

Brexit, Fisheries and Scottish Devolution: An Intergovernmental Disruption

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Abstract

With the UK leaving the EU, the Common Fisheries Policy (CFP) will no longer apply and an alternative legislative framework will need to be put in place, simultaneously navigating the devolved settlement. However, aspects of fisheries management fall under international negotiations, which is a reserved area, to the UK Government. Disagreements between the UK and Scottish governments over where the line between devolved and reserved lies in this matter has led to difficulties in formulating a post-Brexit fisheries framework. This dispute has exposed weaknesses in intergovernmental relations between the two governments.

Keywords

Fisheries, Brexit, Devolution, Scottish Politics, British Politics

Introduction

The Scottish Parliament began its work in 1999 following a referendum two years before. Although campaigns for and debates around the idea of Scottish self-government had existed for decades before 1990, the proposed competencies that any parliament would have and the respective balance of power between the UK and Scottish Governments evolved over time. Despite further devolution being granted to Scotland, mainly in the area of taxation, in 2012 and 2016, the broad parameters of the 1998 Scotland Act regarding which powers are reserved at the UK-level and which powers are devolved has remained largely unchanged.

Despite being technically devolved, a number of policy areas, in practice, are 'Europeanised' in the sense that these policies are largely determined by the EU. Agriculture, in the form of the Common Agricultural Policy, Fisheries in the form of the Common Fisheries Policy (CFP), and environmental policy are good examples of Europeanised policy areas whereby they are technically devolved according to legislation but their implementation is subject to frameworks set at the EU level. Up until 2016, these Europeanised policy areas have been stable with regards to the constitutional understanding between the Scottish and UK Governments about where decisions were made and implemented. However, the process of leaving the EU has meant that this constitutional understanding has been disrupted and the two governments have not, as of yet, been able to reach an agreement on where control over elements previously with the EU should reside once Brexit occurs.

This article begins by outlining fisheries as an example of the nature of intertwined EU competence in the UK's devolved constitution and the difficulties that have been faced, in intergovernmental terms, in seeking to replace the EU's influence over fisheries after Brexit. This focuses mainly on the issues of common frameworks. The article then discusses how the Brexit process has had a negative impact on the process of putting together an agreed legislative framework for fisheries in a post-Brexit UK.

Fisheries and Devolution

Despite the fact that Brexit is an extremely complex process with regards to the repatriation of powers from the EU to the UK, there is an element of simplicity when it is clear and obvious where power will be exercised. In the area of immigration, for example, Westminster will be responsible for setting out the UK's immigration policy once the UK is, presumably, no longer part of the single market. Fisheries, however, is more complex in this regard because EU law intersects with devolved legislative competence. In order to account for this, the UK and devolved administrations have agreed that common frameworks ought to be put in place to ensure consistency across 160 distinct policy areas, one of which is fisheries. In October 2017, the Joint Ministerial Committee (JMC) met in order to agree the principles upon which common frameworks would be based. The JMC defined common frameworks thus:

As the UK leaves the European Union, the Government of the United Kingdom and the devolved administrations agree to work together to establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures. A framework will set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate.¹

To date, there has been very little progress determining the shape of these common frameworks. Delays and uncertainty in the UK's negotiations with the EU have certainly hindered progress. Furthermore, poor intergovernmental relations between UK and devolved governments has aggravated the situation. The European Union (Withdrawal) Act, the legislation that repeals the European Communities Act 1972, received royal assent in June 2018. The legislation was heavily criticised by the Scottish Government as being a 'power grab' on devolved powers, a view shared by the Scottish Parliament as a whole who voted overwhelmingly to refuse consent for the bill. According to the Sewel Convention, any infringement on devolved competencies by UK legislation normally requires the consent of the Scottish Parliament before a bill receives royal assent. In 2017, the Supreme Court ruled that the Sewel Convention was just that; a convention that had no legally enforceable value and, as a result, the UK Parliament is legally entitled to create laws whether it receives devolved consent or not. These developments have highlighted an inherent weakness in the UK's territorial constitution where the EU's place in that territorial constitution no longer exists. McHarg and Mitchell² argue that the Brexit is revealing the insecurity that the devolved institutions face within this new constitutional reality, alongside uncertainty about how the devolved institutions project their constitutional voice on issues of intertwined competence.

Fisheries is a good example of this intertwined competence and the issues that have arisen within an intergovernmental system that has largely operated in the absence of formal structures which exist in federal systems. Marine Scotland, a civil service directorate within the Scottish Government, is the body responsible for the management of Scotland's seas. Within the structure of the CFP, Marine Scotland is responsible for controlling the activities of

all vessels within Scotland’s Exclusive Economic Zone (EEZ). Decisions about the Total Allowable Catch (TAC) of fish stocks is decided annually by ministers from member states at the EU-level, with member states then responsible for ensuring limits set are not breached via a system of quotas. Although member states ultimately have formal recognition at the Council of Fisheries Ministers, the UK minister is normally accompanied by their devolved equivalents and negotiating positions are arrived by discussion between Marine Scotland and the Department for Environment, Food and Rural Affairs (DEFRA). Given that Scotland is home to the majority of the fishing industry (see table 1 below) both in terms of landings and value, Marine Scotland has had significant input into negotiations at the EU-level despite not having member state status.

This type of informal intergovernmentalism through the civil service is typical of a number of policy areas post-devolution.³ Overall, and despite disagreements between Scottish and UK authorities when negotiating an agreed position, the relationship has worked well based on close relationships between civil servants and mutual dependency. Brexit has, however, strained these relationships. As mentioned above, there has been general disagreement over the relative involvement of the devolved administrations in the UK’s exit from the EU. Specifically to fisheries, disagreements between the UK and Scottish Governments have largely centred around interpretation of where the line between devolved and reserved competency lies. Fisheries is usually considered a devolved matter, but international negotiation is a reserved matter. After Brexit, when the UK becomes an independent coastal state, the UK Government will be responsible for negotiating with other independent coastal states things like access to UK waters.

Table 1: Share of fishing industry in different UK nations⁴

	England	Northern Ireland	Scotland	Wales
Number of vessels 10m and under	2,569	202	1,456	419
Number of vessels over 10m	529	149	575	32
Total fleet capacity (tonnes)	58,813	13,916	105,395	5,186
Number of fishermen	5,306	875	4,823	753
Total landings by nationality of vessel (thousand tonnes)	201.6	29.4	453.3	9.9
Total value of landings by nationality of vessel (£ million)	304.7	41.6	556.9	21.7

Fisheries is unique in that it is the only devolved policy area where the majority of economic activity (in terms of total value of landings) is in Scotland. Indeed, of the total value of fish landed in the UK, 60% of that occurs in Scotland. Although there are more vessels in England, for example, Scotland has the largest share of vessels over 10m. Scotland is also home to a large pelagic fleet which tends to operate very large vessels that are capable of catching and landing huge amounts of fish. Marine Scotland's capacity in terms of resources reflects this. Relatedly, Marine Scotland has a powerful position within UK fisheries governance overall in that it rivals its counterparts in England in terms of resources and has been a powerful actor in guiding management approaches across the UK. The Department for Environment, Food & Rural Affairs (DEFRA) relies on Marine Scotland's expertise and knowledge of the Scottish sector and they regularly work in partnership, underpinned by close working relationships between civil servants.

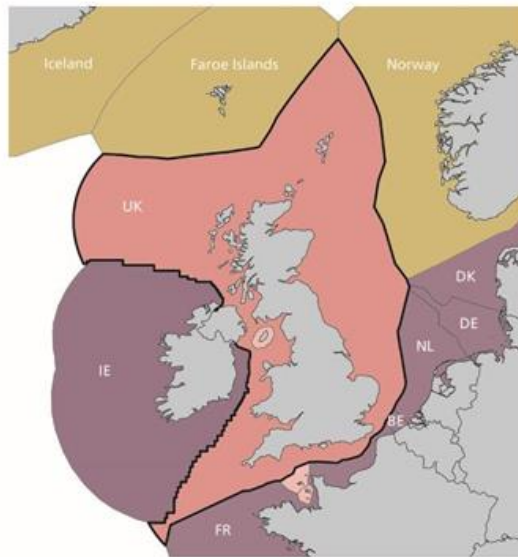
Marine Scotland also plays an international role in that it works closely with counterparts in Norway, for example, on the management of shared stocks. Although international negotiation is a reserved matter, this type of cooperation is ubiquitous and deemed necessary in promoting sustainability and resolving disputes. As mentioned above, Marine Scotland plays a key role in assisting the UK negotiating position when it comes to annual talks between member states over quotas. Indeed, Marine Scotland's expertise and knowledge of the Scottish sector is invaluable for determining the UK's overall position.

The challenge of a post-Brexit framework for fisheries

Fishing is on the front line of Brexit politics. While the fishing industry represents a relatively small part of the UK's economy (less than 0.05% of GDP), it has deep political significance, not least in many coastal communities where it is economically important and forms an important part of cultural identity. There is evidence to suggest that fishermen were largely in favour of Brexit, with the vast majority of Scottish skippers with vessels over 10m supporting leaving the EU and, as a consequence, the CFP.⁵ The fishing industry does not just consist of those who go to sea however. Much of the industry's economic output is generated by the seafood processing sector that relies on tariff-free trade with the rest of the EU and where almost half of the workforce are EU/EEA migrants. There is also a diversity of interests within the catching sector itself. Much of the shellfish catch is not subject to EU quotas, for example, and so would not benefit from a redistribution of quota. Rather, export markets are vital for this part of the catching sector, meaning frictionless trade of this valuable and perishable commodity is a priority.

In early 2018, the then Environment Secretary Michael Gove assured the catching sector that the CFP would no longer apply during the transition period and that the UK would become an independent coastal state. Yet, the UK Government then conceded that the CFP would effectively remain in place until the end of 2020 in order to ensure continued tariff-free trade during the transition period. Fishing groups such as the Scottish Fishermen's Federation responded by arguing that the rights of Scottish fishers were being sacrificed on the altar of Brexit politics, adding further strain to an already tense relationship between government and industry. Assurances were then given by the UK Government that full coastal status will happen after the transition. This means the UK would have full sovereignty over its waters, known as its Exclusive Economic Zone (EEZ) (see Figure 1), and would enter talks with other coastal states in order to discuss reciprocal access to stocks in each others' EEZs.

Figure 1: UK's Exclusive Economic Zone



To date, it is not entirely clear what shape UK fisheries policy will take post-Brexit. In its 25 year environment plan, the government has committed to developing a world-class fisheries management system, with decisions based on principles of sustainability and informed by scientific evidence. However, there remain many other areas beyond the management of fisheries which also require consideration. This includes the availability of subsidies and funding to support the fishing industry and coastal communities, how key fisheries principles will be enshrined in legislation and how voices from industry and other stakeholders, including environmental interests, will be able to feed into decisions about fisheries. The Fisheries Bill was published in October 2018 but even this has yielded few clues as to the future of fisheries once the UK leaves the EU.

The bill does, however, attempt to resolve some of the puzzles presented by devolution, as outlined above. In order to overcome the common frameworks issue, the bill proposes to achieve this through Joint Fisheries Statements, where the UK fisheries administrations jointly set out their policies for achieving key objectives. The bill also sets out powers for the devolved administrations in a number of areas, including licensing and marine conservation. But it also sets out that fishing opportunities will be decided at the UK level (albeit in consultation with the devolved administrations). The Scottish Government responded to the Fisheries Bill with a number of reservations. On the matter of fishing opportunities, the UK Government views this as a reserved matter, but the Scottish Government disagrees, arguing that this is a devolved matter and, if this aspect of the bill remained in place, it would require a Legislative Consent Motion to be passed by the Scottish Parliament in order for it to become law.⁶

Given that the CFP has been in place for over four decades, putting in place a legal framework post-Brexit is a difficult and arduous task. In the past, close working between officials in DEFRA and Marine Scotland has led to successful outcomes. However, interviews with a number of Marine Scotland officials highlighted that the process of drafting

the white paper which led to the bill was conducted with Marine Scotland being left largely in the dark, both in terms of the content of the document but also with regards to Marine Scotland being consulted and involved in its drafting. Given Marine Scotland's crucial role in the management of UK fisheries, such practices were out of step with how matters had been conducted previously. Political considerations were a key factor here, with the UK Government (in this case, the Scottish Office) keen to maintain control over the Brexit process and to effectively shut out the Scottish Government. As a result, the resulting bill has come under scrutiny in a number of key areas that could well have been avoided had the previous intergovernmental relations been conducted in this case. Evidence has shown successful and sustainable fisheries management regimes in nearby independent coastal states (Iceland, Norway and the Faroe Islands) are based on cooperation and trust⁷ (Huggins et al, 2018; McAngus et al, 2018). The construction of post-Brexit legislation has certainly not taken these lessons on board.

Conclusion

Fisheries has become symbolic of the ideals of Brexit. Leaving the CFP would mean taking back control of the UK's EEZ, and access to UK waters would be at the discretion of the UK authorities. It would lead to an increase in catch for UK fishermen and would provide an economic boost to coastal communities. Whether this plays out or not remains to be seen. In another sense, however, it has become symbolic of the difficulties that have arisen when the UK's devolved settlement is taken into account. With the EU taking a large amount of responsibility for a number of devolved policy areas, a certain equilibrium was reached regarding the roles and responsibilities of the different institutions involved in the management of the UK's seas. Brexit has upset this equilibrium to a large degree and has led to a situation where there are crucial questions being asked of what is devolved and what is reserved. To date, the line between devolved and reserved, at least with regards to fisheries, has not been agreed. Without this agreement, the prospect of seeing a common framework for fisheries being implemented seems somewhat distant.

The political sensitivities surrounding Brexit have also disrupted the previously stable intergovernmental relations that existed between the UK and Scottish Governments. Whilst DEFRA and Marine Scotland officials worked closely in the past, recent events have put this working relationship under increasing strain. With the ideal of common frameworks a blueprint for a more formal understanding of intergovernmental relations looking like a distant prospect, the UK and Scottish Governments will continue to rely on these more informal relationships in order to effectively manage the UK's EEZ. To date, both governments are not at all close to agreeing the shape of the post-Brexit fisheries landscape and their relative roles within that framework. Fisheries therefore continues to act as an example of the difficulties that the UK's devolved constitution presents to the Brexit project and highlights McHarg and Mitchell's (2016) observation that the insecurities that the devolved institutions are feeling during the process of leaving the EU.

¹ Joint Ministerial Committee (2017) *Joint Ministerial Committee (EU Negotiations) Communique*, London: 16 October 2017:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

² McHarg, A., & Mitchell, J. (2017). *Brexit and Scotland. The British Journal of Politics and International Relations*, 19(3), 512-526.

³ Cairney, P. & McGarvey, N. (2013). *Scottish politics 2nd Edition*, London: Red Globe Press

⁴ Marine Management Organisation (2018) *UK Fishing Vessel Lists, July 2018*, UK Government: <https://www.gov.uk/government/collections/uk-vessel-lists>

⁵ McAngus, C. (2018). A survey of Scottish fishermen ahead of Brexit: Political, social and constitutional attitudes. *Maritime Studies*, 17(1), 41-54.

⁶ SPICe (2018) *Scottish Parliament Information Centre: UK Fisheries Bill Briefing*, Scottish Parliament, 17th December 2018

⁷ Huggins, C., Connolly, J., McAngus, C., & van derZwet, A. (2018). Brexit and the future of UK fisheries governance: Learning lessons from Iceland, Norway and the Faroe Islands. *Contemporary Social Science*, 14(2), 327-340; McAngus, C., Huggins, C., van der Zwet, A., & Connolly, J. (2018). *Governing UK fisheries after Brexit – Lessons from Iceland, Norway and the Faroe Islands*. Available at: <http://ukandeu.ac.uk/wp-content/uploads/2018/05/Governing-UK-fisheries-after-Brexit-Lessons-from-iceland-Norway-and-the-Faroe-Islands.pdf>

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