

Workshop on impacts of the EU-UK Trade and Cooperation Agreement on fisheries and aquaculture in the EU

Part I: Legal aspects



Fisheries



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Abstract

This study is the first research paper in a series of three, commissioned for a PECH Committee Workshop. It provides an analysis of the legal aspects of the EU-UK TCA relating to fisheries. The analysis covers, *inter alia*, the scope of the fisheries provisions, conservation and management, fishing opportunities, arrangements on access to waters, arrangements on governance (including provisions on remedial measures, dispute settlement, institutional arrangements, termination, review and relationship with other agreements), and trade-related provisions with relevance for fisheries. It concludes with recommendations for the implementation of the fisheries provisions of the EU-UK TCA.

This document was requested by the European Parliament's Committee on Fisheries.

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LIST OF ABBREVIATIONS

CCRF	Code of Conduct for Responsible Fisheries (FAO)
CFP	EU's Common Fisheries Policy
CFP Regulation	Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy
Compliance Agreement	Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO)
DSU	Dispute Settlement Understanding (Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement)
EEZ	Exclusive Economic Zone
EU-Norway Agreement on Fisheries	Agreement on fisheries between the European Economic Community and the Kingdom of Norway
External Fishing Fleets Regulation	Regulation (EU) 2017/2403 of the European Parliament and of the Council of 12 December 2017 on the sustainable management of external fishing fleets
FAO	Food and Agriculture Organization of the United Nations
Fisheries Control Regulation	Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Union control system for ensuring compliance with the rules of the Common Fisheries Policy
GATT	General Agreement on Tariffs and Trade
Granville Bay Agreement	Agreement between the United Kingdom of Great Britain and Northern Ireland and the French Republic Concerning Fishing in the Bay of Granville
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICES	International Council for the Exploration of the Sea
ITLOS	International Tribunal for the Law of the Sea

IUU fishing	Illegal, unreported and unregulated fishing
IUU Regulation	Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing
London Fisheries Convention	Fisheries Convention of 9 March 1964
MSY	maximum sustainable yield
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NEAFC	North-East Atlantic Fisheries Commission
NM	nautical mile
PECH Committee	European Parliament's Committee on Fisheries
PSMA	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (FAO)
RFMO	regional fisheries management organisation
TAC	total allowable catch
TCA	EU-UK Trade and Cooperation Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK-Norway Framework Agreement on Fisheries	Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway
UN	United Nations

UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	United Nations Fish Stocks Agreement (United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks)
VCLT	Vienna Convention on the Law of Treaties (UN)
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement establishing the World Trade Organization

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EXECUTIVE SUMMARY

The EU-UK Trade and Cooperation Agreement (TCA) establishes the legal framework applicable to the relations between the EU and the UK. The purpose of the present study is to examine the **legal aspects of the TCA** insofar as the **agreement relates to fisheries (especially Part Two, Heading Five of the TCA)**.

Scope of the fisheries provisions of the TCA

Chapter two of the study examines the **scope of Heading Five**. This Heading extends to the Exclusive Economic Zones (EEZs) and territorial seas of EU Member States, the EEZ and territorial sea of the UK, and the territorial sea adjacent to the Bailiwicks of Guernsey and Jersey and the Isle of Man. It applies to fishing vessels flying the flag of an EU Member State and registered in the Union as well as UK flagged fishing vessels that are registered in the UK. The TCA covers virtually **all categories of marine living resources** that are found in the waters of the EU and/or the UK.

Conservation and management

Chapter three details the **conservation and management framework applicable to fisheries**. In doing so, it highlights the importance of the precautionary and ecosystem-based approaches to fisheries management as well as the significance of fisheries management based on the best available scientific advice. Chapter three further outlines the cooperation obligations of the EU and the UK, as well as the obligations associated with **authorisation and licencing**. In doing so, the TCA **recognizes the sovereign rights of the EU and the UK** in their respective waters.

Fishing opportunities

Chapter four details the **legal framework for the fishing opportunities** enunciated in Heading Five and in particular those addressed in **Annexes 35 and 36**. It examines the **joint setting of total allowable catches (TACs)** and the subsequent **allocation of pre-determined quota shares** for certain categories of fish stocks. Included in chapter four is a discussion of pre-determined quota shares for **other groups of stocks** (e.g. stocks managed in the framework of regional fisheries management organisations (RFMOs)). For many of these stocks, the EU's pre-determined quota shares are **gradually reduced** until the end of the adjustment period in 2026. Thereafter, unless amended by agreement, the relative quota shares of both Parties **remain stable**.

Arrangements on access to waters

The focus of **chapter five** is on the **arrangements on access to waters**. The Parties are entitled to use their **fishing opportunities** in the waters of the other Party. During the **adjustment period**, each Party has full access to the EEZ of the other Party as well as partial access to the 6-12 nautical miles (NM) belt of the territorial sea for certain listed stocks. **After June 2026, annual consultations** will determine the level and conditions of access. Chapter five then analyses **compensatory measures** that may be taken in the event that one Party, if provisional TACs have been adopted, unilaterally changes the level and conditions of provisional access. It ends by detailing the **specific access arrangements** applicable to the territorial sea of the British Crown Dependencies and the adjacent territorial seas of EU Member States.

Arrangements on governance

Chapter six examines the **arrangements on governance** for the implementation of the TCA's fisheries provisions. It provides an in-depth discussion of the **mechanism for remedial measures and dispute resolution**. Chapter six also details the **institutional framework** in place to implement Heading Five – which framework comprises the EU-UK Partnership Council, the Specialised Committee on Fisheries and the Parliamentary Partnership Assembly. Additionally, it examines another mechanism of the TCA dedicated to the **termination** of Heading Five.

Trade-related provisions concerning fisheries

Thereafter, **chapter seven** explains **trade-related provisions of the TCA that are relevant to fisheries**. In this regard, “fishery products” are considered as originating in the relevant Party, and generally enjoy **preferential tariff treatment**. Chapter seven also includes a discussion of various commitments and obligations concerning **trade and sustainable management of marine biological resources and aquaculture**. Whereas the commitments concern compliance with international fisheries law, the obligations address participation in RFMOs, combatting illegal, unreported and unregulated (IUU) fishing and cooperation in the WTO, RFMOs and other fora.

Conclusions and recommendations

Chapter eight provides the **conclusions and recommendations**. It emphasises that the fisheries-related provisions of the TCA constitute a bilateral fisheries agreement **unprecedented** in international fisheries law. These provisions also differ from the equally complex regime of the EU's Common Fisheries Policy (CFP), particularly in relation to the mechanisms for compensatory measures, remedial measures, and dispute resolution foreseen by the TCA. The extent to which the TCA **integrates aspects of fisheries and trade** is clear evidence of the success of the EU in achieving its goal of creating a **strong bond** between the fisheries arrangements and the provisions on trade in order to reduce the UK's legal and political leeway in withdrawing from (parts of) the arrangements on fishing opportunities and access to waters.

Chapter eight concludes that the provisions on **access to waters** during the adjustment period until 30 June 2026 constitute the core of the fisheries-related provisions of the TCA. It stresses the uniqueness of the mechanism for **remedial measures**. This mechanism is again accompanied by a binding **dispute resolution procedure** that involves a review of the legality of compensatory measures by an arbitration tribunal. Chapter eight highlights that the implementation and future development of the detailed fisheries regime of the TCA is primarily governed via the **Partnership Council** and the **Specialised Committee on Fisheries**. The role of the European Parliament is limited to an oversight and advisory function in relation to the implementation and adoption of recommendations addressed to the Partnership Council through the joint **Parliamentary Partnership Assembly**.

Chapter eight furthermore emphasizes the **ambitious nature** of the objectives and principles concerning the **conservation and sustainable use of fisheries**. A priority of the EU should be to ensure that the TCA's fisheries provisions and their future development are implemented in line with these objectives and principles. The Parties should strive to reach agreement on sustainable TACs and other management measures during the annual consultations. In the absence of agreement on TACs, the TCA provides for an **innovative mechanism for science-based and precautionary provisional**

TACs. This is a considerable achievement that could provide a blueprint beyond the EU-UK fisheries relationship, including within the framework of RFMOs.

Concerning **access to waters**, it is likely that the UK will seek to reduce EU access to its waters as part of the annual negotiations after 2026, which may lead to future disputes going far beyond the current disputes experienced in relation to the UK's territorial sea and that of the Bailiwick of Jersey. Chapter eight of the study strongly encourages the parties of the TCA to **act in good faith, manage expectations, and adopt moderate positions** to avoid disputes over access that could result in severe repercussions for fisheries, trade, and the EU-UK partnership generally. The trade-related instruments of the TCA should arguably be considered a **matter of last resort** if Part Two, Heading Five of the TCA is meant to provide a lasting cooperative framework for fisheries. The more **confrontative instruments** for dispute resolution envisaged by the TCA should be **handled with caution**. To avoid the **risk of countermeasures** in response to unlawful remedial measures as well as an aggravation of the dispute more generally, **invocation of the general dispute resolution mechanism** under Part Six of the TCA, which follows a reverse procedure (remedial measures only after arbitration), may often be the preferred option of dispute settlement compared to immediate remedial measures. Even in the most serious disputes, there is little incentive for the Parties to opt out of the TCA's fisheries regime entirely as the Parties cannot unilaterally escape these arrangements by terminating Heading Five (Fisheries) without also terminating Headings One (Trade), Two (Aviation) and Three (Road Transport).

1. INTRODUCTION

Following the **EU-UK Withdrawal Agreement**,¹ which was concluded on 17 October 2019 and entered into force on 1 February 2020, the EU and the UK had to negotiate their **future economic relationship**, including with respect to **trade and fisheries**. The legal framework for both of these issues has been codified in the **TCA**,² which was concluded on 30 December 2020, subsequently applied provisionally until 30 April 2021, and finally entered into force on **1 May 2021**.³ The **legal impact of the UK's withdrawal from the EU on the CFP** has been the subject of a previous study for the PECH Committee⁴ as well as extensive scholarly analysis.⁵ Since the **UK is no longer subject to the CFP**, the fisheries relationship between the EU and the UK is now entirely **governed by international law**. For this reason, and as an independent international agreement between the EU and the UK, the focus of the present study is on the **legal framework for fisheries under the TCA**. Accordingly, only limited reference is made to legal instruments adopted under the CFP.

In order to understand the particularly complex legal framework for fisheries and related provisions concerning trade and dispute settlement under the TCA, it is important to consider the factual, political and legal context which has led to the conclusion of this framework in its current form. Despite its relatively minor economic importance to the overall economy of the EU and the UK, the issue of fisheries was **highly controversial** in the negotiations prior to the adoption of the TCA. It had been a priority of the UK to withdraw from the **CFP**,⁶ which was considered to unfairly favour EU Member States in respect to **fishing opportunities** and the **access of Union vessels to UK waters** under the **CFP Regulation**.⁷ Indeed, when considered in isolation, the UK's position concerning the allocation of fishing opportunities and the access of EU-flagged vessels to UK waters under international law, including **UNCLOS**⁸ and the **UNFSA**,⁹ is significantly stronger than the position of the EU.

For this reason, the UK initially tried to secure a **separate fisheries framework agreement** with the EU following its withdrawal, which agreement would have included annual consultations on TACs and allocations. Unlike quota shares based on **relative stability** as under the CFP, this agreement sought quota shares on the basis of **zonal attachment**. As a close trading partner of the EU, the UK is economically dependent on trading conditions with the EU that are more favourable than **international trade law** as applicable in the framework of the **WTO** (in particular the GATT).¹⁰ Therefore, the EU, whose fishing industry is currently dependent on access to the UK's waters and on its previous shares of fishing opportunities under the CFP, strongly pushed for an **integration of the**

¹ [Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) (17 October 2019).

² [Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part](#) (30 December 2020).

³ For early assessments of the TCA generally, see, e.g., Christina Eckes and Päivi Leino-Sandberg, 'The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?' (2021) [Modern Law Review \(pre-published\)](#); Peter van Elsuwege, 'A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law' (2021) [6 European Papers 785-799](#).

⁴ José 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 \(2017\), 5-44](#).

⁵ Valentin J. Schatz, 'Access to Fisheries within the United Kingdom's Territorial Sea after its Withdrawal from the European Union: A European and International Law Perspective' (2019) [9 Goettingen Journal of International Law 457-500](#); Valentin J. Schatz, 'The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union' (2020) [35 The International Journal of Marine and Coastal Law 133-162](#); Thomas Appleby and James Harrison, 'Brexit and the Future of Scottish Fisheries: Key Legal Issues in a Changing Regulatory Landscape' (2017) [25 Journal of Water Law 124-132](#); Jeremy Phillipson and David Symes, 'A Sea of Troubles: Brexit and the Fisheries Question' (2018) [90 Marine Policy 168-173](#).

⁶ For basic works on the CFP, see Robin R. Churchill and Daniel Owen, *The EC Common Fisheries Policy* (Oxford: Oxford University Press, 2010); Jill Wakefield, *Reforming the Common Fisheries Policy* (Cheltenham: Edward Elgar Publishing, 2016).

⁷ [Regulation \(EU\) No 1380/2013](#) of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy.

⁸ *United Nations Convention on the Law of the Sea* (10 December 1982) 1833 UNTS 3.

⁹ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (4 December 1995) 2167 UNTS 3.

¹⁰ *General Agreement on Tariffs and Trade* (30 October 1947) 55 UNTS 817.

fields of fisheries and trade within the same regulatory framework. This was done to secure a respectable and lasting fisheries deal from which the UK could not easily withdraw.

Despite the diverging political preferences of the EU and the UK in the negotiations, the EU succeeded with its position insofar as the legal framework regarding fisheries is located in **Heading Five (Fisheries)** of **Part Two (Trade, Transport, Fisheries and Other Arrangements)** of the TCA.¹¹ Thus, the fisheries-related provisions of the TCA are not only found in the same part as the trade-related rules of **Heading One (Trade)**, but are also closely related to these provisions. That said, certain concessions were made by the EU regarding fishing opportunities and access to waters – such as gradual reductions of quota shares during the **adjustment period lasting until 30 June 2026**, and no guaranteed access to UK waters after that period.

With a particular **focus on Heading Five**, this study provides an **analysis of the legal aspects** of the TCA relating to fisheries. It begins by examining the **scope of Heading Five** as defined in its Chapter 1 (2.). Next, this study addresses the fisheries **conservation and management provisions** of Heading Five, which are codified in Chapters 1 and 2 (3.). Thereafter, it turns to the important issue of **fishing opportunities**, which are regulated in Chapter 3 of Heading Five (4.). Following this, the study examines the **arrangements on access to waters**, which are of similar political and economic importance as the provisions on fishing opportunities (5.). The penultimate chapter of the study analyses the **arrangements on governance** (6.), before turning to a discussion on the trade-related provisions concerning fisheries (7.). The last chapter of the study provides concluding remarks and recommendations on the implementation of the TCA's fisheries provisions (8.).

¹¹ For an in-depth analysis of the TCA's fisheries provisions, see Alexander Proelß, 'Fischerei', in Gesa Kübek, Christian J. Tams and Jörg P. Terhechte (eds.), *Handels- und Kooperationsvertrag EU/GB: Handbuch* (Baden-Baden: Nomos, 2021) (forthcoming).

2. SCOPE OF THE FISHERIES PROVISIONS OF THE TCA

KEY FINDINGS

The TCA contains special provisions delimiting the scope of Heading Five on fisheries:

- The **geographical scope** of Heading Five is important in the context of the TCA's arrangements on access to waters. The fisheries provisions extend to the EEZs and territorial seas adjacent to the European territories of EU Member States (**waters of the EU**). Similarly, they apply to the EEZ and territorial sea of the UK, excluding the UK's overseas territories (**waters of the UK**). Moreover, for the purposes of the TCA's specific arrangements for the British Crown Dependencies, the TCA also applies to the **territorial sea adjacent to the Bailiwicks of Guernsey and Jersey and the Isle of Man**.
- The **vessel-related scope** determines which fishing vessels are subject to the requirements as well as the benefits associated with quota sharing and access that Heading Five provides. It includes all **fishing vessels flying the flag of an EU Member State** and registered in the Union (**Union vessels**). With respect to the UK, Heading Five applies to **fishing vessels flying the UK flag**, registered in the UK, the Bailiwicks of Guernsey and Jersey or the Isle of Man, and licensed by a UK fisheries administration (**UK vessels**).
- In terms of **subject-matter scope**, Heading Five contains a very broad definition of "**shared stocks**" that covers "fish, including shellfish, of any kind that are found in the waters of the Parties, which includes molluscs and crustaceans". This definition includes virtually all categories of marine living resources, including sedentary species attributed to the continental shelf.

In a first step, it is necessary to determine where, to which vessels, and to which fish stocks the fisheries provisions of the TCA apply. In this respect, Chapter 1 contains a number of definitions, which delineate the **scope of the fisheries regime of the TCA**.¹²

2.1. Geographical scope

With respect to the geographical scope of Heading Five, the TCA contains a definition of "**waters**" (**of a Party**), which is the overarching geographic reference point for most fisheries provisions.¹³ After defining the waters in relation to the EU, the subsequent paragraph defines the waters of the UK.

EU waters comprise the EEZs and territorial seas of EU Member States.¹⁴ For the EU, the term "EEZ" covers the **EEZs of EU Member States**¹⁵ **adjacent to their European territories**.¹⁶ The reference to "European territories" makes clear that **no EEZs of overseas territories** of EU Member States, such as France *d'outre-mer*, are covered. This applies regardless of whether they constitute territories within the meaning of other general provisions of the TCA,¹⁷ or whether they are subject to the CFP.

¹² Article 495 TCA.

¹³ Article 495 (1)(g) TCA.

¹⁴ Article 495(1)(g)(i) TCA.

¹⁵ Article 6(1)(c) TCA.

¹⁶ Article 495(1)(a)(i) TCA.

¹⁷ See Article 6(1)(f) read together with Article 774(1)(a) TCA.

Concerning the territorial seas of the EU Member States, the TCA defines “territorial sea” of the EU as the **territorial sea¹⁸ established by EU Member States** adjacent to their European territories.¹⁹

The waters of the UK consist of its EEZ and its territorial sea.²⁰ However, for the purpose of those provisions of the TCA²¹ that make reference to specific fisheries arrangements for **British Crown Dependencies**,²² the territorial seas adjacent to the Bailiwicks of Guernsey and Jersey and the Isle of Man are excluded from the term “waters” (but included in the scope of the TCA with respect to these special provisions).²³ The EEZ of the UK is simply defined as the **EEZ established by the UK**.²⁴ Importantly however, the territory of the UK, and accordingly also the EEZ established by the UK off this territory, **does not include** the British Crown Dependencies,²⁵ Gibraltar,²⁶ or British Overseas Territories,²⁷ such as the Falkland Islands.²⁸ The “territorial sea” of the UK is defined as the **territorial sea established by the UK**.²⁹

¹⁸ Article 495(1)(f)(i) TCA; cf. Article 2 UNCLOS.

¹⁹ Article 774(1) TCA defines the territorial scope of the TCA with respect to the EU as including “the territories to which the TEU, the TFEU and the Treaty establishing the European Atomic Energy Community are applicable, and under the conditions laid down in those Treaties”. As the territorial sea of EU Member States falls within this clause regardless of whether it is adjacent to their European territories or not, the geographical limitation in Article 495(1)(f) TCA constitutes a derogation from Article 774(1) TCA.

²⁰ Article 495(1)(g)(ii) TCA.

²¹ Articles 500 and 501 and Annex 38 TCA.

²² See 5.5.

²³ See 5.5.1.

²⁴ Article 495(1)(a)(ii) TCA.

²⁵ Article 774(3) TCA.

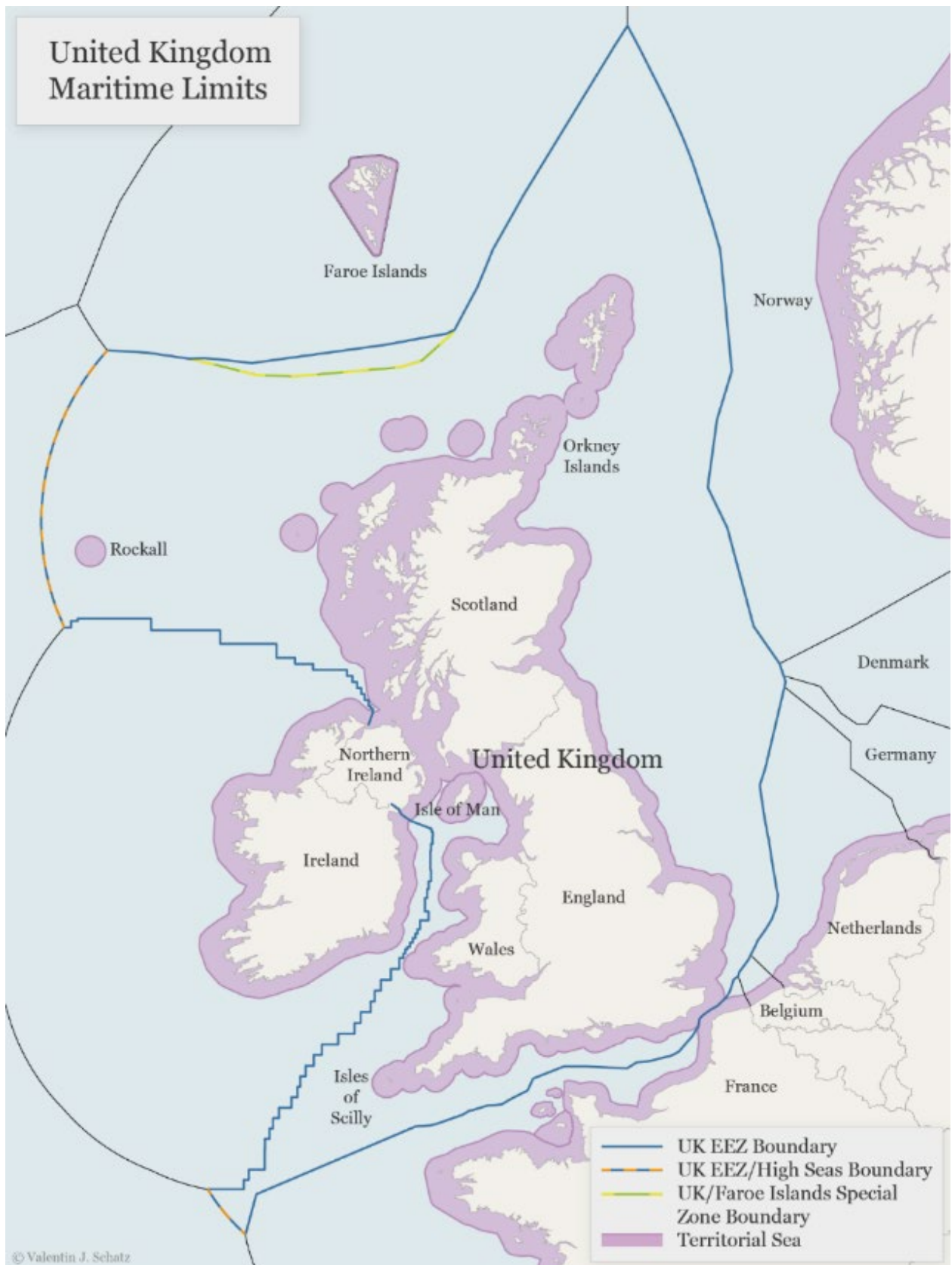
²⁶ Article 774(3) TCA.

²⁷ Article 774(4) TCA.

²⁸ Article 6(1)(f) in conjunction with Article 777(1)(b) TCA. For recent analysis of the fisheries relations between the EU and the Falkland Islands, see Gabriela A. Oanta, ‘European Union–Falkland Islands Fisheries Relations Post Brexit’ (2021) [Ocean Development & International Law \(forthcoming\)](#).

²⁹ Article 495(1)(f)(ii) TCA.

Figure 1: United Kingdom Maritime Limits



Source: Valentin J. Schatz

For illustration purposes only.

2.2. Vessel-related scope

The regulation of fisheries primarily relies on the **principle of flag State jurisdiction**.³⁰ Therefore, the scope of international fisheries law instruments is generally determined not only geographically, but also by reference to categories of vessels. Following this, the TCA defines the term “vessel” for each Party.³¹ A **UK vessel** is defined as a **fishing vessel flying the UK flag, registered in the UK, the Bailiwicks of Guernsey and Jersey or the Isle of Man, and licensed by a UK fisheries administration**.³² An **EU vessel** is defined as a **“fishing vessel flying the flag of a Member State and registered in the Union”**.³³ The classification of a vessel as a Party vessel under the TCA, ultimately depends on the domestic law of EU Member States or the UK, respectively.³⁴

2.3. Subject-matter scope

The TCA contains a very **broad definition of “shared stocks”** to which Heading Five applies.³⁵ It comprises “fish, including shellfish, of any kind that are found in the waters of the Parties, which includes molluscs and crustaceans”. In other words, the term “shared stocks” in the TCA would appear to cover transboundary EEZ stocks,³⁶ straddling stocks,³⁷ highly migratory species,³⁸ anadromous stocks,³⁹ and catadromous species⁴⁰ that are found in the waters of both the EU and the UK.⁴¹

However, the TCA goes beyond the traditional understanding of “shared stocks” in that it **includes sedentary species**. Sedentary species are defined as “organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil”.⁴² Beyond the territorial sea, these species are included under the continental shelf regime established under UNCLOS and are, therefore, not subject to the provisions on the management of marine living resources in the EEZ.⁴³ Following this, the definition of “fish” in the UNFSA, which was concluded to implement the fundamental principle that States must cooperate to ensure conservation and promote the objective of the optimum utilization of straddling and highly migratory fish stocks both within and beyond the EEZ, only includes “molluscs and crustaceans except those belonging to sedentary species” as defined in UNCLOS.⁴⁴ In the case of the TCA, the fisheries provisions apply without restriction to molluscs and crustaceans “of any kind”,⁴⁵ regardless of whether they must be classified as sedentary species or not.

³⁰ Cf. Article 92(1) UNCLOS. See, e.g., Natalie S. Klein, ‘Strengthening Flag State Performance in Compliance and Enforcement’, in Richard Caddell and Erik J. Molenaar (eds.), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Oxford: Hart Publishing, 2019), 351–372; Mercedes Rosello, *IUU Fishing as a Flag State Accountability Paradigm: Between Effectiveness and Legitimacy* (Leiden: Brill, 2021).

³¹ Article 495(1)(h) TCA.

³² Article 495(1)(h)(i) TCA. On the issue of vessel registration more generally, see Richard Coles and Andrew Serdy, ‘Ship Registration and Brexit’ (2019) [43 Tulane Maritime Law Journal 290-308](#).

³³ Article 495(1)(h)(ii) TCA. This definition is aligned with the definition of a “Union fishing vessel” under Article 4(1)(5) CFP Regulation. See further Alexander Proelss, ‘The European Court of Justice and Its Role in (Re-)Defining EU Member States’ Jurisdiction over Ships’, in Henrik Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden: Brill, 2015), 422–448.

³⁴ Cf. Article 91(1) UNCLOS.

³⁵ Article 495(1)(c) TCA.

³⁶ Article 63(1) UNCLOS.

³⁷ Article 63(2) UNCLOS.

³⁸ Article 64 UNCLOS.

³⁹ Article 66 UNCLOS.

⁴⁰ Article 67 UNCLOS.

⁴¹ For a contemporary and in-depth analysis of this ambiguous definition, see Valentin J. Schatz, ‘Crawling Jurisdiction: Revisiting the Scope and Significance of the Definition of Sedentary Species’ (2022) [36 Ocean Yearbook \(forthcoming\)](#), with further references.

⁴² Article 77(4) UNCLOS.

⁴³ Valentin J. Schatz, ‘Crawling Jurisdiction: Revisiting the Scope and Significance of the Definition of Sedentary Species’ (2022) [36 Ocean Yearbook \(forthcoming\): Articles 77\(1\) and \(4\) UNCLOS](#).

⁴⁴ *Ibid.*

⁴⁵ Article 495(1)(c) TCA.

3. CONSERVATION AND MANAGEMENT

KEY FINDINGS

Part Two, Heading Five, Chapters 1 and 2 provide for an overarching **fisheries conservation and management framework**, which contains **objectives and principles** as well as more specific provisions on **conservation and sustainable exploitation**. Key elements include:

- **Recognition of the Parties' sovereign rights** over fisheries in their waters, including their regulatory and enforcement authority.
- An obligation to cooperate in order to **ensure sustainable long-term management and restoration of shared stocks at MSY** and an application of the **precautionary and ecosystem-based approaches** to fisheries conservation and management as well as **science-based fisheries management** that relies on the **best available scientific advice (principally provided by the ICES)**. Although the TCA goes somewhat further, the provisions of the UNFSA provide additional guidance on the content of the precautionary approach under the TCA.
- **Implementation and enforcement** as well as the Parties' own prescriptive and enforcement measures must be carried out in **good faith cooperation** and in line with **rule of law principles** such as non-discrimination, proportionality and due publicity. However, the prohibition of discrimination is without prejudice to international obligations of the Parties concerning port State control measures under the multilateral PSMA or within the framework of RFMO.
- Vessels of a Party that have access to fish in the waters of the other Party under the arrangements on access to waters, **must seek an authorisation or licence** to do so. The Party with access must communicate a list of vessels to the other Party, which other Party must issue the required authorisations or licences.
- Vessels of each Party fishing in the waters of the other Party must **comply with the applicable fisheries laws and regulations**. Common in fisheries access agreements, the TCA also calls for **flag State responsibility**. The Parties are, therefore, obliged to take all necessary measures to ensure compliance by their vessels with the rules applicable in the other Party's waters, including any conditions attached to authorisations or licenses.

Part Two, Heading Five, Chapters 1 and 2 provide for an **overarching fisheries conservation and management framework** for the more specific arrangements on access to waters and resources contained in Chapter 3. This framework, again, consists **objectives and principles** laid down in Chapter 1 (Articles 493 and 494 TCA) and more specific provisions on **conservation and sustainable exploitation** codified in Chapter 2. The latter comprises only two provisions, namely Article 496 TCA on **fisheries management** and Article 497 TCA on **authorisations, compliance and enforcement**.

3.1. Conservation and management objectives and principles

The conservation and management objectives and principles of the fisheries provisions laid down in the TCA generally reflect corresponding requirements under international⁴⁶ and EU fisheries law,⁴⁷ but certain differences exist.

3.1.1. Sovereign rights of coastal States

From the outset, the TCA emphasises that the Parties, as coastal States, “should” **exercise their sovereign rights** for the purpose of exploring, exploiting, conserving and managing the living resources in their waters “**pursuant to and in accordance with the principles of international law**”, including **UNCLOS**.⁴⁸ These sovereign rights are codified both for the EEZ as well as for sedentary species on the continental shelf in UNCLOS.⁴⁹ Under customary international law, coastal States enjoy even broader rights over fisheries in their internal waters, as well as broader rights under UNCLOS with regards to their territorial sea and, in the case of archipelagic States, in their archipelagic waters.⁵⁰

The emphasis on the sovereign rights of coastal States is reiterated in another provision of the TCA, according to which the EU and the UK must fully respect the rights and obligations of “**independent coastal States**”.⁵¹ The term “independent coastal States” also appears in the preamble as well as Annex 38 (Protocol on Access to Waters) of the TCA. This term – although inconsequential from a legal point of view – was included on the initiative of the UK since it had great **symbolic political value** in the context of the UK’s withdrawal from the EU and, importantly, the CFP.⁵²

3.1.2. Sustainable long-term management of fisheries above MSY

The TCA **obligates Parties to cooperate** to ensure “that fishing activities for shared stocks in their waters are **environmentally sustainable in the long term** and contribute to **achieving economic and social benefits**”.⁵³ To this end, the TCA envisages that shared stocks are exploited “at rates intended to **maintain and progressively restore populations of harvested species above biomass levels that can produce the [MSY]**.”⁵⁴ Thus, Article 494(1) and (3)(b) TCA essentially mirrors the content of Articles 2 and 5(a) UNFSA and Article 2(1) CFP Regulation. However, it is noteworthy that the TCA, unlike Article 5(b) UNFSA and Article 61(3) UNCLOS, expressly refers to the biomass that can produce the MSY as the relevant reference point for fisheries. At the same time, however, the TCA refrains from legitimising catches that differ from MSY due to environmental and economic factors, special requirements of developing countries, fishing patterns, the interdependence of stocks, and international minimum standards. Arguably, this implies a limitation to the discretion of the Parties in determining the MSY. Similarly, the reference to the **principle of sustainability** – which includes environmental, social and economic sustainability – is more specific in Article 494(3)(b) TCA than in its counterpart in Article 5(a) UNFSA.

⁴⁶ Cf. in particular Articles 2 and 5 UNFSA.

⁴⁷ Cf. Articles 2 and 3 of the CFP Regulation.

⁴⁸ Article 493 TCA.

⁴⁹ Articles 56(1)(a), 77(1) and (4) UNCLOS respectively.

⁵⁰ Articles 2(1) and 49(1) UNCLOS.

⁵¹ Articles 494(1) and 493 TCA.

⁵² Andrew Serdy, ‘The 2018 Fisheries White Paper, the Fisheries Act 2020 and Their International Legal Dimension’ (2021) [10 Cambridge International Law Journal 73–95](#), 76–77.

⁵³ Article 494(1) TCA.

⁵⁴ Article 494(2) TCA; on the international legal concept of MSY, see Alexander Proelss, ‘Fisheries’, in Elisa Morgera and Kati Kulovesi (eds.), *Research Handbook on International Law and Natural Resources* (Cheltenham: Edward Elgar Publishing, 2016), 178-197, 184 *et seq.*

3.1.3. Precautionary approach and ecosystem-based approach

Under the TCA, Parties must have regard to various principles, including the application of the **“precautionary approach to fisheries management”**.⁵⁵ Article 495(1)(b) TCA defines this concept as “an approach according to which the absence of adequate scientific information does not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment”. This wording largely mirrors that used in the UNFSA but omits the additional wording that States must “be more cautious when information is uncertain, unreliable or inadequate”.⁵⁶ In any event, Article 495(1)(b) TCA must be interpreted in light of Articles 5(c) and 6 as well as Annex II UNFSA, which UNFSA provisions provide further guidance on the content of the precautionary approach. Notably, the definition in the TCA goes beyond Article 6(2) UNFSA by explicitly including **associated or dependent species and non-target species and their environment**. This approach is further specified by the **principle of selectivity** of fisheries in Article 494(3)(d) TCA, which principle aims to “protect juvenile fish and spawning aggregations of fish, and to avoid and reduce unwanted bycatch”.⁵⁷ In addition to the precautionary approach to fisheries management, the TCA also requires that Parties take “due account of and [minimise] harmful impacts of fishing on the marine ecosystem and [take] due account of the need to preserve marine biological diversity”.⁵⁸ The content of this latter principle largely mirrors Articles 5(e) and (g) UNFSA and effectively points towards the application of an **ecosystem-based approach to fisheries management**.⁵⁹

3.1.4. Science-based fisheries management

Article 494(3)(c) TCA contains a principle whereby the Parties must base their conservation and management decisions on the **“best available scientific advice”**, which advice **is principally the scientific advice provided by ICES**.⁶⁰ By explicitly transforming the advice of ICES into a legal reference point, this provision goes beyond its counterpart in Article 5(b) UNFSA. Founded in 1902, ICES is the oldest intergovernmental body in the field of marine exploration. ICES is, amongst other things, dedicated to the stock development of more than 100 fish species in the North-East Atlantic and produces annual assessments concerning the TACs for the fish surveyed stocks. These assessments and the accompanying advice serve as the scientific basis for the fisheries conservation and management policies of its Member States as well as the EU.⁶¹ In order to ensure that good scientific advice is available, the TCA requires that Parties ensure **“the collection and timely sharing of complete and accurate data”**.⁶²

3.1.5. Implementation and enforcement of conservation and management measures

While clarifying that **Parties retain their regulatory authority** as coastal States with sovereign rights, the TCA also requires that the Parties must have regard to the principle of **“applying proportionate and non-discriminatory measures”**.⁶³ Insofar as any measures are agreed between the Parties on the basis of the TCA, the Parties must **ensure “the timely implementation of any agreed measures into**

⁵⁵ Article 494(3)(a) TCA; cf. Articles 5(c) and 6 UNFSA.

⁵⁶ Article 6(2) UNFSA.

⁵⁷ On the issue of associated species, see generally Karen N. Scott, ‘Bycatch Mitigation and the Protection of Associated Species’, in Caddell and Molenaar (eds.), *supra* note 30, 165–187.

⁵⁸ Article 494(3)(e) TCA.

⁵⁹ Cf. Article 2(3) CFP Regulation, where this approach is spelled out explicitly.

⁶⁰ Article 494(3)(c) TCA; *Convention for the International Council for the Exploration of the Sea* (12 September 1964) 652 UNTS 237.

⁶¹ European Commission, [Scientific advice and data collection](#), 2021.

⁶² Article 494(3)(g) TCA.

⁶³ Cf. 3.1.1.

the Parties' regulatory frameworks".⁶⁴ The Parties' regulatory activities must be accompanied by enforcement measures that ensure "compliance with fisheries conservation and management measures" and that combat IUU fishing.⁶⁵

3.2. Fisheries management

3.2.1. Conservation and management measures

In line with the recognised sovereign rights of the Parties, Article 496(1) TCA clarifies that it is up to the Parties to decide on the **conservation and management measures** to be applied in their waters. The term "measure" refers to "any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, requirement or practice, or any other form".⁶⁶ The measures adopted by each Party must **pursue the objectives set out in Articles 494(1) and (2) TCA**. Moreover, in deciding on conservation and management measures, the Parties must have regard to the **principles referred to in Article 494(3) TCA**, including the principle that the Parties ensure "the timely implementation of any agreed measures into the Parties' regulatory frameworks".⁶⁷

3.2.2. Science-based fisheries management

Mirroring Article 5(b) UNFSA, the TCA **obligates Parties to base their measures under Article 496(1) TCA on the "best available science"**.⁶⁸ As stated by Article 494(3)(c) TCA, this is principally the **science provided by ICES**.⁶⁹ As this obligation is only to "base" measures on the best available science, the Parties retain a margin of appreciation in their decision-making, which may involve deviating from the best available science to a certain extent. However, the burden is on the Parties to show that their measures are nonetheless "based" on the best available science.

3.2.3. Prohibition of discrimination

In the spirit of reciprocity, the TCA **prohibits any discrimination by a Party of the vessels of another Party**. In line with this, a Party shall not apply measures adopted under Article 496(1) to the vessels of the other Party unless it also applies the same measures to its own vessels.⁷⁰ This prohibition arguably extends to any **indirect discrimination**, which discrimination involves a formally non-discriminatory application of measures to all vessels but which factual application distinguishes between a Party's own vessels and vessels of the other Party. This serves to implement the **principle of non-discrimination** laid down in the TCA as one of the principles which Parties must have regard to.⁷¹

3.2.4. Port State control measures

The third subparagraph of Article 496(2) TCA clarifies that the prohibition of discrimination is without prejudice to **international obligations of the Parties concerning port State control measures**⁷²

⁶⁴ Articles 494(3)(f) and 494(3)(i) TCA.

⁶⁵ Article 494(3)(h) TCA. See also 7.3.3.

⁶⁶ Article 512(i) TCA; cf. also the definition in Article 512(j) TCA for the term "measures of a Party". An indicative list of possible conservation and management measures permissible under international law may be found in Article 62(4) UNCLOS; cf. *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment, 14 April 2014, 2014 *ITLOS Reports* 4, para. 123.

⁶⁷ Article 494(3)(i) TCA. See also *supra* 3.1.

⁶⁸ Article 496(2)(1) TCA.

⁶⁹ See 3.1.4.

⁷⁰ See the second subparagraph of Article 496(2) TCA.

⁷¹ Article 494(3)(f) TCA.

⁷² See further Erik J. Molenaar, 'Port State Jurisdiction (2021)', in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2021); Arron Honniball, *Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing* (Utrecht: Utrecht University, 2019).

under the multilateral PSMA⁷³ or within the framework of RFMOs, namely the NEAFC Scheme of Control and Enforcement,⁷⁴ NAFO Conservation and Enforcement Measures,⁷⁵ and ICCAT Recommendation 18-09 on Port State Measures to Prevent, Deter and Eliminate IUU Fishing.⁷⁶ These instruments serve to implement the principle that the Parties ensure compliance with conservation and management measures and to combat IUU fishing.⁷⁷ That said, **port State measures themselves must not discriminate in form or fact against the vessels of any State** as stated by the PSMA and UNFSA.⁷⁸ Considering that listed port State obligations may be amended, that new measures may be adopted, or that additional multilateral treaties may be concluded in the future, the TCA grants power to the **Specialised Committee on Fisheries**⁷⁹ to amend the list of pre-existing obligations in Article 496(2)(3) TCA.⁸⁰

3.2.5. Publicity of new measures

Whenever the Parties adopt new measures under Article 496(1) TCA that are “likely to affect” the vessels of the other Party, they must **notify the other Party before they start applying those measures**.⁸¹ This notification must allow “sufficient time” for the other Party to provide comments or seek clarification. In this respect, the TCA is more specific than Article 62(5) UNCLOS, which merely requires coastal States to “give due notice” of conservation and management laws and regulations.

3.3. Authorisations, compliance and enforcement

If the vessels of a Party have access to fish in the waters of the other Party under the **arrangements on access to waters**,⁸² the Party with access must communicate, within a reasonable period before fishing is to commence, to the other Party a **list of vessels** for which it seeks **authorisations or licences**.⁸³ The other Party must then **issue the requested authorisations or licenses** in accordance with Heading Five and that Party’s domestic fisheries laws and regulations.⁸⁴ In the UK, the relevant licensing provisions are found in the **Fisheries Act 2020**.⁸⁵ The EU’s licensing framework for foreign vessels fishing in Union waters is laid down in the **External Fishing Fleets Regulation**.⁸⁶

Fishing vessels located in the waters of the other Party must at all times **comply with the applicable fisheries laws and regulations**. For example, UK vessels sailing through Union waters without an authorisation to fish must keep their gear lashed and stowed in accordance with the conditions laid down in the **Fisheries Control Regulation**.⁸⁷ Similarly, fishing licenses and authorisations granted to UK vessels in accordance with the TCA do not affect the EU’s **landing obligation under Article 15 CFP**

⁷³ *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (22 November 2009) No. 54133 UNTS 1.

⁷⁴ See Chapter V (Articles 20-27) of NEAFC, ‘NEAFC Scheme’ (2020).

⁷⁵ See Chapter VII (Articles 42-47) of *NAFO Conservation and Enforcement Measures*, 2021.

⁷⁶ ICCAT, *Recommendation 18-09 on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, 2018.

⁷⁷ See 3.1.5.

⁷⁸ Cf. Article 23(1) UNFSA and Articles 3(4), 13(2)(h) and 23(2) PSMA.

⁷⁹ See 5.2.2.

⁸⁰ Article 496(2)(4) TCA.

⁸¹ Article 496(3) TCA.

⁸² See 5.

⁸³ Article 497(1)(a) TCA.

⁸⁴ Article 497(1)(b) TCA.

⁸⁵ Secs. 12 *et seq.* *Fisheries Act 2020* (23 November 2020). For further information, see United Kingdom Single Issuing Authority (UKSIA): *Guidance* (2020).

⁸⁶ Articles 32 *et seq.* *Regulation (EU) 2017/2403* of the European Parliament and of the Council of 12 December 2017 on the sustainable management of external fishing fleets.

⁸⁷ Article 32(3) *External Fishing Fleets Regulation* in conjunction with Article 47 *Council Regulation (EC) No 1224/2009* of 20 November 2009 establishing a Union control system for ensuring compliance with the rules of the common fisheries policy.

Regulation,⁸⁸ which provision UK vessels must accordingly also comply with.⁸⁹ In case of **violations of their respective fisheries laws and regulations**, each Party may take **enforcement measures** against the vessels of the other Party. Such measures may include fines and more serious administrative or criminal sanctions. In the EU, a basic system for enforcement is laid down in the **Fisheries Control Regulation**,⁹⁰ which leaves direct enforcement measures primarily to the Member States and their national legislation.⁹¹

Additionally, the Parties themselves are obliged to **“take all necessary measures to ensure compliance”** by their vessels with the rules applicable to those vessels in the other Party's waters, including any conditions attached to authorisations or licences.⁹² This type of **flag State responsibility clause** is common in fisheries access agreements, particularly those of the EU, and imposes an **obligation of conduct** on the flag State that requires it to exercise due diligence in taking prescriptive and enforcement measures to prevent violations of the coastal State's laws and regulations by its fishing vessels.⁹³ Therefore, if one of the Parties fails to take effective measures in order to prevent non-compliance by its fishing vessels with the laws and regulations applicable in the other Party's waters, and there is **evidence that this failure is systemic** rather than limited to rare instances, the other Party can **take remedial measures** in response to this violation of the TCA.⁹⁴

⁸⁸ See further Sven S. Uhlmann, Clara Ulrich and Steven J. Kennelly (eds.), *The European Landing Obligation: Reducing Discards in Complex, Multi-Species and Multi-Jurisdictional Fisheries* (Cham: Springer, 2019).

⁸⁹ Cf. United Kingdom Single Issuing Authority (UKSIA), [UK Vessel - External Waters \(EU\) Conditions](#) (2021).

⁹⁰ Articles 89 *et seq.* Fisheries Control Regulation.

⁹¹ See, for example, §§ 5 *et seq.* [Gesetz zur Regelung der Seefischerei und zur Durchführung des Fischereirechts der Europäischen Union \(Seefischereigesetz – SeeFischG\)](#), 6 July 1998 (as of 26 May 2021).

⁹² Article 497(2) TCA.

⁹³ Valentin J. Schatz, 'The Contribution of Fisheries Access Agreements to Flag State Responsibility' (2017) [84 Marine Policy 313–319](#). This obligation is consistent with the requirements of Article 58(2) UNCLOS as interpreted by the ITLOS. See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, 2015 *ITLOS Reports* 4, para. 124. For critical commentary, see Valentin J. Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) [47 Ocean Development & International Law 327–345](#).

⁹⁴ See 6.1.1.

4. FISHING OPPORTUNITIES

KEY FINDINGS

The legal framework for **fishing opportunities** in Chapter 3 of Heading Five and Annexes 35 and 36 of the TCA addresses the **joint setting of TACs** and the subsequent **allocation of quota shares** for certain categories of fish stocks. Key findings related to this framework include:

- There are bilateral **annual consultations** on the setting of **TACs** and the allocation of **pre-determined quota shares** for **jointly managed stocks** (Annex 35 TCA), which are stocks found in the EEZs of both the EU and the UK. The quota shares resemble the principle of **relative stability** in the allocation of fishing opportunities under the CFP and do not, therefore, reflect the concept of **zonal attachment** initially preferred by the UK. However, for many of these stocks, the EU's **quota shares are gradually reduced until the end of the adjustment period in 2026**. Thereafter, the relative quota shares of both Parties remain stable unless they are amended by agreement. The annual consultations may also address a multitude of further issues such as quota transfers.
- Tables A and B of Annex 36 TCA contain pre-determined quota shares for **UK-EU-Norway trilateral stocks** and **Coastal State Stocks** managed through multilateral consultations with other coastal States, such as Iceland – including in the framework of **NEAFC**. Again, for most of those stocks, the EU's **quota shares are gradually reduced until 2026**. Fixed and stable quota shares may be found in Tables C to F, which address stocks managed under the framework of **ICCAT** and **NAFO** respectively, as well as special cases (such as cod in the waters of Svalbard) and stocks found in the waters of only one Party. Importantly, the TACs and allocations for all of these stocks are not decided on the basis of the annual consultations under the TCA, but are instead decided by the relevant coastal States or within the relevant multilateral fora.
- In the absence of agreement on TACs for jointly managed stocks (Annex 35 TCA) and for UK-EU-Norway trilateral stocks and Coastal State Stocks (Tables A and B of Annex 36 TCA), there is a **mechanism for provisional TACs**. This mechanism leaves **no room for unilateral TACs exceeding the existing scientific advice** and allocations are conducted on the existing relative quota shares. Therefore, the mechanism for provisional TACs constitutes an important step towards improved science-based and precautionary fisheries management. However, these provisional TACs **only bind the Parties**, not other coastal States in the North East Atlantic, which means that **unsustainable TACs and allocations** for shared stocks may remain a problem.

The TCA establishes a legal framework for fishing opportunities, which includes **consultations on the joint setting of TACs for certain groups of stocks** (as well as a mechanism for provisional TACs) and the subsequent **allocation of quota shares**.⁹⁵ The term “TAC” is defined as the “**total allowable catch, which is the maximum quantity of a stock (or stocks) of a particular description that may be**

⁹⁵ Note that the arrangements made between the Parties as a result of any consultations under Article 498 TCA must be documented in written records and subsequently produced and signed by the heads of delegation of the Parties (Article 498(6) TCA). See, e.g., [Written record of fisheries consultations between the United Kingdom and the European Union for 2021](#).

caught over a given period”.⁹⁶ This concept is well established in international fisheries law and describes both a conservation measure (a quantitative restriction on fishing) and a quantitative reference point for the allocation of fishing opportunities.⁹⁷

4.1. Consultations on TACs and allocations for jointly managed stocks (Annex 35 TCA)

Annex 35 TCA contains a detailed list of quota shares of agreed TACs for various shared stocks **managed bilaterally** on the basis of annual consultations between **the EU and the UK**. The **management areas contained in this Annex** can be aligned by the Parties based on advice requested from ICES, which may result in agreed changes to the list of stocks and respective quota shares.⁹⁸ Consultations on TACs and allocations for these stocks proceed as follows:

- The first step must be completed by 31 January of each year, and involves the Parties cooperating to set a **schedule of consultations**. The aim of such consultations is to agree on TACs for **the stocks listed in Annex 35 TCA** for the following year or years.⁹⁹ The agreed upon schedule must “take into account other annual consultations among coastal States that affect either or both of the Parties”.¹⁰⁰
- The second step is that of **annual consultations between the Parties** based on the agreed schedule.¹⁰¹ The purpose of these consultations is to **agree, by 10 December of each year, on TACs for the following year** for the stocks listed in Annex 35 TCA. The consultations must involve an “early exchange of views on priorities as soon as advice on the level of the TACs is received”. Importantly, TACs are not an entirely discretionary matter for the Parties, but must fulfil two requirements. First, TACs must be **agreed on the basis of “the best available scientific advice”** as well as on **“other relevant factors, including socio-economic aspects”**.¹⁰² Second, TACs must **comply “with any applicable multi-year strategies for conservation and management agreed by the Parties”**.¹⁰³ Such multi-year strategies can be developed by and agreed upon within the framework of the **Specialised Committee on Fisheries**.¹⁰⁴ The development of multi-year strategies helps to avoid the setting of annual TACs that are influenced by short-term political interests rather than a consistent long-term management strategy. Therefore, such strategies can make a significant contribution to the sustainable management of jointly managed stocks.
- In the third step, the agreed TACs must be **allocated between the Parties on the basis of the quota shares specified in Annex 35 TCA**.¹⁰⁵ This rigid allocation mechanism strongly **resembles the principle of relative stability** that applies among EU Member States in Union waters.¹⁰⁶ The quota shares are determined based on the **statistical ICES fishing sub-areas in**

⁹⁶ Article 495(1)(d) TCA.

⁹⁷ Cf. Article 61(1) UNCLOS; Article 10(b) UNFSA.

⁹⁸ Article 504 TCA.

⁹⁹ Article 498(1) TCA.

¹⁰⁰ Article 498(1) TCA.

¹⁰¹ Article 498(2) TCA.

¹⁰² Article 498(2)(a) TCA.

¹⁰³ Article 498(2)(b) TCA.

¹⁰⁴ Article 508(1)(b) TCA. See 6.2.2.

¹⁰⁵ Article 498(3) TCA.

¹⁰⁶ See Article 16(1) CFP Regulation. On the principle of relative stability, see José M. Sobrino Heredia and Marta Sobrido, ‘The Common Fisheries Policy: A Difficult Compromise Between Relative Stability and the Discard Ban’, in Gemma Andreone (ed.), *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests* (Cham: Springer, 2017), 23-43.

the North-East Atlantic.¹⁰⁷ Significantly, for many stocks listed in Annex 35, **the EU's quota shares are gradually reduced until the end of the adjustment period in 2026.**¹⁰⁸ Thereafter, the relative quota shares remain stable. For example, the EU's quota share of "Horse Mackerel (Southern North Sea and Eastern Channel)" is 71,4% in 2021 and is thereafter gradually reduced to a final quota share of 60% from 2026 onwards.

4.1.1. Additional consultations concerning TAC amendments

TACs agreed on the basis of the annual consultations are not set in stone. Rather, at the request of either Party, the Parties may hold **additional consultations** with the aim of agreeing **amended TACs.**¹⁰⁹

4.1.2. Annual quota transfers

The Parties may **consult annually regarding a transfer of parts of the quota shares** allocated to them to the other Party.¹¹⁰ In other words, the Parties are free to agree to deviate from the otherwise rigid allocation of quota shares. At the consultations in 2021, "[n]o agreed conclusion on such transfers was reached".¹¹¹

4.1.3. Mechanism for voluntary in-year transfers

Similar to annual quota transfers, there is provision for a **mechanism for "voluntary in-year transfers of fishing opportunities"** between the Parties, which take place each year.¹¹² These in-year quota swaps must be distinguished from those agreed during the annual consultations for the following year.¹¹³ The details of this mechanism are decided by the **Specialised Committee on Fisheries.**¹¹⁴ Within the framework of this mechanism, the Parties can make transfers, in particular, of fishing opportunities regarding stocks which are, or which are projected to be, underfished. Such transfers should be made available at market value. At the time of writing, the Specialised Committee on Fisheries had not yet adopted such a mechanism at its first meeting in July 2021. However, the Parties "noted progress on setting up an interim mechanism for in-year transfers of fishing opportunities, [...] with the execution of the first tranche of agreed transfers likely to take place in July 2021".¹¹⁵

4.2. Stocks listed in Annex 36 TCA

Subdivided into **Tables from A to F, Annex 36 TCA** addresses quota shares of the TACs for several distinct categories of shared stocks that are managed by different **coastal States or RFMOs.** TACs and allocations for these stocks are **not** decided on the basis of the **annual consultations** under the TCA, but by the relevant coastal States or within the relevant multilateral fora. The combined quota share of the EU and the UK is allocated in their bilateral relationship based on the quota shares in **Annex 36 TCA.**¹¹⁶ Thereafter, the Parties must notify the relevant States and RFMOs of their respective shares of the stocks listed in **Tables A to D** (all of which are trilateral or multilateral stocks).¹¹⁷ As the stocks listed

¹⁰⁷ For an up-to-date map, see International Council for the Exploration of the Sea, Ecoregions including ICES Statistical Areas, December 2017, <https://www.ices.dk/data/Documents/Maps/ICES-Ecoregions-hybrid-statistical-areas.png>.

¹⁰⁸ On the adjustment period, see 5.1.

¹⁰⁹ Article 498(5) TCA.

¹¹⁰ Article 498(4)(a) TCA.

¹¹¹ Written record of fisheries consultations between the United Kingdom and the European Union for 2021, *supra* note 95, 5.

¹¹² Article 498(8) TCA.

¹¹³ Article 498(4)(a) TCA.

¹¹⁴ See 6.2.2.

¹¹⁵ Specialised Committee on Fisheries, '[First meeting of the Specialised Committee on Fisheries on 20 July 2021 - Minutes](#)' (2021).

¹¹⁶ Article 505(1) TCA.

¹¹⁷ Article 505(2) TCA.

in Tables A to D of Annex 36 TCA are **shared stocks that are also present in the waters of the Parties**, they must approach the management of these stocks in accordance with the TCA's objectives and principles for conservation and management.¹¹⁸

4.2.1. UK-EU-Norway trilateral stocks (Table A of Annex 36 TCA)

Table A concerns the so-called **UK-EU-Norway trilateral stocks**, which are managed through **trilateral consultations** rather than bilateral EU-UK consultations. The withdrawal of the UK from the EU has **complicated the management of such stocks** since the previously bilateral EU-Norway management has been turned into a trilateral management relationship – now including the UK as an additional independent coastal State. The EU's relationship with Norway is governed by the general **EU-Norway Agreement on Fisheries**¹¹⁹ and three regional agreements.¹²⁰ The UK's relationship with Norway has recently received its own framework in the **UK-Norway Framework Agreement on Fisheries**.¹²¹ These agreements are quite different from the TCA's fisheries provisions as they only provide a framework for consultations without pre-agreed negotiation outcomes in terms of fishing opportunities (e.g., provisional TACs or fixed quota shares), pre-agreed access to waters or extensive arrangements on governance (e.g., remedial measures or binding dispute settlement).

The combined quota share of the EU and the UK, as agreed in the trilateral consultations with Norway, is **allocated in accordance with Table A of Annex 36 TCA**. For 2021, for example, Table A provides quota shares of 34,7% (EU) and 65,2% (UK) for blue whiting in ICES sub-area 4. In the trilateral agreement reached for 2021, the respective quota shares are 31,3% (EU) and 58,7% (UK), which correspond to the shares in Table A insofar as the bilateral EU-UK relationship is concerned.¹²² This **prevents excessive unilateral allocations** in the bilateral relationship between the EU and the UK, but not vis-à-vis Norway.

4.2.2. Coastal States stocks (Table B of Annex 36 TCA)

Table B covers **"Coastal States Stocks"**. This rather obscure term is not self-explanatory. It refers to straddling stocks of mackerel and blue whiting in the North-East Atlantic that are shared multilaterally among the EU and several coastal States (including the Faroe Islands, Iceland, Norway, Russia, and the UK) and that are **managed multilaterally among the relevant coastal States** within the framework of **NEAFC** (the competent RFMO) and agreements among coastal States.¹²³ Apart from the UK, the EU currently has **bilateral agreements with Norway, the Faroe Islands and Iceland**, which are referred to as **"Northern Agreements"**.¹²⁴ The agreements are implemented through annual fisheries arrangements that are agreed in **consultations**. These consultations regularly prove challenging with respect to agreement on TACs and allocations – leading to **fisheries disputes between the EU and other coastal States** in the past.¹²⁵ While the withdrawal of the UK from the EU has added another

¹¹⁸ Article 505(5) TCA in conjunction with Article 494 TCA. See 3.1.

¹¹⁹ [Agreement on Fisheries between the European Economic Community and the Kingdom of Norway](#) (29 August 1980).

¹²⁰ Churchill and Owen, *supra* note 6, 333-337; Schatz, *supra* note 4, 155-159.

¹²¹ *Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway* (30 September 2020), <https://www.gov.uk/government/publications/uknorway-framework-agreement-on-fisheries-cs-norway-no12020>. For detailed discussion, see Richard Barnes, 'Framework Agreement on Fisheries between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Norway' (2021) 36 *The International Journal of Marine and Coastal Law* 155-164, https://brill.com/view/journals/estu/36/1/article-p155_7.xml.

¹²² [Agreed Record of Fisheries Consultations between the European Union, Norway and the United Kingdom for 2021](#), 16 March 2021.

¹²³ On the EU's fisheries access agreements, see, e.g., Gabriela A. Oanta, 'Some Recent Questions Regarding the European Union's Public Access Fisheries Agreements', in Andreone (ed.), *supra* note 106, 44-63.

¹²⁴ European Commission, [Northern agreements](#), 2021.

¹²⁵ *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, Termination Order, 23 September 2014, PCA Case 2013-30. For discussion, see Clemens Wackernagel, 'MOX Plant Reloaded?: Reflections on Denmark's Legal Position in the Faroe Islands' "Mackerel War" with the EU' (2013) [39 Policy Papers on Transnational Economic Law 1-12](#); Bjørn Kunoy, 'Assertion

(independent) player to this multilateral competition for shared stocks in the North-East Atlantic, the **strict allocation** based on the quota shares in Table B prevents excessive unilateral allocations by the EU and the UK, but **not by the other coastal States**.¹²⁶

4.2.3. Stocks managed internationally within the frameworks of ICCAT and NAFO (Tables C and D of Annex 36 TCA)

Tables C and D provide quota shares for shared **stocks managed internationally within the frameworks of ICCAT and NAFO**. Table C addresses highly migratory fish stocks¹²⁷ managed by ICCAT, namely albacore tuna (North Atlantic), bluefin tuna (North-East Atlantic), blue shark (North Atlantic) and swordfish (North Atlantic). Table D lists only one straddling stock¹²⁸ managed by NAFO in accordance with the UNFSA, namely cod (NAFO 3M). Prior to the UK's withdrawal from the EU, the EU had a uniform quota both in ICCAT and NAFO. As the UK is now an independent Member of both ICCAT and NAFO, this **quota must now be divided among the EU and the UK** and notified to both RFMOs, with the combined shares constituting no more than 100% of the formerly uniform quota.¹²⁹ Subsequent **changes in the quota shares of the Parties** with respect to the stocks listed in Tables C and D may only be determined within the frameworks of ICCAT and NAFO.¹³⁰

4.2.4. Special cases: Cod in the waters of Svalbard (Table E of Annex 36 TCA)

Table E concerns "**Special Cases**", the only current example being the cod stock in the **waters of Svalbard**. Sovereignty over Svalbard rests with Norway based on the 1920 **Spitsbergen Treaty**,¹³¹ which contains a non-discriminatory access regime for States Parties to the Treaty that explicitly includes access to fisheries in Svalbard's territorial sea.¹³² The application of this special access regime to the **Svalbard Fisheries Protection Zone** (an exclusive fisheries zone in which Norway exercises sovereign rights and jurisdiction over the fisheries) is contested between the EU and Norway.¹³³ While the EU is not a party to the Spitsbergen Treaty, a considerable number of its Member States are – and the European Commission takes the Member States' treaty-based rights and interests into account in its consultations with Norway. Indeed, EU access to fisheries in this zone, in which the cod stock listed in Table E of Annex 36 TCA is found, is negotiated with Norway on the basis of the **EU-Norway Agreement on Fisheries** rather than directly under the Spitsbergen Treaty. Notably, Table E does not currently address the **snow crab fishery** on Norway's continental shelf off Svalbard and in the Barents Sea, access to which is contested between the EU and Norway.¹³⁴

of Entitlement to Shared Fish Stocks', in Myron H. Nordquist, John N. Moore and Ronán Long (eds.), *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries* (Leiden: Brill, 2016), 464–507.

¹²⁶ See generally Peter Ørebeck, 'The "Lost Mackerel" of the North East Atlantic: The Flawed System of Trilateral and Bilateral Decision-making' (2013) [28 The International Journal of Marine and Coastal Law 343–373](#).

¹²⁷ Cf. Article 64 UNCLOS.

¹²⁸ Cf. Article 63(2) UNCLOS.

¹²⁹ See further Gabriela A. Oanta, 'Resolving the United Kingdom and European Union Membership of Regional Fisheries Management Organisations Post Brexit' (2021) [36 The International Journal of Marine and Coastal Law 355–367](#).

¹³⁰ Article 505(3) TCA.

¹³¹ *Treaty relating to Spitsbergen* (9 February 1920) 18 *The American Journal of International Law* 199.

¹³² See Articles 2 and 3 Spitsbergen Treaty.

¹³³ Robin R. Churchill and Geir Ulfstein, 'The Disputed Maritime Zones around Svalbard', in Myron H. Nordquist, John N. Moore and Tomas H. Heidar (eds.), *Changes in the Arctic Environment and the Law of the Sea* (Leiden: Martinus Nijhoff, 2010), 551–593; Erik J. Molenaar, 'Fisheries Regulation in the Maritime Zones of Svalbard' (2012) [27 The International Journal of Marine and Coastal Law 3–58](#); Øystein Jensen, 'The Svalbard Treaty and Norwegian Sovereignty' (2020) [11 Arctic Review on Law and Politics 82–107](#). For the current EU position, see also European Commission, *Fisheries in Svalbard*, 2021.

¹³⁴ See further Robert C. Steenkamp, 'Svalbard's 'Snow Crab Row' as a Challenge to the Common Fisheries Policy of the European Union' (2020) [35 The International Journal of Marine and Coastal Law 106–132](#); Valentin J. Schatz, 'The Snow Crab Dispute on the Continental Shelf of Svalbard: A Case-Study on Options for the Settlement of International Fisheries Access Disputes' (2020) [22 International Community Law Review 455–470](#); Andreas Østhagen and Andreas Raspochnik, 'Crab! How a Dispute over Snow Crab Became a Diplomatic Headache between Norway and

4.2.5. Stocks that are only present in one Party's waters (Table F of Annex 36 TCA)

Finally, **Table F** contains quota shares for stocks that are **only present in one Party's waters**. For such stocks, each Party retains **full authority to set TACs** in its own waters, but the **allocation of quota shares must be based on Table F**. Accordingly, at the first annual consultations in 2021, the Parties merely noted that “[t]he Delegations informed each other of the relevant TAC amounts set for the stocks present in their respective waters and took note of the quotas allocated to the other Party”.¹³⁵

4.3. Provisional TACs for jointly managed stocks (Annex 35 TCA), UK-EU-Norway trilateral stocks and coastal State stocks (Tables A and B of Annex 36 TCA)

The TCA contains a mechanism for the adoption of **provisional TACs in the absence of agreement on TACs** for **jointly managed stocks** (Annex 35 TCA)¹³⁶ and for **UK-EU-Norway trilateral stocks** and **Coastal State Stocks** (Tables A and B of Annex 36 TCA).¹³⁷

4.3.1. Provisional TACs in the absence of agreement

If no TAC has been agreed by the Parties for a stock by 10 December, they must **resume consultations in order to agree on a TAC**.¹³⁸ Such consultations must happen “immediately” and must include frequent engagement by the Parties “with a view to exploring all possible options for reaching agreement in the shortest possible time”. If, nevertheless, no agreement is reached by 20 December, **each Party must separately set a provisional TAC**.¹³⁹ This deadline ensures that TACs are agreed or set provisionally before the EU adopts the respective **secondary EU legislation**.¹⁴⁰

Importantly, provisional TACs must **correspond to the catch level advised by ICES** for the respective stock and must **apply from 1 January of the following year**.¹⁴¹ This obligation creates an **indirect binding effect** for formally non-binding ICES recommendations. Moreover, if taken literally, this provision leaves **no room for TACs exceeding the existing scientific advice** based on “other relevant factors, including socio-economic aspects”, which would be the case for agreed TACs. Therefore, the mechanism for provisional TACs is an **important step towards improved science-based and precautionary fisheries management** as required by the TCA's provisions on conservation and management.¹⁴²

An additional safeguard against overfishing in the absence of agreement on TACs lies in the fact that each Party is obliged to set its own share of the provisional TACs in accordance with Annex 35 TCA and Tables A and B of Annex 36 TCA.¹⁴³ While these quota shares must **not exceed the shares laid down in the Annexes**, they can of course be lower. An advantage of this allocation mechanism is that it prevents Parties from allocating themselves quota shares that, when added, exceed the provisional TACs set in accordance with the advice of ICES. However, with respect to the stocks listed in Tables A

the EU' (2018) [98 Marine Policy 58–64](#); Andreas Østhagen and Andreas Raspotnik, 'Why Is the European Union Challenging Norway Over Snow Crab? Svalbard, Special Interests, and Arctic Governance' (2019) [50 Ocean Development & International Law 190–208](#).

¹³⁵ See Written record of fisheries consultations between the United Kingdom and the European Union for 2021, *supra* note 95, 5.

¹³⁶ See 4.1.1.

¹³⁷ See 4.2.1. and 4.2.2.

¹³⁸ Article 499(1) TCA.

¹³⁹ Article 499(2) TCA.

¹⁴⁰ See, e.g., [Council Regulation \(EU\) 2021/92](#) of 28 January 2021 fixing for 2021 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters.

¹⁴¹ Article 499(2) TCA.

¹⁴² Cf. Articles 494 and 496 TCA. See 3.1.3., 3.1.4. and 3.2.2.

¹⁴³ Article 499(7) TCA.

and B of Annex 36 TCA, this bilateral mechanism only prevents such situations of **unilateral “over-allocation”** among the Parties, **not** by other coastal States such as Norway, the Faroe Islands, or Iceland.

4.3.2. Provisional TACs for special stocks

In partial derogation of the general rules on provisional TACs codified in Article 499(2) TCA, the TCA establishes a **special regime for “special stocks”**.¹⁴⁴ “Special stocks” are defined as either “stocks where the ICES advice is for a zero TAC”;¹⁴⁵ “stocks caught in a mixed fishery, if that stock or another stock in the same fishery is vulnerable”;¹⁴⁶ or “other stocks which the Parties consider require special treatment”.¹⁴⁷ The Specialised Committee on Fisheries is tasked with the adoption of **guidelines for the setting of provisional TACs for special stocks** by 1 July 2021.¹⁴⁸ At its first meeting in July 2021 however, the Specialised Committee on Fisheries did not adopt such guidelines.¹⁴⁹ With respect to the setting of provisional TACs, the Parties must prioritise discussions regarding special stocks and the application of any guidelines established by the Specialised Committee on Fisheries each year when the ICES has provided its advice on TACs.¹⁵⁰

4.3.3. Application and notification of provisional TACs and allocations

Provisional TACs and corresponding allocations, including for special stocks, remain in effect until the Parties have succeeded in **jointly establishing an agreed TAC**.¹⁵¹ Moreover, both Parties are obliged to **immediately notify** the other Party of the provisional TACs and the corresponding provisional shares of the TAC.¹⁵²

4.4. Consultative stocks (Annex 37 TCA)

As the annual consultations do not have to cover TACs and allocations regarding the **consultative stocks listed in Annex 37 TCA**, the Parties retain **full authority to set and amend TACs** for these stocks unilaterally. However, they are obliged to give **“sufficient notice”** to the other Party before they set or amend these TACs.¹⁵³ At the first consultations in 2021, the delegations of the Parties “agreed to adopt these TACs after the conclusion of these consultations and that the Parties will notify each other if they amend any of these TACs during the year”.¹⁵⁴ Additionally, if the Parties so desire, they may **optionally consult on a TAC** for stocks that are listed in Annex 37 TCA and the allocation of quota shares among them.¹⁵⁵

4.5. Non-quota stocks, unlisted stocks and prohibited species

The annual consultations do not cover **“non-quota stocks”**, which are defined as **“stocks which are not managed through TACs”**.¹⁵⁶ This includes, for example, most shellfish which are of considerable economic importance. Thus, no TACs are applicable to these stocks, which is why they are **omitted**

¹⁴⁴ Article 499(3) TCA.

¹⁴⁵ Article 499(4)(a) TCA.

¹⁴⁶ Article 499(4)(b) TCA.

¹⁴⁷ Article 499(4)(c) TCA.

¹⁴⁸ Article 499(5) TCA.

¹⁴⁹ Cf. Specialised Committee on Fisheries, *supra* note 115.

¹⁵⁰ Article 499(6) TCA.

¹⁵¹ Article 499(8) TCA.

¹⁵² Article 499(9) TCA.

¹⁵³ Article 498(7) TCA.

¹⁵⁴ Cf. Written record of fisheries consultations between the United Kingdom and the European Union for 2021, *supra* note 95, 6.

¹⁵⁵ Article 498(4)(c) TCA.

¹⁵⁶ Article 495(1)(e) TCA.

from the Tables in Annexes 35 to 37 TCA. There are currently no quantitative catch limits for such stocks as such. However, in the context of **access during the adjustment period**, the level of reciprocal access mirrors that of the **average tonnage fished** by each Party in the waters of the other Party **during the period 2012-2016**. Given the nature of non-quota stocks and their importance for small-scale fisheries not subject to extensive requirements in terms of documentation of catches, the implementation of this rule might prove challenging. Additionally, the Parties are free to adopt conservation measures that result in limitations of catches of non-quota stocks. There may be consultations concerning **“stocks of mutual interest to the Parties”** other than those listed in Annexes 35 to 38 TCA.¹⁵⁷ Moreover, the Parties may decide on a list of **stocks for which fishing is prohibited**.¹⁵⁸

¹⁵⁷ Article 498(4)(e) TCA.

¹⁵⁸ Article 498(4)(b) TCA.

5. ARRANGEMENTS ON ACCESS TO WATERS

KEY FINDINGS

Chapter 3 of Heading Five contains **arrangements on access to waters**, through which the Parties can make use of part of their fishing opportunities or fish for non-quota stocks in the waters of the other Party:

- **Adjustment period:** The TCA provides for an adjustment period **until 30 June 2026**. During this period, fishers of both Parties retain the access they had prior to the entry into force of the TCA. During the adjustment period, each Party has **full access to the EEZ** of the other Party as well as **partial access to the 6-12 NM belt of the territorial sea** for the stocks listed in Article 2(1) of Annex 38 TCA. At the same time, the **quota shares provided in Annexes 35 and 36 (Tables A and B)** are gradually phased in until the end of the adjustment period. For **non-quota stocks**, the level of access mirrors that of the average tonnage fished by each Party in the waters of the other Party during the period 2012-2016 for the entire adjustment period. Overall, this process will result in a **gradual reduction of fishing opportunities and access** for EU vessels in UK waters.
- **Period after June 2026: Annual consultations** will determine the level and conditions of access for (at least) the stocks listed in Article 500(4) TCA following agreement on TACs. Therefore, the general obligation to grant access **does not guarantee that access is in fact fully granted**. In principle, there is nothing a Party can do to prevent a partial loss of access after June 2026. However, proportional **compensatory measures** can be taken by the Parties if there are changes in access concerning the period from 1 July 2026 to 31 December 2026. Only in severe cases of a denial of access amounting to a breach of the obligation to negotiate access in good faith by one Party, can **remedial measures** potentially be taken in response by the other Party.
- If **provisional TACs** apply, there is **provisional access** effective until the Parties have reached agreement on TACs. If no agreement is reached within certain time limits, the Parties may **unilaterally change the level and conditions** of provisional access. However, if a Party makes use of this option, the other Party may take **compensatory measures** in response. These measures may include a **suspension of access and/or preferential tariff treatment** granted to fishery products. If the other Party doubts the legality of these compensatory measures, it can seek a binding resolution to the dispute by submitting the dispute to an **arbitration tribunal**.
- Irrespective of both the adjustment period and the general rules, **specific access arrangements exist** for the territorial sea of the **British Crown Dependencies** and the adjacent territorial seas of EU Member States. These arrangements are limited to “qualifying vessels”, which can prove certain degrees of past fishing activity in these waters under previous **voisinage agreements** (e.g., the **Granville Bay Agreement**). These *voisinage* agreements are now suspended but would be revived automatically if the Parties activate the **termination clause** for the special access arrangements.

The TCA establishes a **regime of fisheries access to the “waters” of the Parties**.¹⁵⁹ For clarification, access to fish in a Party’s waters must be distinguished from the allocation of quota shares regarding a shared stock. The latter determines the catch that may be taken from a stock **in quantitative terms**, whereas the former determines whether, to what extent, and under which conditions (parts of) this catch may be taken **in another State’s maritime zones** of exclusive rights over fisheries.

5.1. Access to waters during the adjustment period

To lessen the social and economic impact of the TCA’s changes of access through a period of stability, the TCA provides for an **adjustment period until 30 June 2026**. During this period, fishers of both Parties retain the access they had prior to the entry into force of the TCA.¹⁶⁰ Access during the adjustment period is regulated by the **Protocol on Access to Waters in Annex 38 TCA**, which Protocol takes precedence over the general access arrangements of the TCA.¹⁶¹ This Protocol provides for **full reciprocal access to waters to fish for the stocks** listed in Article 2(1) of Annex 38 TCA, which access extends to the **EEZs of the Parties and parts of the 6-12 NM belt of their respective territorial seas**. The extent of access is essentially identical to the list of expected consultation outcomes found in the TCA.¹⁶² The key difference is that the Protocol makes such access **binding during the adjustment period** with the Parties having no discretion to reduce such access unilaterally. Importantly, the **quota shares provided for in Annexes 35 and 36 (Tables A and B)** are gradually phased in until the end of the adjustment period. For **non-quota stocks**, the level of access mirrors that of the average tonnage fished by each Party in the waters of the other Party during the period 2012-2016 for the entire adjustment period.¹⁶³ As mentioned, this process will result in the **gradual reduction of fishing opportunities and access** for EU vessels in UK waters.

When read in conjunction with the definition of the term “waters”,¹⁶⁴ the wording of Article 2(1) of Annex 38 TCA (“full access to its waters”) appears, at first sight, to include the **territorial seas of the Parties**. For this reason, it has been suggested that the obligation to grant access during the adjustment period also **covers the entire 0-12 NM belt including the territorial seas** of the Parties (e.g., the UK’s territorial sea around **Rockall**).¹⁶⁵ This reading is to some extent supported by the fact that Articles 2(1)(a) and (b) of Annex 38 TCA do not contain wording that limits their spatial scope. Upon closer inspection, however, the **better view** is that the spatial extent of reciprocal access to the territorial sea is exhaustively addressed in Article 2(1)(c) of Annex 38 TCA – which provision refers to “the zone in the waters of the Parties between six and twelve nautical miles from the baselines in ICES divisions 4c and 7d-g”. If the internal logic of Article 2(1) of Annex 38 TCA included a presumption of access to the entire “waters” of the Parties, Article 2(1)(c) of Annex 38 TCA would have to be read as an exception to this rule rather than a positive rule providing for access in the 6-12 NM belt. However, such an interpretation cannot be reconciled with the object and purpose of Article 500(4)(c) TCA, which is unambiguously a positive rule on access. Therefore, there is **no general access to the 0-6 NM belt and no access to the 6-12 NM belt except as specified in Article 2(1)(c) of Annex 38 TCA**. That said, the inclusion of the words “full access to its waters” is a rather **unfortunate drafting choice**.

¹⁵⁹ Articles 500 *et seq.* TCA. On the “waters of the Parties”, see 2.1.1.

¹⁶⁰ Article 1 of Annex 38 TCA.

¹⁶¹ Article 500(8) TCA.

¹⁶² Article 500(4); Articles 2(1)(a)-(c) of Annex 38.

¹⁶³ See 4.4.

¹⁶⁴ Article 495(1)(g) TCA.

¹⁶⁵ Nele Matz-Lück, ‘Von Felsen und Fischen – Zur Frage der Fischereirechte um Rockall’ (2021) [Völkerrechtsblog](#); James Harrison, ‘Unpacking the Legal Disputes over Rockall’ (2019) [SPICe Spotlight](#).

It follows that each Party may grant vessels of the other Party **access to the territorial sea on a voluntary basis**, but there is **no obligation** to do so.¹⁶⁶ It is only to **certain parts of the 6-12 NM belt of the territorial sea** that the Parties have to grant each other access, with the additional requirement that such access is only available to **“qualifying vessels”** and to the extent that such vessels **had access to the 6-12 NM zone on 31 December 2020**.¹⁶⁷ The term “qualifying vessel” is defined as a vessel of a Party which **“fished in the zone [...] in four of the years between 2012 and 2016, or its direct replacement.”**¹⁶⁸ In practice, the implementation of these arrangements has proven **contentious specifically between France and the UK**. There is currently a **dispute concerning the burden of evidence** imposed by the UK on (French-flagged) Union vessels to prove their past fishing activity.¹⁶⁹ This dispute raises similar legal questions as the parallel dispute concerning access to the territorial sea of the Bailiwick of Jersey, addressed below.¹⁷⁰

There are obvious **parallels** between Article 2(1)(c) of Annex 38 TCA and Article 5(2) CFP Regulation. For its part, Article 5(2) CFP Regulation allows EU Member States to restrict access to fisheries located in their waters within 12 NM to fishing vessels “that traditionally fish[ed] in those waters from ports on the adjacent coast”, thereby **derogating from the principle of equal access** under Article 5(1) CFP Regulation.¹⁷¹ In practice, EU Member States, as well as the UK prior to its withdrawal from the EU, have made such liberal use of this exception that it *de facto* represented the rule rather than the exception when the TCA was negotiated. That said, the CFP Regulation includes an “exception to the exception” with Article 5(2) stating that restrictions for the 12 NM belt are “without prejudice to [...] the arrangements contained in Annex I”. This “exception to the exception” fixes for “each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned”.¹⁷² Annex I of the CFP Regulation contained various **arrangements for access within the 6-12 NM belt** between the UK on the one hand, and **Belgium, France, Germany, Ireland, and the Netherlands**, on the other hand. Therefore, vessels of each Party have been fishing in the 6-12 NM belt of other Parties until 31 December 2020 (and in four of the years between 2012 and 2016) despite the existing restrictions on fishing in the 12 NM belt. Ultimately, it is only **these vessels that will qualify for access** during the adjustment period. On this basis, the TCA abandoned the basic principle of equal access to the 12 NM belt (as included in Article 5(1) CFP Regulation) already during the adjustment period.

Before the end of the adjustment period, Parties to the TCA must **notify each other of any changes to the level and conditions of access** that will be applicable from 1 July 2026.¹⁷³ For such changes, the provisions regarding **compensatory measures** in cases of withdrawal or reduction of access apply *mutatis mutandis* for the **period from 1 July to 31 December 2026**.¹⁷⁴

¹⁶⁶ This is also reflected in the practice of the UK, which includes wording to this end in its fishing licenses issued to Union vessels. See [Foreign vessel licence granted by the Scottish Ministers, Welsh Ministers, the Department of Agriculture, Environment and Rural Affairs in Northern Ireland and the Marine Management Organisation in accordance with Section 17 of the Fisheries Act 2020](#), 24th February 2021, 2: “Unless otherwise stated, this licence **does not** permit the vessel to undertake fishing activities in waters which fall within 12 nautical miles of the baselines from which the breadth of the territorial sea adjacent to the United Kingdom is measured”.

¹⁶⁷ Article 2(1)(c) of Annex 38 TCA.

¹⁶⁸ For the definition of a “vessel”, see 2.1.2.

¹⁶⁹ George Bowden, ‘[UK risks French anger over fishing permits](#)’, BBC News, 29 September 2021. For a more detailed legal analysis, see Romy Klimke, ‘Fischen im Trüben: Über die rechtlichen Hintergründe des Fischereistreits zwischen Frankreich und Großbritannien’ (2021) [Verfassungsblog](#).

¹⁷⁰ See 5.5.1.

¹⁷¹ Schatz, *supra* note 4, 465–467, with further references.

¹⁷² *Ibid.*, 468–470, with further references.

¹⁷³ Article 2(2) of Annex 38 TCA.

¹⁷⁴ Article 2(3) of Annex 38 TCA in conjunction with Article 501 TCA.

5.2. Annual consultations on access to waters after the adjustment period

After the end of the adjustment period, each Party must grant the other Party **access to fish in its waters** in the relevant ICES sub-areas **if the Parties have agreed on TACs** with respect to the relevant stocks in **annual consultations**.¹⁷⁵ These annual consultations also serve to determine the **level and conditions of access**.¹⁷⁶ The consultations must be conducted in good faith¹⁷⁷ and must aim at “ensuring a mutually satisfactory balance between the interests of both Parties”.¹⁷⁸ During such annual consultations, the Parties may agree **additional access conditions** relating to the agreed upon fishing opportunities under Article 498 TCA,¹⁷⁹ any multi-year strategies for non-quota stocks developed under Article 508(1)(c) TCA,¹⁸⁰ and any technical and conservation measures agreed to by the Parties – without prejudice to Article 496 TCA.¹⁸¹

Ultimately, the level and conditions of access must be **annually negotiated** between the Parties. In this regard, Article 500(1) TCA obliges the Parties to grant vessels of the other Party access if TACs have been agreed, but does not spell out the details of such access. This obligation must therefore be considered an **obligation of conduct** rather than one of result, meaning that the Parties have some discretion in giving effect to this obligation – particularly with respect to the extent of access granted. The existence of a margin of discretion for each Party to grant access is further evidenced by Article 500(7) TCA. According to this provision, the Parties are permitted, in granting access, to consider **whether individual or groups of vessels have complied with the applicable rules in its waters during the preceding year**, as well as the **“measures taken by the other Party pursuant to Article 497(2) [TCA] during the preceding year”**.¹⁸² Moreover, the consultations “should” normally result in the granting of access.¹⁸³ While this objective provides further guidance on the Parties’ good faith implementation of their obligation to grant access, it equally **does not dictate a binding outcome**. Therefore, there is **no general or unconditional right of access** comparable to that applicable during the adjustment period. These arrangements confirm once again that there are **no historic fishing rights sensu stricto** under customary international law that the Parties could rely on vis-à-vis each other in order to claim access.¹⁸⁴ That said, in severe cases of a denial of access amounting to a breach of the obligation to negotiate access in good faith, **remedial measures** may arguably be taken in response.¹⁸⁵ Alternatively, the fishing State could invoke the **general dispute resolution mechanism** of the TCA.¹⁸⁶

Access should be granted as follows:

- Access to fish stocks listed in **Annex 35**¹⁸⁷ and **Tables A, B and F of Annex 36 TCA**¹⁸⁸ in each other’s EEZ (or if access is granted under Article 500(4)(c) TCA, in the EEZs and in the divisions

¹⁷⁵ Article 500(1) TCA.

¹⁷⁶ Articles 500(1) and (3) TCA.

¹⁷⁷ Cf. Article 26 of *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331.

¹⁷⁸ Article 500(3) TCA.

¹⁷⁹ Article 500(2)(a) TCA.

¹⁸⁰ Article 500(2)(b) TCA.

¹⁸¹ Article 500(2)(c) TCA.

¹⁸² See 3.3.

¹⁸³ Article 500(4) TCA.

¹⁸⁴ For detailed discussion, see Robin 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 Federation](#) (2017), 12-13; Schatz, *supra* note 5, 488-495; Schatz, *supra* note 5, 150-151; Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed.) (Leiden/Boston: Brill, 2019), 39. Contra: Sophia Kopela, ‘Historic Fishing Rights in the Law of the Sea and Brexit’ (2019) [61 Leiden Journal of International Law 1–19](#).

¹⁸⁵ See 6.1.1.

¹⁸⁶ See 6.1.3.

¹⁸⁷ See 4.1.

¹⁸⁸ See 4.2.

mentioned in that provision) at a level that is reasonably commensurate with the Parties' respective shares of the TACs.¹⁸⁹

- Access to **non-quota fish stocks**¹⁹⁰ in each other's EEZ (or if access is granted under Article 500(4)(c) TCA, in the EEZs and in the divisions mentioned in that provision), at a level that at least equates to the average tonnage fished by that Party in the waters of the other Party during the period 2012-2016.¹⁹¹
- Access to the **waters of the Parties between 6 and 12 NM from the baselines in ICES divisions 4c and 7d-g** for qualifying vessels to the extent that Union fishing vessels and UK fishing vessels had access to those waters on 31 December 2020.¹⁹² For these purposes, the term "**qualifying vessel**" is defined as a "vessel of a Party which fished in the zone mentioned in the previous sentence in four of the years between 2012 and 2016, or its direct replacement". In addition, annual consultations regarding access may include "**appropriate financial commitments and quota transfers between the Parties**".

5.3. Provisional access to waters

In the event that the Parties have established and applied **provisional TACs**,¹⁹³ they are obliged to grant each other **provisional access to the waters** in the relevant ICES sub-areas under their respective jurisdiction **until they have agreed on TACs**.¹⁹⁴ Different **time limits** apply to provisional access **depending on the category of stocks**:

- Access must be provided from 1 January until 31 March for **stocks listed in Annex 35 TCA and non-quota stocks**, at the levels provided for in Articles 500(4)(a) and (b) TCA.¹⁹⁵ For **stocks listed in Annex 36 TCA**, access must be granted from 1 January until 14 February at the levels provided for in Article 500(4)(a) TCA.¹⁹⁶ In relation to the mentioned categories of stocks (including non-quota stocks), access must be "in proportion to the average percentage of a Party's share of the annual TAC which that Party's vessels fished in the other Party's waters in the relevant ICES sub-areas during the same period of the previous three calendar years."¹⁹⁷
- In the **6-12 NM belt of the territorial sea**, access in accordance with Article 500(4)(c) TCA must be granted from 1 January to 31 January at a level equivalent to the average monthly tonnage fished in that zone in the previous three months.¹⁹⁸

The Parties must inform each other of **changes in the level and conditions of access** applicable after the expiry of the mentioned deadlines within separate deadlines (31 January in respect of the stocks listed in Annex 36 TCA and 15 March in respect of all other stocks).¹⁹⁹ Without prejudice to the preferred alternative of an **agreement of the Parties on TACs**,²⁰⁰ the Parties are obliged to "**seek to agree further provisional access arrangements at the appropriate geographical level with the aim of minimising disruption to fishing activities**" within specified deadlines for each category of stock.²⁰¹

¹⁸⁹ Article 500(4)(a) TCA.

¹⁹⁰ See 4.4.

¹⁹¹ Article 500(4)(b) TCA.

¹⁹² Article 500(4)(c) TCA.

¹⁹³ See 4.7.1.

¹⁹⁴ Article 500(5)(1) TCA.

¹⁹⁵ Article 500(5)(1)(a) TCA.

¹⁹⁶ Article 500(5)(1)(b) TCA.

¹⁹⁷ Article 500(5)(2) TCA.

¹⁹⁸ Article 500(5)(1)(c) TCA.

¹⁹⁹ Article 500(5)(3) TCA.

²⁰⁰ See 4.7.3.

²⁰¹ Article 500(6) TCA.

5.4. Compensatory measures in case of withdrawal or reduction of access

As an incentive to retain stability in the reciprocal access regime, there is a mechanism for **compensatory measures** that a Party may take in **response to changes in the level and conditions of provisional access**.²⁰²

5.4.1. Requirements and nature of compensatory measures

If a Party (referred to as the “host Party”) notifies the other Party (referred to as the “fishing Party”) that the host Party intends, after expiration of the time limits for provisional access,²⁰³ to **unilaterally change the level and conditions of provisional access to its waters**,²⁰⁴ the fishing Party may adopt **compensatory measures**. The same applies when a Party makes such changes in respect of the period **from 1 July 2026 to 31 December 2026**.²⁰⁵

In taking compensatory measures, the fishing Party may **suspend**, in whole or in part, the **access of the host Party to its own waters** and/or the **preferential tariff treatment granted to fishery products**.²⁰⁶ The obligations suspended in the taking of compensatory measures are **very similar to the obligations suspended in the context of remedial measures**.²⁰⁷ That said, the reason for compensatory measures is **fundamentally different** from that of remedial measures. The objective of compensatory measures is **not to compel the host Party to cease a violation of Heading Five** through sanctions. Rather, the aim is to **compensate the fishing Party for the economic and societal impact** of perfectly lawful changes in the level and conditions of access. To ensure that compensatory measures under the TCA cannot be prevented through reliance on international trade law, the host Party is **prohibited from invoking the WTO Agreement**²⁰⁸ (in particular the GATT),²⁰⁹ or any other international agreement in order to preclude the fishing Party from making use of the suspension clause.²¹⁰

5.4.2. Proportionality of compensatory measures

Compensatory measures must be **“commensurate to the economic and societal impact of the change in the level and conditions of access to waters”**.²¹¹ This requirement is essentially one of **proportionality** that must be interpreted in light of the general proportionality principle of Heading Five.²¹² The standard of proportionality is not further concretised except in that it requires the impact of the relevant withdrawal or reduction of access to be **“measured on the basis of reliable evidence and not merely on conjecture and remote possibility”**.²¹³ Overall, this open wording suggests that the Parties have a **margin of appreciation** in identifying commensurate compensatory measures if they have reliable evidence on which they can base their decision. At the same time, there is an **additional proportionality requirement** that obliges the fishing Party to give priority to the compensatory measure that is the **least disturbing for the operation of the TCA**.²¹⁴ Moreover, the

²⁰² Article 501 TCA.

²⁰³ Article 500(5)(1) TCA.

²⁰⁴ Article 500(5)(3) TCA.

²⁰⁵ Article 2(3) of Annex 38 TCA.

²⁰⁶ See 7.1.

²⁰⁷ See 6.6.1. For limitations concerning obligations that may be suspended, see Articles 762 in conjunction with Article 749(3) TCA.

²⁰⁸ *Marrakesh Agreement establishing the World Trade Organization* (15 April 1994) 1867 UNTS 31874.

²⁰⁹ Cf. Article 513 TCA, which lists the different WTO Agreements referred to in Part Two.

²¹⁰ Article 501(6) TCA.

²¹¹ Article 501(1) TCA.

²¹² Article 494(3)(f) TCA. See 3.1.5.

²¹³ Article 501(1) TCA.

²¹⁴ Article 501(1) TCA.

fishing Party must immediately **withdraw its compensatory measures** once the conditions for such measures are no longer met.²¹⁵

5.4.3. Procedural requirements of compensatory measures

Compensatory measures may take effect no earlier than seven days **after** the fishing Party has given the host Party **notice of the intended suspension of obligations**.²¹⁶ Compensatory measures taken with respect to the situations addressed in Articles 500(5)(1)(a) to (c) TCA may take effect no earlier than the day after each of the **reference dates** stated for the relevant stocks (1 April, 15 February and 1 February, respectively). Prior to the notification, the Parties must **consult within the Specialised Committee on Fisheries**²¹⁷ in order to reach a “mutually agreeable solution”.²¹⁸ The notification of compensatory measures must contain information on the date of suspension, the obligations to be suspended, and the extent of the suspension.

5.4.4. Dispute resolution and countermeasures

If the host Party considers the compensatory measures of the fishing Party unlawful, it may **submit the dispute to binding resolution by an arbitration tribunal**.²¹⁹ The application to the arbitration tribunal can be made immediately following receipt of the notification of compensatory measures and **without the requirement of prior consultations**.²²⁰ The jurisdiction of the arbitration tribunal is restricted to a **review of the conformity of the compensatory measures with Article 501(1) TCA**, including both the general conditions and the requirements of proportionality. All such cases must be treated with urgency.²²¹ Overall, this procedure shares many aspects of the **arbitration procedure concerning remedial measures**.²²²

In particular, there is also a special procedure by which the **host Party can obtain remedies** if the arbitration tribunal **finds against the fishing Party**.²²³ In such a situation, the fishing Party must terminate its compensatory measures to the extent that the arbitration tribunal finds them unlawful. However, the host Party may additionally have an interest in suspending obligations in response to the fishing Party’s unlawful compensatory measures. For this purpose, and **within 30 days of the ruling**, the host Party may request that the arbitration tribunal determine the appropriate extent of **countermeasures that the host Party may take**. This appropriate extent is referred to as the level of **suspension of obligations under the TCA “not exceeding the level equivalent to the nullification or impairment caused by the application of the compensatory measures”**.²²⁴ Such a decision of the arbitration tribunal is only available where it additionally finds that the inconsistencies of the original compensatory measures with the applicable requirements are **“significant”**. The request of the host Party must contain a **proposal for a level of suspension** in accordance with the general requirements of remedial measures and the relevant **principles listed in Article 761 TCA**. The **host Party may apply countermeasures** in accordance with the level of suspension determined by the arbitration tribunal following a **waiting period of 15 days**.

²¹⁵ Article 501(4) TCA.

²¹⁶ Article 501(2) TCA.

²¹⁷ See 6.2.2.

²¹⁸ Article 501(2) TCA.

²¹⁹ Article 501(3) TCA. The arbitration tribunal is established pursuant to Article 738 TCA.

²²⁰ Article 501(3) TCA.

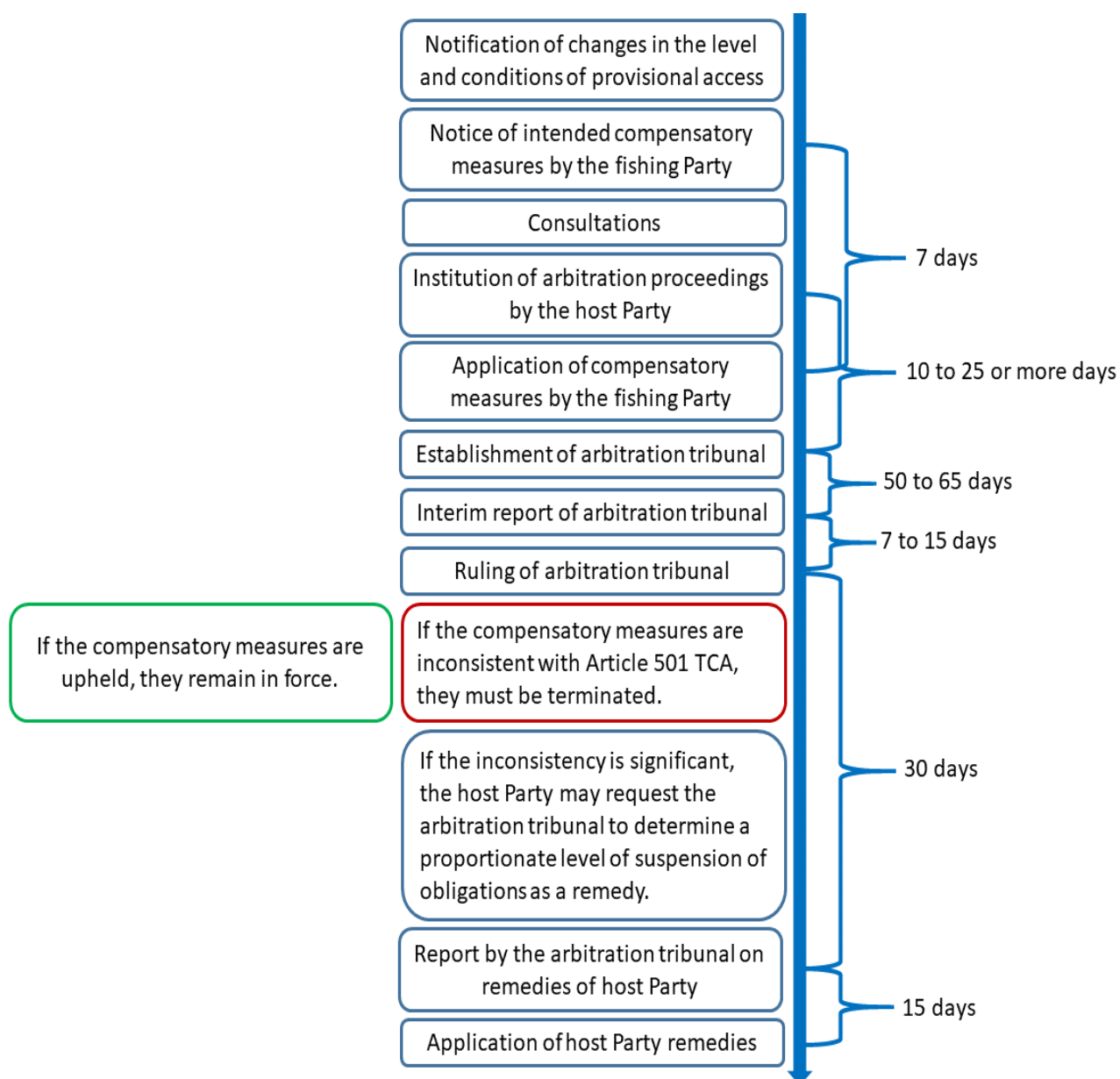
²²¹ Article 501(3) in conjunction with Article 744 TCA.

²²² See 6.1.2.

²²³ Article 501(5) TCA.

²²⁴ Article 501(5) TCA.

Figure 2: Mechanism for compensatory measures and dispute settlement under Article 501 TCA



Source: Valentin J. Schatz

For illustration purposes only.

5.5. Specific access arrangements relating to the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man

The TCA establishes a **special regime on access** to fishing in the **territorial sea around the Bailiwicks of Guernsey and Jersey and the Isle of Man** on the one hand, and in the **territorial sea of the EU Member States** on the other hand.²²⁵ This special regime **applies irrespective of the adjustment period and the annual negotiations on TACs and allocations.**²²⁶

5.5.1. Operation of the special access arrangements

The special regime has several distinct requirements, which must be met for the obligation to grant access to apply:

- First, the term **“waters” (of a Party)** is defined for these purposes as **“the territorial sea adjacent to a Member State”** in respect of the EU,²²⁷ and as **“the territorial sea adjacent to each of the Bailiwicks of Guernsey, the Bailiwick of Jersey and the Isle of Man”** in respect of the UK.²²⁸ The special regime, therefore, does not apply to the UK’s territorial sea in its entirety, but only to the territorial sea adjacent to the mentioned British Crown Dependencies, which have a considerable degree of autonomy in internal matters under UK constitutional law.²²⁹ These British Crown Dependencies were never part of the EU and never subject to the CFP, which in turn justifies their exclusion from the general access regime under the TCA and the access provisions applicable during the adjustment period.
- Second, the term **“vessel” (of a Party)** for the purposes of the special regime, derogates from the general definition²³⁰ in that it is restricted to fishing vessels flying under the UK flag, **registered in the Bailiwick of Guernsey or Jersey or the Isle of Man**, and licensed by a UK fisheries administration.²³¹ Other UK flagged fishing vessels do not profit from the special access regime.
- Third, access must only be granted to vessels of the other Party if such access reflects **requirements of past fishing activity**, which fishing activity’s extent and nature must be demonstrated as having been carried out during the period covering 1 February 2017 (included) and ending on 31 January 2020 **“by qualifying vessels of the other Party in the waters and under any treaty arrangements that existed on 31 January 2020”**.²³² The only such treaty arrangement applicable to the mentioned waters and undoubtedly in force on 31 January 2020 is the **Granville Bay Agreement**.²³³
- Fourth, besides fishing under such a treaty arrangement, the relevant **past fishing activity must have been carried out by a “qualifying vessel”**. Defined with respect to fishing carried out in waters adjacent to the British Crown Dependencies or an EU Member State, a **“qualifying vessel”** is **“any vessel which fished in the territorial sea adjacent to that territory or that Member State on**

²²⁵ Article 502 TCA.

²²⁶ Article 502(1) TCA.

²²⁷ Article 502(2)(c)(i) TCA.

²²⁸ Article 502(2)(c)(ii) TCA. Cf. also Article 495(1)(g)(ii) TCA.

²²⁹ On the fisheries regime of the Bailiwicks of Guernsey and Jersey prior to the conclusion of the TCA, see Schatz, *supra* note 4, 466 and 472–475. More generally on the status of Jersey, see Christopher Tan, ‘Brexite and Jersey Fishing Rights: The International Legal Status of the Crown Dependencies’ (2021), *EJIL:Talk!*. On the Isle of Man, see Clive R. Symmons, ‘The Sea Fishery Regime of the Irish Sea’ (1989) 4 *The International Journal of Estuarine and Coastal Law* 192–216.

²³⁰ Article 495(1)(h) TCA.

²³¹ Article 502(2)(b) TCA.

²³² Article 502(1) TCA.

²³³ *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. For detailed discussion, see Schatz, *supra* note 4, 472–475, with further references.

more than 10 days in any of the three 12 month periods ending on 31 January, or between 1 February 2017 and 31 January 2020".²³⁴ Thus, in order to obtain access, vessels must provide **evidence of their lawful fishing activity in the relevant area of territorial sea during the specified time periods**, following which they can be classified as "qualifying vessels". As the exact modalities of this administrative process are not further specified, the details of its implementation are a matter for each Party to decide.²³⁵ However, in so doing the Parties must **cooperate**²³⁶ and act in **good faith**.²³⁷ This means that the relevant administrative processes must not result in disproportionate administrative burdens or unrealistic evidentiary requirements for vessels that objectively qualify for access.²³⁸ That said, a **dispute between France and the UK** has already arisen regarding the relevant requirements imposed by Jersey, which have resulted in the refusal of licenses for many of the French vessels that applied for licenses to fish in the territorial sea of Jersey.²³⁹ Where such disputes cannot be resolved through consultations, and a Party (in this case the EU) is convinced that the other Party has **violated the special access arrangements**, the complaining Party may take **remedial measures** and subsequently submit the dispute to resolution by an **arbitration tribunal**.²⁴⁰

5.5.2. Notification periods relating to the importation and direct landing of fishery products

Addressed exclusively to the EU, Article 503(1) TCA establishes **specific notification periods for fishery products**²⁴¹ caught by UK-flagged vessels registered in the Bailiwick of Guernsey or the Bailiwick of Jersey (but not the Isle of Man) in the territorial sea of these Bailiwicks or the territorial sea of EU Member States and **landed directly in the EU**. This provision takes into account the fact that the catch of fishing vessels registered in the Channel Islands is, to a significant extent, landed directly in France.

5.5.3. Independent termination of the special access arrangements

There is a special mechanism whereby either Party may request the **Partnership Council**²⁴² to decide that Articles 502 and 503 TCA and any other related provisions of Heading Five²⁴³ **shall cease to apply with regard to either of the British Crown Dependencies**.²⁴⁴ The unilateral request by either Party is arguably **binding** for the Partnership Council ("shall decide [...] that").²⁴⁵ Any such decision takes effect after 30 days. This mechanism reflects the **special status of the British Crown Dependencies** and is intended to safeguard the interests of the UK.²⁴⁶

An activation of this termination clause would **not result in a loss of reciprocal access** in relation to the British Crown Dependencies. On the one hand, it is true that Heading Five **"supersedes and replaces" any existing**²⁴⁷ **agreements or arrangements** with respect to fishing of Union vessels in

²³⁴ Article 502(2)(a) TCA.

²³⁵ Article 497(1)(b) TCA..

²³⁶ Cf. Article 494(1) TCA.

²³⁷ Cf. Article 3(1) and (2) TCA and Article 26 VCLT.

²³⁸ Cf. also Article 494(3)f) TCA, which requires the Parties to have regard to the principle that the Parties apply „proportionate and non-discriminatory measures for [...] the management of fisheries resources, while preserving the regulatory autonomy of the Parties“.

²³⁹ J. Lichfield, 'From the Normandy coast, the Jersey whelk wars look like sabotage', The Guardian, 9 May 2021; 'Jersey refuses licences to 75 French fishing boats', BBC News, 29 September 2021. For legal analysis, see Klimke, *supra* note 169.

²⁴⁰ See 6.1.

²⁴¹ Article 503(2) TCA defines "fishery products" for the purposes of this provision (only) as "all species of marine fish, molluscs and crustaceans".

²⁴² See 6.2.1.

²⁴³ As well as Articles 520(3)-(8) TCA.

²⁴⁴ Article 502(3) TCA.

²⁴⁵ In addition, the Partnership Council may decide to amend the aforementioned provisions. See Article 502(4) TCA.

²⁴⁶ Article 509(4)(a) TCA.

²⁴⁷ Article 512(d) TCA defines the term "existing" as "in effect on the date of entry into force of [the TCA]".

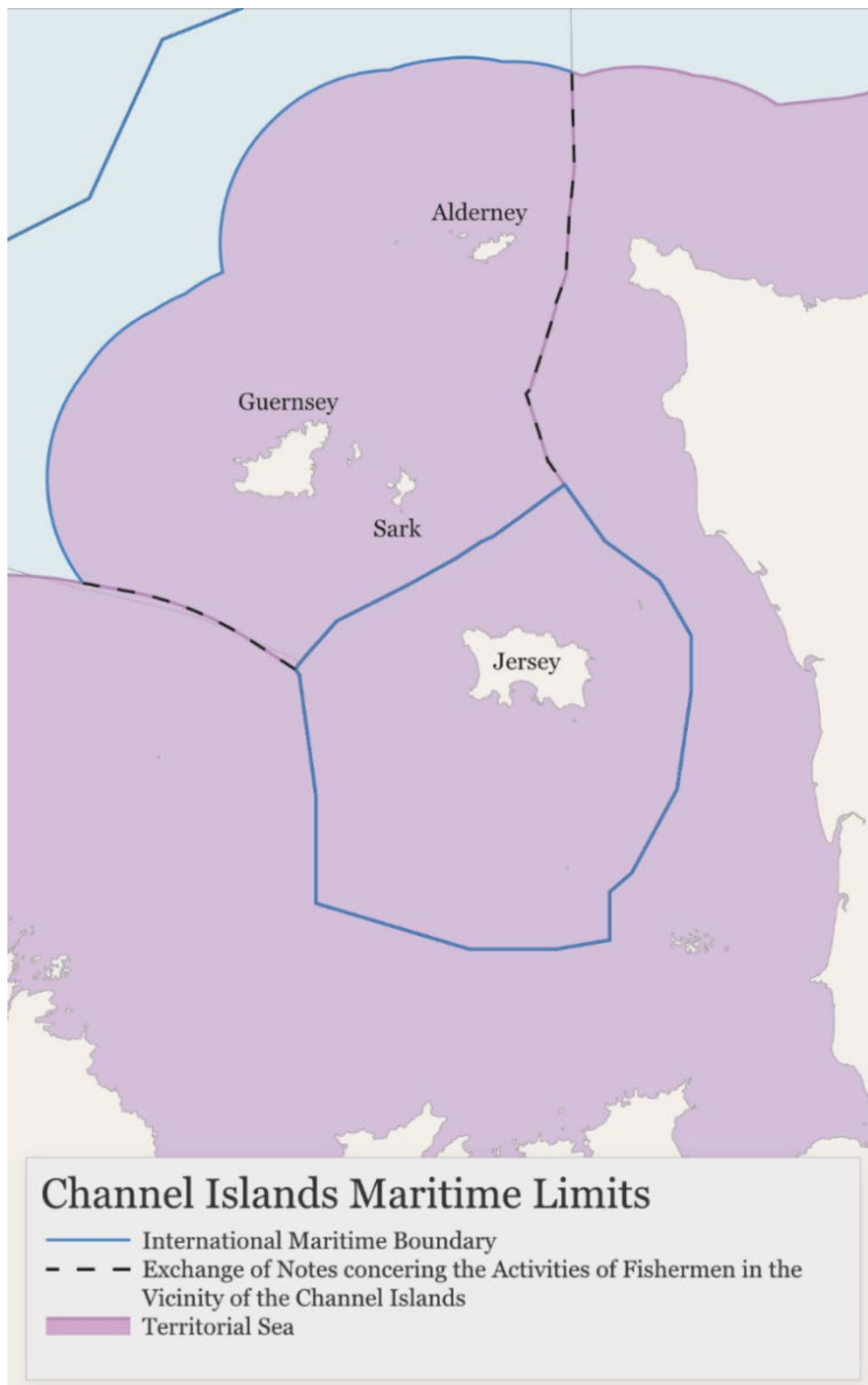
the territorial sea of the British Crown Dependencies and vice versa, including the **Granville Bay Agreement**.²⁴⁸ On the other hand, following a decision by the Partnership Council to terminate the special arrangements, the previous agreements or arrangements are **revived in relation to the relevant Crown Dependency**.²⁴⁹ For example, if the mechanism is activated in respect of the Bailiwick of Jersey, the Granville Bay Agreement would be reactivated in respect of fishing in the territorial sea of Jersey. Therefore, the TCA merely **suspended** the Granville Bay Agreement and other relevant agreements and arrangements.²⁵⁰

²⁴⁸ Article 511(2) TCA.

²⁴⁹ See Article 511(2) TCA.

²⁵⁰ See Article 57(b) VCLT. This provision addresses the explicitly consensual suspension of a treaty by a later treaty, whereas Article 59(2) VCLT would have been applicable if the suspension is only implied by the later treaty. See Thomas Giegerich, 'Article 57', in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary (2nd ed.)* (Berlin: Springer, 2018), para. 19.

Figure 3: Channel Islands Maritime Limits



Source: Valentin J. Schatz

For illustration purposes only.

6. ARRANGEMENTS ON GOVERNANCE

KEY FINDINGS

Chapter 4 of Heading Five contains **arrangements on governance**, which serve the purpose of ensuring the **effectiveness of the implementation and the enforcement of Heading Five**:

- If a Party **violates the provisions of Heading Five**, there exists a mechanism for **remedial measures**. Available remedial measures include the **suspension of fisheries access**, the **suspension of preferential tariff treatment for fisheries products and other goods**, and even the **suspension of Part Two of Heading One**. This mechanism is based on escalatory steps and the principle of proportionality, which means that less severe remedial measures would normally have to be exhausted before more severe trade-related measures may be relied upon.
- Remedial measures are subject to **mandatory judicial review by an arbitration tribunal**. If the arbitration tribunal finds that the complaining Party's remedial measures are unlawful, the respondent Party can ask the arbitration tribunal to determine **proportionate countermeasures**. To avoid these risks as well as an aggravation of the dispute more generally, the complaining Party can also invoke the **general dispute resolution mechanism under Part Six**, which follows a reverse procedure (**remedial measures only after arbitration**).
- The TCA establishes an **institutional framework** whereby the implementation of Heading Five is entrusted to the **EU-UK Partnership Council**, as the primary body, and to the **Specialised Committee on Fisheries** as the subsidiary implementation body. There is also a **Parliamentary Partnership Assembly** that exercises democratic oversight and an advisory function.
- Further governance provisions include a special mechanism for the **termination of Heading Five**. This, however, automatically also terminates **Headings One (Trade), Two (Aviation) and Three (Road Transport)**. Due to the resulting detrimental effects on the EU-UK trade system, a termination of Heading Five would normally not be a proportionate reaction to a disagreement between the Parties concerning fisheries matters.
- Separate termination rules exist for the specific arrangements of the **British Crown Dependencies**. There is also a mechanism for **reviewing Heading Five**, with a first review envisaged **after 30 June 2026**. This mechanism can be used to amend Heading Five in order to avoid problems with its implementation or to provide agreed solutions to disputes. Finally, there is also a **conflict clause** that addresses the **relationship of Heading Five with other agreements**, and which treats the **British Crown Dependencies** separately.

Part Two, Heading Five, Chapter 4 contains **arrangements on governance**,²⁵¹ which include provisions concerning remedial measures and dispute resolution, data sharing, institutions tasked with fisheries governance under the TCA, a termination procedure, a review procedure, and a conflict clause. The

²⁵¹ For a general overview of the TCA's provisions on governance, see Stefano Fella, *The UK-EU Trade and Cooperation Agreement: Governance and Dispute Settlement* (London: House of Commons Library, 2021).

overarching purpose of these provisions is **to ensure the effectiveness of implementing and enforcing Heading Five**, and **to maintain flexibility in adapting its provisions to changing circumstances and priorities**.

6.1. Remedial measures and dispute resolution

Article 506 TCA contains procedures for **remedial measures** in response to violations of Heading Five and procedures for **dispute resolution** with respect to such remedial measures. As such, it integrates the TCA's fisheries provisions with those concerning trade, and forms a **central part of the compromise between the EU and the UK** in this respect.

6.1.1. Remedial measures

A Party (referred to as "complaining Party") may, after giving notice to the other Party (referred to as "respondent Party"), take **remedial measures in the form of a suspension of certain obligations under Part Two** in order to react to an **alleged failure of the respondent Party to comply with Heading Five**.²⁵² These remedial measures essentially constitute **sanctions under international law**. As the remedial measures primarily concern tariffs and trade, the Parties are **prohibited from invoking the WTO Agreement** (in particular the GATT) or any other international agreement to preclude remedial measures.²⁵³

At least **seven days prior to taking remedial measures**, the complaining Party must **consult** with and **notify** the respondent Party of its intention to take remedial measures.²⁵⁴ The remedial measures do not take effect before this notice period has lapsed. In its notification, the complaining Party must specify its views regarding the alleged violation of the respondent Party,²⁵⁵ the date upon which it intends to suspend,²⁵⁶ and the intended level of suspension.²⁵⁷

a. Remedial measures relating to violations of Heading Five

The general mechanism for remedial measures applies to **violations of Heading Five generally**.²⁵⁸ Its logic follows clearly defined **escalatory steps**. As a first step, the complaining Party may opt to suspend, in whole or in part, **access to its waters** under Article 500 TCA and/or the **preferential tariff treatment granted to fishery products** under Article 21 TCA.²⁵⁹ The second step is a suspension, in whole or in part, of the **preferential tariff treatment of other goods** under Article 21 TCA.²⁶⁰ As a final step, the complaining Party may suspend, in whole or in part, **obligations under Part Two, Heading One (Trade)** with the exception of Title XI (Level Playing Field for Open and Fair Competition and Sustainable Development).²⁶¹ Importantly, if Part Two, Heading One is suspended in whole, **Part Two, Heading Three (Road Transport) is also suspended**. Most of these remedial measures, and particularly a full suspension of Heading One, are surprisingly **severe responses** to violations of fisheries provisions of an agreement.²⁶² As such, they are **unprecedented in fisheries access agreements** both in form and in severity.

²⁵² Articles 506(1) and (2) TCA.

²⁵³ Article 506(8) TCA.

²⁵⁴ Article 506(4) TCA.

²⁵⁵ Article 506(4)(a) TCA.

²⁵⁶ Article 506(4)(b) TCA.

²⁵⁷ Article 506(4)(c) TCA.

²⁵⁸ Article 506(1) TCA.

²⁵⁹ Article 506(1)(a) TCA.

²⁶⁰ Article 506(1)(b) TCA.

²⁶¹ Article 506(1)(c) TCA.

²⁶² For limitations concerning obligations that may be suspended, see Articles 762 in conjunction with Article 749(3) TCA.

b. Remedial measures relating to violations of the special access arrangements for the British Crown Dependencies

In addition, there is a special mechanism for remedial measures²⁶³ with respect to alleged violations of the **special access arrangements for British Crown Dependencies**.²⁶⁴ This mechanism confirms the **independent nature of the special access arrangements**. Although this mechanism also follows three escalatory steps, these steps **differ considerably**. The first step is the suspension of all or parts of the other Party's access under Article 502 TCA and does not involve tariff-related remedial measures.²⁶⁵ The second and third steps are identical to the first and second steps of Article 506(1) TCA. This means that there is **no suspension of obligations under Heading One generally**, which is normally the final step.

c. Proportionality of remedial measures

All remedial measures – including at the first escalatory step – must be **“proportionate to the alleged failure by the respondent Party and the economic and societal impact thereof”**.²⁶⁶ In addition, before each escalation, the complaining Party must fully exhaust all possibilities provided by the previous step and must conclude that such remedial measures are not “commensurate to the economic and societal impact of the alleged failure”.²⁶⁷ For example, the preferential tariff treatment of other goods may not be suspended if the complaining Party has not yet suspended fisheries access and the preferential tariff treatment of fishery products in whole. Even within the first step, a suspension of parts of the existing fisheries access will in many cases constitute the only proportionate response to a failure of the respondent Party to provide access to parts of its waters.²⁶⁸

Unfortunately, the requirement that **a suspension is “not commensurate”** to the economic and societal impact of the alleged violation is not further concretised. The subjective language of the relevant provisions (“if it considers”), when read in conjunction with this ambiguous requirement, points towards the complaining State having a **margin of appreciation**. However, Article 506(3) TCA does contain a clearly **objective requirement of proportionality** and, therefore, clarifies that this margin of appreciation is in any event limited. This is confirmed by the provisions on dispute resolution, which provisions show that arbitration tribunals can review the legality of remedial measures.²⁶⁹

6.1.2. Dispute resolution

Following a notification of remedial measures, the Parties have an **obligation to consult through the Specialised Committee on Fisheries** in order to reach a “mutually agreeable solution”.²⁷⁰ Such an obligation is typical in fisheries access agreements (including those of the EU) and represents common practice. However, the TCA goes far beyond this common practice by establishing a **compulsory dispute resolution mechanism** in the absence of agreement following consultations. In this event, the complaining Party must, **within 14 days of the notice announcing its remedial measures**, challenge the respondent Party's alleged failure to comply with Heading Five by requesting the establishment of an **arbitration tribunal**.²⁷¹ Unless otherwise provided, the arbitration proceedings

²⁶³ Article 506(2) TCA.

²⁶⁴ See 5.5.

²⁶⁵ Article 506(2)(a) TCA.

²⁶⁶ Article 506(3) TCA.

²⁶⁷ Cf. Articles 506(1)(b)-(c) and (2)(b)-(c) TCA.

²⁶⁸ Cf. Article 506(1)(a) TCA.

²⁶⁹ Articles 506(5) and (7) TCA.

²⁷⁰ Article 506(4) TCA.

²⁷¹ Article 506(5) TCA. This arbitration tribunal is established pursuant to Article 739 TCA (Part Six, Title I).

are governed by the provisions of Part Six, Title I.²⁷² In particular, the additional consultations and other requirements under the normal arbitration procedure do not apply.²⁷³ Moreover, arbitration tribunals must treat these disputes as **cases of urgency**,²⁷⁴ which means that they must deliver their interim **report within 50 days** of their establishment or, if they are unable to do so, **within 65 days**.²⁷⁵ Within **7 days** of the delivery of the interim report, the Parties may request the arbitration tribunal to review specific aspects of the report, and the other Party may comment on this request within **3 days** of the request.²⁷⁶ Otherwise, the interim report becomes the final ruling of the arbitration tribunal.²⁷⁷ In case there is a request for review, the arbitration tribunal renders its **ruling within 65 days** or, in case of delay, **within 80 days** of its establishment.²⁷⁸

At first glance, it might seem **unusual that the complaining Party must invoke the arbitration procedure** against the respondent Party for failure to comply. In traditional international dispute settlement, it would have been for the respondent Party to challenge the complaining Party's remedial measures in case it considers them unlawful. This is the approach taken, for example, **in WTO law under the DSU**.²⁷⁹ However, within the framework of the DSU, remedial measures can only be taken **after** a violation of the respondent Party has been found by the WTO's **Dispute Settlement Body** following a challenge by the complaining Party.²⁸⁰ In other words, the TCA allows **remedial measures at an earlier stage** than the DSU, but does not entirely dispense of the requirement that the complaining Party invoke a dispute settlement procedure. This way, the TCA's dispute resolution mechanism ensures that remedial measures are subject to **judicial review in all cases**.

If the arbitration tribunal concludes that the respondent Party has not violated the provisions of Chapter 5, the complaining Party must **terminate its remedial measures**.²⁸¹ The same applies if, at any point prior to or during the arbitration proceedings, the complaining Party is satisfied of the respondent Party's compliance with its relevant obligations under Heading Five.²⁸² Conversely, if the arbitration tribunal decides in favour of the complaining Party, its **remedial measures may remain in force** until the respondent Party complies with its obligations under Heading Five.²⁸³ In this event, the respondent Party is obliged to "comply immediately with the ruling of the arbitration tribunal in order to bring itself in compliance with the covered provisions".²⁸⁴

The fact that there is only a reference to an "alleged failure by the respondent Party to comply"²⁸⁵ raises the question of the **scope of the arbitration tribunal's jurisdiction** in relation to the remedial measures taken by the complaining Party. While this wording suggests that the arbitration tribunal's jurisdiction is restricted to the question of whether there was a **basis** for remedial measures (**the "if"**), it would be curious if it did not also extend to the **proportionality** of these measures (**the "how"**).²⁸⁶ Otherwise, the proportionality requirement would be rendered largely meaningless – an unlikely outcome. Moreover, and as reflected in the DSU, the procedure would deviate from **common practice**

²⁷² Articles 739 *et seq.* TCA. For an overview, see Fella *supra* note 251, 32-45.

²⁷³ Article 506(5) TCA.

²⁷⁴ Article 506(5) in conjunction with Article 744 TCA.

²⁷⁵ Article 745(2) in conjunction with Article 745(1) TCA.

²⁷⁶ Article 745(2) in conjunction with Article 744(2) TCA.

²⁷⁷ Article 745(3) TCA.

²⁷⁸ Article 745(4) in conjunction with Article 744(2) TCA.

²⁷⁹ See Article 22(6) *Understanding on Rules and Procedures Governing the Settlement of Disputes* (15 April 1994) UNTS 401.

²⁸⁰ See Articles 22(1)-(2) DSU.

²⁸¹ Article 506(6)(b) TCA.

²⁸² Article 506(6)(a) TCA.

²⁸³ Article 506(6)(b) TCA (*a contrario*).

²⁸⁴ Article 746(1) TCA.

²⁸⁵ Article 506(5) TCA.

²⁸⁶ Cf. Articles 506(1)-(3) TCA.

pursuant to which the arbitrator or arbitration panel has **jurisdiction to review the proportionality of the complaining Party's countermeasures**.²⁸⁷ Therefore, the preferred view is that the arbitration tribunal can review both the conformity of the respondent Party's conduct with Heading Five, as well as the complaining Party's remedial measures with the requirements of proportionality.

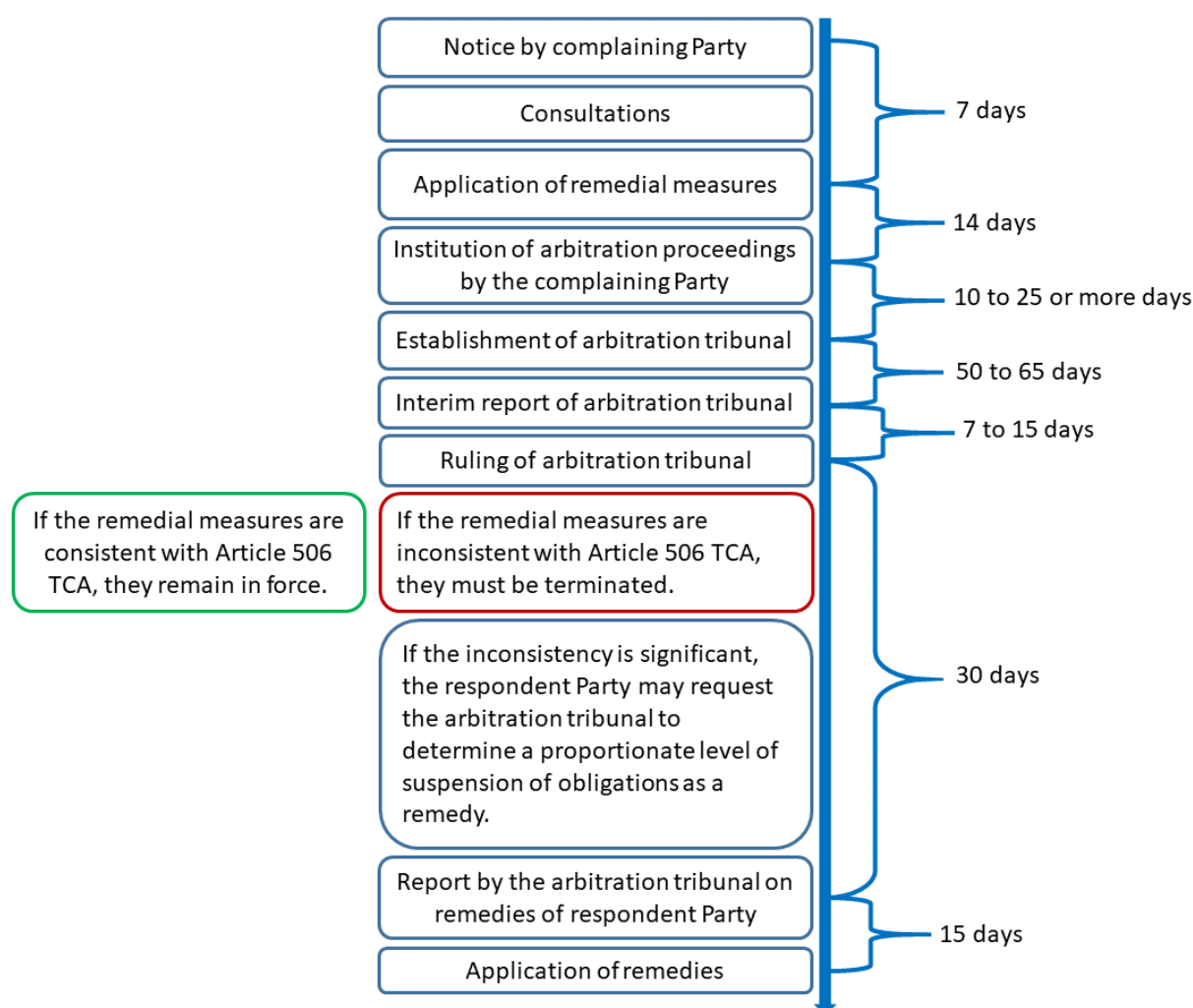
Additionally, there is a special procedure by which the **respondent Party can obtain remedies** if the arbitration tribunal **finds in favour of the respondent Party**.²⁸⁸ The standard situation would be that the complaining Party's remedial measures are unlawful because the **respondent Party has not violated provisions of Heading Five**. However, as stated, the same is arguably true in cases where the **remedial measures of the complaining Party are disproportionate**. In both of these situations, the complaining Party must terminate its remedial measures to the extent that the arbitration tribunal finds them unlawful. However, the respondent Party may additionally have an interest in taking remedial measures of its own in response of the complaining Party's unlawful remedial measures. For this purpose, the respondent Party may request the arbitration tribunal, **within 30 days from the ruling**, to determine a level of **suspension of obligations under the TCA "not exceeding the level equivalent to the nullification or impairment caused by the application of the [original] remedial measures"**.²⁸⁹

Such a decision of the arbitration tribunal is only available where the tribunal additionally finds that the inconsistencies of the original remedial measures with the applicable requirements are **"significant"**. While there is no explicit reference to proportionality, this requirement must arguably be read into the reference to Articles 506(1)-(2) TCA. The request of the respondent Party must contain a **proposal for a level of suspension** in accordance with the general requirements of remedial measures and the relevant **principles listed in Article 761 TCA**. The **respondent Party may apply remedial measures** in accordance with the level of suspension determined by the arbitration tribunal following a **waiting period of 15 days**.

²⁸⁷ See Article 22(7) DSU.

²⁸⁸ Article 506(7) TCA. See also, for comparison, the corresponding procedure under Articles 22(6)-(7) DSU.

²⁸⁹ Article 506(7) TCA.

Figure 4: Mechanism for remedial measures and dispute settlement under Article 506 TCA

Source: Valentin J. Schatz

For illustration purposes only.

6.1.3. Relationship with the general dispute resolution mechanism under Part Six of the TCA

Part Six (Dispute Settlement and Horizontal Provisions), Title I (Dispute Settlement) contains a **general mechanism for the resolution of disputes**.²⁹⁰ Unless explicitly excluded, this mechanism covers any “disputes between the Parties concerning the interpretation and application of the provisions of [the TCA] or of any supplementing agreement”.²⁹¹ Disputes concerning the interpretation and application of the **fisheries provisions** of Heading Five are **not excluded** from the scope of the dispute resolution mechanism.²⁹² In contrast to this, the general dispute resolution applies to disputes concerning the interpretation and application of the fisheries provisions of Heading Five **in addition** to the mechanism for remedial measures and dispute resolution under Article 506 TCA. It is beyond the scope of the present study to provide an in-depth analysis of the general dispute resolution

²⁹⁰ Articles 734 *et seq.* TCA.

²⁹¹ Article 735(1) TCA.

²⁹² Cf. Articles 735(2)-(5) TCA.

mechanism.²⁹³ Needless to say, it provides for **consultations**²⁹⁴ prior to the submission of the dispute to a compulsory **arbitration procedure**.²⁹⁵

Importantly, under this procedure, the arbitration tribunal first renders its ruling,²⁹⁶ following which the respondent Party – in case of a finding that an obligation under the TCA was breached – must take the **necessary measures to comply with the ruling**.²⁹⁷ It is only in the case of non-compliance (in time) that the complaining Party may **request compensation** or adopt **remedial measures**.²⁹⁸ A clear advantage of taking this avenue, rather than that of Article 506 TCA, is that a legally binding arbitral decision on the legality of the respondent Party's conduct is obtained prior to any further escalation in the dispute through remedial measures. This also reduces the risk of taking unlawful remedial measures that, following a finding of the arbitration tribunal, may result in remedial measures by the respondent Party.

6.2. Institutional framework

Part One, Title III contains the **institutional framework of the TCA**,²⁹⁹ which includes the **Partnership Council**, the **Specialised Committee on Fisheries** and the **Parliamentary Partnership Assembly**. The first of these two institutions have been assigned important roles in Part Two, Heading Five, Chapter 4, while the functions of the latter are more limited. A Council Decision of the EU³⁰⁰ sets out important details regarding the **role of different EU institutions in the implementation of the TCA**.³⁰¹ In addition to the general provisions concerning cooperation in the implementation of the TCA,³⁰² the Parties are obliged to **share such information as is necessary to support implementation**, specifically of Heading Five, and subject to the laws of each Party.³⁰³

6.2.1. Partnership Council

The **Partnership Council** comprises representatives of the EU and the UK.³⁰⁴ It is co-chaired by a Member of the European Commission³⁰⁵ and a representative of the UK at ministerial level, and meets at least once a year and/or at the request of the EU or the UK.³⁰⁶ Its main tasks are to oversee that the TCA and any supplementing agreements achieve their respective objectives, and to supervise and facilitate the implementation and application of the TCA.³⁰⁷ As such, the Partnership Council functions are a **forum to which the Parties can refer any issues that might arise with respect to implementation, application and interpretation of the TCA**.³⁰⁸ It adopts its decisions and

²⁹³ For an overview, see Paschalis Paschalidis and Léo Delamare, 'Le règlement des différends dans l'accord de commerce et de coopération entre l'UE et le Royaume-Uni' (2021) *Journal de Droit Européen* 334-340.

²⁹⁴ Article 738 TCA.

²⁹⁵ Article 739 TCA.

²⁹⁶ Article 745 TCA.

²⁹⁷ Articles 746 and 747 TCA.

²⁹⁸ Article 749 TCA.

²⁹⁹ For an overview, see Fella, *supra* note 251, 21–31; Mark Konstantinidis and Poula Vasiliki, 'From Brexit to Eternity: The institutional landscape under the EU-UK Trade and Cooperation Agreement' (2021) *European Law Blog*.

³⁰⁰ [Council Decision \(EU\) 2021/689](#) of 29 April 2021 on the Conclusion, on Behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one Part, and the United Kingdom of Great Britain and Northern Ireland, of the other Part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning Security Procedures for Exchanging and Protecting Classified Information.

³⁰¹ For a brief overview, see Fella, *supra* note 251, 27–28.

³⁰² Cf. Article 3(1) TCA.

³⁰³ Article 507 TCA.

³⁰⁴ Article 7(1) TCA.

³⁰⁵ Cf. Article 2(1) Council Decision (EU) 2021/689.

³⁰⁶ Article 7(2) TCA.

³⁰⁷ Article 7(3) TCA.

³⁰⁸ Article 7(3) TCA.

recommendations by mutual consent³⁰⁹ and its work is governed by the rules of procedure set out in Annex 1 TCA.³¹⁰

The Partnership Council has **far-reaching powers, which includes “legislative” competences** to, for example, amend or supplement the primary treaty rules of the TCA.³¹¹ The tasks of the Partnership Council in relation to Part Two are found in Heading Six.³¹² The Partnership Council may, adopt decisions to amend Articles 502 and 503 TCA³¹³ and any other provision of Heading Five.³¹⁴ Moreover, the Partnership Council may also adopt decisions to amend Annexes 35, 36 and 37 TCA.³¹⁵

Additionally, the Partnership Council is entrusted with the **competence to issue interpretations** of the provisions of Part Two, including those of Heading Five.³¹⁶ As all decisions adopted by the Partnership Council are binding,³¹⁷ this mechanism allows the Parties to clarify contested interpretations of fisheries provisions in order to avoid or resolve disputes. The binding nature of the decisions of the Partnership Council also extend to other bodies set up under the TCA, including the arbitration tribunal referred to in Part Six, Title I.³¹⁸ Therefore, and by way of mutual consent, interpretations adopted by the Partnership Council may also be used to correct unwelcome jurisprudence of the arbitration tribunal.

6.2.2. Specialised Committee on Fisheries

The **Specialised Committee on Fisheries** deals with matters covered by Part Two, Heading Five.³¹⁹ Like other Specialised Committees, it comprises **representatives of each Party** (the European Commission in case of the EU).³²⁰ The Parties must ensure that their representatives have the appropriate expertise with respect to the issues being discussed – in the present case fisheries matters. The work of the Specialised Committee on Fisheries is initially governed by the rules of procedure set out in Annex 1 TCA, but the Committee may adopt its own rules of procedure.³²¹ It is expected to meet 3 to 5 times per year, particularly during the first 9 months of the year.³²²

The Specialised Committee on Fisheries has a variety of powers.³²³ Specific tasks and powers of the Committee are stated in Article 508 TCA. In particular, Article 508 provides a **non-exhaustive list of tasks** and enumerates the Committee’s **powers to adopt measures, including decisions and recommendations**.³²⁴ The extent of tasks and powers listed underlines the central role that the Specialised Committee on Fisheries plays in the governance structure of Heading Five. By way of example, the tasks of the Specialised Committee on Fisheries include the development of multi-year strategies for conservation and management,³²⁵ the setting of TACs for special stocks,³²⁶ the preparation of annual consultations, and serving as a forum for consultation in the context of the peaceful settlement of disputes. Examples of powers of the Specialised Committee on Fisheries include

³⁰⁹ Article 10(2) TCA.

³¹⁰ Article 7(5) TCA.

³¹¹ Article 7(4) TCA.

³¹² Article 519 TCA lists the tasks of the Partnership Council.

³¹³ Article 502(4) TCA.

³¹⁴ Article 519(a)(xi) TCA in conjunction with Article 7(4)(c) TCA.

³¹⁵ In accordance with Article 508(3) TCA; Article 519(a)(xii) TCA in conjunction with Article 7(4)(c) TCA.

³¹⁶ Article 519(b) TCA in conjunction with Article 7(4)(c) TCA.

³¹⁷ Article 10(1) TCA.

³¹⁸ Article 10(1) TCA.

³¹⁹ Article 8(1)(q) TCA.

³²⁰ Article 2(1) Council Decision (EU) 2021/689.

³²¹ Articles 8(9) and (10) TCA.

³²² Specialised Committee on Fisheries 2021, *supra* note 149.

³²³ See Article 8(4) TCA.

³²⁴ Articles 508(1) and (2) TCA.

³²⁵ Article 508(1)(b) TCA.

³²⁶ Article 499(5) in conjunction with Article 508(1)(g) TCA.

adopting measures, such as decisions and recommendations, with respect to most of its general tasks as well as some additional issues, such as the list of pre-existing international obligations referred to in Article 496(2) TCA.

6.2.3. Parliamentary Partnership Assembly and role of the European Parliament

The TCA envisages a joint mandate for the European Parliament and the UK Parliament regarding the Agreement's implementation. For this purpose, they may jointly establish a **Parliamentary Partnership Assembly** consisting of members of both parliaments, which functions **as a forum for exchanging views on partnership**.³²⁷ The Parliamentary Partnership Assembly has rights and powers that establish **democratic oversight and an advisory function**.³²⁸ These powers include the power to request relevant information regarding the implementation of the fisheries-related provisions of the TCA from the Partnership Council, which is in turn obliged to supply the requested information.³²⁹

While the Specialised Committees are not mentioned separately in Article 11 TCA, they are essentially subsidiary bodies of the Partnership Council in that they must assist it in the performance of its tasks, report to it and carry out tasks that it assigns to them.³³⁰ Therefore, the power of the Parliamentary Partnership Assembly to request information from the Partnership Council ultimately also covers any Specialised Committees, including the **Specialised Committee on Fisheries**. The Parliamentary Partnership Assembly also has the **right to be informed** of the Partnership Council's decision and recommendations³³¹ and has the power to make non-binding recommendations to the Partnership Council.³³² At the time of writing, the Parliamentary Partnership Assembly has **not yet been established**, although preparations are ongoing. On 5 October 2021, the European Parliament adopted a decision setting up its **delegation of 35 members** to the Parliamentary Partnership Assembly.³³³

Besides the role of the **European Parliament** directly under the TCA, the European Parliament **retains its internal parliamentary prerogatives under the TEU**³³⁴ **and TFEU**.³³⁵ Whenever the Partnership Council or the Specialised Committee on Fisheries adopts acts that have legal effect under the TCA, the position of the EU that the European Commission must take in these institutions must first be adopted by the Council of the EU, following a proposal from the European Commission, in accordance with the **procedure set out in the TFEU**.³³⁶ While the European Parliament is not involved in this process, it must be **"immediately and fully"** informed **at all stages of the procedure**.³³⁷

In addition, the Commission is obliged to **inform the Parliament "as appropriate"** in the exercise of its competence to take measures under the TCA.³³⁸ More generally, the Parliament **"shall be put in a position to exercise fully its institutional prerogatives throughout the process in accordance with the Treaties"**.³³⁹ Moreover, the Commission is obliged to submit **annual reports on the implementation and application of the TCA** to the Parliament for an initial period of five years from

³²⁷ Article 11(1) TCA.

³²⁸ Article 11(2) TCA.

³²⁹ Article 11(2)(a) TCA.

³³⁰ Article 8(4) TCA.

³³¹ Article 11(2)(b) TCA.

³³² Article 11(c)(b) TCA.

³³³ [European Parliament decision of 5 October 2021](#) on setting up a delegation to the EU-UK Parliamentary Partnership Assembly, and defining its numerical strength (2021/2917(RSO)).

³³⁴ [Treaty on European Union](#) (26 October 2012).

³³⁵ [Treaty on the Functioning of the European Union](#) (26 October 2012).

³³⁶ This procedure is laid down in Article 218(9) TFEU.

³³⁷ Article 218(10) TFEU.

³³⁸ Article 3(2) Council Decision (EU) 2021/689 of 29 April 2021.

³³⁹ Article 2(3) Council Decision (EU) 2021/689 of 29 April 2021.

1 January 2021.³⁴⁰ Thereafter, the Commission must report on a regular basis and at least every two years.³⁴¹

6.3. Termination

Part Two, Heading Five has its own **termination provision that** – like other aspects of Heading Five – distinguishes between the general fisheries provisions of Heading Five and the specific access arrangements for the British Crown Dependencies.³⁴² Although similar termination provisions exist for other sections of the TCA, this clause reflects the **politically sensitive nature of the fisheries provisions**. This is especially relevant given that the UK initially aimed for a separate fisheries framework agreement.

6.3.1. Termination of Part Two, Heading Five

There is also the possibility of a **unilateral termination of Heading Five by each Party** at any moment by written notification through diplomatic channels. In such a case, there is no requirement to terminate the TCA as a whole under Article 779 TCA or the entirety of Part Two under Article 531 TCA.³⁴³ However, Heading Five is **tied to Headings One (Trade), Two (Aviation) and Three (Road Transport)**, and these Headings will cease to be in force together with Heading Five “on the first day of the ninth month following the date of notification”.³⁴⁴ In any event, the obligations of the Parties under Heading Five for the year during which the termination becomes effective will **continue to apply until the end of that year**.³⁴⁵

6.3.2. Termination and amendment of the special access arrangements for the British Crown Dependencies

As an expression of the special and separate nature of the arrangements regarding the **British Crown Dependencies**, Article 509(4) TCA contains a mechanism whereby the **special access arrangements relating to these territories remain in force independently of Heading Five** if either Party terminates Heading Five as a whole.³⁴⁶ In other words, Articles 502 and 503 TCA as well as other relevant provisions would **continue to operate** as a replacement for, *inter alia*, the **Granville Bay Agreement** without a reactivation of the latter. Thus, while Article 502(3) TCA seeks to ensure the legal independence of the special access arrangements by allowing for their separate termination, Article 509(4) TCA aims to achieve the same by shielding them from the general termination mechanisms of the TCA. However, if either Party also wants to terminate the specific access arrangements once Heading Five has been terminated, Article 509(4) TCA allows for a **unilateral termination of one or more of the British Crown Dependencies** by either Party, which termination is effective three years after the notice of termination.³⁴⁷ Alternatively, the special access arrangements are terminated on the date on which Articles 520(3)–(5) TCA cease to be in force.³⁴⁸

³⁴⁰ Article 2(4) Council Decision (EU) 2021/689 of 29 April 2021.

³⁴¹ Article 2(4) Council Decision (EU) 2021/689 of 29 April 2021.

³⁴² Article 509 TCA.

³⁴³ Article 509(1) TCA. For an overview of the different termination clauses of the TCA, see Fella, *supra* note 251, 66–67.

³⁴⁴ Article 509(1) TCA.

³⁴⁵ Article 509(2) TCA.

³⁴⁶ Such termination is done under Article 509(1) TCA.

³⁴⁷ Articles 509(3)(a)(i) and (b) TCA.

³⁴⁸ Articles 509(3)(a)(ii) and (c) TCA.

6.4. Periodic review of Heading Five

Heading Five also contains a **review clause** in Article 510 TCA, with Article 510(1) providing for an initial review of the provisions of Heading Five **four years after the end of the adjustment period (= from 1 July 2030)**. Thereafter, further reviews of this nature may be conducted “at subsequent intervals of four years after the conclusion of the first review”.³⁴⁹ The modalities of the review are decided by the Parties in advance through the **Specialised Committee on Fisheries**.³⁵⁰ The purpose of these reviews is to consider “whether arrangements, including in relation to access to waters, can be further codified and strengthened”.³⁵¹ The review applies to the **entirety of Heading Five**, including the provisions concerning conservation and sustainable exploitation. This is further evidenced by the extensive and non-exhaustive list of topics to be evaluated as part of the review under Article 510(4) TCA.

6.5. Relationship with other agreements

The **conflict clause** of Article 511(1) TCA clarifies that Part Two, Heading Five is “without prejudice to other existing agreements concerning fishing by vessels of a Party within the area of jurisdiction of the other Party”. Unlike the term “waters” used in the other provisions of Heading Five,³⁵² **the term “area of jurisdiction” is not defined** in Article 495 TCA or in Article 511(1) TCA. This renders the geographic scope of this provision somewhat ambiguous. Ultimately, the term “area of jurisdiction” can only be interpreted as a reference to **all maritime zones of exclusive coastal State rights and jurisdiction** regarding the conservation and management of fisheries (EEZ, continental shelf with respect to sedentary species, archipelagic waters, territorial sea, and internal waters).³⁵³ However, the CFP Regulation, which has been replaced by the TCA in the EU/UK relationship, has previously regulated access to the waters of EU Member States exhaustively in the sense of a full and non-discriminatory right of access under its Article 5(1) – the sole exception being the so-called **voisinage agreements** under Article 5(2) CFP Regulation.³⁵⁴ Therefore, with the potential exception of the *voisinage* agreement between Ireland and the UK (which status remains unclear),³⁵⁵ it is difficult to identify any true fisheries access agreements falling within the scope of Article 511(1) TCA. In particular, the **London Fisheries Convention of 1964**³⁵⁶ is not covered since the UK withdrew from this Convention, effective as from 31 January 2020.³⁵⁷ Given that the term “area of jurisdiction” goes beyond the term “waters” (of the Parties) under the TCA, Article 511(1) TCA may also serve as a conflict clause in relation to fisheries access agreements between territories of the Parties *not* covered by the TCA, such as non-European and overseas territories.³⁵⁸

Article 511(2) TCA specifically addresses the relationship between the TCA and any **existing agreements or arrangements with respect to fishing of Union vessels in the territorial sea of the British Crown Dependencies** (and vice versa), as discussed above in relation to the special access regime of these territories.³⁵⁹

³⁴⁹ Article 510(2) TCA.

³⁵⁰ See 6.2.2.

³⁵¹ Article 510(1) TCA.

³⁵² See 2.1.1.

³⁵³ See 3.1.1.

³⁵⁴ On Article 5(2) CFP Regulation, see Schatz, *supra* note 4, 470–471.

³⁵⁵ *Ibid.*, 475–479, with further references. See also Clive R. Symmons, ‘Recent Developments in Ireland: The Voisinage Doctrine and Irish Waters: Recent Judicial and Legislative Developments’ (2018) [49 Ocean Development & International Law 79–84](#).

³⁵⁶ *Fisheries Convention* (9 March 1964) 581 UNTS 57.

³⁵⁷ For detailed analysis of the status of the London Fisheries Convention and its role in the context of the UK’s withdrawal from the EU, see Schatz, *supra* note 4, 484–487.

³⁵⁸ See 2.1.1.

³⁵⁹ See 5.5.

7. TRADE-RELATED PROVISIONS CONCERNING FISHERIES

KEY FINDINGS

Part Two, Heading One (Trade) contains **trade-related provisions** relevant to fisheries, which are, however, not very detailed:

- **Fishery products** that are “products of sea fishing and other products taken from the sea outside any territorial seas by a vessel of a Party” are considered as **originating in the relevant Party**. As such, they enjoy **preferential tariff treatment**, which is of utmost importance to the fishing industries of the UK and, to a lesser extent, that of the EU. As the preferential tariff treatment of fishery products may be suspended through **compensatory measures** and **remedial measures**, any escalation of fisheries disputes that could lead to the imposition of such measures carries a risk of severe ramifications in the context of trade.
- The TCA’s subsidy control regime **excludes “subsidies related to trade in fish and fish products” from subsidy control**. Given that Part Two, Heading Five equally does not contain any provisions tailored to subsidy control, the question of the lawfulness of subsidies related to trade in fish and fishery products is not addressed by the TCA.
- There are **commitments and obligations concerning trade and sustainable management of marine biological resources and aquaculture**, which do not, however, modify the fisheries provisions of Part Two, Heading Five. Whereas the *commitments* primarily concern **compliance with international fisheries law**, the *obligations* address **participation in RFMOs, combatting IUU fishing** and cooperation in the **WTO, RFMOs** and **other multilateral fora**.

Part Two, Heading One (Trade) contains a number of **trade-related provisions of importance in the context of fisheries**.³⁶⁰

7.1. National treatment and market access for fishery products

Part Two, Heading One, Title I (Trade in Goods), Chapter 1 (National Treatment and Market Access for Goods including Trade Remedies) contains a **general prohibition of customs duties “on all goods originating in the other Party”**, except as otherwise provided for in the TCA (Article 21 TCA). In other words, the TCA establishes a general a system of **preferential tariff treatment** for such goods. Fishery products are considered to be wholly obtained or produced in a Party, thereby profiting from preferential tariff treatment, if they are “**products of sea fishing and other products taken from the sea outside any territorial seas by a vessel of a Party**”.³⁶¹ Importantly, the preferential tariff treatment of fishery products under Article 21 TCA may be suspended through **compensatory measures**³⁶² and **remedial measures**.³⁶³

³⁶⁰ On the relationship of fisheries and trade in the EU’s past trade agreements, see Mihail Vatsov, ‘Towards Achieving Sustainable Fishing Through EU Trade Agreements?’ (2019) [3 Europe and the World: A Law Review 1–18](#).

³⁶¹ Article 41(1)(h) TCA.

³⁶² See 5.4.

³⁶³ See 6.1.1.a. and 6.1.1.b.

7.2. Exception from subsidy control

Part Two, Title XI, Chapter 3 (Subsidy Control) contains a general set of provisions concerning the **control of trade subsidies**. However, Chapter 3 **does not apply to “subsidies related to trade in fish and fish products”**.³⁶⁴ As Part Two, Heading Five equally does not contain any provisions tailored to subsidy control, the question of the lawfulness of subsidies related to trade in fish and fishery products is not addressed by the TCA.

7.3. Trade and sustainable management of marine biological resources and aquaculture

Within Part Two, Heading One, Title XI (Level Playing Field for Open and Fair Competition and Sustainable Development), Chapter 7 (Environment and Climate), Article 404 TCA addresses the issue of **trade and sustainable management of marine biological resources and aquaculture**. However, this provision is explicitly **“without prejudice to the provisions of Heading Five”** on “Fisheries”.³⁶⁵ Moreover, this provision simply states that the Parties recognise the importance of conservation and sustainable management of marine biological resources and marine ecosystems, that the Parties will promote responsible and sustainable aquaculture, and emphasises the role that trade has to play in pursuing these objectives. Given its non-prescriptive wording, it must be assumed that Article 404(1) TCA **does not create binding legal effects** beyond constituting a reference point for the interpretation of other provisions. However, Article 404(1) is further concretised by Article 404(2) TCA, which states several **commitments and obligations of the Parties**.

7.3.1. Commitment to act consistently and comply with relevant instruments of international fisheries law

Article 404(2)(a) TCA documents the Parties’ commitment to “acting consistently and complying, as appropriate,” with various **instruments of international fisheries law**. In this respect, Article 404(2)(a) TCA may be classified as a so-called **rule of reference** regarding the **relevant agreements of the UN and FAO, UNCLOS, the UNFSA, the Compliance Agreement**,³⁶⁶ **the CCRF**,³⁶⁷ **and the PSMA**.

At first glance, the use of the ambiguous wording “as appropriate” could be interpreted as implying that the relevant instruments, including the mentioned legally binding treaties, may not have to be complied with after all. However, a preferred explanation is that this wording was included to avoid transforming the entire content of the CCRF, a non-binding soft-law instrument adopted by the FAO, into binding obligations under the TCA. Even if the qualification “as appropriate” is considered to be applicable also to the listed treaties, this would only mean that there is no *additional* commitment to comply with these treaties *under the TCA*. However, on the basis of the **principle of pacta sunt servanda**, the Parties must comply with these treaties in their implementation of the TCA. Therefore, Article 404(2)(a) TCA is primarily declaratory in respect of the mentioned treaties.

The open reference to **relevant agreements of the UN and FAO** ensures that treaties not mentioned in the list, but applicable to fisheries conservation and management, are also covered. Moreover, it provides scope for including treaties of relevance in the future. In relation to relevant soft-law, the commitment to act consistently (“as appropriate”) with the CCRF increases the legal significance of the

³⁶⁴ Article 364(5) TCA.

³⁶⁵ Article 404(4) TCA.

³⁶⁶ *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (24 November 1993) 2221 UNTS 91.

³⁶⁷ FAO, *Code of Conduct for Responsible Fisheries* (31 October 1995).

CCRF. Notably, a number of relevant non-binding instruments, such as the FAO's **Voluntary Guidelines for Flag State Performance**, are not mentioned.³⁶⁸ There is, however, an additional commitment to participate in the FAO's initiative on the **Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels**.³⁶⁹

7.3.2. Obligation to participate in the work of RFMOs

The Parties are obliged to **promote sustainable fisheries and good fisheries governance** through active participation in the work of relevant international organisations or bodies to which they are either members, observers or cooperating non-contracting parties.³⁷⁰ In the context of the North-East Atlantic, these relevant international organisations include RFMOs such as **NAFO, NASCO, NEAFC** and **ICCAT**. Where applicable, **active participation in RFMOs** has to take place by means of (1) effective monitoring, control or enforcement of the RFMOs' resolutions, recommendations or measures, (2) the implementation of their catch documentation or certification schemes, and (3) port State measures.³⁷¹

7.3.3. Obligation to combat IUU fishing

The Parties have an obligation to **adopt and maintain effective tools to combat IUU fishing**.³⁷² Within the framework of the CFP, the **IUU Regulation** serves this purpose.³⁷³ The requirement that such tools be "effective" makes clear that it is not sufficient to merely have "any" tools in place if such tools are inadequate at combatting IUU fishing. It further clarifies that the Parties may replace current tools with more effective options rather than maintaining less effective measures. Article 404(2)(c) TCA explicitly mentions **measures to exclude the products of IUU fishing from trade flows**, including cooperation to that end. The **legality of trade measures** to combat IUU fishing, or unsustainable fishing practices more generally under world trade law, is a complex matter beyond the scope of this study.³⁷⁴

7.3.4. Development of sustainable and responsible aquaculture

Article 404(3) TCA obliges the Parties to **cooperate on conservation and trade-related aspects of fisheries and aquaculture policies and measures**. Such cooperation may take place in the framework of the **WTO** and **RFMOs** as well as **other suitable multilateral fora** "as appropriate". Additionally, cooperation in this context must serve the aim of "promoting sustainable fishing and aquaculture practices and trade in fish products from sustainably managed fisheries and aquaculture operations".³⁷⁵ In relation to aquaculture, Article 404(2)(d) TCA also obliges the Parties to **"promote the development of sustainable and responsible aquaculture"**.

³⁶⁸ [Voluntary Guidelines for Flag State Performance](#) (11 June 2014).

³⁶⁹ FAO, [Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels](#), 2021.

³⁷⁰ Article 404(2)(b) TCA.

³⁷¹ On port State measures, see 3.2.4.

³⁷² Article 404(2)(c) TCA.

³⁷³ [Council Regulation \(EC\) No 1005/2008](#) of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

³⁷⁴ See, e.g., Margaret Young, 'International Trade Law Compatibility of Market-related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing' (2016) [69 Marine Policy 209–219](#); Robin R. Churchill, 'International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing', in Caddell and Molenaar (eds.), *supra* note 30, 319–350; Eva van der Marel "Evaluating Market Conditionality in Fisheries: Interactional Law and Global Administration" (PhD thesis, defended 24 January 2020 at UiT The Arctic University of Norway).

³⁷⁵ Article 404(3) TCA.

8. CONCLUSION AND RECOMMENDATIONS

KEY FINDINGS

The fisheries-related provisions of the TCA (particularly in Part Two, Heading Five) constitute a bilateral fisheries agreement **unprecedented in international fisheries law**. Following the extensive nature of these provisions, there is considerable potential for future disputes between the EU and the UK:

- The **detailed arrangements with regards to fishing opportunities** are evidence of a unique and close relationship in fisheries matters – whether in the political interest of both Parties or not. In this respect, the EU is faced with a **gradual reduction of quota shares until June 2026** and the UK finds itself locked into **fixed quota shares that cannot unilaterally be changed** despite annual consultations on TACs. In this context, differing views between the Parties concerning quotas **must not result in unsustainable TACs and allocations** and **best attempts should be made to achieve equitable results**.
- The potential for future disputes – including the escalation of current disputes – are also evident in the **extensive arrangements on access to waters during the adjustment period until 30 June 2026**. After the end of the adjustment period, when general access to waters is no longer guaranteed, the relationship between the EU and the UK concerning such access has the **potential to unravel to a considerable extent**. With this in mind, the Parties should **act in good faith, manage expectations and adopt moderate positions** to avoid disputes over access that could result in severe repercussions for fisheries, trade, and the EU-UK partnership generally.
- The TCA's arrangements on governance will play an important role in preventing and settling disputes. If institutional discussions and bilateral consultations are unable to settle a dispute, the Parties can make use of the **general dispute resolution mechanism** of the TCA to obtain a **binding ruling by an arbitration tribunal** before opting for remedial measures. Alternatively, the Parties may take **remedial measures** (including severe suspensions of preferential tariff treatment) right away but must submit these measures to **legal review by an arbitration tribunal**.
- Even in the most serious disputes, there is little incentive for the Parties to opt out of the TCA's fisheries regime entirely since **the Parties cannot unilaterally escape these arrangements** by terminating Heading Five (Fisheries) **without also terminating Headings One (Trade), Two (Aviation) and Three (Road Transport)**.
- The mentioned key aspects of the TCA concerning fishing opportunities, access and trade should not, however, distract from the TCA's **ambitious objectives and principles concerning the conservation and sustainable use of fisheries**. From a legal perspective, the EU must prioritise the implementation of these objectives and principles over short-term economic interests in order to secure the interests of both current and future generations of EU citizens.

When considered in their entirety, the fisheries-related provisions of the TCA (in particular those of Part Two, Heading Five) constitute a bilateral fisheries agreement that is **unprecedented in international fisheries law**. Only the **arrangements under the CFP**, from which some aspects of the TCA (such as access in the 6-12 NM belt of the territorial sea and quota allocation based on relative stability) are ultimately derived, are more extensive. At the same time, the arrangements under the CFP and the TCA are quite different, particularly when compared to the TCA's mechanisms for compensatory measures, remedial measures, and dispute resolution. The following **conclusions** focus on key aspects of the TCA's fisheries provisions that stand out in particular and which may pose distinct challenges:

- The extent of the TCA's fisheries provisions, **integrating aspects of fisheries and trade**, has no equivalent in the history of fisheries access agreements. This integration is clear evidence of the success of the EU in achieving its goal of creating a strong bond between the TCA's fisheries arrangements and the provisions on trade in order to **reduce the UK's legal and political leeway** in withdrawing from (parts of) the arrangements on fishing opportunities and access to waters.
- The arrangements on **fishing opportunities** are extremely detailed and include **annual consultations on TACs** as well as **fixed allocations of quota shares based on Annexes 35 and 36 TCA** for a broad variety of stocks, such as stocks that are managed unilaterally or multilaterally by coastal States or within the framework of RFMOs. These arrangements are evidence of a uniquely close relationship in fisheries matters – be it in the political interest of both Parties or not. Notably, the EU's quota shares with respect to many stocks are **gradually reduced until the end of the adjustment period in 2026**, after which they remain stable. This allocation system is much **closer to the principle of relative stability** used under the CFP than to the concept of zonal attachment that would have been the UK's preference.
- The extensive **arrangements on access to waters** during the **adjustment period until 30 June 2026** reflect international best practices with respect to a gradual reduction of quotas and access that shields the fishing industry from (parts of) the immediate disruption caused by changing fisheries arrangements. The burden of the industry can be further alleviated with supporting measures such as the **Brexit Adjustment Reserve**, which is of particular importance in the context of fisheries.³⁷⁶ The access arrangements are additionally guarded by a unique mechanism for **compensatory measures** in response to withdrawal or reduction of provisional access in situations of provisional TACs pending agreement on TACs. This mechanism is accompanied by a binding **dispute resolution procedure** that involves a review of the legality of compensatory measures by an arbitration tribunal.
- From an institutional perspective, the implementation and future development of the detailed fisheries regime of the TCA is primarily governed via the **Partnership Council** and the **Specialised Committee on Fisheries**. The **role of the European Parliament** directly under the TCA is limited to an oversight and advisory function in relation to the implementation and adoption of recommendations addressed to the Partnership Council through the joint **Parliamentary Partnership Assembly**.
- Where disputes cannot be prevented or resolved through its institutional framework or via direct consultations between the Parties, the TCA provides a number of avenues for dispute

³⁷⁶ See Article 4(3) and Annex I of [Regulation \(EU\) 2021/1755](#) of the European Parliament and of the Council of 6 October 2021 establishing the Brexit Adjustment Reserve.

resolution that are significantly less cooperative and more confrontative in nature. Violations of the TCA's fisheries provisions are subject to a **special mechanism for remedial measures** and binding **dispute resolution involving an arbitration tribunal**. Such remedial measures may, in severe cases, even go beyond compensatory measures because they cover the **suspension of Part Two, Heading One (Trade)** entirely. To avoid the risk of countermeasures in response to unlawful remedial measures as well as an aggravation of the dispute more generally, the complaining Party can also invoke the **general dispute resolution mechanism under Part Six**, which follows a reverse procedure (**remedial measures only after arbitration**).

As far as **recommendations** for future action are concerned, it should be noted that the present analysis is largely **limited to legal considerations**, taking into account that its authors are not legitimized to make purely political recommendations. Against that background, the present study justifies the following recommendations:

- In the interest of cooperation and sustainable fisheries management (as required by international fisheries law), and despite the continuing potential for disagreement concerning the basis for the allocation of quota shares, the Parties should **strive to reach agreement on TACs and other management measures during the annual consultations**. Differing views regarding quotas and allocations must not result in unsustainable TACs or allocations, and best attempts should be made to achieve equitable results, taking into account the socio-economic impacts for both Parties in the short and long term. Notably, in the absence of agreement on TACs, the TCA provides for an **innovative mechanism for science-based and precautionary provisional TACs**. This is a considerable achievement that could provide a blueprint beyond the EU-UK fisheries relationship, including within the framework of RFMOs.
- The close relationship in terms of access to waters between the EU and UK is not set in stone. Rather, it has the **potential to unravel to a considerable extent** after the end of the adjustment period, when general **access to the respective waters is no longer guaranteed**. It is highly likely that the **UK will seek to significantly reduce EU access** to its waters as part of the annual negotiations after 2026, which may lead to future disputes going far beyond the current disputes experienced in relation to the UK's territorial sea and that of the Bailiwick of Jersey. In this respect, both Parties should **implement the TCA in good faith, manage expectations and adopt moderate positions to avoid disputes** over access that could result in severe repercussions for fisheries, trade, and the EU-UK partnership more generally. It is in this respect that the TCA's arrangements on fisheries governance play an important role.
- The TCA's fisheries provisions bring with them **considerable potential for future disputes between the EU and the UK**. Given the lack of other (unilateral) options under the TCA to achieve some of the initial aims of its withdrawal from the EU in terms of fisheries, the UK may have an incentive to interpret the existing ambiguities and flexibilities in some of the provisions of Heading Five to its advantage. Such interpretations could trigger disputes with the EU. Therefore, the trade-related instruments of the TCA should arguably be considered a matter of last resort if Heading Five is meant to provide a lasting cooperative framework for fisheries.
- As far as the more confrontative instruments for dispute resolution envisaged by the TCA are concerned, in most situations invocation of the **general dispute resolution mechanism** under Part Six will be the preferable option, taking into account that remedial measures can then only be taken **after** arbitration. Moreover, even in the most serious disputes, there is little incentive for the Parties to opt out of the TCA's fisheries regime entirely as the Parties **cannot**

unilaterally escape these arrangements by terminating Heading Five (Fisheries) without also terminating **Headings One (Trade), Two (Aviation) and Three (Road Transport)**.

- The EU and the UK have agreed on **ambitious objectives and principles concerning the conservation and management of fisheries** under the TCA, **including sustainable long-term management, application of the precautionary and ecosystem-based approaches, and science-based fisheries management**. In the interest of current and future generations of EU citizens, a priority of the EU should be to ensure that the implementation of the TCA's fisheries provisions and their future development is true to these objectives and principles not only on paper but also in practice.

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This study is the first research paper in a series of three, commissioned for a PECH Committee Workshop. It provides an analysis of the legal aspects of the EU-UK TCA relating to fisheries. The analysis covers, *inter alia*, the scope of the fisheries provisions, conservation and management, fishing opportunities, arrangements on access to waters, arrangements on governance (including provisions on remedial measures, dispute settlement, institutional arrangements, termination, review and relationship with other agreements), and trade-related provisions with relevance for fisheries. It concludes with recommendations for the implementation of the fisheries provisions of the EU-UK TCA.
