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Considering the significance of historic and traditional fishing rights in today's law of the sea, illustrated with the post-Brexit fisheries legal regime.

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Abbreviations

CFP	Common Fisheries Policy
EAEC	European Atomic Energy Community
EEZ	Exclusive Economic Zone
EEC	European Economic Community
EFZ	Exclusive Fisheries Zone
EU	European Union
FAO	Food and Agriculture Organization (of the United Nations)
ICJ	International Court of Justice
LFC	London Fisheries Convention
LOSC	Law of the Sea Convention (also referred to as 'the Convention')
LOSI	Law of the Sea Institute
nm	nautical miles
OJ	Official Journal (of the European Union)
PCA	Permanent Court of Arbitration
RIAA	(United Nations) Report of International Arbitration Awards
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Conference for the Law of the Sea
UNTS	United Nations Treaty Series
US	United States (of America)
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties

Summary

1. Introduction

As part of this thesis' introduction, the objectives (1.1), the scope delimitation (1.2), the sources and methodology used in this work (1.3) shall be looked into.

1.1. Objectives

The starting point for this master thesis is the question of the role that tradition plays in fishing and how it can be translated into general international law. Fisheries activities have been carried out throughout history, however on a smaller and less industrial scale than nowadays.[1] The issue of fishing practices is parallel to the extension of coastal States' sovereignty and jurisdiction over large parts of what used to be the high seas. Thus, access to fisheries resources or allocation of fishing opportunities have become central questions over time. Maritime areas that used to be governed by the freedom of fishing may now find themselves under the control of coastal States.[2] This could be an issue for fishermen from a certain State who traditionally fished in an area that now belongs to another State. There is a need in this case to secure these practices on which local communities' livelihoods rely. This could be done through the recognition of historic or traditional fishing rights.

Historic and traditional fishing rights are customary rights, which means that they are not sanctioned by treaties or conventions, but solely by practice, that can become opposable to the coastal State.[3] Written bilateral or multilateral agreements can take these rights into consideration; however, they face a certain amount of opposition by some States.[4] Therefore, the relevance of historic and traditional fishing rights is particularly interesting in the light of the 'conventionalization' of the international law of the sea. By this term is meant the always increasing drafting of agreements, taking over an international legal regime mostly based on custom. This can be witnessed through the ratification of the Law of the Sea Convention (LOSC)[5], which represents the most important legal regime for the oceans nowadays.[6] These

[1] See T.W. Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters: With Special Reference to the Rights of the Fishing and the Naval Salute* (William Blackwood and Sons, Edinburgh and London, 1911), accessible at https://www.gutenberg.org/files/54977/54977-h/54977-h.htm, p. 604 et seq [hereinafter: Fulton, *The Sovereignty of the Sea*].
[2] See D.R. Rothwell, T. Stephens, *The International Law of the Sea,* 2nd edition (Hart, Oxford and Portland, Oregon, 2016), p. 1 et seq [hereinafter: Rothwell, Stephens, *The International Law of the Sea*].
[3] S. Kopela, 'Historic fishing rights in the law of the sea and Brexit' (2019), 32 *Leiden Journal of International Law* 695, p. 698 [hereinafter: Kopela, 'Historic fishing rights in the law of the sea and Brexit].
[4] *Ibid.*, p. 706.
[5] *United Nations Convention on the Law of the Sea,* 10 December 1982, 1833 UNTS 3 [hereinafter: LOSC, 1982].
[6] Rothwell, Stephens, *The International Law of the Sea, supra* note 2, p. 14.

developments involve a reduction of the places of 'absolute freedom' on the seas, especially through the extension of coastal States' jurisdiction and sovereignty, as was explained earlier. Thus, it is interesting to examine whether historic and traditional fishing rights as customary rights also disappeared to leave room for new fisheries conventions, management organizations or if they carried out throughout time.

In relation to these first considerations on historic and traditional fishing rights, it is interesting to analyze whether an event such as Brexit could mean their revival, if it is to be assumed that these rights were overtaken by treaties. The referendum held on 23 June 2016 that settled for the exit of the United Kingdom (UK) from the European Union (EU) created great uncertainty. At the time when this thesis was drafted, no agreement on fisheries had been found, even if the UK had already officially left the EU on 31 January 2020. Application of EU law continues; however, questions about future relations remain, after years of free and mutual access to fisheries resources in the UK's and other EU Member States' waters.[7] Even if restrictions on the access to these resources existed before Brexit in order to guarantee a certain level of sovereignty to the UK, there shall be in the future even greater control by the British authorities over their own waters and fisheries resources.

Certain communities of fishermen might consider themselves harmed by what these greater restrictions will represent.[8] Indeed, transboundary fisheries activities have been carried out by nationals of all States[9] even before the UK became part of the EU in 1973.[10] These practices did not stop between 1973 and 2016, or respectively 2020, which as a consequence only strengthened fisheries activities and reliance of local communities on these activities. During these years, the UK was part of the Common Fisheries Policy (CFP)[11] which created a united European Exclusive Economic Zone (EEZ), in which all Member States have access to resources.[12] Historic and traditional fishing rights which were touched upon earlier, could be considered in the context of Brexit and the exit from the CFP. On top of Brexit, the denunciation

[7] *Brexit: UK leaves the European Union*, BBC, 1 February 2020, available at https://www.bbc.com/news/uk-politics-51333314, consulted on 22 August 2020 [hereinafter: *Brexit: UK leaves the European Union,* BBC].
[8] C. Bradley, *EU panic: French fishermen 'very scared' as Brexit trade talks stall,* Express, 13 August 2020, available at https://www.express.co.uk/news/uk/1322310/eu-fisheries-news-french-fishermen-scared-brexit-trade-talks-spt, consulted on 22 August 2020.
[9] Fulton, *The Sovereignty of the Sea, supra* note 1, p. 604 et seq.
[10] *Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom to the EEC and the EAEC,* 22 January 1972, L73 OJ.
[11] European Parliament and Council Regulation 1380/2013, 11 December 2013, OJ L 354/22 [hereinafter: EU Regulation 1380/2013].
[12] Art. 3(1)(d) *Treaty on the Functioning of the European Union,* 26 October 2012, OJ C 326/47 [hereinafter: TFEU, 2012].

by the UK of the London Fisheries Convention (LFC)[13] is also of importance.[14] This convention predates the CFP and was a steppingstone towards an integrated European fisheries regime. If it is to be assumed that early fishing practices predating the EU and continuing through the CFP can be qualified as historic and traditional fishing rights, their survival has to be considered. After Brexit and the denunciation of the LFC, such rights could be revived in order to even out the effects of strong limitations on transboundary fisheries access.

Following these first considerations on the objective of the thesis, questions arise that will serve as a breadcrumb trail throughout this work. First, are historic and traditional fishing rights of any relevance in the current international legal order or could they have been overtaken by an always expanding importance of treaties and other written agreements? Second, could the uncertainties arisen after Brexit, be partly solved through a recourse to these rights in order to preserve the interests of local fishing communities or should other preserving mechanisms be taken into consideration?

1.2. Scope delimitation: Differentiating historic rights from historic and traditional fishing rights

In order to narrow down the topics addressed in this thesis, it is essential to define the different notions at hand, such as historic rights, historic waters, historic and traditional fishing rights. These notions are not precisely and extensively defined, and it is difficult to draw a precise distinction between them. The purpose of the thesis is to study historic and traditional fishing rights in the current context of international law and investigate the relevance of Brexit in that matter.

Definitions of these terms were given by the South China Sea Award and they will be used throughout this work.[15] The notion of historic rights is as follows:

> The term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular

[13] UK Depository Status List, Fisheries Convention, signed at London, 9 March – 10 March 1964, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625470/15._Fisheries_Convention__1964__status.pdf [hereinafter: LFC, 1964].
[14] V. Schatz, 'Brexit and fisheries access – Some reflections on the UK's denunciation of the 1964 London Fisheries Convention,' (2017), *European Journal of International Law,* accessible at https://www.ejiltalk.org/brexit-and-fisheries-access-some-reflections-on-the-uks-denunciation-of-the-1964-london-fisheries-convention/.
[15] *South China Sea Arbitration (The Philippines v. China), Merits, Award* (2016), PCA case 2013-19 [hereinafter: *South China Sea Arbitration*].

> historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty.[16]

Historic rights are described as on overarching term, covering claims based on sovereignty over maritime areas and claims based on certain practices that do not require sovereignty, such as historic and traditional fishing rights. When they fall short of sovereignty, historic rights can be of two kinds: historic rights with quasi-territorial or zonal impact and historic rights as activities performed non-exclusively in the maritime zones of other States. These activities encompass passage or fishing for instance.[17] These activities being performed non-exclusively, no sovereignty-like entitlement is created over the area.[18] The South China Sea Arbitration mentions two decisions supporting this argument. The Qatar v. Bahrain case established that historic pearl fishing "seems in any event never to have led to the recognition of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters."[19] The International Court of Justice (ICJ) in the Continental Shelf case between Tunisia and Libya met a comparable decision in differentiating the legal basis for historic fishing rights from the regime applicable to the continental shelf.[20] The defining characters of historic fishing rights will be later touched upon.[21]

Before the South China Sea Arbitration, 'historic rights' were not understood in the same way. They could not encompass sovereignty-based claims: these were referred to as claims on 'historic waters.' The regime of historic waters was laid out in a study published by the United Nations (UN) Secretariat in 1962 on the 'juridical regime of historic waters, including historic bays.' [22] The notion of 'historic rights' was used to indicate what is now referred to as 'historic fishing rights.'[23]

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[16] *South China Sea Arbitration, supra* note 15, §225.
[17] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 697.
[18] *Ibid.,* p. 702.
[19] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits (Judgement),* [2001], ICJ Rep 40, §236 [hereinafter: *Qatar v. Bahrain*].
[20] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya) (Judgement),* [1982], ICJ Rep 18, §100 [hereinafter: *Tunisia v. Libyan Arab Jamahiriya*].
[21] See part 2 *Historic and traditional fishing rights,* p. 11.
[22] UN Secretariat, 'Juridical Regime of Historic Waters, Including Historic Bays,' Study prepared by the UN Secretariat, UN Doc A/CN.4/143, 9 March 1962, in *Yearbook of the International Law Commission,* Vol II, 1962 (New York, 1964), p. 25, §185 [hereinafter: UN Secretariat, Study on Historic Waters].
[23] See T.L. McDorman, 'Rights and Jurisdiction over Resources in the South China Sea: UNCLOS and the 'Nine-Dash Line,'' in *South China Sea Disputes and the Law of the Sea,* S. Jayakumar, T. Koh, R.C. Beckman (Edward Elgar Publishing Limited, Cheltenham, 2014) [hereinafter: McDorman, 'Rights and Jurisdiction over Resources in the South China Sea'] ; C.R. Symmons, *Historic Waters in the Law of the Sea: A Modern Reappraisal* (Martinus Nijhoff, Leiden, 2008) [hereinafter: Symmons, *Historic Waters in the Law of the Sea*].

Among 'historic rights' as a general term, 'historic waters' (based on sovereignty) and 'historic fishing rights' (based on practices falling short of sovereignty) do not require the same elements in order to be established. Historic waters demand more requirements than historic fishing rights. According to the UN Secretariat study, it is commonly accepted that 'historic waters in order to be established, require an "effective exercise of sovereignty," that must have "continued during a considerable time" in "an attitude of general toleration."[24] What weight to give to each of these requirements is however debated. Whether they are cumulative criteria or if they can balance each other out is questionable.[25]

When it comes to the elements required to establish the existence of 'historic fishing rights', Bernard mentions "long-established activities and the continuous exercise of these activities that are recognized by other States."[26] These criteria appear to be less exigent than those required for a claim based on historic waters,[27] however, when observing case law, they appear to be very precise when it comes to the extent of the claim. Pearling is at stake in the Qatar v. Bahrain case,[28] the Barbados v. Trinidad and Tobago case[29] was about flying fish and the Jan Mayen case,[30] about "whaling, sealing and fishing for capelin."[31] The criterion requiring an effective exercise of sovereignty for historic waters is not to be established for historic fishing rights.

The first criterion established by the UN Secretariat rapport on historic waters is the effective exercise of sovereignty. It means that the State claiming historic waters has to exercise authority over the claimed area.[32] This element is not required for the establishment of historic and traditional fishing rights, which constitute an activity that is not exclusive and not necessarily based on adverse practice.[33] This concept of adverse practice imply that there exists a claim on an area that is already subject to the jurisdiction or sovereignty of a State. Another State's claim of historic rights where it should not have rights, is in confrontation with the holder's rights,

[24] UN Secretariat, Study on Historic Waters, *supra* note 22, §§80, 185, 186.
[25] D.P. O'Connell, *The International Law of the Sea: Volume I*, 1st edition, edited by I.A. Shearer, Oxford Scholarly Authorities on International Law, 1982, p. 433, 434 [hereinafter: O'Connell, *The International Law of the Sea*].
[26] L. Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation' (2012), *LOSI Conference Papers, UC Berkeley-Korea Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012*, p. 4 [hereinafter: Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation'].
[27] McDorman, 'Rights and Jurisdiction over Resources in the South China Sea,' *supra* note 23, p. 154.
[28] *Qatar v. Bahrain, supra* note 19.
[29] *Barbados v. Trinidad and Tobago, Award* (2006), PCA case 2004-02, (2008) XXVII RIAA 147.
[30] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Merits (Judgement),* [1993], ICJ Rep 38.
[31] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation,' *supra* note 26, p. 5.
[32] UN Secretariat, Study on Historic Waters, *supra* note 22, §185.
[33] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 698.

which explains the term 'adverse practice.' Historic and traditional fishing rights can be established even if the fishing practices have been carried out on the high seas where there is freedom of fishing, thus no adverse practice. This particular aspect will be further touched upon.[34]

The issue of sovereignty as being one aspect of historic rights appears clearly in the Fisheries case opposing the UK and Norway.[35] In this case, Norway did not claim any historic waters but intended to delimit its internal waters according to its own baseline system, which had been allegedly used over an extended period of time. Norway argued it was making use of a historic right but pretended that the element of prescription related to that of adverse acquisition were not required. These last concepts establish that historic rights related to an area or certain activities are created in opposition to other States' interests. These interests can consist in having sovereignty over the same area or activities,[36] as well as being close geographically.[37] These historic rights are characterized as "exceptional"[38] and built at odds with existing laws.[39] Thus, Norway's position is contrary to the very essence of historic rights, which are intrinsically based on the historic practice's apparent unlawfulness. These rights are only justified by the fact that they appear through a process of continuous usage, through a long period of time, which grants them a historic character and qualifies them as prescriptive rights.[40]

1.3. Sources and Methodology

The scope delimitation already gave better insight into what kind of sources will be used throughout this thesis. Treaties and customary law as sources of international law will be looked into quite extensively.[41] These conventions might be multilateral such as the LOSC or the CFP Regulation and the LFC on a European level. Bilateral agreements such as the voisinage arrangements that will be looked into are also important elements for this thesis. Jurisprudence

[34] See part 2.1.1.2 *The legal nature of historic and traditional fishing rights,* p. 14.
[35] *Fisheries (United Kingdom v. Norway), Merits (Judgement),* [1951], ICJ Rep 116 [hereinafter: *Fisheries case*].
[36] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 698.
[37] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law' (1953), 30 *British Yearbook of International Law* 1*,* p. 31 [hereinafter: Fitzmaurice, 'The Law and Procedure of the International Court of Justice'].
[38] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 697, 698.
[39] Fitzmaurice, 'The Law and Procedure of the International Court of Justice,' *supra* note 38, p. 28.
[40] See Black's Law Online Dictionary, available at https://thelawdictionary.org/prescription/, consulted on 22 June 2020 [hereinafter: Black's Law Online Dictionary].
[41] Art. 38(1)(a)(b) *Statute of the International Court of Justice,* 26 June 1945, 33 UNTS 993 [hereinafter: ICJ-Statute, 1945].

as a subsidiary source of international law will be thoroughly investigated as well.[42] Indeed, where conventions fail to establish a solid legal regime, courts and tribunals have helped shape the way historic and traditional fishing rights are to be understood and applied. To complement these sources, the work of scholars who investigated the topic as well as newspaper articles will be analyzed.

As for the methodology of this thesis, several difficulties must be taken into account. First of all, one of the aspects of this work that is Brexit involves great uncertainty. Indeed, negotiations to come up with an agreement are still ongoing after the UK left the EU on 31 January 2020. Thus, historic and traditional fishing rights are only investigated in order to find out if they could be of any relevance in the scope of a future fisheries agreement between the UK and the EU. Moreover, Brexit being a very sensible and politically controversial issue, the way scholars from different legal backgrounds approach the topic cannot be ignored. Indeed, the perspective from a British author might differ from the views of a peer from Ireland, France or any other EU Member State. Despite the aforementioned difficulties, the approach used throughout the thesis will be mostly doctrinal.

In order to discuss this thesis' topic extensively, the historic and traditional rights regime will be investigated as it stands in today's law of the sea, considering treaties and jurisprudence. Then, the way these rights could be considered in the scope of Brexit will be analyzed through legislation in the area.

2. Historic and traditional fishing rights

The legal regime of historic and traditional fishing rights has its own specificities that need to be clarified in order to fully grasp the extent of these rights. These particularities come with a few difficulties such as the definitions of the different notions at hand. They will be looked into in a first step (2.1). In a second step, the establishment of historic and traditional fishing rights has to be analyzed (2.2). This is an important element to be understood for these rights are customary, thus not created by a treaty. The influence that written agreements can have on historic and traditional fishing rights will be touched upon in a third step through the perspective of the LOSC ratification (2.3).

[42] Art. 38(1)(d) ICJ-Statute, 1945, *supra* note 42.

2.1. Clarifying the different notions

Throughout this thesis, 'historic' and 'traditional' fishing rights are used jointly. This could imply that they both embrace different ideas. However, there used together in this work in order to avoid any misunderstanding on the fact that they actually are similar notions, as will be explained in a first subsection (2.1.1). Moreover, some defining elements are specifically related to historic and traditional fishing rights. Those will be looked into in a second subsection (2.1.2).

2.1.1. Historic and traditional fishing rights, two similar concepts

The difference between the general concept of 'historic rights' and the more specific notions of 'historic waters' and 'historic fishing rights' has been explained, however the question whether a distinction can be done between historic and traditional fishing rights needs to be looked into. Indeed, literature and jurisprudence use both terms without justifying the use of one term or the other, as will be shown in a first step (2.1.1.1). However, using one or the other notion might help putting the emphasis on the technical legal aspect or the materiality of the fishing practice. Since those notions are similar, the legal nature of historic and traditional fishing rights will be investigated in a second step (2.1.1.2).

2.1.1.1. The entwinement of both concepts in literature and jurisprudence

The South China Sea Award refers to both concepts. The Philippines' first and second submissions are related to historic rights claimed by China within the so-called 'nine-dash line.'[43] China's claims to historic rights contain, among others, access to marine living resources in the area.[44] The tenth submission of the Philippines addresses 'traditional fishing rights.' The Award expressly mentioned that the Philippines made sure not to use the terminology 'historic fishing rights' when referring to "access for its fishermen to pursue their traditional livelihood."[45] It appears here that the term 'traditional fishing rights' was used in order not to create confusion with the 'historic rights' claimed by China.[46]

[43] *South China Sea Arbitration, supra* note 15, §169.
[44] *Ibid.,* §214.
[45] *Ibid.,* §781.
[46] *Ibid.,* §781.

What can be derived from this is, that the Philippines did not intend to create a distinction between historic and traditional fishing rights.[47] The Eritrea v. Yemen Arbitration indicates the proximity between both concepts as well. Indeed, the case gives great insight into the traditional fishing regime[48] and makes it clear that the fishing rights at stake in the case are historic rights created by traditional elements.[49] The traditional fishing practices carried out in the Red Sea by fishermen from both countries are based on historical elements. The presence of the Ottoman Empire brought Islamic concepts that had a strong relevance for fishermen from Eritrea and Yemen, such as the "inherent right to sustain their nutritional needs through fishing from coast to coast with free access to fish on either side and to trade the surplus."[50] These Islamic concepts strengthened fishing practices in a manner intrinsically related to the geographical and political situation of the Red Sea between Eritrea and Yemen.

It does not appear from both previously mentioned cases that a difference can be made on the scope of historic and traditional fishing rights. Moreover, the way certain scholars define tradition resembles what will be explained later on about the elements necessary to claim historic and traditional fishing rights.[51] Polite insists on the fact that "something can be considered traditional if it has a demonstrable history of being handed down through generations, or by existing over a relatively long period of time."[52]

However, when it comes to the intent behind the use of one or the other word, insisting on the traditional character of a fishing right more than its historic character might imply a specific opinion on its actual scope. One view focuses primarily on the methods of fishing, by whom these activities are performed and for what purpose. The other puts the emphasis on the fact that these practices have to be carried on through time and generations.[53] Settling for one or the other argument may indicate what activities to define as traditional and at the same time what terminology to use: historic or traditional fishing rights. Speaking about traditional fishing rights may also involve other related concepts, that do not appear as clearly when speaking about historic fishing rights. Indeed, it is unquestionable that the main issue behind traditional

[47] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 700.
[48] See *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award* (1999), PCA case 1996-04, (1999) XXII RIAA 335, Chapter IV [hereinafter: *Eritrea v. Yemen Arbitration (Maritime Delimitation)*].
[49] *Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen), Award* (1998), PCA case 1996-04, (1998) XXII RIAA 211, §126 [hereinafter: *Eritrea v. Yemen Arbitration (Scope of the Dispute)*].
[50] *Eritrea v. Yemen Arbitration (Maritime Delimitation), supra* note 49, §92.
[51] See part 2.2.1 *The criteria necessary for the apparition of historic and traditional fishing rights,* p. 22.
[52] D. Polite, 'Traditional fishing rights: analysis of State practice' (2013), 5:3 *Australian Journal of Maritime & Ocean Affairs* 120, p. 122 [hereinafter: Polite, 'Traditional fishing rights'].
[53] *Ibid.,* p. 120.

fisheries are indigenous communities or local communities that rely on artisanal fishing to support their livelihoods. How far these elements are to be taken into account will be later looked into.[54] It is the view of this thesis' author that the actual difference between historic and traditional fishing rights is only a matter of vocabulary and do not imply any legal consequences.

As seen earlier, both traditional and historic fishing rights are part of tribunals' and scholars' vocabulary. However, it doesn't appear that they are differentiated and used to define different legal concepts. They can both play a role when it comes to establish sovereign rights as it is the case in the South China Sea Arbitration, or when it comes to maritime boundary delimitation as it is the case in the Grisbådarna Arbitration,[55] where the economic dependency of Swedish fishermen was used as a way to adjust the provisional maritime boundary line.[56] Kopela argues that traditional and historic fishing rights coincide in the sense that "qualitative elements of fishing, such as methods, gears, etc., are not relevant for the establishment of the entitlement but only to the ascertainment of its content."[57] To conclude and as will now be looked into, it does not appear from theory or jurisprudence that a different legal regime should be applied to both traditional and historic fishing rights, for these concepts are similar. An observation could be made on the purpose of the different articles on the matter. Literature about 'historic fishing rights' seem to focus more on the technicality of the applicable legal regime,[58] whereas theory about 'traditional fishing rights' contain more insight about the practical exercise of these rights.[59] More emphasis is put on the activity as such, as will be seen later on.[60]

2.1.1.2. The legal nature of historic and traditional fishing rights

It has been established that historic and traditional fishing rights are two similar notions. Thus, their legal nature is not different from one another and will now be looked into.

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[54] See part 2.1.2.1 *The concept of artisanal fishing,* p. 17.
[55] *Grisbådarna case (Norway v. Sweden), Award* (1909), PCA case 1908-0, (1961) XI RIAA 155.
[56] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation,' *supra* note 26, p. 13, the author does not make a distinction between traditional and historic fishing rights, as they plaid a role in the maritime boundary delimitation.
[57] See Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 701.
[58] See *Ibid.*; S. Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' (2017), 48:2 *Ocean Development & International Law* 181 ; V. Schatz, 'The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union' (2019), 35 *The International Journal of Marine and Coastal Law* 133 [hereinafter: Schatz, 'Post-Brexit EEZ Fisheries Access'].
[59] See Polite, 'Traditional fishing rights,' *supra* note 53.
[60] See part 2.1.2.1 *The concept of artisanal fishing,* p. 17.

Kopela establishes that historic fishing rights, as historic rights falling short of sovereignty, can be described as non-prescriptive rights and do not necessarily need an adverse practice for their formation.[61] These two elements are what differentiate historic and traditional fishing rights from historic rights based on sovereignty, such as those claimed on historic waters, as seen earlier.[62] Contrarily to sovereignty-based historic rights, historic and traditional fishing rights can be based on lawful practice such as fishing activities in the high seas. Accordingly, those fishing rights are not exclusive when carried out in the high seas, for other States can carry out the same activities. Historic and traditional fishing rights need not be characterized as an adverse practice in order to be established. Indeed, the concept of high seas freedom of fishing is contrary to a fishing practice that would violate any State's sovereignty. However, a fishing practice on the high seas might become an adverse practice if these high seas were to become part of a coastal State's jurisdiction through the extension of the territorial sea or the creation of an EEZ. In order to claim historic and traditional fishing rights, certain criteria need to be verified and will be investigated later on.[63]

Following these considerations, it can be stated that "historic fishing rights are regarded to be of a non-prescriptive non-exclusive nature, and they do not necessarily require adverse practice for their formation."[64] However, another situation could be envisaged, such as the existence of historic and traditional fishing rights within an area already under the sovereignty or jurisdiction of a coastal State. The establishment of those rights in this scenario would be different, for the fishing practices at stake would be contrary to the coastal State's rights on fisheries, thus representing an adverse practice. Interpreting *a contrario* the aforementioned characteristics of historic and traditional fishing rights based on the freedom of the high seas, it is the view of this thesis' author that these rights can be of a prescriptive nature and based on an adverse practice. In order to be qualified as historic or traditional fishing rights, the fishing practices need to fulfill the criteria analyzed later on.[65]

Traditional fishing rights are discussed extensively in two cases, among others: The South China Sea case and the Eritrea v. Yemen case. The former describes the latter as emphasizing the "importance of preserving traditional fishing practices in the Red Sea which had been carried on for centuries, without regard for the specifics of maritime boundaries."[66] The Eritrea

[61] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 698.
[62] See part 1.2 *Scope delimitation: Differentiating historic rights from historic and traditional fishing rights,* p. 7.
[63] See part 2.2.1 *The criteria necessary for the apparition of historic and traditional fishing rights,* p. 22.
[64] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 698.
[65] See part 2.2.1 *The criteria necessary for the apparition of historic and traditional fishing rights,* p. 22.
[66] South China Sea Arbitration, supra note 15, §259.

v. Yemen Arbitration sees these traditional fishing rights as historically consolidated and building an international easement "falling short of territorial sovereignty."[67] In both cases, it appears clearly that historic and traditional fishing rights exist independently from boundaries and sovereignty. Thus, these rights can have concrete consequences, as it is reminded in the LOSC. This Convention states in its Article 15 that historic fishing rights can act as special circumstances that can modify the boundary delineation. The Eritrea v. Yemen case reminds this provision as it states that it is generally agreed that "the median or equidistance line normally provides an equitable boundary."[68] It also confirms that historic titles can adapt the delineation of the boundary, but the Tribunal found no reason to make use of this possibility in that situation.[69] In the same case, the question was raised whether the traditional fishing practices happening between Eritrea and Yemen could influence the boundary. Both parties submitted their own proposal for the boundary that would take the interests of fishermen from both States into consideration.[70] The Tribunal found that the economic dependency on fishing in that case cannot be proven to be so strong that it would create its own line of delimitation.[71] Moreover, no party could prove that their proposition for a line of delimitation would have "detrimental effects on fishing communities."[72] The legal regime of historic and traditional fishing rights also contains specific defining elements specifically related to these rights that shall now be investigated.

2.1.2. Elements specifically related to historic and traditional fishing rights

Some elements of definition have been given earlier, relating to the distinction of the different notions as well as the nature of the rights at stake. It shall also be explained through which processes such rights appear. The elements of definition that will now be touched upon are paramount to the understanding of historic and traditional fishing rights. Indeed, these rights have specific characterizing aspects that help understand how they are established. Thus, the link to artisanal fishing (2.1.2.1) and the characterization of historic and traditional fishing rights as private rights (2.1.2.2) will be investigated.

[67] *Eritrea v. Yemen Arbitration (Scope of the Dispute), supra* note 50, §126.
[68] *Eritrea v. Yemen Arbitration (Maritime Delimitation), supra* note 49, §131.
[69] *Ibid.,* §158.
[70] *Ibid.,* §§59, 60.
[71] *Ibid.,* §64.
[72] *Ibid.,* §72.

2.1.2.1. The concept of artisanal fishing

More than a legal aspect of historic and traditional fishing rights, artisanal fishing is a way of characterizing the fishing practices that may lead to the recognition of such rights. They are essential in the understanding of why it is important to secure and preserve historic and traditional fishing rights for the sake of local communities' livelihoods, which rely on fisheries activities. It is this thesis' author's point of view that this element might be overlooked in certain cases such as the South China Sea Arbitration, where legal arguments take precedence over the purpose of the rights at stake. This will be further looked into.[73]

Making use of the term 'traditional' when referring to fishing practices may indicate the intention to insist on the importance those rights have for communities whose local economy rely on fisheries. The Food and Agriculture Organization (FAO) provided guidance on artisanal fisheries and clearly establishes a link with 'traditional fisheries:'

> Traditional fisheries involving fishing households (as opposed to commercial companies), using relatively small amount of capital and energy, relatively small fishing vessels (if any), making short fishing trips, close to shore, mainly for local consumption. In practice, definition varies between countries, e.g. from gleaning or a one-man canoe in poor developing countries, to more than 20-m. trawlers, seiners, or long-liners in developed ones. Artisanal fisheries can be subsistence or commercial fisheries, providing for local consumption or export. They are sometimes referred to as small-scale fisheries.[74]

However, no universal definition exists for artisanal fishing, as it is reminded by the South China Sea Award. Several bodies have addressed the issue, such as the FAO as seen earlier, the International Labor Organization and the United Nations Environment Programme.[75]

The relations between artisanal fishing practices and traditional fishing rights is particularly stressed in the international jurisprudence as it is the case in the Eritrea v. Yemen Arbitration, which inquires Yemen to

> ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.[76]

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[73] See part 2.3.2 *Position of case law on the matter*, p. 30; part 2.4 *Concluding remarks,* p. 34.
[74] FAO, Artisanal Fisheries (2005), available at http://www.fao.org/family-farming/detail/en/c/335263/, consulted on 29 June 2020.
[75] *South China Sea Arbitration, supra* note 15, §797.
[76] *Eritrea v. Yemen Arbitration (Scope of the Dispute), supra* note 50, §526.

The South China Sea Award also establishes a link between fishing practices and communities' livelihoods:

> The attention paid to traditional fishing rights in international law stems from the recognition that traditional livelihoods and cultural patterns are fragile in the face of development and modern ideas of interstate relations and warrant particular protection.[77]

The same Award also refers to the Eritrea v. Yemen Arbitration in order to explain that the element defining artisanal fishing are relative and that "the specific practice of artisanal fishing will vary from region to region, in keeping with local customs."[78] However, it is clear that the Tribunal wished to differentiate artisanal from industrial fishing practices and makes it an essential element in order to create a parallel with traditional fishing rights. Indeed, it states that "traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of the community, in other words to 'those entitlements that all fishermen have exercised continuously through the ages,'[79] but not to industrial fishing that departs radically from traditional practices."[80]

Traditional livelihoods related to fisheries were also at stake in the South China Sea Arbitration. At the center of the dispute was the Scarborough Shoal, whose sovereignty was disputed. It was the parties' understanding that the rights for their fishermen to carry out their activities in their vicinity was dependent on which State had sovereignty. As will be discussed further, the matter of sovereignty in this case is not relevant.[81] China was accused by the Philippines of "unlawfully [preventing] Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal."[82] In the tenth submission, the Philippines and China describe quite extensively the nature of the activities carried out by their fishermen and establish the link to artisanal fishing and communities' livelihoods in a clear manner. The Philippines refer to the Scarborough Shoal as a "traditional fishing ground" where fishermen from neighbouring States would come and fish "for about a week or more."[83] These fishermen carried out their activity for generations using "spear and net fishing methods," in

[77] *South China Sea Arbitration, supra* note 15, §794.
[78] *Ibid.*, §797.
[79] See *Eritrea v. Yemen Arbitration (Maritime Delimitation), supra* note 49, §104.
[80] *South China Sea Arbitration, supra* note 15, §798.
[81] See part 2.2.2.1 *In the territorial sea,* p. 26.
[82] *South China Sea Arbitration, supra* note 15, §758.
[83] *Ibid.,* §761.

order to harvest certain species.[84] China states that their fishermen as well have been present in the area "since ancient times."[85]

The fishing methods described by the Philippines, that could be qualified as artisanal, have a relevance when it comes to qualify fishing rights as traditional. Indeed, the Tribunal defines the fishing methods protected by international law as

> those that broadly follow the manner of fishing carried out for generations: in other words, artisanal fishing in keeping with the traditions and customs of the region. The Tribunal is not prepared to specify any precise threshold for the fishing methods that would qualify as artisanal fishing, nor does the Tribunal deem it necessary to consider how and when traditional fishing practices may gradually change with the advent of technology.[86]

The Abyei Arbitration[87] established a link with the need to protect communities' livelihoods and the special interests of indigenous communities that can be "holders of historical/traditional fishing rights." However, they are not the only recipients of these rights. Other non-indigenous communities can be involved, which is a good way to avoid the debate around the definition of indigeneity, according to Kopela.[88] The South China Sea and the Eritrea v. Yemen cases both "stress[ed] the link between the activities of fishermen and the local culture,"[89] thus implying a link between traditional fishing rights and specific communities. Indeed, these fishing rights are rooted in "the rights of local people to pursue their livelihood."[90] The link to artisanal fisheries and local communities is an element that characterizes historic and traditional fishing rights as private rights as will now be looked into.

2.1.2.2. The qualification as private rights

Some uncertainties persist with regard to who can be regarded as the holder of historic and traditional fishing rights. The answer could seem clear-cut for States are, among others, subject of international law. It is not true for individuals who can possess private rights. These rights allow individuals to enjoy their own property.[91] However, as it has been explained earlier,

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[84] *South China Sea Arbitration, supra* note 15, §763.
[85] *Ibid.,* §761.
[86] *Ibid.,*, §806.
[87] *Abyei Arbitration (Sudan v. Sudan People's Liberation Movement/Army), Final Award* (2009)*,* PCA case 2008-07, (2013) XXX RIAA 145 [hereinafter: *Abyei Arbitration*].
[88] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 701, 702.
[89] *Ibid.,* p. 700.
[90] *Ibid.,* p. 701.
[91] Black's Law Online Dictionary, *supra* note 41, consulted on 18 August 2020.

historic and traditional fishing rights are a special field of international fisheries law. Indeed, there remains a strong relation to communities' livelihoods. On the one side, these fall under a State's concerns, but on the other side, the fact that these practices are not designed to provide great productivity and are much more focused on a specific community's interests makes them deviate from sole interstate relations. The Eritrea v. Yemen Arbitration endorsed that view, stating that these rights are individuals and attached to communities.[92] The Award refused to apply "the western legal fiction […] whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State."[93] However, Kopela argues that the Eritrea v. Yemen Award could imply that these rights also belong to the State, thus creating a hybrid regime, where the State and some of its nationals would be the holders.[94] The decision, in its second stage, states indeed that "although the immediate beneficiaries of this legal concept were and are the fishermen themselves, it applied equally to States in their mutual relations."[95] When it came to artisanal fishing, the South China Sea Arbitration agreed with this argumentation and stated that "artisanal fishing rights attach to the individuals and communities that have traditionally fished in the area. These are not the historic rights of States, as in the case of historic titles, but private rights."[96] Indeed, historic titles are related to the concept of sovereignty. Both previously mentioned cases establish that the holders of historic and traditional fishing rights are those exercising these activities. The only requirements to be entitled to those rights are a question of "nationality of the fishermen" and of their "links with the local community, which is not static but can be dynamic and evolving."[97]

Qualifying historic and traditional fishing rights as a hybrid regime were both the States and some of their nationals are the holders does however not imply that the advantages these holders can obtain from the historic and traditional fishing regime are the same. It is the view of this thesis' author that States have above all obligations when it comes to historic and traditional fishing rights. Indeed, in decisions such as the South China Sea case or the Eritrea v. Yemen case, the States Parties were compelled to recognize rights of access for fishermen from the other State, regardless of matters of sovereignty or boundaries.[98]As such, it appears that historic

[92] See *Eritrea v. Yemen Arbitration (Maritime Delimitation), supra* note 49, §101.
[93] *Ibid.,* §101.
[94] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 701.
[95] *Eritrea v. Yemen Arbitration (Maritime Delimitation), supra* note 49, §93.
[96] *South China Sea Arbitration, supra* note 15, §798.
[97] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 701.
[98] See part 2.2.2.1 *In the territorial sea,* p. 26.

and traditional fishing rights remain primarily private rights whose holders are the fishermen carrying out their activities, and that States have to recognize and comply with.

As a consequence of the qualification of historic and traditional fishing rights as private rights, certain events such as the change of sovereignty on a specific area does not impede their practice by the holders. The Abyei Arbitration addressed issues such as traditional rights and decided that they, "in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation."[99] In this specific case, traditional grazing rights remained unaffected by the established boundary. Similar to the Abyei Arbitration, the South China Sea Award mentioned the Bering Sea Arbitration[100] which "exempted indigenous people from its division of jurisdiction with respect to the hunting of fur seals in the Bering Sea."[101]

The South China Sea Tribunal also develops its take on the matter of sovereignty change with respect to the LOSC ratification. Before the contemporary regime, certain States established Exclusive Fisheries Zones (EFZ), in order to protect their fisheries interests. In this case, it is argued that existing fishing rights could not have been impacted, for declaring an EFZ can be assimilated to a change of sovereignty.[102] It is the solution the ICJ came up with in the Fisheries Jurisdiction case opposing the UK and Iceland.[103] In the same way, the South China Sea Tribunal considered the extension of the territorial sea as being similar to a change of sovereignty, thus not impairing historic and traditional fishing rights.[104] The same interpretation is not extended to the EEZ, which appeared under the LOSC. The Tribunal's argumentation will be explained further.[105] Now that the notions of 'historic' and 'traditional' fishing rights have been explained, the way these rights can be established will be investigated.

2.2. Establishing historic and traditional fishing rights

It can be generally considered that historic and traditional fishing rights are formed through the practice of fishermen carrying out their activities "close to the coasts where they live regardless

[99] *Abyei Arbitration, supra* note 88, §766.
[100] *Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seal (United Kingdom v. United States), Award* (1893), (2007) XXVIII RIAA 263.
[101] *South China Sea Arbitration, supra* note 15, §799.
[102] *Ibid.,* §802.
[103] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits (Judgement),* [1974], ICJ Rep 3, §62 [hereinafter: *Fisheries Jurisdiction case*].
[104] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 705.
[105] See part 2.3.2 *Position of case law on the matter,* p. 30.

of the legal status of the maritime zones and of the gradual extension of the jurisdiction of the coastal States."[106] These rights go through a process of "historical consolidation," which means the passing of years, decades is paramount to the very existence of those rights.[107] The elements to take into consideration for the establishment of historic and traditional fishing rights will be looked into. Some of these elements have been touched upon earlier[108] in order to differentiate historic and traditional fishing rights from sovereignty-based claims on historic titles. They shall now be looked into with more details in a first part (2.2.1). In a second part, the geographical scope of applicability of historic and traditional fishing rights will be analyzed, as the existence of these rights depends on it (2.2.2).

2.2.1. The criteria necessary for the apparition of historic and traditional fishing rights

As seen earlier, the two criteria necessary to establish the existence of a historic or traditional fishing right are a longstanding practice (2.2.1.1) and acquiescence by other States (2.2.1.2). However, these requirements carry some uncertainties that need to be looked into.

2.2.1.1. A longstanding usage

In order to grant a fishing practice its historic character, it is evident that this activity needs to have stretched over time. The exact amount of time is however uncertain.

Indications brought by customary international law can be a starting point. The Asylum case dealt with the question. It has been found that "a consistent and uniform usage practiced by the States in question" is needed, in order for a customary rule to emerge. [109] When it comes to the duration of this usage, it is not so much the actual practice's spreading over time as "the degree and the intensity" that matters. If the changes brought forth by a specific usage are of such intensity that they result in a dramatic revision of the practices admitted so far, and if this new usage is widely followed by the international community, then it "need not be spread over decades."[110] However, what is true for rules of customary international law, as was just

[106] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 702.
[107] *Ibid.,* p. 702.
[108] See part 1.2 *Scope delimitation: Differentiating historic rights from historic and traditional fishing rights,* p. 7.
[109] *Asylum case (Colombia v. Peru) (Judgement),* [1950], ICJ Rep 266, p. 276.
[110] H. Lauterpacht, 'Sovereignty over Submarine Areas' (1950), 27 *British Yearbook of International Law* 376*,* p. 393.

explained, is not for "the acquisition of specific and special rights by an individual State on a prescriptive basis," i.e. historic rights.[111] Indeed, customary rules of law are created following "a generalized pattern of the behaviour of many," they are a general and collective norm whereas historic rights are the result of "the repetition of the same activity by one" and as such are individual rights with a specific holder.[112] However, as was seen earlier, historic and traditional fishing rights differentiate themselves from historic rights, as they are not necessarily established on a prescriptive basis. [113] They can rely on lawful practices such as fishing on the high seas. But even in this case, the passage of time is an essential requirement. Indeed, as was seen earlier, the holders of historic and traditional fishing rights can be private individuals. In this case, the comments made by Fitzmaurice apply, as the practice of a historic fishing right, whose holder is an individual cannot constitute a widespread practice as it would be the case for customary international law. The essence of historic fishing rights is to be attached to a specific area and specific rights' holders, as it is seen throughout this thesis.

Moreover, the purpose of this condition is to ensure the stability of a practice. Indeed, it is paramount to avoid any dislocation that might result from a change of situation and would considerably impair the situation of historic rights' holders. When it comes to fisheries activities for instance, they must have been "accustomed from time immemorial or over a long period."[114]

The Eritrea v. Yemen Arbitration confirmed that the passage of time is essential in the creation of a traditional fishing right. The Award states in the first stage, relating to territorial sovereignty and the scope of the dispute:

> The Tribunal's [First Stage] Award on Sovereignty was not based on any assessment of volume, absolute or relative, of Yemeni or Eritrean fishing in the region of the islands. What was relevant was that fishermen from both of these nations had, from time immemorial, used these islands for fishing and activities related thereto.[115]

The same decision in the second stage, about maritime delimitation, recognizes that "the traditional fishing regime covers those entitlements that all the fishermen have exercised continuously through the ages."[116] The Philippines in the South China Sea Award argue that

[111] Fitzmaurice, 'The Law and Procedure of the International Court of Justice,' *supra* note 38, p. 31.
[112] O'Connell, *The International Law of the Sea, supra* note 25, p. 433.
[113] See part 1.2 *Scope delimitation: Differentiating historic rights from historic and traditional fishing rights,* p. 7.
[114] Fitzmaurice, 'The Law and Procedure of the International Court of Justice,' *supra* note 38, p. 51.
[115] *Eritrea v. Yemen Arbitration (Scope of the Dispute), supra* note 50, §126.
[116] *Eritrea v. Yemen Arbitration (Maritime Delimitation), supra* note 49, §104.

for fishing practices to be protected by international law, they must be "longstanding, long, deep, peaceful, uninterrupted, ancient and having occurred since times immemorial."[117]

Finding evidence of this longstanding usage might prove to be difficult as the South China Sea Tribunal noticed:

> The stories of most of those who have fished at Scarborough Shoal in generations past have not been the subject of written records, and the Tribunal considers that traditional fishing rights constitute an area where matters of evidence should be approached with sensitivity. That certain livelihoods have not been considered of interest to official record keepers or the writers of history does not make them less important to those who practice them.[118]

In this respect, both the Eritrea v. Yemen and South China Sea Arbitration came up with ways of establishing evidence of a longstanding practice. The first one mentions "the most reliable historical and geographical sources, both ancient and modern" as well as the "statements attributed to fishermen."[119] The second one referred to different ancient books, articles and maps.[120] Next to a longstanding usage, the States impacted by the fishing practices have to acquiesce to these activities. What the notion of acquiescence exactly refers to shall be looked into.

2.2.1.2. Acquiescence by other States

On top of a longstanding usage, other States impacted by the fishing practice need to recognize and accept a specific practice in order for it to be qualified as a historic right.[121] In matters of historic and traditional fishing rights, the need for 'acquiescence' by other States is not straight forward. This term involves a certain level of recognition that will now be described and is not always applicable for historic and traditional fishing rights.

Acquiescence does not equal an explicit consent. It is rather the absence of protest by the adverse State over the practice of another State's nationals. For acquiescence to be verified, quite a low threshold is required. Indeed, the historic character of a practice can be used to presume acquiescence. The concerned State can rebut this presumption, however, the way this protest can effectively interfere with the establishment of a historic right has to meet certain

[117] *South China Sea Arbitration, supra* note 15, §779.
[118] *Ibid.*, §805.
[119] *Eritrea v. Yemen Arbitration (Scope of the Dispute), supra* note 50, §§127, 315.
[120] See *South China Sea Arbitration, supra* note 15, §§180, 181, 186, 195, 762, 779.
[121] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation,' *supra* note 26, p. 4.

criteria. The result of a State's protest must be effective. It follows that a mere diplomatic opposition or a "formal attitude of protest" is not enough to oppose the presumption of acquiescence over time.[122] If the State does not protest and is considered to have acquiesced to a specific practice in a certain area, the State can be held to have extended its acquiescence over the whole concerned area.[123] Indeed, the Fisheries case established that Norway's way of delimitating baselines was not only opposable to the UK in the area at the centre of the dispute, but on the whole of Norway's coastline.[124] However, a State can only protest if it has knowledge of the situation involving potential historic rights. In the Fisheries case, the UK could only protest Norway's method based on historic rights to enclose its internal waters, if it knew that this was a Norwegian practice. Fitzmaurice brings forth two principles related to this issue. First, a State cannot be held to have knowledge of another's State legislation or regulation, except if it was made aware of it by way of official communication or by any other unmistakable mean. It can be an incident between British nationals and the Norwegian authorities in what Norway considers to be its internal waters. Second, States can rely on generally accepted international law for the protection of their interests and cannot be prejudiced if they don't object right away.[125]

The requirements needed for acquiescence to be verified are only applicable in the case where a specific activity faces an adverse practice. What situation is meant by 'adverse practice' has been touched upon earlier.[126] If the fisheries activities took place in the high seas, where freedom of fishing is granted, no 'adverse practice' can take place, thus no acquiescence is required. However, if the fisheries activities were to take place in the territorial sea under the sovereignty of a specific State, acquiescence by that State would be needed. Thus, the question of the geographical applicability of historic and traditional fishing rights is central and will now be looked into.

2.2.2. The geographical applicability of historic and traditional fishing rights

As explained earlier, historic and traditional fishing rights are non-excusive and do not necessarily require adverse practice for their formation.[127] These characteristics explain why

[122] Fitzmaurice, 'The Law and Procedure of the International Court of Justice,' *supra* note 38, p. 29.
[123] *Ibid.,* p. 40.
[124] *Fisheries case, supra* note 36, p. 138.
[125] Fitzmaurice, 'The Law and Procedure of the International Court of Justice,' *supra* note 38, p. 34.
[126] See part 2.1.1.2 *The legal nature of historic and traditional fishing rights,* p. 14.
[127] *Ibid.*

continuous fisheries activities on the high seas could give rise to historic fishing rights once the same high seas become part of a State's territorial sea or EEZ. This is however a debated issue. Some authors argue for the validity of this theory,[128] as well as some jurisprudence, such as the Eritrea v. Yemen case,[129] while other authors[130] and court decisions pronounced themselves against it, such as the South China Sea Arbitration.[131] The matter at hand is not to investigate whether historic and traditional fishing rights can emerge on the high seas, but if they can appear after an extension of jurisdiction or sovereignty of a coastal State over the high seas. Indeed, the freedom of fishing in the high seas prevents States from making any claim that would exclude others from enjoying this freedom.[132] This issue is closely related to the extension of the territorial sea from six to twelve nautical miles (nm) (2.2.2.1) or the apparition of the EEZ under the LOSC regime and the survival of historic fishing rights (2.2.2.2).

2.2.2.1. In the territorial sea

The territorial sea as an extension from the mainland where coastal States exercise sovereignty has always existed in the law of the sea. The breadth of this zone has varied over time, from State to State and was established at twelve nm after UNCLOS III.[133] When it comes to historic and traditional rights in this area, two cases can be differentiated. First, these rights can have been established over time as an adverse practice in a coastal State's territorial sea that was already existing as the fishing practices started. Second, those fishing practices may have taken place in what used to be the high seas but found itself falling under a coastal State's sovereignty after an extension of the territorial sea's breadth.

The South China Sea Arbitration pronounced itself on the matter as it states: "established traditional fishing rights remain protected by international law."[134] It implies that, no matter the territorial sea subject to a coastal State's sovereignty, historic and traditional fishing rights may be exercised by the nationals of any State.[135] Indeed, the Philippines and China were disputing the status of Scarborough Shoal and which State had sovereignty there. The question turned out

[128] See Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 698.
[129] *Eritrea v. Yemen Arbitration (Maritime Delimitation), supra* note 49.
[130] See Schatz, 'Post-Brexit EEZ Fisheries Access,' *supra* note 59, p. 150.
[131] *South China Sea Arbitration, supra* note 15.
[132] Art. 87(1)(d) LOSC, 1982, *supra* note 5.
[133] Art. 3 LOSC, 1982, *supra* note 5.
[134] *South China Sea Arbitration, supra* note 15, §804.
[135] *Ibid.,* §759.

to be irrelevant, for the Tribunal, which could not deal with a matter of land sovereignty, decided:

> Consistent with the limits on its jurisdiction, the Tribunal has refrained from any decision or comment on sovereignty over Scarborough Shoal. The Tribunal also considers it imperative to emphasize that the following discussion of fishing rights at Scarborough Shoal is not predicated on any assumption that one Party or the other is sovereign over the feature. Nor is there any need for such assumptions. The international law relevant to traditional fishing would apply equally to fishing by Chinese fishermen in the event that the Philippines were sovereign over Scarborough Shoal as to fishing by Filipino fishermen in the event that China were sovereign. The Tribunal's conclusions with respect to traditional fishing are thus independent of the question of sovereignty.[136]

The Award does not seem to make a distinction between historic and traditional fishing rights established in an existing territorial sea or after the high seas, in which the fishing practices were carried out, fell under a coastal State's jurisdiction. Thus, it can be interpreted that in either case, historic and traditional fishing rights can be preserved in the territorial sea. The outcome is however different when it comes to the EEZ.

2.2.2.2. In the EEZ

One of the main achievement that arose with the ratification of the LOSC is the establishment of the EEZ.[137] This new maritime zone is regulated in Part V of the LOSC and grants coastal States sovereign rights on marine living resources, among other prerogatives.[138] These sovereign rights that a coastal State possesses extend up to 200 nm from the baselines.[139] Such a regime was an innovation. However, even before the LOSC ratification, some States like the UK and Iceland declared or tried to establish an EFZ off their coasts to secure their interests related to fisheries. The ICJ recognized this practice as being part of customary international law in the Fisheries Jurisdiction Case opposing the UK and Iceland.[140]

These newly created EEZs reduced the high seas portion of the oceans, where freedom of fishing applied. As a consequence, States or communities of fishermen who used to fish in certain parts of the high seas, could not carry out their activities anymore, for some of their

[136] *South China Sea Arbitration, supra* note 15, §793.
[137] See Rothwell, Stephens, *The International Law of the Sea, supra* note 2, p. 85.
[138] Art. 56(1)(a) LOSC, 1982, *supra* note 5.
[139] Art. 57 LOSC, 1982, *supra* note 5.
[140] *Fisheries Jurisdiction case, supra* note 104, §52.

fishing grounds fell under a coastal State's jurisdiction. According to the LOSC and its Article 56(1)(a), in its EEZ, a coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living."[141] However, the EEZ regime does not mean that States could not access each other's EEZ in order to fish. Part of a coastal State's jurisdiction over its EEZ is the possibility to determine a total allowable catch.[142] This refers to the maximal quantity of fish resources that can be harvested and the surplus that the coastal State could not use is left over to other States, according to certain criteria.[143] One of the issues arising with these increasing powers of the coastal State upon such a large maritime area is the fate of States or fishermen who consider to have traditionally fished there, as it was the high seas and who now find themselves impaired in carrying out their activities. Thus, the question whether historic and traditional fishing rights that used to be carried out in the high seas still exist in the EEZ will be looked into. Indeed, it cannot be considered that coastal States have a "residual jurisdiction" in the EEZ, as a form of jurisdiction defined negatively in comparison to the rights of other States. However, the creation of the EEZ may not have impacted all claims made by other States. Thus, a balance has to be found with rights that other States may potentially have in the same area.[144] The apparition of the EEZ being so closely linked to the ratification of the LOSC, the coexistence of historic or traditional fishing rights and the EEZ will be looked into in the part about the influence the LOSC ratification had on these rights.[145] As will be seen, the South China Sea Arbitration and the Eritrea v. Yemen case came up with different solutions for that matter.

2.3. The impact of the LOSC on historic and traditional fishing rights

In order to frame out the impact that the LOSC had on the historic and traditional fishing rights regime, different sources will be looked into. As a first step, the content of the LOSC in respect to that matter will be investigated (2.3.1) and as a second step, case law will be touched upon, in order to examine what interpretation of the LOSC was applied (2.3.2).

[141] Art. 56 (1)(a) LOSC, 1982, *supra* note 5.
[142] Art. 61(1) LOSC, 1982, *supra* note 5.
[143] Art. 62(2) LOSC 1982, *supra* note 5.
[144] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation,' *supra* note 26, p. 7.
[145] See part 2.3.2 *Position of case law on the matter,* p. 30.

2.3.1. Information provided by the LOSC

Historic rights in general are not directly regulated by the LOSC. It is reminded by the Philippines in the South China Sea Arbitration, which states that the negotiations of the Convention took some preexisting rights into consideration but did not create specific provisions for historic rights.[146] They are to be found through other provisions dealing with related issues. In the case of sovereignty-based historic rights such as historic waters for instance, there were strong resistances during the elaboration of the LOSC to include a special regime in that respect.[147] For example, Article 15 LOSC relates to the delimitation of the territorial sea between States with opposite or adjacent coasts. In this scenario, an equidistant line is drawn in order to preserve each party's interest. However, this method doesn't find application if historic titles are at variance with it. The boundary line might be modified in order to preserve historic titles of another State over an area. The historicity of the title gives rise to an historic right that precedes the equidistance principle in this case.

It can be observed from investigating historic titles and Article 15 LOSC, that all kind of historical considerations were not left out of the territorial sea regime. However, no such provision is to be found in Part V of the LOSC regarding the EEZ, which could speak for the absence of historic claims in that maritime zone. Since the LOSC does not contain any specific provision regarding historic titles, the Preamble is to be applied. The eighth paragraph states: "*Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law." Thus, the regime of historic waters for example, is governed by general international law.[148]

When it comes to historic and traditional fishing rights, the UNCLOS negotiations also witnessed objections to acknowledge historic and traditional fishing rights in another State's EEZ.[149] No direct regulation exists on the matter, but these rights are mentioned on several occasions. It has been said earlier that States can allocate the surplus of fish stocks they harvested in their EEZ from their total allowable catch to other States. This allocation happens following certain criteria, among which is Article 62(3) LOSC. This provision mentions "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone." Historic and traditional fishing rights are not expressly mentioned here, but it is to understand that if such activities as described earlier have taken place in a State's EEZ, they

[146] *South China Sea Arbitration, supra* note 15, §194.
[147] McDorman, 'Rights and Jurisdiction over Resources in the South China Sea,' *supra* note 23, p. 151.
[148] *Ibid.,* p. 152.
[149] *Ibid.*, p. 157.

have to be taken into account.[150] However, this Article does not give a preferential right on the total allowable catch to States who might claim historic or traditional fishing rights. Moreover, it can be argued that there would be no need for such a provision if the LOSC drafters intended to preserve historic and traditional fishing rights in the EEZ. Indeed, a clearer formulation could have been used.[151]

Article 51(1) LOSC is a provision that expressly mentions 'traditional fishing rights' in relation to archipelagic States. These States are allowed to establish 'archipelagic waters,' that have a specific status. It contains the duty to "recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters." The provision gives two precisions on its application. First, it applies not only to adjacent States but also to neighbouring States, which broaden the scope of the rights' holders. Secondly, it only aims at guaranteeing traditional fishing rights within the archipelagic waters, not on the EEZ outside of the archipelago. This element might be of interest when considering the intentions of the drafters to make the EEZ a zone on which the coastal States have strong entitlements.[152]

Since the LOSC itself does not provide much insight in the problematic of its coexistence with historic and traditional fishing rights, it is necessary to look into how the jurisprudence ruled on the matter. However, only considering the LOSC, it appears as though its provisions do not preserve historic and traditional fishing rights.

2.3.2. Position of case law on the matter

Courts and Tribunals were confronted with the issue because of the disagreements States have on that matter, as will be looked into. A unanimous stance does not exist, even within 'developed' States. Most States defend a strong EEZ, where the coastal State's jurisdiction precedes any claim other States may have in the same area, while others like Australia and New-Zealand are in favour of guaranteeing historic rights for a delimitated time.[153] It is interesting to study cases on historic rights in general after the adoption of the LOSC in order to see what role these rights play under the new regime.

[150] See Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 706, 707.
[151] See *South China Sea Arbitration, supra* note 15, §804.
[152] See McDorman, 'Rights and Jurisdiction over Resources in the South China Sea,' *supra* note 23, p. 158.
[153] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation,' *supra* note 26, p. 8.

As a first step, judgements rendered prior or contemporary to UNCLOS III shall be looked into. The Fisheries Jurisdiction case between the UK and Iceland dealt with the creation of an EFZ by Iceland and the historic fishing rights the UK pretended to have in the same area. [154] The ICJ decided in this case that Iceland could not establish an EFZ per se, for it would infringe on "the UK's historic rights and economic dependency on certain fish stocks located in such a fishing zone." A fishing zone could be established but not in an exclusive way.[155] Thus, this decision speaks for the conservation of historic and traditional fishing rights in zones were a coastal State seeks to possess sovereign rights over marine living resources. However, it should be kept in mind that this process happened prior to the ratification of the LOSC. In 1982, year in which the UNCLOS III negotiations took an end, a decision involving historic rights and EEZs was taken by the ICJ. The Tunisia v. Libya case "recognized the emerging concept of the EEZ." It explained that the at the time fairly recent LOSC contained provisions about historic claims "in a way amounting to a reservation to the rules set forth therein."[156] However, the case did not involve fishing rights, but the delimitation of the continental shelf[157] and the Court did not get to pronounce itself clearly on the survival of historic rights following UNCLOS. Indeed, the historic rights and titles claimed by Tunisia were contained within the 200 nm in which rights could be claimed.[158]

The ICJ pronounced itself in the Gulf of Maine case relating to maritime boundary delimitation and the influence fishing practices might have in that respect.[159] Therefore, this case is slightly different from the Fisheries Jurisdiction case between the UK and Iceland, for it does not directly relate to fisheries. The United States used to have a strong presence in this high seas area when it came to fisheries activities, but the Gulf was to fall under Canadian jurisdiction. The US wanted the historic interests that its fishermen had in the region to be taken into consideration when establishing the final maritime boundary. However, the ICJ refused this argumentation and stated that "whatever preferential situation the United States may previously have enjoyed, this cannot constitute in itself a valid ground for it is now claiming the incorporation into its own exclusive fishery zone of any area which, in law, has become part of Canada."[160] Thus, it seems in this case that claims about historic rights did not play a role in the

[154] *Fisheries Jurisdiction case, supra* note 104.
[155] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation,' *supra* note 26, p. 8.
[156] *Tunisia v. Libyan Arab Jamahiriya, supra* note 20, §100.
[157] McDorman, 'Rights and Jurisdiction over Resources in the South China Sea,' *supra* note 23, p. 156.
[158] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation,' *supra* note 26, p. 9.
[159] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States) (Judgement),* [1984], ICJ Rep 246 [hereinafter: *Gulf of Maine case*].
[160] *Gulf of Maine case, supra* note 159, §235.

context of an EFZ. Prior to Canada's extension of jurisdiction, the US were making use of the freedom of the high seas and the "shared regime was terminated when coastal States' jurisdiction was extended."[161] The South China Sea Arbitration used this case to justify its argumentation and mentions the different subject at hand. Even though the claims brought to the South China Sea Arbitral Tribunal were not relating to maritime boundary delimitation, the decision used the interpretation of the LOSC brought forth in the Gulf of Maine case to support theirs.[162]

As a second step, decisions taken after the LOSC ratification will be investigated. The South China Sea Arbitration found a decision contrary to that of the ICJ in the Fisheries Jurisdiction case, which established that historic fishing rights could not be ignored if a State decided to claim preferential rights in fishing off its coasts.[163] The Arbitral Tribunal argued that when this case was tried in 1974, the LOSC was not set in force yet and the concepts of EEZ or EFZ had not yet emerged or were heavily debated.[164] However, the decision found by the Tribunal can also be subject to criticism as it will be looked into.[165] With the nine-dash line China was claiming historic rights in the South China Sea and maintained that this line "does not contradict the obligations undertaken under UNCLOS; rather, it supplements what is provided for in the Convention."[166] By this, China was arguing that historic fishing rights were preserved under the EEZ regime, as provided for by the LOSC. However, the Tribunal decided otherwise and established a different system depending on the maritime zone these rights were carried out.

The South China Sea Tribunal came up with the following question after considering China's and the Philippines' claims:

> Does the Convention, and in particular its rules for the exclusive economic zone and the continental shelf, allow for the preservation of rights to living and non-living resources that are at variance with the provisions of the Convention and which may have been established prior to the Convention's entry into force by arrangement or unilateral act?[167]

The Award then goes on to give an answer to that question and starts by establishing that the Article 311 LOSC is applicable to the interactions between the Convention and historic

[161] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 707.
[162] *South China Sea Arbitration, supra* note 15, §257.
[163] *Fisheries Jurisdiction case, supra* note 104, §62.
[164] *South China Sea Arbitration, supra* note 15, §258.
[165] See part 2.4 *Concluding remarks,* p. 34.
[166] Z. Gao, B. Jia, 'The Nine-Dash Line in the South China Sea: History, Status and Implications' (2013), 107 *American Journal of International Law* 98, p. 123.
[167] *South China Sea Arbitration, supra* note 15, §234.

rights.[168] This Article regulates the relations between the LOSC and other international agreements and states that rights derived from other agreements shall not be impaired by the ratification of the LOSC as long as they are compatible with it. In relation to that provision, the Tribunal also referred to the Article 30(2) of the Vienna Convention on the Law of Treaties (VCLT)[169] which provides for the prevalence of a newer treaty over an older one.[170] After considering these articles, the Tribunal explains the possibilities of coexistence between the LOSC and historic rights. First, the Convention could explicitly permit or preserve historic rights, even if they do not take the form of an agreement. Second, if the LOSC does not contain direct rules on the matter, historic rights could be compatible with the Convention and interpretation of the latter would indicate the intention of including such historic rights. Third, if these historic rights were prior and incompatible with the Convention, then according to the VCLT, the LOSC would have priority.[171] The Tribunal endorsed the third possibility, observing that no provision regulated such historic rights, as seen previously,[172] and that these rights are incompatible with the Convention.[173] As seen earlier, historic rights are mentioned in Article 62(3) LOSC when it comes to allocate the surplus of the total allowable catch.[174] The Tribunal interprets this provision as precluding from allocating even more rights in the EEZ. If historic rights were to be widely applicable in EEZs, there would be no need for a norm such as Article 62(3) LOSC. [175] Where the drafters intended to preserve historic and traditional fishing rights in the new legal regime, they established provisions accordingly, as it is the case for archipelagic waters or the allocation of the surplus.[176] Moreover, the tribunal relies on the development's history of the concept of EEZ:

> In the Tribunal's view, the prohibition on reservations is informative on the Convention's approach to historic rights. It is simply inconceivable that the drafters of the Convention could have gone to such lengths to forge a consensus text and to prohibit any but a few express reservations while, at the same time, anticipating that the resulting Convention would be subordinate to broad claims of historic rights.[177]

[168] *South China Sea Arbitration, supra* note 15, §235.
[169] *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 UNTS 33.
[170] *South China Sea Arbitration, supra* note 15, §237.
[171] *Ibid.*, §238.
[172] See part 2.3.1 *Information provided by the LOSC,* p. 29.
[173] *South China Sea Arbitration, supra* note 15, §246.
[174] See part 2.3.1 *Information provided by the LOSC,* p. 29.
[175] *South China Sea Arbitration, supra* note 15, §243.
[176] *Ibid.,* §783.
[177] *Ibid.,* §254.

The South China Sea Tribunal endorses in this case a more contractual approach to the LOSC, according to which, States parties agreed to relinquish some of their rights (here potential historic fishing rights) in order to gain more (here through the regime of sovereign rights over marine living resources in the EEZ).[178]

The Eritrea v. Yemen decision, taken more than a decade before the South China Sea Arbitration, came up with a different solution on how to consider historic and traditional fishing rights in the different maritime zones contained in the LOSC. It ruled that "historic fishing rights by a third State in waters otherwise under the jurisdiction of a coastal State are not necessarily extinguished by UNCLOS."[179] However, even if it appears from the decision that those rights are applicable both in the territorial sea and the EEZ,[180] coastal State sovereignty is an essential element that cannot be trumped by any right a third State might claim in this situation.[181]

2.4. Concluding remarks

It is this author's opinion that the differentiation made by the South China Sea Arbitration between the territorial sea and the EEZ does not hold when it comes to the existence of historic and traditional fishing rights. Many arguments can speak against the solution according to which such rights were only preserved in the territorial sea of a coastal State and not in its EEZ. The motivation behind the South China Sea Arbitration, as was seen earlier, is based on a contractual view of the LOSC.[182] States had to renounce claims based on historic or traditional fishing rights in another State's EEZ, for they acquired sovereign rights over marine living resources in their own EEZ. The South China Sea Tribunal does not adopt the same view for the territorial sea, for its regime did not evolve greatly after the LOSC ratification.[183] However, the Tribunal fails to take into account that the territorial sea under the LOSC was established at twelve nm, which for some areas might have represented an infringement on what used to be the high seas. Thus, in this case, the situation is quite similar to the infringement on the high seas that the creation of EEZs represented. The main difference relies on the fact that a coastal

[178] *South China Sea Arbitration, supra* note 15, §257.
[179] McDorman, 'Rights and Jurisdiction over Resources in the South China Sea,' *supra* note 23, p. 158.
[180] See *Eritrea v. Yemen Arbitration (Maritime Delimitation), supra* note 49, §109.
[181] McDorman, 'Rights and Jurisdiction over Resources in the South China Sea,' *supra* note 23, p. 158.
[182] See part 2.3.2 *Position of case law on the matter,* p. 30.
[183] *South China Sea Arbitration, supra* note 15, §804.

State enjoys sovereignty over its territorial sea, not only sovereign rights over marine living resources. However, this speaks against the South China Sea Award as was noted by Kopela:

> This may give rise to the question of why States would accept (and have accepted) such a restriction in a zone in which they exercise sovereignty (and which is very important both for economic and security reasons), but not in a maritime zone further away from their coasts in which they exercise sovereign rights.[184]

The reason for refusing the existence of historic and traditional fishing rights in the EEZ might reside in the fact that the coastal State never got to give at least its acquiescence to a certain fishing practice that used to be carried out on the high seas an now finds itself in the newly created EEZ. Fitzmaurice, well before the LOSC was set in force, explains in relation with historic claims to non-exclusive rights in now called territorial seas, that sometimes, "it would not be necessary to prove consent or acquiescence in the fishing by other States, but merely the fact of it," if waters that were part of the high seas were to fall under "the territorial or national waters of another State."[185] Kopela's argument reproduced earlier with respect to the greater control of a coastal State in its territorial sea than in its EEZ is applicable in this case as well. If historic and traditional fishing rights can be recognized in the territorial sea, based merely on the existence of the fishing practices, it would logically also be the case for the EEZ.

It would imply for a coastal State to recognize historic and traditional fishing rights in its EEZ if it can be established that these activities took place as the area was under the high seas regime. It appears that this solution might compensate what the South China Sea Arbitration is lacking, which is to take into consideration the special interests of local communities that depended for generations on these fishing practices. The Eritrea v. Yemen Arbitration considered these interests and came up with a different decision. As seen earlier, the decision establishes a clear link between traditional fishing rights and artisanal fishing. Those rights can be exercised in all maritime zones, regardless of sovereignty over these areas. In that case, the will to protect the interests of local communities seems to appear more clearly.[186]

Examining the regime applicable to the continental shelf may help arguing towards a more flexible approach on the coexistence of historic or traditional fishing rights and the EEZ. Article 77(3) LOSC establishes indeed that the continental shelf is inherent to the coastal State. Neither occupation nor a proclamation is needed to guarantee its jurisdiction on the continental shelf.

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[184] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 705.
[185] Fitzmaurice, 'The Law and Procedure of the International Court of Justice,' *supra* note 38, p. 30.
[186] See part 2.1.2.1 *The concept of artisanal fishing,* p. 17.

This regime makes it intrinsically incompatible to claim any historic or traditional fishing rights. Indeed, it was the aim of the drafters to "[defeat] any claim of historic waters, title or rights."[187] This regime is different from the one applicable to the EEZ, that needs to be proclaimed by the coastal State.[188] The fact that an EEZ is not inherent makes it necessary to balance out any rights that other States might have in the same area, including historic and traditional fishing rights. The argumentation brought forth by the South China Sea Arbitration regarding the antagonism between the motivation behind establishing the EEZ regime and any opposing right of other States, might fail to see that such an incompatibility is not as straight forward as that of the continental shelf regime. Moreover, the territorial sea as a maritime zone could to some extent be recognized as being inherent to a coastal State. Indeed, territorial waters have existed throughout history and need not be claimed under the new LOSC regime.[189] The territorial sea as a maritime zone cannot be entirely compared with the continental shelf, however, it seems contradictory to consider historic and traditional fishing rights antinomic to the continental shelf, but not the territorial sea. Logically, these rights should have been erased altogether, which did however not happen. This can be proof of the will to preserve the interests stemming from fishing practices. Accordingly, they should also apply to the EEZ.

As a last argument against the decision made by the South China Sea Tribunal, it has been established that the LOSC does not directly recognize historic and traditional fishing rights.[190] However, practice has shown that agreements taking such rights into account have been signed between States regardless of the LOSC. It is the case between India and Sri Lanka or Australia and Papua New Guinea for instance. These examples may show the will of some States to acknowledge existing fishing practices outside of industrial circuits and their actors.[191]

3. The applicability of the historic and traditional fishing rights legal regime to fisheries after Brexit

The application of historic and traditional fishing rights after the LOSC ratification and depending on maritime zones has been looked into. Whether this regime can be of any relevance in the case of Brexit will now be investigated. After the referendum that took place the 23 June 2016, the UK decided to leave the EU. After years long of negotiations, the formal withdrawal

[187] McDorman, 'Rights and Jurisdiction over Resources in the South China Sea,' *supra* note 23, p. 160.
[188] See Art. 57 LOSC 1982, *supra* note 5.
[189] Art. 3 LOSC 1982, *supra* note 5.
[190] See part 2.3.1 *Information provided by the LOSC,* p. 29.
[191] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 707, 708.

happened on the 31 January 2020. However, a transition period shall be applied until 31 December 2020 and can be prolonged until the 31 December 2021.[192] This period is a time in which European Law will not entirely cease to apply in the UK and the European Single Market will still be accessible to the UK. One of the main characteristic elements of the European Single Market is the CFP that creates a common European EEZ.[193] Every fisherman from the EU have a right to fish in that zone. After Brexit is laid out in every legal aspect, the UK shall recover control over their maritime zones and European fishermen are theoretically not to be treated any differently than other non-European fishermen.

Indeed, the UK leaving the EU created great uncertainty pending a potential agreement. It appears that historic and traditional fishing rights in British waters could be closely linked to treaties that used to recognize fishing practices in certain areas, of certain species and in a definite amount of time. Thus, it is interesting to determine the nature of such rights and whether they can play a role in the post-Brexit situation. European States could be tempted to rely on such rights in order to maintain their fisheries activities in waters such as the UK's territorial sea or EEZ, to which they used to have access and might now be barred from. Considering these elements, the relations between agreements applicable to the UK before Brexit and historic or traditional fishing rights will be investigated as a first step (3.1). Whether these rights existed before any agreement was signed shall be closer looked into in order to determine whether a revival of these rights after the denunciation could be considered. Following this first subpart, voisinage arrangements as a possible way to secure historic and traditional fishing rights will be touched upon (3.2).

3.1. Granting historic and traditional fishing rights based on the fisheries legal regime before Brexit

As a member of the EU, the UK was part of the CFP, which was the main framework for the fisheries legal regime in EU-waters. The CFP was built on the LFC which used to be the main instrument to regulate fisheries access in the European Economic Community (EEC).[194] Thus, the LFC and the CFP represent fisheries access agreements, which means that they establish the rules for different States' fishing fleets to access the waters of another State in order to

[192] *Brexit: UK leaves the European Union*, BBC, *supra* note 7, consulted on 22 August 2020.
[193] Art. 3(1)(d) TFEU, 2012, *supra* note 12.
[194] V. Schatz, 'Access to Fisheries in 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, p. 460 [hereinafter: Schatz, 'Fisheries in the United Kingdom's Territorial Sea'].

exploit its marine living resources. Following the vote on Brexit of July 2016, which implied that the CFP would not be applicable to the UK anymore, it was decided that the LFC would be denunciated as well. These two agreements, as they take into consideration "habitual"[195] and "traditional"[196] fishing practices that could be considered as historic or traditional fishing rights will be presented as a first step (3.1.1). As a second step, the effects of Brexit and the denunciation of the LFC on those historic and traditional fishing rights will be touched upon (3.1.2).

3.1.1. Fisheries access agreements before Brexit

The possibility for States to access the fisheries resources of another State depends partly on the nature of the maritime zone these activities are supposed to be carried out in. According to the LOSC, coastal States enjoy only sovereign rights on the exploitation of marine living resources in the EEZ, whereas they have sovereignty in their territorial sea.[197] Several options are available in order to guarantee fishing rights in the territorial sea of another State. First, bilateral or multilateral fisheries access agreements can be signed between the coastal State and other States. There is also the possibility for historic fishing rights to be recognized and preserved.[198] When it comes to the EEZ, as was seen earlier, if the LOSC does not contain rules on fisheries access,[199] it gives information on how to allocate the surplus of the total allowable catch that could not be harvested by the coastal State. This can be done with regard to habitual fishing practices of other States in the area. [200] Several agreements contain rules on fisheries access (3.1.1.1). These as well as their links to historic and traditional fishing rights shall now be looked into (3.1.1.2).

3.1.1.1. The London Fisheries Convention and the Common Fisheries Policy

The LFC was signed in 1964, at a time were the concept of territorial sea as a zone where coastal State enjoy sovereignty was known, but whose breadth was not uniformly established around the world. Indeed, UNCLOS II failed to reach a consensus in this regard. Matters such as

[195] Art. 3 LFC, 1964, *supra* note 13.
[196] Art. 5(2) EU Regulation 1380/2013, *supra* note 11.
[197] Art. 2(1), 56(1)(a) LOSC 1982, *supra* note 5.
[198] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 462.
[199] *Ibid.,* p. 482.
[200] Art. 62(3) LOSC 1982, *supra* note 5.

fisheries access or historic and traditional fishing rights were left for the States to agree on.[201] The concept of EEZ did not exist at the time, but more and more States wanted to establish zones in which they could have jurisdiction over fisheries activities among others.[202] The LFC relates to fisheries access and contains specific rules in this respect. It establishes the rights for parties to claim an EFZ within 12 nm and exercise exclusive jurisdiction in fisheries matters in this area. The EFZ is divided into two parts in which different rules apply. The first one extending from the baselines to six nm can be subject to transitional agreements for parties who habitually fished there. In the second one extending from six to twelve nm, rights to fish certain species can be recognized for parties who habitually fished there between 1953 and 1962.[203] The LFC also grants permanent access to parties who habitually fished in a certain area, on the basis of a voisinage arrangements. These arrangements are "reciprocity agreements, in that [they involve] an exchange of benefits of the same type between the two contracting States which each grant each other fishing rights in the zones subject to their respective jurisdiction."[204] The particular case of voisinage arrangements will be investigated later on.[205]

The LFC was closely related to the EEC. Indeed, its parties all ended up being members of the EU and its Article 10 provided for the possibility of "the maintenance or establishment of a special régime in matters of fisheries." The parties to the LFC envisaged the possibility that the EEC or its successor, the EU might develop a more integrated and comprehensive legal regime concerning fisheries.[206] This expectation was fulfilled through the apparition of the CFP in 1970. The CFP, as defined by the European Commission, is "a set of rules for managing European fishing fleets and for conserving fish stocks."[207] It is based on the EU Regulation 1380/2013[208] among others, that is the result of other regulations related to the CFP and amended over time. The CFP Framework's provisions contain important principles. Its Article 5(1) states that "Union fishing vessels shall have equal access to waters and resources in all Union waters." The reference to Union waters encompasses theoretically both the territorial sea and the EEZ of EU Member States. On top of the principle of equal access, article 16(1)

[201] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 706.
[202] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 482.
[203] *Ibid.*, p. 483.
[204] *Filleting within the Gulf of St. Lawrence between Canada and France (La Bretagne Arbitration), Decision* (1986), (1990) XIX RIAA 225, §29 [hereinafter: *La Bretagne Arbitration*].
[205] See part 3.2 *Voisinage arrangements as a possibility to maintain historic and traditional fishing practices,* p. 44.
[206] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 484, 485.
[207] *The Common Fisheries Policy,* European Commission, available at https://ec.europa.eu/fisheries/cfp_en, consulted on 29 June 2020.
[208] EU Regulation 1380/2013, *supra* note 11.

regulates the allocation of fishing opportunities and provides that it shall be carried out "on the basis of either the principle of relative stability for existing fisheries or on EU Member State interests for new fisheries."[209] Now that the LFC and the CFP have been touched upon, the links to traditional fishing practices they establish shall be looked into.

3.1.1.2. The links between the LFC or the CFP and traditional fishing practices

Both the LFC and the CFP Regulation contain mentions of "habitual"[210] and "traditional"[211] fishing practices. As explained earlier, the LFC allowed its parties to access halieutic resources within six and twelve nm, based on their habitual fishing practices between 1953 and 1962. The CFP Regulation in its Article 5(2) contains an exception to the free access principle. It states that, in the twelve nm zone off their coasts, Member States are allowed to "restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coasts."[212] These restrictions on free access were agreed on in order for the UK, Denmark, Ireland and Norway to join the EEC. Indeed, they objected the equal access principle implemented by the CFP.[213] A consensus was found and with the exception of Norway, the applicants joined the EEC. However, exceptions exist to the possibility for States to restrict the access to the twelve nm zone off their coasts. According to Article 5(2) of the CFP Regulation, it cannot impair the arrangements reproduced in Annex I of the Regulation for the zone between six and twelve nm.[214] These arrangements are the same as those established by the LFC: a list of States having rights to fish certain species in specific zones off the coasts of other States parties, based on fisheries activities that these States carried out between 1953 and 1962. Thus, including the arrangements from the LFC in the CFP Regulation implies incorporating the legal framework of the LFC into the CFP, which is EU law.[215] Similarly, for the zone up to six nm,[216] the possibility to restrict access to the twelve nm off the coasts is "without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing

[209] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 465.
[210] Art. 3 LFC, 1964, *supra* note 13.
[211] Art. 5(2) EU Regulation 1380/2013, *supra* note 11.
[212] *Ibid.*
[213] R. Churchill, 'Possible EU Fishery Rights in UK Waters and Possible UK Fishery Rights in EU Waters Post-Brexit' (2016), Opinion prepared for the Scottish Fishermen's Federation, available at http://www.sff.co.uk/wp-content/uploads/2017/03/Opinion-for-SFF-2016-1.pdf.
[214] See *Annex*, p. 60.
[215] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 468, 485.
[216] *Ibid.,* p. 468.

neighbourhood relations between Member States."[217] This provision is a reference to voisinage arrangements, which shall be touched upon afterwards.[218]

It appears that neither the LFC nor the legal framework of the CFP are strangers to the concept of historic fishing practices. However, they both take such practices into consideration only when it comes to the twelve nm off the coasts of a State party, which nowadays encompass the concept of territorial sea under the LOSC. No mention is made of the zone beyond twelve nm that could involve today's EEZ concept. As seen earlier, the question of the coexistence between EEZ and historic and traditional fishing rights is highly debated.[219] However, this issue is hardly relevant in the case of the LFC and the CFP, for they are not as widely applicable when it comes to traditional fishing practices.

Looking into what is referred to as "habitual" fishing by the LFC[220] or traditional fishing by the CFP,[221] it raises the question whether these practices amount to the qualification of historic and traditional fishing rights. This issue will be now touched upon, in order to determine whether Brexit or the denunciation of the LFC has an influence on exercising such rights.

3.1.2. The extinction of historic and traditional fishing rights after Brexit and the denunciation of the London Fisheries Convention?

Brexit and the denunciation of the LFC had as consequence to free the UK of its obligations under both legal regimes. As seen earlier, these agreements contained mentions of habitual or traditional fishing practices that were already in place before the entry into force of the LFC or the CFP.[222] If these can be qualified as historic and traditional fishing rights as they were investigated before, there could be the possibility for them not to be impacted or to be 'revived' after Brexit and the denunciation of the LFC. To answer this question, it is essential to determine whether the LFC or the CFP Regulation established those fishing rights (3.1.2.1) or merely put down on paper customary rights that existed beforehand, and which could be revived (3.1.2.2).

[217] Art. 5(2) EU Regulation 1380/2013, *supra* note 11.
[218] See part 3.2 *Voisinage arrangements as a possibility to maintain historic and traditional fishing practices,* p. 44.
[219] See part 2.3.2 *Position of case law on the matter,* p. 30.
[220] Art. 3 LFC, 1964, *supra* note 13.
[221] Art. 5(2) EU Regulation 1380/2013, *supra* note 11.
[222] See part 3.1.1.2 *The links between the LFC or the CFP and traditional fishing practices,* p. 40.

3.1.2.1. The establishment of historic and traditional fishing rights based on the LFC and the CFP?

It is necessary in this case to differentiate between the different maritime zones at stake. As explained earlier, the LFC is only applicable up to twelve nm, which corresponds nowadays to the territorial sea, according to the LOSC.[223] The CFP is applicable to Union waters, which encompass territorial seas and EEZs of EU Member States.[224] However, reference to traditional fishing practices is only made in reference to the twelve nm zone off the coasts, as the rules implemented by the LFC have been taken over by the Annex I of the CFP Regulation. No reference is made of such practices in the EEZ or waters beyond twelve nm. Thus, only the regime applicable within those twelve nm will be looked into.

However, this same Award explained that historic and traditional fishing rights were maintained in the territorial sea of other coastal States. Thus, the question of perseverance of such rights after Brexit is relevant. The first question to be considered is whether the LFC or the CFP could have created historic and traditional fishing rights because of the long time both regimes were applicable. This consideration is made under the assumption that these fishing practices did not exist before the different agreements were enforced. As the South China Sea Award states, historic fishing rights are established by "the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States."[225] The longstanding usage, as investigated earlier, makes here no doubt.[226] Indeed, the LFC was signed by the UK on 9 March 1964, ratified on 11 September 1964, the Convention entered into force on 15 March 1966 and was denunciated by the UK on 3 July 2017.[227] Thus, it has been fifty-one years between the moment of enter into force and denunciation, establishing a longstanding practice. However, the need for these activities to be acquiesced by the coastal State in which jurisdiction they take place, might be more complicated to establish. Indeed, as seen earlier, acquiescence does not constitute an express authorization on the part of the concerned State but more an absence of active protest, resulting in the termination of the activities.[228] In the present situation, it cannot be argued that the UK acquiesced. The UK expressly permitted through a convention for other States to fish in a zone between six and twelve nm. This direct consent does not constitute acquiescence, thus making the qualification of fishing practices covered by

[223] Art. 3 LOSC 1982, *supra* note 5.
[224] Art. 1(2)(b) EU Regulation 1380/2013, *supra* note 11.
[225] *South China Sea Arbitration, supra* note 15, §265.
[226] See part 2.2.1.1 *A longstanding usage,* p. 22.
[227] LFC, 1964, *supra* note 13.
[228] See part 2.2.1.2 *Acquiescence by other States,* p. 24.

the LFC or the CFP Regulation as historic or traditional fishing rights impossible. As was shown in the Special Master Report from March 2004[229] relating to the Alaska v. US case[230] on historic waters, treaties can be used as evidence to prove the preexistence of a title to historic waters.[231] As seen earlier, historic waters represent a form of historic rights related to sovereignty, contrarily to historic fishing rights.[232] Thus, it can be assumed that the indications brought forth by the Special Master Report can be applied in the present situation as well. Using domestic US jurisprudence is relevant in this case, as it was explained by Symmons.[233] Indeed, the decision relies on customary international law and is relevant for its developments. To conclude, the LFC and the CFP Regulation cannot be considered to have created historic fishing rights, but they could be an evidence of preexisting rights, as it will now be investigated.

3.1.2.2. The revival of historic and traditional fishing rights preexisting the London Fisheries Convention and the Common Fisheries Policy?

If historic fishing rights preexisting any agreement on fisheries matters were to exist, the question could be raised whether they could be revived after a denunciation. This matter is particularly relevant in the case of the dispute surrounding the Rockall islet. This rock off the coasts of Scotland is under the UK's sovereignty even if Ireland disputes this title. The territorial sea around Rockall is not mentioned in the Annex I of the CFP Regulation, and as such, according to its Article 5(2), the access to fisheries in that zone can be restricted to vessels that traditionally fish there. Ireland precisely claims to have used the neighbouring waters to carry out fisheries activities. Harrison explains in an article for the Scottish Parliament that if historic fishing rights were to be proven in the area, the Brexit would not impact them. Indeed "their basis would be international law rather than EU law."[234] It is to understand here that, generally speaking, if an agreement regulating fisheries access were to be denunciated, historic rights constituted prior to the agreement could be revived.

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[229] No. 128 Original: *Report of the Special Master on Six Motions for Partial Summary Judgement and One Motion for Confirmation of a Disclaimer of Title,* March 2004, available at https://www.supremecourt.gov/SpecMastRpt/Orig128_033004.pdf

[230] 545 US __ (2005), United States Supreme Court.

[231] Symmons, *Historic Waters in the Law of the Sea, supra* note 23, p. 79.

[232] See part 1.2 *Scope delimitation: Differentiating historic rights from historic and traditional fishing rights,* p. 7.

[233] Symmons, *Historic Waters in the Law of the Sea, supra* note 23, p. 9.

[234] J. Harrison, 'Unpacking the Legal Disputes over Rockall', *SPICe Spotlight* (18 June 2019), available at https://spice-spotlight.scot/2019/06/18/guest-blog-unpacking-the-legal-disputes-over-rockall/, consulted on 4 August 2020.

However, these rights could have been erased by the ratification of the LFC and the entry into force of the CFP. Indeed, the regime of the LFC aimed at protecting habitual fishing practices between six and twelve nm and made sure to exclude "any possible historic fishing rights in the 0-6 nm belt by providing in Article 9(1) LFC, that these rights had to be incorporated into transitional arrangements."[235] Through such arrangements, historic fishing rights in the area were meant to gradually disappear over time. The CFP did not change a lot to these considerations, drawing inspiration from the LFC.[236] Moreover, even before the ratification of the LFC, access to fisheries in the UK's territorial sea was based on agreements, preventing the concept of acquiescence to be verified. This can be observed through the different agreements that applied over history, such as access rights derived from royal privileges granted in the 17th century to the city of Bruges.[237] To conclude, it appears that any potential historic or traditional fishing rights that may have existed before the implementation of the LFC or the CFP, have been eradicated by these agreements. Thus, a revival of preexisting rights is not to be considered in the zone up to twelve nm off the UK's coasts. Now that the UK retrieved sovereign rights on its EEZ without the influence of the EU, the matter whether any potential historic or traditional fishing rights survived in that zone is the same debate as exposed earlier, on the coexistence of such rights and the LOSC EEZ regime.[238] If any European State could successfully prove to have historic fishing rights in the area, they could face the argument that such rights have been taken over by the EEZ legal regime, as it was argued in the South China Sea Arbitration. However, a possibility to maintain a certain form of traditional fishing practices shall now be investigated: voisinage arrangements.

3.2. Voisinage arrangements as a possibility to maintain historic and traditional fishing practices

Bilateral agreements can be relevant when it comes to historic and traditional fishing rights. Already during UNCLOS II this issue was discussed. However, no consensus was reached and historic fishing rights in the territorial sea were left to be dealt with through bilateral agreements.[239] The same issues arose during UNCLOS III despite the general willingness to establish a new maritime zone, the EEZ. However, certain fishing States were concerned about

[235] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 490.
[236] *Ibid.*, p. 490, 491.
[237] See *Ibid.,* p. 493.
[238] See part 2.3.2 *Position of case law on the matter,* p. 30.
[239] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 706.

the potential under exploitation of marine resources in the EEZs of 'developing States' that may not have the financial means to carry out these activities. Article 62(3) LOSC, which has been touched upon earlier,[240] was drafted in order to address these concerns and guarantee a surplus to States that habitually fished in those areas. Since the issue of historic or traditional rights' persistence in the EEZs of other States was not properly addressed by the LOSC, it has been proposed to leave it up to the involved States to come up with regional agreements, in order to grant a legal regime for those fishing practices.[241] Such agreements have been adopted parallelly to the LOSC and

> the State practice reflected in these agreements may demonstrate that the survival of historic fishing rights in the territorial sea and the EEZ of a State will depend on the local circumstances, the fishing history and the intentions and attitudes of the relevant States.[242]

Some States made use of the possibility to establish local fisheries agreements, such as India and Sri Lanka, Japan and Korea or China, Australia and Papua New Guinea.[243] These agreements exist despite the EEZ regime and the sovereign rights on fisheries it carries. Voisinage arrangement are an example of such agreements and they will be defined in a first step (3.2.1). One of the starting point of this thesis being Brexit, the voisinage arrangements applicable in the UK's waters will be looked into (3.2.2).

3.2.1. The definition of voisinage arrangements

Some of the aforementioned agreements are known as 'voisinage arrangements' and, as Symmons define them, they "[allow] mutual and reciprocal cross-boundary fishing practices in inshore waters."[244] Indeed, as Kopela reminds it, "certain neighbouring States have historically respected the habitual past cross-boundary inshore fishery practices by fishers of immediately neighbouring States up to the present time, despite changing maritime zones, that is, in their respective territorial waters, on the basis of complete reciprocity."[245] Voisinage arrangements can be qualified as remains from the old law of the sea[246] and have been addressed in certain

[240] See part 2.3.1 *Information provided by the LOSC,* p. 29.
[241] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 706, 707.
[242] *Ibid.,* p. 708.
[243] Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation,' *supra* note 26, p. 9.
[244] C.R. Symmons, 'Recent Developments in Ireland: The Voisinage Doctrine and Irish Waters: Recent Judicial and Legislative Developments' (2018), 49:1 *Ocean Development & International Law* 79, p. 79 [hereinafter: Symmons, 'Recent Developments in Ireland'].
[245] Kopela, 'Historic fishing rights in the law of the sea and Brexit,' supra note 3, p. 709.
[246] Symmons, 'Recent Developments in Ireland,' *supra* note 245, p. 79.

decisions such as the La Bretagne Arbitration[247] or the Barlow case, where the Supreme Court of Ireland defined them as follows:

> A voisinage arrangement is, as the name implies, an arrangement between neighbouring states under which fishermen […] had fished in each other's waters. This reflects no doubt, the fact that fishing is an occupation with long traditions predating land boundaries. There are no border posts at sea, and fish do not carry passports. A voisinage arrangement is little more than a sensible recognition at official level of practice and tradition whereby fishing boats did not necessarily remain within the national waters but fished neighbouring waters.[248]

It does not appear as though they have to take on a special form, such as a formal treaty. As will be investigated later on, the voisinage arrangement between Ireland and the UK appears to rely on an exchange of letters.[249] This element is also part of what led to the aforementioned Barlow case.

It appears here that voisinage arrangements can recognize and perpetuate historic or traditional fishing rights. However, an important question remains, which is whether they can create these rights and serve as justification for all kind of fishing practices detailed earlier. The idea that a historic right normally based on custom might be created by a treaty appears contradictory. However, could it be considered that the passage of time has an influence on that matter? Could old arrangements, applied for a long time, give rise to a usage that would carry on despite denunciation or forgetting of the treaty? As was seen earlier in the case of the LFC and the CFP, it appears not to be the case. They can merely be the evidence of an existing historic fishing right, but not create one. Nonetheless, Schatz defends the idea that these voisinage arrangements are not threatened by the UK's aspirations towards an independent gestion of their halieutic resources.[250] Indeed, they arose in a specific historical and political context of joined fisheries practices in certain areas, as it will be looked into later on.[251] These voisinage arrangements to which the UK is a party shall now be looked into.

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[247] *La Bretagne Arbitration, supra* note 205.
[248] *Barlow & Others v. Minister of Agriculture,* Supreme Court of Ireland, 27 October 2016, Appeal No. 466/2014, §11, accessible at https://www.courts.ie/acc/alfresco/b5951a02-b190-457c-b117-baa07ca38c96/2016_IESC_62_1.pdf/pdf#view=fitH [hereinafter: *Barlow case*].
[249] Symmons, 'Recent Developments in Ireland,' *supra* note 245, p. 80.
[250] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 474, 479.
[251] See part 3.2.2.1 *Existing voisinage arrangements between the UK and France or Ireland,* p. 47.

3.2.2. Voisinage arrangements in the UK's waters

In this subpart, voisinage arrangements shall be looked into as they exist in UK's waters with France and Ireland (3.2.2.1) and as they could exist with other neighbouring States. Indeed, the question will be raised whether these arrangements could represent a possibility to secure claims of historic and traditional fishing rights in a post-Brexit fisheries legal regime (3.2.2.2).

3.2.2.1. Existing voisinage arrangements between the UK and France or Ireland

The question of voisinage arrangements in the context of Brexit occupies an important place in its own right. Indeed, the political context behind the apparition of such arrangements is quite different from what led to the conclusion of agreements such as the LFC or the CFP. This difference explains why the voisinage arrangements applicable in the UK's waters have not been denunciated and why they should remain applicable. The particular status of voisinage arrangements will now be looked into, using existing agreements as examples. Two voisinage arrangements are currently applicable in the UK's waters, one in which France is a party (3.2.2.1.1)[252] and another in which Ireland is a party (3.2.2.1.2).[253]

3.2.2.1.1. The voisinage arrangement between France and the UK

The voisinage arrangement between France and the UK has the Granville Bay as geographical scope and is more recent than the one involving Ireland. It was signed in 2000 and represents "unquestionably a treaty under public international law."[254] Within the Granville Bay, specific islands are designated by the arrangements: the islands of Guernsey and Jersey, as well as other smaller islands surrounding them, such as Alderney and Sark. These islands are under the UK's sovereignty but were not part of the EU even before Brexit.[255] Their proximity to the French coasts imposes for both States to collaborate on some matters. Fisheries is one of them and the arrangement guarantees "reciprocal fisheries access" in the French and the islands' territorial sea. A Joint Management Committee and a Joint Advisory Committee were created in order to

[252] *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 [hereinafter: *Bay of Granville Agreement,* 2000].
[253] The exchange of letters is reproduced in the *Barlow case, supra* note 249, §12.
[254] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 472.
[255] *The Channel Islands and the European Union,* Channel Islands Brussel Office, available at https://www.channelislands.eu/eu-and-the-channel-islands/, consulted on 30 August 2020.

supervise cooperation.[256] If the legal regime surrounding access to fisheries in the Granville Bay is stabilized since 2000, it has not always been the case, thus explaining the political difficulties that denunciating this voisinage arrangement would represent.

Several treaties were applicable in the Granville Bay long before the 2000 arrangement. They were established in order to settle regularly occurring disputes between France and England. Indeed, the English authorities argued that French fishermen were causing great harm to their fisheries because of "extensive interference and aggressions […] on the coasts of Kent and Sussex."[257] English fishermen were also accused of "dredging for oysters off the French coasts."[258] In 1839, a convention was signed in order to settle these ongoing disputes and

> to define and regulate the limits within which the general right of fishery on all parts of the coasts of the two countries shall be exclusively reserved to the subjects of Great Britain and of France respectively.[259]

This 1839 agreement was the first international convention to establish "the three-mile limit as the boundary of exclusive fishing on the British coasts, so far as French fishermen were concerned."[260] Despite the will of both parties to avoid any further disputes, several encroachments were observed, also due to the lack of applicability of the treaty on nationals other than French or English. Therefore, a new convention was signed in 1867 but was never ratified by France.[261] Until 1965, various agreements followed and in 2000, the voisinage agreement applicable nowadays was signed.[262] This arrangement finds its background in 1992, when the authorities of the Bailiwick of Guernsey decided to extend their fisheries jurisdiction up to twelve nm. An agreement was found with the French authorities in order to guarantee access to French fishermen, with some restrictions, however. Following incidents in the area, the French fishermen's rights of access were restored as they were standing before 1992. The voisinage arrangement of 2000 was developed in order to "review and modernise the regime established pursuant to the Convention of 2 August 1839 and the instruments adopted or

[256] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 472.
[257] Fulton, *The Sovereignty of the Sea, supra* note 1, p. 607.
[258] *Ibid.,* p. 611.
[259] *Convention Between Great Britain and France, for Defining and Regulating the Limits of the Exclusive Right of the Oyster and Other Fishery on the Coasts of Great Britain and of France,* 2 August 1839, 27 *British and Foreign State Papers* 983, p. 984.
[260] Fulton, *The Sovereignty of the Sea, supra* note 1, p. 614.
[261] *Ibid.,* p. 619.
[262] See Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 472.

concluded since then." The "prosperity of local communities" as well as the will to establish "a special regime applicable to fishing activities in the Bay of Granville" are mentioned too.[263]

As was touched upon earlier, the political context that led to one or the other voisinage arrangement was highly sensitive. Denunciating them might not be well received by the French fishermen and represent more instability in the already uncertain post-Brexit future.[264] However, the reform of the French-British voisinage arrangement is under consideration by the authorities of the Bailiwick of Jersey. Indeed, a petition was launched in order to call for the denunciation of the agreement held for "broken" by the Jersey Fishermen's Association.[265] A ministerial response was given and stated that a reform of the arrangement could be considered, but no revocation. Indeed, if it might be necessary to examine that the bases on which the treaty was signed are still respected, the arrangement guarantees equal opportunities and a form of sustainable management in the area. When it comes to the Bailiwick of Guernsey, a dispute arose right after the official exit of the UK from the EU on 31 January 2020. The administration of Guernsey bared access to its territorial sea from French fishermen and declared that fishing vessel which habitually fished there could continue to do so with a license. These new measures sparked criticism by the French authorities.[266] Despite these several disputes, it does not appear as though the Granville Bay voisinage arrangement is about to be denunciated.[267] The history and the regime applicable to the voisinage arrangement between the UK and Ireland is different and shall be looked into.

3.2.2.1.2. The voisinage arrangement between Ireland and the UK

The history of the voisinage arrangement between Ireland and the UK is quite complex as well. It relies on the strong historical ties that Ireland and the UK share.[268] It applies to the fishing zones off the coasts of Ireland and Northern Ireland, where reciprocal fisheries access up to six nm is granted for vessels under a certain size.[269] In recent times, the application of the

[263] *Bay of Granville Agreement, supra* note 253, p. 88.
[264] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 474.
[265] *Fishing treaty petition to receive ministerial response,* Jersey Evening Post, 22 July 2020, available at https://jerseyeveningpost.com/news/2020/07/22/fishing-treaty-petition-to-receive-ministerial-response/#top-of-page, consulted on 10 August 2
[266] *France condemn Guernsey 'ban on fishing boat,'* BBC, 1 February 2020, available at https://www.bbc.co.uk/news/world-europe-guernsey-51333924, consulted on 1 September 2020.
[267] *Minister rejects demands to revoke Granville Bay Treaty,* Jersey Evening Post, 7 August 2020, available at https://www.bbc.com/news/world-europe-guernsey-51333924, consulted on 10 August 2020.
[268] Fulton, *The Sovereignty of the Sea, supra* note 1, p. 620, 621.
[269] *Barlow case, supra* note 249, §12.

arrangement became controversial. The Supreme Court of Ireland dealt with it in the Barlow case. It tackled the issue of mussel fishing off the coasts of Ireland.[270] Indeed, Irish fishermen contested the fact that large scale and industrial Northern Irish fishing practices could take place in Ireland's waters. Moreover, many companies register their vessels in Northern Ireland in order to benefit from the specific rules under the voisinage arrangement. On this matter of flag of convenience, the Judgement indicated that these practices should be considered in the light of their historical context:

> They were very much a product of their time; a time when it was assumed fish were caught on vessels crewed by men, on their own account, rather than as employees of limited companies, and when civil servants addressed each other only by their surname, and when the concepts of aquaculture, and large scale commercial exploitation of mussels, were far in the future.[271]

The voisinage arrangement with Ireland does not consist in a formal treaty as it is the case for the agreement with France: an exchange of letters took place in 1965, which is said to be the origin of the agreement.[272] This raises the question whether this arrangement is a proper treaty or merely a gentlemen's agreement. The Barlow case addressed this question and it was found that the exchange of letters was constitutive of a voisinage arrangement. Indeed, "that is after all how both parties to the arrangement have described it."[273]

On top of not having been "put into a formal treaty form," the voisinage arrangement was not "expressly put into Irish (or British) reciprocating legislation as such."[274] In order to be lawful, the Northern Irish fishing practices had to comply with the Irish Constitution, which provides in its Article 10.1 that all natural resources belong to the State.[275] The Article 10.3 establishes that provisions may only be made by law when it comes to the management of the State's property. In that regard, the voisinage arrangement has to be written down in Irish law. As found in the Barlow case, this is however not the case: in order for the voisinage arrangement to be entirely lawful, it needs to be put into statutory form. This process has already started.[276] Now that existing voisinage arrangements have been analyzed, their role as a potential way to secure claims relating to traditional fishing practices by neighbouring States will be investigated.

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[270] *Barlow case, supra* note 249, §12.
[271] *Ibid.*, §13.
[272] Symmons, 'Recent Developments in Ireland,' *supra* note 245, p. 80.
[273] *Barlow case, supra* note 249, §40.
[274] Symmons, 'Recent Developments in Ireland,' *supra* note 245, p. 80.
[275] *Constitution of Ireland,* 1 July 1937, accessible at http://www.irishstatutebook.ie/eli/cons/en/html#part2.
[276] Symmons, 'Recent Developments in Ireland,' *supra* note 245, p. 81.

3.2.2.2. Voisinage arrangements as a possibility to secure claims to historic and traditional fishing rights in a post-Brexit fisheries legal regime?

It has been explained earlier that treaties cannot create historic or traditional fishing rights, for these are intrinsically customary. However, they can be an evidence that fishing practices took place in a certain area for a long time and could potentially help qualify those practices if the treaty were to be denunciated. It has also been explained earlier that the reason for voisinage arrangements to be established were highly political and sometimes due to ongoing disputes. It can be as well generally considered that historic and traditional fishing rights were erased by the ratification of the LFC and the CFP. Thus, Brexit and the denunciation of the LFC could result in claims of historic fishing rights by EU Member States, but that would not have chances of success. In this situation, if potential customary rights cannot be guaranteed, there could be the possibility to settle claims of historic fishing rights with a treaty such as a voisinage arrangement. It should be specified here that the UK would have no legal obligation to sign voisinage arrangements with their neighbours, but they could do so out of political concern.

Several EU Member States could consider this option, based on several elements that will be looked into. They could rely on the requirements characterizing historic and traditional fishing rights in order to push for a recognition of the fishing practices of their nationals through a voisinage arrangement. Those requirements of a longstanding practice and acquiescence by the interested State were detailed earlier.[277] Looking into the existing voisinage arrangements in which the UK is a party, other characteristics come to attention. It appears that geographical proximity is paramount, for it leads naturally to transboundary fishing practices. The Channel Islands are closer to the French coasts than from the UK's shores and Northern Ireland as well as the Republic of Ireland are closely related. Another criterion appearing is the reliance of local communities on fisheries practices as it is the case as with both voisinage arrangements. Those fishing practices can rely on artisanal methods, perpetuated over time. Between the Republic of Ireland and Northern Ireland, resources such as oysters and mussels are important to local communities, as was indicated by the Northern Ireland Affairs Committee in the House of Commons. [278] The controversy and fears the 'ban on fishing' in the territorial sea of Guernsey

[277] See part 2.2.1 *The criteria necessary for the apparition of historic and traditional fishing rights,* p. 22.
[278] Report on Brexit and Northern Ireland fisheries by the Northern Ireland Affairs Committee, 15 September 2018, §76 et seq. accessible at https://publications.parliament.uk/pa/cm201719/cmselect/cmniaf/878/87806.htm#_idTextAnchor040.

sparked within the French fishing community is also a proof of the importance that these fisheries practices represent for some people.[279]

Some States argue – or could be legitimate to do so – that their fishermen carried out fisheries activities in British waters over centuries. It is the case for fishing nations such as Belgium, Denmark or the Netherlands. Right after Brexit was voted by referendum, Denmark indicated that their fishermen had carried out their activities in the UK's waters since the 15th century. If the rights of their nationals to fish in those waters were impaired, Denmark informed that it was building a legal case to bring to the ICJ. However, since such claims were made in 2017, the situation does not appear to have evolved.[280] Other States such as the Netherlands or Belgium carried out fishing activities in British waters over centuries.[281] Treaties signed between those States and the UK could come as evidence of these practices. However, as was seen earlier, these treaties could have overtaken these customary fishing rights.[282] Moreover, in order for these fishing practices to be taken into consideration, they should still be ongoing and be artisanal. Indeed, as was seen earlier, industrial activities cannot constitute historic or traditional fishing rights.[283]

However, some interrogations remain when considering historic and fishing rights in the framework of voisinage arrangements. Since Ireland and France are still members of the EU, some other Member States could rely on the freedom of establishment granted by EU law in order to gain access to British waters through existing voisinage arrangements.[284] For such loopholes not to threaten the existence of these arrangements, they should be modified in order to bring clarity in that respect.[285] Moreover, the UK is now to be considered as a third State, which implies that all potential new voisinage arrangements regarding fisheries between the UK and a Member State of the EU could not be negotiated individually. Indeed, the EU has an exclusive competence for "external fisheries access relations,"[286] which allows the EU

[279] *France scrambles to end post-Brexit fishing spat in Guernsey waters,* France 24, 4 February 2020, available at https://www.france24.com/en/20200204-france-scrambles-to-end-post-brexit-fishing-spat-in-guernsey-waters, consulted on 1 September 2020.
[280] *Denmark to contest UK efforts to 'take back control' of fisheries,* The Guardian, 18 April 2017, available at https://www.theguardian.com/politics/2017/apr/18/denmark-to-contest-uk-efforts-to-take-back-control-of-fisheries, consulted on 3 September 2020.
[281] Fulton, *The Sovereignty of the Sea, supra* note 1, p. 604 et seq.
[282] See part 3.1.2.2 *The revival of historic and traditional fishing rights preexisting the LFC and the CFP?,* p. 43.
[283] See part 2.1.2.1 *The concept of artisanal fishing,* p. 17.
[284] Art. 49 TFEU, 2012, *supra* note 12.
[285] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 487.
[286] Art. 2(1), 3(1)(d), 3(2) TFEU, 2012, *supra* note 12.

Commission to have oversight over the voisinage arrangements.[287] Then, it is to be expected that the European Commission will take over the management of these arrangements.

3.3. Concluding remarks

In a legal fisheries regime were treaties and agreements take the upper hand over customary law, the situation involving the UK and its surrounding waters represent no exception. Fishing activities in the area have long been shaped by conventions signed between States whose nationals were engaged in transboundary fishing activities. Thus, if treaties can represent an evidence of traditional fishing practices, they can also have overtaken them, as it is the case with the LFC or the CFP.

In any way, following Brexit, the priority if the UK was to restore their sovereignty over their fisheries. This can be witnessed through the denunciation of the LFC on 3 July 2017 shortly after the vote on Brexit took place on 23 June 2016.[288] The short time frame in which both events happened also underlines the uncertainty surrounding the relevance of the LFC after the adoption of the CFP. Indeed, the latter could have overtaken the former.[289] Generally, this also underlines how the debates about Brexit crystallized around the sovereignty of the UK on its own waters and the fisheries activities taking place therein.[290]

4. Conclusion

The first research question to be answered in this thesis regarded the relevance of historic and traditional fishing rights in today's law of the sea and whether they could have been overtaken by treaties. One of the treaties in question is the LOSC and decisions such as the South China Sea case indicate that those rights only survived in the territorial sea of a coastal State and not in its EEZ. It appears that such decisions, or the literature arguing the extinction of historic and traditional fishing rights under the LOSC regime, fail to take into account the main purpose of recognizing such rights. Indeed, as shown earlier, these rights are closely related to the interests of specific communities, depending on such fisheries. The South China Sea Award appears to

[287] Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 487.
[288] LFC, 1964, *supra* note 13.
[289] See Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 485.
[290] C. Dowler, *Privatising the seas: how the UK turned fishing rights into a commodity,* Unearthed, 7 March 2019, available at https://unearthed.greenpeace.org/2019/03/07/fishing-brexit-uk-fleetwood/, consulted on 8 September 2020.

only consider the interests of States under the EEZ regime without acknowledging that these might be different from those of local communities. The Tribunal might have recognized that China acted incompatibly with international law when it completely prevented Filipino fishermen from carrying out traditional fishing practices, however, it seems that these concerns stop with the outer limit of the territorial sea. The prevention of economic dislocation as a reason to take habitual fishing into consideration for the allocation of the surplus,[291] does not apply for other cases, where traditional fishing rights are at stake. However, the risk of disrupting local livelihoods is real and entitling them to a special status will not threaten national economies related to fisheries. Indeed, the South China Sea Tribunal recognizes that certain fishing practices that were at stake, could no longer be qualified as artisanal for they were "sufficiently organized and industrial."[292] It is to be interpreted *a contrario* that fishing practices with an industrial character seek more than sustaining a community and might create imbalance with a coastal State's rights over its maritime zones. Thus, traditional fishing practices are not a threat to economic balance and preventing them from the EEZ is more the result of a technical interpretation of the LOSC than the consideration of the actual interests at stake. Without considering the special interests of fishing communities as such, the decision rendered by the South China Sea Tribunal might be a consequence of the general trend of "conventionalization" of international law, touched upon earlier.[293] Historic and traditional fishing rights might be seen as a solution from the past that can now be settled through agreements, the LOSC being one of them.

With regard to the second research question about the relevance of historic and traditional fishing rights for the post-Brexit situation, the issue of these rights in relation to treaties is quite relevant when considering the interests of fishing communities. Indeed, the importance of treaties compared to customary law might become detrimental to these communities, who could find themselves disadvantaged after Brexit. During the time when the UK was a member of the EEC and later the EU, fisheries activities could be carried out with relative freedom, based on the CFP. Even before that time, certain conventions such as the LFC or the voisinage arrangements allowed for fishermen from certain States to access the UK's waters. As mentioned earlier, on 31 January 2020, the UK officially left the EU. However, EU law will remain applicable for a certain period of time, parallelly to the negotiation of a trade deal between the UK and the EU. Should there be no deal on 1 January 2021, then fishermen from

[291] Art. 62(3) LOSC 1982, *supra* note 5.
[292] *South China Sea Arbitration, supra* note 15, §807.
[293] See part 1.1 *Objectives,* p. 5.

neighbouring States would be barred from fishing in the UK's maritime zones.[294] This situation would represent a considerable setback for fisheries industries, but even more so for smaller communities whose economy rely on those fisheries.

The other part of the second research question addressed other potential mechanisms preserving historic and traditional fishing rights. Voisinage arrangements were mentioned quite extensively in this thesis as way of securing fishing rights. These rights cannot be qualified as historic and traditional for they are not customary. However, they do rely on historic practices and a specific agreement was deemed necessary in order to protect them, due to a very specific political and geographical context. Other States neighbouring the UK could have fishermen in similar situations and as such, their practices could theoretically be protected by such a voisinage arrangement. However, in the context of the EU, such a solution does not appear to be appropriate. Indeed, the European Commission would be the one overlooking the application of these agreements and not the State Party.[295] Moreover, such a diversity of fisheries regimes within the EU might be contrary to the harmonization the EU strives for.[296] As for the existing voisinage arrangements, it appears that neither the UK nor France or Ireland have the intention of denunciating them. Therefore, it should be necessary for any agreement between the UK and the EU to mention both voisinage arrangements and how their existence is not to be questioned. However, as of the time of this thesis' writing, any agreement before the end of the transition period on 31 December 2020 seems very unlikely.[297]

[294] *Prepare your fisheries business for changes from 1 January 2021,* Department for Environment, Food and Rural Affaires, 1 March 2019, available at https://www.gov.uk/guidance/the-fisheries-sector-and-preparing-for-eu-exit, consulted on 6 September 2020.
[295] See part 3.2.2.2 *Voisinage arrangements as a possibility to secure claims to historic and traditional fishing rights in a post-Brexit fisheries legal regime,* p. 51.
[296] See the preamble of the TFEU, 2012, *supra* note 12.
[297] *Brexit: UK-EU trade deal 'seems unlikely' says Michel Barnier,* BBC, 21 August 2020, available at https://www.bbc.com/news/uk-politics-53854730, consulted on 9 September 2020.

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Cover Picture

- Boats decorated with flags and banners campaigning to leave the EU sail by the British Houses of Parliament in London on Wednesday, Niklas Hallen/Getty Images, accessible at https://slate.com/news-and-politics/2016/06/brexit-explained.html

Annex

- Arrangements under Article 5(2) and Annex I of the Basic CFP Framework Regulation (Schatz, 'Fisheries in the United Kingdom's Territorial Sea,' *supra* note 195, p. 474.)

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

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

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

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