Islands, the French Coast of the Cotentin Peninsula, and the Schole Bank in 1992.⁵⁹ The preamble of the exchange of notes expressly adopts the language of the Basic CFP Framework Regulation and refers to “existing

⁵⁷ These include the following: *Convention Between Great Britain and France, for Defining and Regulating the Limits of the Exclusive Right of the Oyster and Other Fishery on the Coasts of Great Britain and of France*, 2 August 1839, 27 *British and Foreign State Papers* 983 (This treaty set up a special fisheries regime for the area. On its background and content, see Fulton, *The Sovereignty of the Sea*, *supra* note 56, 611–615.); *Declaration Between Great Britain and France, Approving the Fishery Regulations, 24 May 1843 for the Guidance of the Fishermen of Great Britain and of France in the Seas Lying Between the Coasts of the two Countries*, 23 June 1843, 31 *British and Foreign State Papers* 165 (establishing regulations for the special fisheries regime); *Agreement Regarding the Limits of French Fisheries in Granville Bay*, 20 December 1928, LXXXVI LNTS 429(modification of details of the delimitation of the area to which the special regime applied); *Agreement Regarding Rights of Fishery in Areas of the Ecrehos and Minquiers*, 30 January 1951, 121 UNTS 98 (establishing a special fisheries regime for the Minquiers and Ecrehos Islands); *Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Concerning the Status of Previous Fisheries Agreements in Relation to the Fisheries Convention Opened for Signature in London from March 9 to April 10 1964*, 10 April 1964, 54 *UK Treaty Series* (This agreement provided for a continued application of the previous instruments despite the adoption of the LFC and expressly made use of the exception of Art. 10(d) LFC.); *Exchange of Notes Concerning the Question of the Habitual Rights of French Fishing Vessels Within British Fishery Limits*, 24 February 1965 (mentioned in the agreement of 2000, source unknown) (regulating details of French fishing rights under the special regime).

⁵⁸ Anderson & Carlton, ‘France-United Kingdom (Guernsey) (1992), Report Number 9-3(5)’, *supra* note 53, 2472.

⁵⁹ *Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Concerning the Activities of Fishermen in the Vicinity of the Channel Islands and the French Coast of the Cotentin Peninsula and, in Particular, on the Schole Bank*, 10 July 1992, 66 *UK Treaty Series* [*Exchange of Notes*].

neighbourhood relations regarding activities by local coastal fishermen”.⁶⁰ Although French fisheries access to Schole Bank expired on 1 January 2010,⁶¹ reciprocal access to fisheries in the waters in the vicinity of the Channel Islands and the French coast of the Cotentin Peninsula remained in place.⁶² The new fishery limits were not, however, received well by French fishers. After the 1993 Cherbourg incident, which, *inter alia*, involved the abduction of UK enforcement officers by French fishers, the voisinage agreement of 1992 was modified.⁶³ In an additional 1994 exchange of notes, a *modus vivendi* without prejudice to legal positions was established in order “to ensure harmonious cohabitation between fishermen”.⁶⁴ In particular, fishing rights of French fishers were extended, or rather restored, in some areas not originally covered by the 1992 Exchange of Notes. These arrangements were subject to tacit renewal. Finally, France and the UK concluded the *Granville Bay Agreement* in 2000 in order “to review and modernise” the fisheries regime in the Bay of Granville established by the previous instruments adopted since 1839.⁶⁵ For that purpose, Article 9 *Granville Bay Agreement* terminated all previous instruments to the extent that they were still in force. It may be concluded that a unilateral termination of the *Granville Bay Agreement* by the UK would be lawful but might trigger significant protest by French fishers.⁶⁶

⁶⁰ Emphasis added.

⁶¹ *Exchange of Notes*, *supra* note 59, para. 2.

⁶² *Ibid.*, para. 3.

⁶³ S. Ward, O. Gillie & A. Gliniecki, ‘French Fishermen Strike Peace Deal With Guernsey: ‘Men in Suits and Ties’ Repudiate Agreement Made After Flotilla From Normandy Sails to Island Harbour for Talks’, *The Independent* (30 March 1993), available at www.independent.co.uk/news/french-fishermen-strike-peace-deal-with-guernsey-men-in-suits-and-ties-repudiate-agreement-made-1500747.html (last visited 17 October 2019).

⁶⁴ *Exchange of Notes Constituting an Agreement Regarding Activities by the Local Coastal Fishermen in the Vicinity of Guernsey and the French Coasts of the Cotentin Peninsula and of Brittany*, 16 August 1994, 1892 UNTS 343.

⁶⁵ *Agreement Between the United Kingdom of Great Britain and Northern Ireland and the French Republic Concerning Fishing in the Bay of Granville*, 4 July 2000, 2269 UNTS 87.

⁶⁶ This conclusion is supported by recent clashes between French and UK fishers in the Channel. See F. Harvey, ‘British Fishermen Attacked by French Boats in the Channel’, *The Guardian* (10 October 2012), available at www.theguardian.com/environment/2012/oct/10/british-fishermen-attacked-french-channel (last visited 17 October 2019).

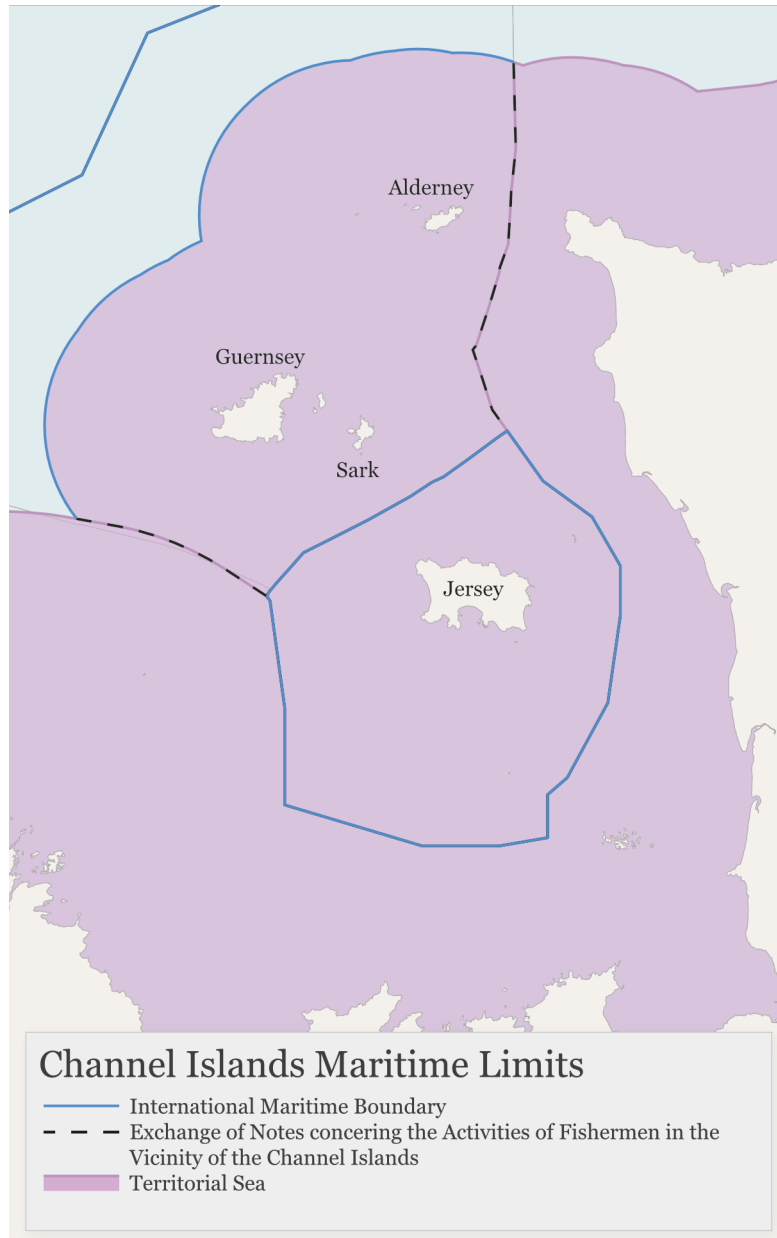


Figure 2: Channel Islands Maritime Limits (for purposes of illustration only)

b. The UK/Ireland Voisinage Agreement

The voisinage agreement between the UK and Ireland relates to fishing by Northern Irish and Irish fishers in the waters off the Irish and Northern Irish coast. The voisinage agreement has not yet been incorporated into a formal treaty text and the text of the original agreement appears to be unavailable.⁶⁷ However, a vague exchange of letters from 1965 between the governments of the UK and Ireland regarding the continued implementation of the voisinage agreement after the conclusion of the LFC in 1964 is documented.⁶⁸ The voisinage agreement accords reciprocal fisheries access to the 0-6 nm belts (originally the 0-3 nm belts) of the waters of Northern Ireland and Ireland under a specific exception for voisinage agreements contained in Article 9(2) LFC.⁶⁹ The exchange of letters conveys that fisheries access for the UK is limited to “boats owned and operated by fishermen permanently resident in [Northern Ireland]”.⁷⁰ Furthermore, the exchange of letters conveys that the voisinage agreement allows for restrictions on vessel sizes at least insofar as such restrictions are applied on a non-discriminatory basis.⁷¹

Doubts have been expressed with respect to the voisinage agreement’s bindingness as a treaty under public international law rather than a mere “gentlemen’s agreement”.⁷² However, it would seem that “the right to fish [accorded under the voisinage agreement] to other Contracting Parties”, to use the words of Article 9(2) LFC, is not an undertaking without legal effect, and is opposable to the coastal State to some extent. For example, enforcement measures taken against vessels of the other party for fishing without license,

⁶⁷ C. R. Symmons, ‘The Sea Fishery Regime of the Irish Sea’, 4 *International Journal of Estuarine and Coastal Law* (1989) 192, 197 [Irish Sea Fishery Regime]; Symmons, ‘Recent Developments in Ireland: The Voisinage Doctrine and Irish Waters: Recent Judicial and Legislative Developments’, *supra* note 48, 80.

⁶⁸ The text of the exchange of letters is reproduced in Supreme Court of Ireland, *Barlow & Ors v. Minister for Agriculture, Food and the Marine & Ors* (2016), IESC, para. 12 [Barlow & Ors].

⁶⁹ *Ibid.*, paras. 11 and 40. See also Section C. I.

⁷⁰ *Ibid.*, para. 12. See also House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’ (2018), Fourth Report of Session 2017–19, 36, available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmniaf/878/878.pdf> (last visited 17 October 2019).

⁷¹ *Barlow & Ors*, *supra* note 68, para. 12.

⁷² *Ibid.*, para. 40; Symmons, ‘Irish Sea Fishery Regime’, *supra* note 67, 197. Compare also House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’, *supra* note 70, 36: “informal agreement”.

despite the legality of fishing activities under the voisinage agreement, would arguably result in a breach of the voisinage agreement.

For some time, the future of the voisinage agreement was unclear. Four Irish fishers had challenged the legality under the Irish constitution of mussel fishing by vessels from Northern Ireland under the voisinage agreement. As a result of this litigation, the Supreme Court of Ireland in its judgment of 2016 in the *Barlow Case* described the operation of the voisinage agreement in the following terms:

“For the last 50 years and, it seems likely, since the foundation of the State, fishermen resident in Northern Ireland have fished waters which, from time to time, have been designated as the territorial waters of the State. This fishing has been carried out with the knowledge and approval of the authorities here and, it appears in circumstances where reciprocal facilities were afforded to Irish fishermen in the waters adjoining the coastal area of Northern Ireland. This case raises the question of the legality of the practice of what may be described in general terms at this stage, as Northern Ireland fishermen, fishing in Irish territorial waters.”⁷³

In particular, fishers resident in Northern Ireland carried out bottom mussel fishing, which “involve[d] the collection of mussel seed at sea, and its transport to sheltered areas which have proved to be productive mussel beds, where the mussels can grow and where they can in due course be harvested.”⁷⁴ The Supreme Court found that “mussel harvesting is not, as yet controlled by the complex EU fishing regime” and that, therefore, the “dispute is to be determined by the provisions of domestic law”.⁷⁵ This finding was correct insofar as the mussel fishery within 12 nm is indeed not regulated by the fisheries access regime of the CFP. The Supreme Court found that the practice of mussel fishing under the voisinage agreement was unlawful, because Article 10 of the Irish Constitution required a law enacted by the Oireachtas for the exploitation of a natural resource such as the common mussel, and that no such law existed at present.⁷⁶

⁷³ *Barlow & Ors*, *supra* note 68, para. 2.

⁷⁴ *Ibid.*, para. 4.

⁷⁵ *Ibid.*, para. 3.

⁷⁶ *Ibid.*, paras. 67 and 73.

Of course, such a finding by a national court does not invalidate the voisinage agreement on the level of public international law. Nonetheless, vessels from Northern Ireland were no longer permitted under Irish law to fish in the 0-6 nm belt of the Irish territorial sea as a result of the judgment.⁷⁷ Irish vessels, on the other hand, continued to have access to Northern Irish waters. Thereafter, the Irish government attempted to pass legislation, namely the *Sea-Fisheries (Amendment) Bill 2017*,⁷⁸ to reinstate the terms of the voisinage agreement under Irish law.⁷⁹ However, the new legislation initially did not pass the committee stage at the Oireachtas due to strong political opposition.⁸⁰ Pending resolution of this asymmetric situation, the UK government emphasized that the UK “will not accept unequal application of the agreement indefinitely”.⁸¹ In a report published on 11 September 2018, Northern Ireland Affairs Committee of the House of Commons issued the following recommendation:

“If the Irish Government does not give a clear commitment to pass, within 6 months of publication of this report, legislation which restores reciprocal access, the Government must discontinue access to UK waters for Irish vessels from 30 March 2019. If the Irish Government does pass legislation to reinstate the Voisinage Arrangement, then the UK Government should consider whether the arrangement should also be put on statutory footing in UK law.”⁸²

The continuing situation of imbalance eventually led to considerable tensions between the UK and Ireland. In February 2019, the Irish navy impounded two fishing vessels from Northern Ireland for fishing illegally in the

⁷⁷ House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’, *supra* note 70, 36.

⁷⁸ Sea-Fisheries (Amendment) Bill (2017), available <https://www.oireachtas.ie/en/bills/bill/2017/19/> (last visited 17 October 2019).

⁷⁹ Symmons, ‘Recent Developments in Ireland: The Voisinage Doctrine and Irish Waters: Recent Judicial and Legislative Developments’, *supra* note 48, 81–82; House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’, *supra* note 70, 36-37.

⁸⁰ House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’, *supra* note 70, 37; G. Ní Aodha, ‘Bill to Allow Northern Irish Boats to Fish off Ireland’s Coasts Approved by Dáil’, (28 March 2019), available at <https://www.thejournal.ie/sea-fisheries-bill-northern-ireland-4566007-Mar2019/> (last visited 17 October 2019).

⁸¹ *Ibid.*

⁸² *Ibid.*

0-6 nm belt of the Irish territorial sea, causing a diplomatic row.⁸³ The incident increased pressure on the Irish government, which eventually managed to pass the *Sea-Fisheries (Amendment) Bill* 2017 in April 2019.⁸⁴ In relevant part, the *Sea-Fisheries (Amendment) Act* 2019 reads:

“A person who is on board a sea-fishing boat owned and operated in Northern Ireland may fish or attempt to fish while the boat is within the area between 0 and 6 nautical miles as measured from the baseline [...] if, at that time, both the person and the boat comply with any obligation specified in subsection (3) which would apply in the same circumstances if the boat were an Irish sea-fishing boat.”⁸⁵

In principle, Ireland or the UK could terminate the voisinage agreement in order to close their fisheries within 0-6 nm off the Irish coast. However, like the *Granville Bay Agreement* with France, the voisinage agreement between the UK and Ireland should probably not be terminated without due consideration for the sensitive political context. Indeed, the judgment of the Supreme Court expressed concerns that

“at this stage of North-South relations, and indeed the relations between Ireland and the UK more generally, that the Court could find itself adjudicating upon a claim with an avowed object

⁸³ G. Moriarty, *et al.*, ‘DUP Calls for Answers as NI Fishing Boats Detained by Irish Navy’, *The Irish Times* (28 February 2019), available at <https://www.irishtimes.com/news/ireland/irish-news/dup-calls-for-answers-as-ni-fishing-boats-detained-by-irish-navy-1.3810224> (last visited 17 October 2019); D. Young, ‘Government Seizure of Fishing Boats ‘Heavy Handed’’, *The Times* (1 March 2019), available at <https://www.thetimes.co.uk/article/government-seizure-of-fishing-boats-heavy-handed-l699jdw9k> (last visited 17 October 2019); C. Macauley, ‘Fishermen ‘do not deserve conviction’ for Irish waters breach’, *BBC News* (1 March 2019), available at <https://www.bbc.com/news/world-europe-47413901> (last visited 17 October 2019).

⁸⁴ G. Ní Aodha, ‘Government Finally Wins Battle to Allow NI Boats to Fish Along Ireland’s Coasts - So What Does it Mean?’, (7 April 2019), available at <https://www.thejournal.ie/northern-irish-boats-voisinage-explainer-4579094-Apr2019/> (last visited 17 October 2019).

⁸⁵ Sec. 10(2) of the *Sea-Fisheries (Amendment) Act* 2019, available at <https://data.oireachtas.ie/ie/oireachtas/act/2019/9/eng/enacted/a0919.pdf> (last visited 17 October 2019).

of invalidating an important area of cooperation between the jurisdictions.”⁸⁶

IV. Relevance of the Freedom of Establishment for Access to Fisheries in the Territorial Sea

Under EU law, access to the UK’s territorial sea fisheries is also indirectly affected by rules that do not form part of the CFP in the strict sense. Under Article 49 TFEU, nationals of EU Member States enjoy freedom of establishment in other EU Member States. This freedom also applies to the establishment of fishing companies in the UK that are owned and operated by nationals or corporations of another EU Member State, and the acquisition of UK fishing vessels by such companies.⁸⁷ Therefore, the freedom of establishment in principle makes it possible for nationals of other EU Member States to access fishing opportunities reserved for, or allocated to, the UK,⁸⁸ including within the territorial sea.

The UK’s current requirements for the registration of fishing vessels, which were softened in order to comply with the freedom of establishment,⁸⁹ have attracted considerable investment of other EU Member States. This is of particular relevance for territorial sea fisheries because they can be excepted from the principle of equal access and, therefore, the access arrangements in Annex I of the Basic CFP Framework Regulation and the existing voisinage agreements are the only avenues of fisheries access. The issue is also relevant in the context of the UK’s voisinage agreements themselves as not all of these

⁸⁶ See *Barlow & Ors*, *supra* note 68, para. 28.

⁸⁷ See discussion by J. M. Sobrino Heredia, ‘Legal Framework for Governance’, in European Parliament, Directorate General for Internal Policies (ed.), *Research for PECH Committee: Common Fisheries Policy and BREXIT* (2017), available at [www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU\(2017\)601981_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU(2017)601981_EN.pdf) (last visited 17 October 2019), 18–20; House of Lords, European Union Committee, ‘Brexit: Fisheries, 8th Report of Session 2016–17’ (2016), 17–18, available at <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/78/78.pdf> (last visited 17 October 2019); Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13.

⁸⁸ Sobrino Heredia, ‘Legal Framework for Governance’, *supra* note 87, 18–20; House of Lords, ‘Brexit: Fisheries, 8th Report of Session 2016–17’, *supra* note 87, 17–18; Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13.

⁸⁹ Insofar as the UK has in the past imposed strict requirements for the ownership of fishing vessels through the 1988 Merchant Shipping Act, this legislation has been held to be in conflict with the freedom of establishment by the European Court of Justice. See R. Churchill & D. Owen, *The EC Common Fisheries Policy* (2010), 164–166 and 202–210.

agreements necessarily provide for sufficiently strict requirements for vessels to make use of the access rights granted. For example, EU Member States other than Ireland are able to make use of the UK-Ireland voisinage agreement.⁹⁰ Unless a future agreement between the UK and the EU provides otherwise, the UK's withdrawal from the EU will have the effect of removing the freedom of establishment in its current form for the UK and thus allow it to (re)impose stricter requirements for fishing vessel registration.⁹¹

V. Impact of Brexit

Post-Brexit, the entitlements to fisheries access under Article 5(2) in conjunction with Annex I of the Basic CFP Framework Regulation will no longer apply to the UK. The same is true of the application of the freedom of establishment under EU law unless a future trade agreement between the EU and the UK continues its application. On the other hand, fisheries access based on the voisinage agreements preserved by Article 5(2) of the Basic CFP Framework Regulation is not affected by Brexit. A guidance issued by the UK government acknowledges that although fisheries access arrangements under the CFP would cease to apply, there might be continued access under "any existing agreements relating to territorial waters".⁹² Thus, the UK's withdrawal from the EU will not affect these agreements unless the UK chooses to terminate them under their own terms. Whether a termination of either of these two voisinage agreements is politically desirable, however, is a question that deserves careful consideration in light of the political sensitivity of their historical background. In addition to the voisinage arrangements, fisheries access arrangements stemming from treaties or customary international law that are valid independently of the CFP and EU law may provide legal bases for access to fisheries in the UK's territorial sea

⁹⁰ This was also highlighted in *Barlow & Ors*, *supra* note 68, para. 6.

⁹¹ Sobrino Heredia, 'Legal Framework for Governance', *supra* note 87, 19–20; 'UK White Paper', *supra* note 5, 27; Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13. Under the international law of the sea, the regulation of vessel registration, including that of fishing vessels, falls within the competence and discretion of the flag State. See Art. 91(1) UNCLOS; *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, ITLOS Case No. 2, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf (last visited 17 October 2019); J. Harrison & E. Morgera, 'Article 62', in Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS) – A Commentary*, *supra* note 26, para. 7.

⁹² UK No-Deal-Guidance, available at <https://www.gov.uk/guidance/the-fisheries-sector-and-preparing-for-eu-exit> (last visited 17 October 2019).

post-Brexit. All potential sources of fisheries access to the UK's territorial sea post-Brexit are analysed in the following section (C.).

C. Post-Brexit Fisheries Access to Waters Within 12 nm

As far as fisheries access to coastal State waters of up to 12 nm⁹³ is concerned, Part II of UNCLOS does not contain express rules for fisheries access. However, UNCLOS also does not prevent States from concluding bilateral and multilateral fisheries access agreements, which may contain relevant rules. In this respect, the prospect of Brexit has brought back to the stage one of the oldest European fisheries access agreements, namely the LFC (C. I.). In addition, the UK's voisinage agreements with Ireland and France are valid sources of fisheries access rights under public international law independently of the Basic CFP Framework Regulation (C. II.). Besides these treaties, the question of historic fishing rights in the waters of the UK and neighbouring EU Member States deserves attention (C. III.). For the sake of completeness, and distinct from historic fishing rights, it is also justified to briefly address the issue of fishing rights derived from royal privileges (C. IV.).

I. The 1964 London Fisheries Convention

The prospect of the UK's withdrawal from the EU initially triggered discussion as to whether the LFC would be relevant for reciprocal fisheries access between the UK and some EU Member States after the CFP ceases to apply to the UK.⁹⁴ In order to address this issue, the following discussion begins with an introduction to the historical background of the LFC and its content before it turns to the role of the LFC after the establishment of the CFP and the UK's withdrawal from the LFC.

1. Historical Context and Content of the LFC⁹⁵

Originally, the LFC was a milestone in the gradual extension of coastal State fisheries jurisdiction. The parties to the LFC reciprocally recognized each

⁹³ In most but not all areas, EU Member States have declared full territorial seas of 12 nm.

⁹⁴ On this discussion, see Churchill, 'Possible Fishery Rights in EU Waters Post Brexit', *supra* note 42, 3–12; Schatz, 'Brexit and Fisheries Access', *supra* note 42.

⁹⁵ On this, see Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 75–78.

other's right to claim an exclusive fishery zone (EFZ) of up to 12 nm.⁹⁶ The LFC recognizes the right of coastal States to exclusive jurisdiction in fisheries matters within 12 nm.⁹⁷ In the belt between 6 and 12 nm, however, the coastal State's exclusive fisheries jurisdiction is qualified by a right to fish of the other parties to the LFC "the fishing vessels of which have habitually fished in that belt between 1st January 1953 and 31st December 1962."⁹⁸ This was a remarkable development in the 1960s because only a territorial sea of up to 3 nm was then firmly established under public international law and claims to a broader territorial sea (or a functional zone such as an EFZ) remained contested.⁹⁹ Accordingly, the 1882 *International Convention for Regulating the Police of the North Sea Fisheries* (NSFP Convention),¹⁰⁰ which regulated fisheries in the high seas of the North Sea until the conclusion of the LFC, had only provided for exclusive fishing rights within a zone of 3 nm.¹⁰¹ Thus, the coastal States, which became parties to the LFC, traded the recognition of their EFZ claims for a right of other states to continued access to the 6-12 nm belt of the EFZ based on historical fishing practices between 1953 and 1962. In the belt between 0-6 nm, no permanent right of access was envisaged under the LFC, but transitional arrangements had to be made to grant access to fishers "who have habitually fished in [that] belt

⁹⁶ Arts. 1(1), 2 and 3 LFC. For a detailed discussion of the contribution of the LFC specifically to the gradual extension of coastal State fisheries jurisdiction, see V. J. Schatz, 'The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone: A Historical Perspective', 5 *Journal of Territorial and Maritime Studies* (2018) 2, 5, 12–13 [The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone].

⁹⁷ Arts. 1(1), 2, 3 and 5 LFC.

⁹⁸ Arts. 1(1) and 3 LFC. Notably, Art. 1(2) in conjunction with Art. 14(1) LFC grants any State party to the LFC a right to maintain a fisheries access regime applicable before 9 March 1964 if that regime is more favorable than the access regime established by the LFC itself.

⁹⁹ D. W. van Lynden, 'The Convention on Conduct of Fishing Operations in the North Atlantic, London, 1967', 14 *Netherlands International Law Review* (1967) 3, 245, 246 and 250–251; Schatz, 'The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone', *supra* note 96, 10–11.

¹⁰⁰ *Convention for Regulating the Police of the North Sea Fisheries*, 6 May 1882, available at <https://iea.uoregon.edu/treaty-text/1882-policenorthseasfisheryentxt> (last visited 17 October 2019) [NSFP Convention].

¹⁰¹ See Art. II NSFP Convention. On the historical background of the failure of the NSFP Convention, see Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 69–75.

[...] to adapt themselves to their exclusion from that belt”.¹⁰² In addition, the LFC allowed coastal States to grant permanent access to “other Contracting Parties of which the fishermen have habitually fished in the area by reason of voisinage arrangements”.¹⁰³ This last option was also used to establish the UK-Ireland voisinage agreement discussed above.

Article 5(1) LFC grants the coastal State prescriptive and enforcement jurisdiction in its EFZ as far as fisheries are concerned. Under Article 5(2) LFC, this jurisdiction is subject to a duty to inform the other parties to the LFC of any new laws and regulations, as well as being subject to a duty to consult with them “if they so wish”. However, the coastal State must not discriminate “in form or in fact against fishing vessels of other Contracting Parties fishing in conformity with articles 3 and 4.”¹⁰⁴ Thus, the coastal State may take enforcement measures against fishing vessels which either cannot claim a right to fish under Article 3 LFC or which violate their obligation not to direct fishing efforts based on Article 3 LFC “towards stocks of fish or fishing grounds substantially different from those which they have habitually exploited” under Article 4 LFC.

The fishing rights granted by Article 3 LFC are sometimes called “historic” because their existence depends on past fishing practices and because Article 4 LFC also limits these rights to such stocks which were the subject of past fishing practices. However, from a legal perspective, the term “historic fishing rights” is generally used to refer to customary rights created through the exercise of an exceptional claim with the acquiescence of the coastal State.¹⁰⁵ In contrast, the fishing rights granted by Article 3 LFC are treaty-based and therefore have their source in the LFC and not in customary international law.

2. Role of the LFC After the Establishment of the CFP

In the wake of, *inter alia*, the increasing regional integration processes during the second half of the 20th century, Article 10 LFC expressly envisaged the possibility of “the maintenance or establishment of a special régime in matters of

¹⁰² Art. 9(1) LFC. See *Agreement as to Transitional Rights Between Ireland and Belgium, the Federal Republic of Germany, France, the Netherlands, Spain and the United Kingdom of Great Britain and Northern Ireland*, 9 March 1964, 581 UNTS 89; *Agreement as to Transitional Rights between the United Kingdom of Great Britain and Northern Ireland and Belgium, the Federal Republic of Germany, France, Ireland and the Netherlands*, 9 March 1964, 581 UNTS 83.

¹⁰³ Art. 9(2) LFC.

¹⁰⁴ Art. 5(1) LFC.

¹⁰⁵ C. III.

fisheries” between certain groups of States exhaustively listed in Article 10(a)-(f) LFC. With the exception of “Spain, Portugal and their respective neighbouring countries in Africa”¹⁰⁶ all of these exceptions relate exclusively to European States or regions. For the present purposes, it is the exception for “States Members and Associated States of the European Economic Community [EEC]” that is most interesting.¹⁰⁷ The reference to the EEC must today be read as a reference to the EU as its successor. As discussed above, a special fisheries access regime was created under the auspices of the CFP in 1970 (and entered into force in 1973¹⁰⁸) and that special regime is now contained in Article 5 and Annex I of the Basic CFP Framework Regulation. The effect is that the fisheries access regime under the CFP applies as between all parties to the LFC, which are also EU Member States. Given that all of the twelve parties to the LFC (Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Sweden, and the UK)¹⁰⁹ are also EU Member States, it follows that the legal framework of the CFP has applied in lieu of the LFC to these States since it entered into force in 1973. The fishing opportunities granted under the LFC were incorporated into Annex I of the Basic CFP Framework Regulation.¹¹⁰ As a consequence, all relevant fishing rights have derived from EU law rather than from the LFC since the CFP has been set up.¹¹¹

3. The UK's Withdrawal From the LFC to Avoid its Revival

Accordingly, the question arose whether the LFC would regain relevance for fisheries access regulation within parts of the 6-12 nm belt of the UK and

¹⁰⁶ Art. 10(e) LFC.

¹⁰⁷ Art. 10(a) LFC.

¹⁰⁸ For the first fisheries regulation of the EEC, see Regulation (EEC) 2141/70 of the Council OJ 1970 L 236/1. For a brief discussion of the fisheries access regime established by that regulation, see Churchill, ‘Possible Fishery Rights in EU Waters Post Brexit’, *supra* note 42, 4–5.

¹⁰⁹ UK Depository Status List: Fisheries Convention (1964), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625470/15._Fisheries_Convention__1964__status.pdf (last visited 17 October 2019). The LFC never succeeded in winning the important support of Norway, Iceland, and Denmark insofar as the Faroe Islands and Greenland are concerned. See Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 76–78.

¹¹⁰ Tables 1 and 2.

¹¹¹ See references in *supra* note 42.

its neighbouring EU Member States¹¹² once the CFP, as well as any transitional arrangements under a future withdrawal agreement, would cease to apply.

In order to prevent such a situation, the UK notified its denunciation of the LFC to the depositary of the LFC (i.e. itself¹¹³) in accordance with Article 15 LFC on 3 July 2017.¹¹⁴ Even though the extent of fishing opportunities granted by the LFC is limited, it has been argued that the denunciation of the LFC will benefit the small-scale inshore fishing fleet of the UK.¹¹⁵ Article 15 LFC stipulates that the LFC is of “unlimited duration”, but subject to denunciation by its parties after 20 years (i.e. 1986). A denunciation of the LFC takes effect after a period of two years (in the case of the UK on 2 July 2019) unless they envisage a later date.¹¹⁶ The UK added a condition that the denunciation will “take effect 2 years from the date of this letter or on the date on which the [UK] ceases to be a Member State of the European Union, whichever is the later date.”¹¹⁷

If the original date for Brexit of 29 March 2019 had been upheld and the UK ceased to be an EU member State on that date, the denunciation of the LFC would have taken effect only several months after the UK’s formal withdrawal from the EU. During these months (i.e. from 1 April 2019 to 2 July 2019), the LFC would again have been applicable to the fisheries access relationship between the UK and the other parties of the LFC which are also EU Member States. This somewhat awkward transitional application of the LFC would have been prevented if the *Third Draft Withdrawal Agreement* would have been adopted, as the transitional arrangements for fisheries access under this agreement would have applied in lieu of the LFC until 2020, i.e. until well after the denunciation of the LFC takes effect.¹¹⁸ However, an application of the LFC

¹¹² This concerns only those of the entitlements in Tables 1 and 2 above, which are based on the LFC.

¹¹³ Somewhat ironically, the Foreign and Commonwealth Office of the UK is itself the depositary of the LFC. See Arts. 12 ff. LFC.

¹¹⁴ UK Depositary Status List: Fisheries Convention, *supra* note 109. According to the UK government, this move formed “part of the wider process of becoming an independent Coastal State”. See ‘Explanatory Notes to UK Fisheries Bill’, *supra* note 12, 11. See also ‘UK White Paper’, *supra* note 5, 18.

¹¹⁵ B. D. Beukers-Stewart & B. C. O’Leary, ‘Post-Brexit Policy in the UK: A New Dawn? Fisheries, Seafood and the Marine Environment’ (2017), 5, available at <https://www.york.ac.uk/media/yesi/yesoldwebsite/researchoutputs/Brexit%20Fisheries%20Brief.pdf> (last visited 17 October 2019).

¹¹⁶ Art. 15 LFC.

¹¹⁷ UK Depositary Status List: Fisheries Convention, *supra* note 109.

¹¹⁸ See Section D.

for only a few months would have been unlikely in practice and other solutions (such as transitional fisheries agreements) might have been adopted by the States concerned.¹¹⁹ In any case, the EU Commission would have had to take over the implementation of the LFC for the remaining EU Member States *vis-à-vis* the UK in light of the EU's exclusive competence for the CFP.

As the withdrawal date was again postponed (this time to 31 October 2019), the UK's denunciation of the LFC will take effect before Brexit and the question of whether the LFC could have applied to fisheries access within the UK's territorial sea has been rendered moot. In this context, it had been claimed that, based on two alternative arguments derived from Articles 30(3) and 59(1) VCLT, the LFC is either no longer in force or at least is no longer applicable due to being incompatible with UNCLOS.¹²⁰ The present author does not share the view that the relevant provisions of the LFC – and even less so the LFC in its entirety – are incompatible with Part II of UNCLOS, but the issue need not further be explored in the present article. In any case, there will be no post-Brexit fisheries access to the waters of up to 12 nm for either the UK or EU Member State.

II. The UK-France and UK-Ireland Voisinage Agreements

Unlike the LFC, the UK has not terminated its voisinage agreements with France and Ireland.¹²¹ Therefore, these agreements would continue to provide for reciprocal fisheries access between these States post-Brexit. If the UK should desire to keep its voisinage agreements in place without creating a loophole for nationals of EU Member States other than France and Ireland, it might become necessary to renegotiate at least the Irish agreement to impose sufficiently strict requirements for access in addition to mere nationality of fishing vessels.¹²² Otherwise, the freedom of establishment among EU member States might at least in theory allow businesses from other EU Member States to use, for example, Irish access rights to fisheries in the UK's territorial sea.

If the UK's voisinage agreements with Ireland and France are to remain in place post-Brexit, they will no longer fall within the remit of Article 5(2) of the Basic CFP Framework Regulation because they will cease to constitute “existing

¹¹⁹ Schatz, 'Brexit and Fisheries Access', *supra* note 42.

¹²⁰ Churchill, 'Possible Fishery Rights in EU Waters Post Brexit', *supra* note 42, 6–12.

¹²¹ See Section B.III.2.

¹²² The same concerns are shared among Irish fishers. See Ní Aodha, 'Government Finally Wins Battle to Allow NI Boats to Fish Along Ireland's Coasts - So What Does it Mean?', *supra* note 84.

neighbourhood relations *between Member States*”,¹²³ As such, they would fall within the exclusive competence of the EU for external fisheries access relations. In principle, such agreements can remain in force, but the EU Commission would oversee their implementation.¹²⁴ The negotiation of new agreements directly with individual EU Member States, on the other hand, will not be an option post-Brexit.¹²⁵

III. Historic Fishing Rights

1. General Doctrine of Historic Fishing Rights

Another issue that has gained new traction in the context of Brexit is that of historic fishing rights of EU Member States in the UK’s waters.¹²⁶ From an international legal perspective, the term “historic fishing rights” generally denotes rights short of sovereignty that have accrued through the exercise of an exceptional claim with the acquiescence of the coastal state.¹²⁷ As such, they must be distinguished from treaty-based rights. As the International Court of Justice (ICJ) stated in its judgment of 1951 in the *Fisheries Case (United Kingdom v. Norway)*, a historic right “must [...] be recognized although it constitutes a derogation from the rules in force [and] would otherwise be in conflict with international law”.¹²⁸ This approach has been upheld by the arbitral tribunal in the *South China Sea Arbitration*, which described historic fishing rights as “any rights that a State may possess that would not normally arise under the general

¹²³ Emphasis added.

¹²⁴ For example, the EU acts on behalf of Sweden in the implementation of the *Agreement Between the Government of Sweden and the Government of Norway Concerning Fisheries*, 9 December 1976, 1258 UNTS 83. See Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13.

¹²⁵ This was arguably not fully appreciated by O. Paterson, ‘National Policy on Fisheries Management in UK Waters: A Conservative Party Green Paper’ (2005), 12, available at <http://www.eureferendum.com/documents/fishinggreenpaper.pdf> (last visited 17 October 2019).

¹²⁶ For example, the government of Denmark is reported to have a claim to fisheries access in UK waters dating back to the 1400s. See D. Boffey, ‘Denmark to Contest UK Efforts to ‘Take Back Control’ of Fisheries’, *The Guardian* (18 April 2017), available at www.theguardian.com/politics/2017/apr/18/denmark-to-contest-uk-efforts-to-take-back-control-of-fisheries (last visited 17 October 2019).

¹²⁷ For an explanation of the relevant terminology, see C. R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal*, 2nd. ed. (2018), 1-13 [Historic Waters and Rights], with further references.

¹²⁸ *Fisheries Case (United Kingdom v. Norway)*, Judgment, ICJ Reports 1951, 116, 130-131.

rules of international law, absent particular historical circumstances”.¹²⁹ Thus, historic fishing rights are acquired by “the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States”.¹³⁰ While a full appreciation of the question of historic fishing rights is beyond the scope of this article,¹³¹ it is shown that such rights are of very limited relevance in the present context.

2. Survival of Historic Fishing Rights in the 0-3 nm Belt of the Territorial Sea

There is widespread agreement that, unlike in the EEZ,¹³² historic fishing rights in the territorial sea have not been extinguished after the entry into force of UNCLOS.¹³³ At first sight, this result might be counterintuitive as coastal States enjoy sovereignty in the territorial sea, which goes beyond the sovereign rights of coastal States in the EEZ.¹³⁴ However, the regime of the territorial sea, unlike the EEZ, existed long before the UNCLOS and has long been compatible with foreign fishing activity, which is also documented by the vast amount of bilateral and multilateral treaties in this respect. Thus, there was sufficient time to establish historic fishing rights in the territorial sea where such fishing took place in the absence of a legal basis such as a fisheries access agreement. As the arbitral tribunal in the *South China Sea Arbitration* stated, UNCLOS “continued the existing legal regime largely without change”.¹³⁵ It further noted that there was “nothing that would suggest that the adoption of [UNCLOS] was

¹²⁹ *South China Sea Arbitration*, Award of the Arbitral Tribunal, 12 July 2016, PCA Case No. 2013-19, para. 225.

¹³⁰ *Ibid.*, para. 265.

¹³¹ For an in-depth analysis, see Symmons, *Historic Waters and Rights*, *supra* note 127, in particular 1-62.

¹³² As far the EEZ is concerned, historic fishing rights are widely regarded as having been extinguished by Part V of UNCLOS. See Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13, with further references; Symmons, *Historic Waters and Rights*, *supra* note 127, 44-57, with further references.

¹³³ *Award of the Arbitral Tribunal in the Second Stage of the Proceedings Between Eritrea and Yemen* (Maritime Delimitation), 17 December 1999, XXII RIAA 335, 361, para. 109; *South China Sea Arbitration*, *supra* note 129, para. 407; Symmons, *Historic Waters and Rights*, *supra* note 127, 57-61.

¹³⁴ Accordingly, it has been argued that historic fishing rights should be extinguished *a fortiori* in the territorial sea. See Churchill, ‘Possible Fishery Rights in EU Waters Post Brexit’, *supra* note 42, 13.

¹³⁵ *South China Sea Arbitration*, *supra* note 129, para. 804(c).

intended to alter acquired rights in the territorial sea”.¹³⁶ Accordingly, the arbitral tribunal held that “within that zone—in contrast to the exclusive economic zone—established traditional fishing rights remain protected by international law”.¹³⁷ The argument that historic fishing rights are compatible with the regime of the territorial sea under Part II of UNCLOS is also widely considered to be supported by Article 2(3) UNCLOS.¹³⁸

However, it should be noted that only the 0-3 nm belt of the territorial sea was firmly established in international law prior to the conclusion of the UNCLOS and that the UK only extended its territorial sea from 3 nm to 12 nm in 1987.¹³⁹ Prior to this extension of its territorial sea, the UK had claimed a 12 nm EFZ in accordance with the LFC.¹⁴⁰ As shown below, the LFC established its own fisheries access regime that would have prevented the acquisition of historic fishing rights in the UK’s EFZ. Therefore, historic fishing rights may only have accrued in the 0-3 nm belt of the UK’s territorial sea.

3. Extinction of Historic Fishing Rights in the UK’s Territorial Sea

Having established that, in principle, historic fishing rights could have existed in the 0-3 nm belt of the territorial sea of the UK and neighbouring EU Member States, the question remains whether any relevant historic fishing rights do exist today. This would have required a continuous exercise of claimed fishing rights by a state in the territorial sea of another State in conjunction with acquiescence by that other state. In addition, it would require that subsequent practice of the States concerned did not lead to an extinction of such historic fishing rights.

However, already prior to the conclusion of the LFC in 1964, territorial sea fisheries access between the UK and its neighbours was primarily based on consensual arrangements rather than acquiescence, namely through the various voisinage agreements.¹⁴¹ When the LFC was concluded in 1964, it

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award of the Arbitral Tribunal, 18 March 2015, PCA Case No. 2011-03, paras. 499–517; *South China Sea Arbitration*, *supra* note 129, para. 808; Barnes, ‘Article 2’, *supra* note 26, para. 23.

¹³⁹ *Territorial Sea Act*, 15 May 1987, available at www.legislation.gov.uk/ukpga/1987/49 (last visited 17 October 2019).

¹⁴⁰ See Section C. I .1.

¹⁴¹ See Section B. III. 2.

expressly removed any possible historic fishing rights in the 0-6 nm belt by providing, in Article 9(1) LFC, that these rights had to be incorporated into transitional arrangements, which in turn provided for a phasing-out of these rights to “allow [affected fishers] to adapt themselves to their exclusion from that belt”.¹⁴² Afterwards, the access regime of the LFC was taken over by the special access provisions of the CFP, which were themselves closely modelled on the LFC, in line with Article 10(a) LFC.¹⁴³ Thus, even if the LFC had not effectively extinguished historic fishing rights in the UK's territorial sea, they would have been replaced by consensual access regimes and no longer exercised.¹⁴⁴ Access based on explicit consent, however, does not lead to new (or support existing) acquired rights based on acquiescence.¹⁴⁵ Therefore, although it cannot be ruled out that historic fishing rights may have existed prior to the conclusion of the LFC with respect to the UK's territorial sea in the 0-3 nm belt that existed at the time, these access rights were removed by the LFC. Thus, any historic fishing rights of parties to the LFC and EU Member States in the UK's territorial sea have been extinguished.¹⁴⁶

4. Example: The Rockall Fisheries Dispute

The issue has recently resurfaced in the context of a dispute between the UK (or rather Scotland) and Ireland about access of Irish fishing vessels to fisheries in the territorial sea of the island of Rockall.¹⁴⁷ Rockall is a small

¹⁴² See C. I. and in particular the two transitional agreements cited in, *supra* note 102. Compare also Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 75–76.

¹⁴³ Section C. I.

¹⁴⁴ Churchill, ‘Possible Fishery Rights in EU Waters Post Brexit’, *supra* note 42, 12–13.

¹⁴⁵ *Ibid.*; Schatz, ‘Brexit and Fisheries Access’, *supra* note 42; Symmons, *Historic Waters and Rights*, *supra* note 127, 39.

¹⁴⁶ Cf. House of Lords, ‘Brexit: Fisheries, 8th Report of Session 2016–17’, *supra* note 87, 15; Schatz, ‘Brexit and Fisheries Access’, *supra* note 42.

¹⁴⁷ For a legal analysis of the historical Rockall dispute, see C. R. Symmons, *Ireland and the Law of the Sea*, 2nd ed. (2000), 73-76 and 144-153 [Ireland and the Law of the Sea]. For a good recent legal analysis, see J. Harrison, ‘Unpacking the Legal Disputes over Rockall’, *SPICe Spotlight* (18 June 2019), available at <https://spice-spotlight.scot/2019/06/18/guest-blog-unpacking-the-legal-disputes-over-rockall/> (last visited 17 October 2019) [Legal Disputes over Rockall]. See also C. Lysaght, ‘Ireland's Stance in the Rockall Dispute is Largely Nonsense’, *The Irish Times*, 17 June 2019, available at <https://www.irishtimes.com/opinion/ireland-s-stance-in-the-rockall-dispute-is-largely-nonsense-1.3927368> (last visited 17 October 2019) [Ireland's Stance in the Rockall].

rock¹⁴⁸ located in the Atlantic Ocean north of Ireland and west of Scotland in the EEZ of the UK.¹⁴⁹ Ireland has long disputed the UK's sovereignty over Rockall and has also disputed, accordingly, the UK's claim to a territorial sea around Rockall.¹⁵⁰ However, both these claims are clearly unfounded as no other State than the UK has asserted sovereignty over Rockall¹⁵¹ and islands generate a territorial sea irrespective of whether they are rocks or not.¹⁵² As the UK has not granted Ireland access to fisheries within the territorial sea of Rockall in accordance with a voisinage agreement or through an arrangement under Annex I of the Basic CFP Framework Regulation, Irish fishing vessels cannot rely on the principle of equal access to fish in Rockall's territorial sea.¹⁵³ In the absence of access under the CFP, it has been suggested that Irish fishing vessels have been fishing in Rockall's territorial sea for some 20-30 years,¹⁵⁴ which has been partly admitted by the Scottish government (increasing "incursions" in 2015-2018 are mentioned).¹⁵⁵ In this context, one commentator has stated with a view to the UK's withdrawal from the EU:

¹⁴⁸ It is also a "rock" within the meaning of Art. 121(3) UNCLOS and, therefore, does not generate an EEZ. See Symmons, *Ireland and the Law of the Sea*, *supra* note 147, 150-153.

¹⁴⁹ Figure 1.

¹⁵⁰ Symmons, *Ireland and the Law of the Sea*, *supra* note 147, 73-76 and 144-153.

¹⁵¹ Harrison, 'Legal Disputes over Rockwall', *supra* note 147.

¹⁵² *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, 659, para. 302; *Territorial and Maritime Dispute Between Nicaragua and Colombia (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624, para. 36. This also follows from an *a contrario* interpretation of Art. 121(3) UNCLOS. See S. Talmon, 'Article 121', in Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS) – A Commentary*, *supra* note 26, paras. 2 and 56. Specifically for Rockall, see Harrison, 'Legal Disputes over Rockwall', *supra* note 147.

¹⁵³ Section B. Specifically for Rockall's territorial sea, see Harrison, 'Legal Disputes over Rockwall', *supra* note 147. But see Lysaght, *Ireland's Stance in the Rockall Dispute*, *supra* note 147, who states that "[a]s Scottish vessels do not fish from ports on Rockall, which is the adjacent coast, they are clearly not entitled to restrict fishing in the 12 nautical miles around Rockall to those vessels and so exclude others".

¹⁵⁴ See, e.g., E. McClafferty, 'Rockall Fishing Row an SNP Political Stunt', BBC News, 13 June 2019, available at <https://www.bbc.com/news/world-europe-48616917> (last visited 17 October 2019); IrishCentral Staff, 'Ireland and Scotland at War over Disputed Rockall Island in North Atlantic', IrishCentral, 10 June 2019, available at <https://www.irishcentral.com/business/ireland-scotland-disputed-rockall-island-north-atlantic> (last visited 17 October 2019).

¹⁵⁵ The Scottish Parliament, Official Report (Draft), Meeting of the Parliament, 11 June 2019, 9-10, available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12180> (last visited 17 October 2019).

“Once the CFP stops applying to the UK, EU vessels will no longer have automatic access to the UK’s EEZ and they will require special authorisation to continue fishing in this area. However, any purported historic rights of Irish vessels in the territorial sea around Rockall, if clearly established, would continue following Brexit, as their basis would be international law rather than EU law.”¹⁵⁶

Given the analysis provided above, in the view of the present author, Ireland cannot rely on pre-existing historic fishing rights in the territorial sea of Rockall.¹⁵⁷ In addition, it is highly unlikely that recent Irish fishing activity in the waters off Rockall has created new “historic” fishing rights.

IV. Access Rights Derived From Royal Privileges

Another potential source of fisheries access in the present context is that of access rights derived from royal privileges granted by a sovereign acting for the UK. These would not constitute historic fishing rights *sensu stricto* because, as will be seen below, they are based on explicit consent rather than acquiescence. Although there might exist a number of such royal privileges dating back hundreds of years, it is beyond the scope of this article to discuss them all. Instead, the merits of invoking such rights derived from royal privileges, which generally have to be assessed on a case-by-case basis, are discussed based on an example from Belgium, which has prominently featured in media reports.¹⁵⁸ In particular, the question arises what, if any, legal relevance such royal privileges have today.

In 1666, Charles II of England awarded to the city of Bruges (a city in Flanders, which is now part of Belgium) perpetual privileges to permit 50 Bruges fishing vessels to fish off the coast of England and Scotland (hereinafter the “Bruges Privileges”) as a token of his gratitude for granting him asylum from

¹⁵⁶ Harrison, ‘Legal Disputes over Rockwall’, *supra* note 147.

¹⁵⁷ Cf. Section C. III. 3.

¹⁵⁸ M. Torfs, ‘Bruges Fishermen can Continue Fishing in British Waters After Brexit Thanks to 1666 Charter’, *Flandersnews.be* (6 July 2017), available at <http://deredactie.be/cm/vrtnieuws.english/News/1.3018117> (last visited 17 October 2019); L. Cendrowicz, ‘Belgium Says 1666 Royal Charter Grants its Fishermen “Eternal Rights” to English Waters’, *iNews* (7 July 2017), available at <https://inews.co.uk/news/uk/belgium-says-1666-royal-charter-grants-fishermen-eternal-rights-english-waters/> (last visited 17 October 2019).

1656 to 1659 during his exile from England.¹⁵⁹ Legally, the Bruges Privileges appear to be a unilateral act of the British Crown, which creates obligations only for the Crown and which fall broadly within the domain of public law.¹⁶⁰ The addressee of the Bruges Privileges was the city of Bruges. This is obvious from the necessity to implement the Bruges Privileges by selecting 50 fishers among the fishers of Bruges, a process that would have to be overseen by an administration. In the 17th century, some cities enjoyed more autonomy than cities generally do today, and some of them were subjects of public international law,¹⁶¹ although it is unclear whether Brussels would fall within the latter category. Given that the Bruges Privileges were thus granted by a sovereign (the English king) to an entity that was either itself a subject of public international law and/or an entity under the sovereignty of another sovereign, it has been argued that they could be qualified, at the time, as a unilateral act not only under UK public law but also under public international law in the form of a royal privilege.¹⁶² Alternatively, the legal value of the Bruges Privileges might be confined to UK domestic law.¹⁶³

Reportedly, the multiple European wars in the following decades prevented the fishers of Bruges from exercising their privileges without interruption, but one fishing vessel resumed fishing in 1835.¹⁶⁴ When the UK started to enforce its fisheries jurisdiction within 3 nm in the English Channel against Belgian fishing vessels in the late 1840s, Belgium protested and invoked the Bruges Privileges.¹⁶⁵ While the UK could be regarded as the successor of Charles II of England with respect to the obligations arising from the Bruges Privileges, it could be asked whether Belgium has standing to invoke the rights of historical Bruges.¹⁶⁶ In any

¹⁵⁹ For a detailed account of the historical background, see J.-P. Mener, 'Le Droit de Pêche en Mer Territoriale au Regard des Privilèges Accordés en 1666 par Charles II d'Angleterre à la Ville de Bruges' (1965), 2 *Revue Belge de Droit International* 2, 431, 432–437 [Le Droit de Pêche en Mer Territoriale]. See also Fulton, *The Sovereignty of the Sea*, *supra* note 56, 461.

¹⁶⁰ Mener, 'Le Droit de Pêche en Mer Territoriale', *supra* note 159, 441–442.

¹⁶¹ See generally C. Hattenhauer, 'Free Cities', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007), paras. 1–4.

¹⁶² Mener, 'Le Droit de Pêche en Mer Territoriale', *supra* note 159, 442–444.

¹⁶³ Cf. Fulton, *The Sovereignty of the Sea*, *supra* note 56, 167, who mentions that the Belgian government at one point intended to invoke the Bruges Privileges before UK courts.

¹⁶⁴ Mener, 'Le Droit de Pêche en Mer Territoriale', *supra* note 159, 433.

¹⁶⁵ Fulton, *The Sovereignty of the Sea*, *supra* note 56, 616, who also claims that the Bruges Privileges were generally regarded as "fictitious".

¹⁶⁶ In favour of standing of Belgium: Mener, 'Le Droit de Pêche en Mer Territoriale', *supra* note 159, 452.

event, according to Fulton,¹⁶⁷ the invocation of the Bruges Privileges by Belgium was successful insofar as it led to the conclusion of a fully reciprocal voisinage agreement between the UK and Belgium concerning fishing within 3 nm in 1852.¹⁶⁸ The agreement made no explicit mention of the Bruges Privileges,¹⁶⁹ but Belgian sources at the time said of this agreement that it was “sans préjudice des droits que les pêcheurs belges pourraient tirer des chartes du roi Charles II”.¹⁷⁰ According to a UK view, however, “defined rights were substituted for vague and disputed privileges” in the agreement of 1852.¹⁷¹ Soon after, all fishing activities by Bruges fishers (as opposed to Belgian fishers generally) ceased as a result of the silting up of the port of Bruges, which was followed by a lack of political interest in Belgium in pursuing any claims based on the Bruges Privileges.¹⁷² The matter was then largely forgotten until the 1960s, when a Belgian national from Bruges tried to invoke the Bruges Privileges by having himself arrested by UK authorities.

As a result of this rather lengthy historical exposition, it appears highly unlikely that the Bruges Privileges, if considered a title under public international law, would still be valid today. Even if one considers that the periods of non-usage between 1674 and 1835, as well as for about a century between ca. 1860 and the 1960s, did not invalidate the title,¹⁷³ it has been terminated by subsequent treaty-law. It is likely that already the 1852 voisinage agreement was at least implicitly intended to replace the Bruges Privileges with a modern fisheries access agreement. In any event, the considerations presented above with respect to the effect of the LFC, in particular Article 9(1) LFC, on historic fishing rights would also generally apply to historic titles such as the Bruges Privileges.

D. Arrangements for the Transition Period and Beyond: The (Failed) Third Draft Withdrawal Agreement

The preceding analysis has shown that EU law currently only partially regulates access to fisheries within 12 nm and that fisheries within these limits can be exempted from the principle of equal access and allocation based on

¹⁶⁷ Fulton, *The Sovereignty of the Sea*, *supra* note 56, 616–617.

¹⁶⁸ *Convention Between Great Britain and Belgium, Relative to Fishery*, 22 March 1852, 2 *Recueil des Traités et Conventions Concernant le Royaume de Belgique* 400.

¹⁶⁹ Mener, ‘Le Droit de Pêche en Mer Territoriale’, *supra* note 159, 435.

¹⁷⁰ *Ibid.*

¹⁷¹ Fulton, *The Sovereignty of the Sea*, *supra* note 56, 617.

¹⁷² Mener, ‘Le Droit de Pêche en Mer Territoriale’, *supra* note 159, 435.

¹⁷³ *Ibid.*, 453–457.

relative stability. The analysis has also shown that there is no general obligation to grant access to fisheries in the territorial sea under Part II of UNCLOS that would apply post-Brexit. However, potentially relevant access arrangements exist under the voisinage agreements with Ireland and France. These agreements will not be affected by Brexit because they constitute commitments that are valid independently of EU law. The same would be true for potential historic fishing rights if such rights do exist.

Thus, few arrangements are required for the transition period with respect to fisheries within 12 nm.¹⁷⁴ Accordingly, the issue of access to fisheries within 12 nm was not specifically addressed in the draft withdrawal agreements negotiated between the UK and the EU on 28 February 2018,¹⁷⁵ 19 March 2018,¹⁷⁶ and 14 November 2018 (*Third Draft Withdrawal Agreement*),¹⁷⁷ respectively. Under the *Third Draft Withdrawal Agreement*, the transition period would have lasted from the agreement's entry into force on 30 March 2019¹⁷⁸ until 31 December 2020.¹⁷⁹ Furthermore, the *Third Draft Withdrawal Agreement* provided for an application of EU law throughout the transition period, unless a matter was expressly excluded.¹⁸⁰ The CFP was not excluded from the scope of the transitional application of EU law, and a number of provisions of the *Third Draft Withdrawal Agreement* addressed questions of fisheries access. The key provision dealing with fisheries access was Article 130 of the *Third Draft Withdrawal Agreement*. However, this provision addressed substantive and

¹⁷⁴ The situation is quite different with regard to the EEZ. See Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13.

¹⁷⁵ European Commission, 'Draft Withdrawal Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland From the European Union and the European Atomic Energy Community' (28 February 2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf (last visited 17 October 2019).

¹⁷⁶ European Commission, 'Draft Withdrawal Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland From the European Union and the European Atomic Energy Community' (19 March 2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf (last visited 17 October 2019).

¹⁷⁷ European Commission, 'Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' (14 November 2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf (last visited 17 October 2019) [Third Draft Withdrawal Agreement].

¹⁷⁸ *Ibid.*, Art. 185.

¹⁷⁹ *Ibid.*, Art. 126.

¹⁸⁰ *Ibid.*, Art. 127(1).

procedural issues concerning the allocation of fishing opportunities within the scope of the principle of equal access and within the context of international consultations and negotiations (e.g. in the context of the North East Atlantic Fisheries Commission).¹⁸¹ It did not specifically address access to fisheries located in waters within 12 nm, which the UK has excluded from the application of the principle of equal access under Article 5(2) of the Basic CFP Framework Regulation. Accordingly, the relevant rules under the CFP would have continued to apply to the UK's waters. Special rules were contained in Article 6 of the *Protocol relating to the Sovereign Base Areas in Cyprus*,¹⁸² and Article 4 of the *Protocol on Gibraltar*,¹⁸³ which formed an integral part of the *Third Draft Withdrawal Agreement*.¹⁸⁴ However, these rules did not specifically address access to fisheries located in the territorial sea either.

Overall, this means that the current legal *status quo* under the CFP for territorial sea fisheries access would have remained unchanged during the transition period (i.e. until 31 December 2020). For the continued application of the Irish and French voisinage agreements, this would have made no difference. However, this arguably also means that the arrangements under Annex I of the Basic CFP Framework Regulation would have continued to apply until 31 December 2020 despite the fact that the UK had denounced the LFC with effect from July 2019 – unless these arrangements would have been deleted from Annex I. After the expiry of the arrangements for the transition period on 31 December 2020, access to fisheries within 12 nm would have been governed by general international fisheries law. By then, the UK would have no longer been a party to the LFC, meaning that the relevant access arrangements would have had to be renegotiated in separate agreements if so desired. The voisinage agreements would have remained in force, but their implementation would have had to be taken over by the EU Commission due to the UK's new status as a third State. With respect to future regulation, the *Third Draft Withdrawal Agreement* would have obliged the UK and the EU to

¹⁸¹ For discussion, see Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13.

¹⁸² Art. 6 of the Protocol relating to the Sovereign Base Areas in Cyprus provided for the continued application of EU fisheries law to the Sovereign Base Areas of Akrotiri and Dhekelia.

¹⁸³ Art. 4 of the Protocol on Gibraltar directed Spain and the UK to establish a coordinating committee as a forum for regular discussion between the competent authorities of issues concerning, *inter alia*, "fishing".

¹⁸⁴ European Commission, 'Third Draft Withdrawal Agreement', *supra* note 177, Art. 182.

“[...] use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration of [DD/MM/2018] and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.”¹⁸⁵

The outline of the “political declaration” referred to in the *Third Draft Withdrawal Agreement* concretised this commitment in the following words:

“Within the context of the overall economic partnership, establishment of a new fisheries agreement on, inter alia, access to waters and quota shares, to be in place in time to be used for determining fishing opportunities for the first year after the transition period.”¹⁸⁶

Thus, the conclusion of one (or more) future fisheries access agreement(s) between the UK and the EU was envisaged. While it is clear that any future access agreement would have regulated the management of shared stocks, including the allocation of fishing opportunities with respect to such stocks,¹⁸⁷ it is less clear whether it would also have covered access to fisheries within 12 nm. Since the UK Parliament’s negative vote on the *Third Draft Withdrawal Agreement*, the conclusion of a withdrawal agreement between the UK and the EU has become less likely and, at the time of writing, the situation remains volatile. Besides the adoption of the *Third Draft Withdrawal Agreement*, there is room, for example, for a new withdrawal agreement containing different provisions on fisheries, a withdrawal without a withdrawal agreement, or a withdrawal with only transitional sectoral agreements that might include a fisheries access agreement. It might also be necessary to extend the withdrawal period and/or

¹⁸⁵ Ibid., Art. 184.

¹⁸⁶ ‘Outline of the Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom’ (14 November 2018), 3, available at https://ec.europa.eu/commission/sites/beta-political/files/outline_of_the_political_declaration.pdf (last visited 17 October 2019).

¹⁸⁷ See discussion by Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13.

transition period further in order to agree on workable solutions in some fields, which might include fisheries.

E. Conclusion

This article has shown that EU Member States currently have only very limited access to fisheries in the UK's territorial sea under the CFP and specifically Article 5(2) of the Basic CFP Framework Regulation. This fisheries access is based on the preservation of historical access arrangements in Annex I of the Basic CFP Framework Regulation (mostly with respect to the 6-12 nm belt of the territorial sea) and two voisinage agreements between the UK and, respectively, France and Ireland (with respect to the 0-6 nm belt of the territorial sea). EU Member States also enjoy a certain degree of "indirect" access to fisheries in the UK's territorial sea through the freedom of establishment under EU law.

After the UK's withdrawal from the EU, and absent the conclusion of agreements to the contrary, the freedom of establishment and the access arrangements under Annex I of the Basic CFP Framework Regulation will cease to exist. However, the two voisinage agreements would remain in force and continue to serve as a legal basis for access to the UK's territorial sea between 0-6 nm unless they are terminated under their own terms.

Therefore, the regulation of territorial sea fisheries access after the UK's withdrawal from the EU would look as follows. Fisheries within the territorial sea are not subject to a general obligation to grant access under Part II of UNCLOS. Thus, any applicable access rights would either have their source in bilateral or multilateral agreements or customary international law. In relation to access to fisheries in the 0-6 nm belt of the territorial sea, the two voisinage agreements grant some access to France and Ireland. If they are to remain in place, and are not renegotiated (with the EU rather than France or Ireland), the EU Commission will have to take over their implementation. If they are renegotiated by the EU Commission, they could also be incorporated into the regime established by a potential framework agreement. As for access to fisheries in the 6-12 nm belt of the UK's territorial sea, this article has shown that the LFC will not be revived as a source of fisheries access due to the UK's denunciation of this treaty. The article has also argued that neither historic fishing rights nor rights to fisheries access derived from royal privileges are likely to be relevant for the future EU-UK fisheries access relationship.

Given that the *Third Draft Withdrawal Agreement* was not accepted by the UK, there is currently no agreed framework for the future regulation of access to territorial sea fisheries between the UK and the EU. However, it is likely that

at least a sectoral agreement on fisheries will be concluded even in the event of a “no-deal” Brexit. In the meantime, both the UK and the EU have begun to unilaterally take precautions to mitigate the negative impact of a “no-deal” Brexit scenario on their respective fishing industries.¹⁸⁸ The EU Commission’s proposal is based on the principle that access has to be based on the condition of complete reciprocity.¹⁸⁹

¹⁸⁸ EU Commission, ‘Brexit preparedness: European Commission adopts two contingency proposals to help mitigate impact of “no-deal” Brexit on EU fisheries’ (23 January 2019), available at http://europa.eu/rapid/press-release_IP-19-584_en.htm (last visited 17 October 2019); UK No-Deal Guidance, *supra* note 92.

¹⁸⁹ EU Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) 2017/2403 as Regards Fishing Authorisations for Union Fishing Vessels in United Kingdom Waters and Fishing Operations of United Kingdom Fishing Vessels in Union Waters’ (2019), COM(2019) 49, available at https://ec.europa.eu/info/sites/info/files/com-2019-49-final_en.pdf (last visited 17 October 2019).