GILL JAMES

NEW ZEALAND'S APPROACH TO DOMESTIC FISHERIES MANAGEMENT

LLM RESEARCH PAPER
LAW OF THE SEA (LAWS 536)

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ABSTRACT

This paper considers the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) which relate to the conservation and management of the living resources of the exclusive economic zone. New Zealand's fisheries legislation, particularly the Fisheries Act 1996, is analysed and measured against the obligations imposed on coastal States by UNCLOS.

The Fisheries Act 1996 is considered in terms of the overall philosophy and effect of the Act, and specific provisions are considered in greater detail to determine whether they are consistent with particular obligations under UNCLOS.

The paper argues that as UNCLOS is an umbrella convention expressed in broad terms, the coastal State has substantial discretion in fulfilling its obligations under UNCLOS. The obligations are expressed in such general terms that States may promote their own best interests in fulfilling their obligations. The philosophy of New Zealand's fisheries legislation is derived from and consistent with that of UNCLOS. The detail of the Fisheries Act is imbued with that philosophy, which permeates all decision-making under the Fisheries Act.

It is noted that, in relation to the provision of access to the fisheries of the EEZ to foreign vessels, there is some scope under the Fisheries Act for New Zealand to act in a way which is arguably contrary to the intent of UNCLOS, although there is no opportunity for other States to challenge New Zealand's decisions.

WORD LENGTH

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14,833 words.

NEW ZEALAND'S APPROACH TO DOMESTIC FISHERIES MANAGEMENT

New Zealand's Fisheries Act 1996 purports to recognise New Zealand's international obligations relating to fishing, particularly the United Nations Convention on the Law of the Sea 1982 (UNCLOS). This paper had its genesis in a submission[1] on the Fisheries Bill (which became the Fisheries Act 1996) which, inter alia, alleged that the Bill's focus on maximum sustainable yield as the basis for fisheries management was inconsistent with New Zealand's international obligations under UNCLOS. However, the scope of this paper is broader than the issue raised by the submission.

This paper is in three parts. Part I describes and analyses those provisions of UNCLOS that relate to the use and conservation of the living marine resources and which are applicable in the exclusive economic zones (EEZs) of coastal States. It then summarises the obligations of coastal States under UNCLOS.

Part II of this paper considers the scheme of New Zealand's fisheries legislation to ascertain whether, as a whole, it conforms with New Zealand's international obligations under UNCLOS. There is particular focus on the provisions of the Fisheries Act 1996.

In conclusion, part III addresses the question of the consistency of New Zealand's fisheries management system with the requirements of UNCLOS. It raises some issues concerning potential threats to the success of New Zealand's system which are outside the scope of this paper but warrant further attention.

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[1] Submission of the New Zealand Fishing Industry Board on the Fisheries Bill.

I THE PROVISIONS OF UNCLOS

The legal regime which pertains to the EEZ of coastal States is set out in Part V of UNCLOS. UNCLOS entered into force in 1994, shortly before the Fisheries Bill was introduced into Parliament. It was ratified by New Zealand in 1996. Article 57 establishes the concept of a 200 nautical mile EEZ.[2] Prior to the Convention entering into force, New Zealand had already declared an EEZ of 200 miles.[3] New Zealand's jurisdiction over its EEZ is fundamental to the application of its domestic fisheries legislation. Under article 56(1)(a) of UNCLOS, New Zealand, as a coastal State, has, in its EEZ –

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil ... .

The coastal State has sovereign rights, but not sovereignty over the resources of the EEZ.[4] The use of the words "sovereign rights" makes it clear that the coastal State has the authority to make the decisions concerning access to and use of the natural resources of its EEZ, and that no other State or organisation has the right to participate in that decision-making.[5] The term "sovereign rights" is used in conjunction with "sovereignty" in article 137(1) as to the legal status of the Area and its resources, reinforcing the conclusion that sovereign rights are not the same thing as sovereignty. The concomitant obligation is that, in exercising its rights and performing its duties in the EEZ, the coastal State is required to have due regard to the rights and duties of other States. It is

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2 Every reference to "miles" in the balance of this paper should be taken as a reference to "nautical miles".

3 Territorial Sea, Contiguous Zone, and the Exclusive Economic Zone Act 1977.

4 Lawrence Juda "The Exclusive Economic Zone: compatibility of National Claims and the United Nations Law of the Sea" (1986) 16 Ocean Dev & Int'l Law 1, 5. Juda notes the same distinction was made in the 1958 Continental Shelf Convention (article 2(1) and that "sovereignty" denotes a fuller set of powers and control.

5 WT Burke *The New International Law of Fisheries – United Nations Conference on the Law of the Sea 1982 and Beyond* Oxford Monographs in International Law, Clarendon Press, Oxford 1994, 39. Balton states that UNCLOS provides States with rights amounting to "full authority over all fishing activities" in the their EEZs: David Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks" (1996) 27 Ocean Dev & Int'l Law 125, 126.

generally accepted that the words "exploring and exploiting, conserving and managing" cover the range of activities involved in fishing.

A The Theory behind the Extension of Coastal State Jurisdiction

Many factors lead to over-exploitation of the fisheries resources of the high seas,[6] including improved fishing methods, substantial government subsidies to fishers, and the degradation of some fish habitats. These factors, together with the unilateral extension of jurisdiction by some States, lead to the success of coastal States in claiming increased jurisdiction over areas of the high seas adjacent to their coasts at the Third United Nations Conference on the Law of the Sea.[7] Proposals to establish international organisations to regulate fishing on the high seas were unsuccessful, perhaps because international mechanisms had proved ineffective in dealing with the greatly increased pressures on the fisheries resources of the high seas.

The extended jurisdiction of coastal States generally brought those parts of the high seas with the richest living resources within the jurisdiction of coastal States. More than 90% of all fish currently caught in the ocean are harvested within 200 miles of land.[8]

Extended jurisdiction was intended to address the problems of open access inherent in common property resources, viz the tragedy of the commons. Burke summarises the development of extended coastal State jurisdiction –[9]

> In short, during the first three decades after WWII, almost all coastal states lacked sufficient control over adjacent fisheries to establish an effective management regime. At the same time, coastal states and fishing states lacked the political will to create international bodies, with the necessary competence and assets to

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6 Above note 5, Balton, 130.

7 Grant James Hewison "High Seas Driftnet Fishing in the South Pacific and the Law of the Sea" (1993) 5 Geo Int'l Env'tl L Rev 239, 335.

8 Above note 5, Balton, 127.

9 Above note 5, Burke, 24.

implement effective management. This combined record of futility eventually lead to wide spread large extension of national jurisdiction for fishery purposes, and the extension became customary international law.

The resources gained by coastal States have been largely at the expense of the distant water fishing nations. Kearney records that extended jurisdiction arrested the rate of decline of stocks, but predicted that this improvement might be short term if the coastal States allowed the fishing effort of its nationals in their EEZs to rise in substitution for that of the distant water fishing nations which previously fished those areas unrestrictedly.[10] Indeed, later in the same volume of essays, Edward L Miles notes that extended coastal State jurisdiction provided the impetus for coastal States to develop their own capacity to harvest, process and market the resources of their EEZs.[11]

B The Obligations of Coastal States with respect to the Living Resources of the EEZ

Articles 61 and 62 set out the general obligations of coastal States under UNCLOS. Article 61 addresses the conservation of living resources, and article 62 relates to their utilisation. The responsibility for conservation of the living resources and for the allocation of rights to use the living resources is vested in the coastal State.

Articles 61 and 62 are drafted in broad and imprecise language leaving the way open for various interpretations. Burke found the fisheries provisions of the Convention to be "exceedingly complex". Terms such as "allowable catch",

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10 Robert Kearney "Does Extended Jurisdiction enable us to do better?" in Edward L Miles (ed) *Management of World Fisheries: Implications of Extended Coastal State Jurisdiction* (University of Washington Press, 1989) 273, 275.

11 Edward L Miles "Conclusions" in Edward L Miles (ed) *Management of World Fisheries: Implications of Extended Coastal State Jurisdiction* (University of Washington Press, 1989) 282, 298.

"best scientific evidence available", and "relevant environmental and economic factors" constitute "a thicket for the unwary".[12]

1 Obligation to determine the "allowable catch"[13]

The coastal State is required to determine the allowable catch of fish in its EEZ. Determination of the allowable catch is a precursor to exploitation of those fish in a managed way. Exploitation (ie the taking of fish) occurs whether or not the coastal State has set the allowable catch for a particular species, unless the coastal State has otherwise regulated or prohibited the taking of particular species and assuming that there is no illegal fishing. Setting a limit on the allowable catch, therefore, constrains the use of the resource. Article 61 does not define nor elaborate on how the allowable catch is to be determined. However, the Food and Agriculture Organisation (FAO) has defined "allowable catch" as –[14]

> that catch which, if taken in any one year, will best enable the objectives of [fisheries] management (eg the optimum long term yield [of the fish stock]) to be achieved.

To determine the "allowable catch" as defined by FAO, coastal States need access to accurate and adequate information about a wide range of matters relating to fish stocks, and to reliable catch and effort statistics from the fishing industry. Obtaining information of the necessary quality and quantity is difficult and costly, especially for developing States.[15] In addition, information about more than just biological and ecological factors is required; the social and economic interests of the States concerned must also be considered.[16]

Although expressed in mandatory terms, the obligation of the coastal State to determine the allowable catch of the living resources of the EEZ cannot

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12 WT Burke *The Law of the Sea: Customary Norms and Conventional Rules* 81 Proc. of the Am Soc'y of Int'l L 75-77 (1987) as cited in Hewison, above note 7 at p 334, note 95.

13 Article 61(1).

14 Department of Fisheries of the FAO, Third United Nations Conference on the Law of the Sea, UN Doc GE 75-64093, cited as edited by Hewison, above note 7 at 355.

15 Above note 5, Burke 45.

16 M Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (M Nijhoff, Dordrecht, 1987); cited in Hewison, above note 7 at 356, note 202.

practically be as stringent an obligation as it appears on paper. Most States cannot acquire sufficient information to be in a position to determine an allowable catch level for every stock or species of living resources in their EEZs, nor are States, especially developing States, likely to have sufficient other resources (such as skilled personnel). This suggests that the coastal State has a discretion in determining when it has sufficient information about any stock or species to determine an allowable catch level for it, and to make decisions as to the priority order in which stocks will be assessed for the purpose of setting an allowable catch. There are so many variables involved in a coastal State's decisions that, in effect, it has a very generous discretion. Inevitably, these decisions will reflect the coastal State's wider interests.

The term "living resources" may be interpreted very broadly. However, in the context of article 61(1), "living resources" is restricted to meaning the "currently harvested living resources". After all, there is no necessity for an allowable catch to be set for species of living resources which are not harvested. Presumably article 61(1) also covers non target species taken as bycatch, ie those killed or harmed accidentally or incidentally to fishing activities, but not to protected species. It seems likely that the obligation to determine allowable catch must be interpreted in a practical way and in the light of the resources available to coastal States, as well as the scientific information available to them. Even if the coastal States had adequate resources and it were practically possible to determine an allowable catch for every species or stock of living resources, it would entail a huge waste of resources, since comparatively little benefit would accrue. It is more practical that States have a discretion to identify stocks which would benefit from restricted catch levels.

Even if article 61(1) means literally what it says, States would be unable to determine the allowable catch levels for all species at once, and would thus have delayed their ratification of UNCLOS and its coming into force indefinitely. It is more likely that a reasonable time for determining allowable catch levels for all species should be implied in the article.

2 *Obligation to ensure that over-exploitation does not endanger the maintenance of the living resources*

The coastal State is obliged to "ensure, through proper conservation and management measures, that the maintenance of the living resources in the [EEZ] is not endangered by over-exploitation". The words "maintenance" and "endangered" appear to be redundant. The quoted section of the clause could more simply be rendered "shall ensure through proper conservation and management measures that the living resources of the EEZ are not over-exploited".

"Conservation" may be interpreted in two ways; restrictively to mean "preservation", or widely to mean "wise use".[17] Arguably, in article 61, it should be given its wider meaning. The very fact of the coastal State being required to determine the allowable catch makes it clear that "conservation" encompasses "use". It is generally accepted that the objective of conservation is to maintain the stocks of marine species at high levels so that they are not in danger of decimation if environmental conditions become unfavourable.[18] Proper conservation and management measures are the means for preventing over-exploitation.

The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks elaborated on the obligation contained in article 118 of UNCLOS that "States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas".[19] The Negotiating Text prepared by the Chairman of the Conference addressed the nature of the conservation and management measures to be established.

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17 Lee M Talbot, *Living Resource Conservation: An International Overview* (US Marine Mammal Commission, Washington, 1996) 1.

18 Edwin S Iverson *Living Marine Resources – Their Utilization and Management* (Chapman & Hall, New York, 1996) 244.

19 *Report of the New Zealand Delegation to the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks* (Wellington, 1993) 9.

"Conservation and management measures" specifically include –[20]

- total allowable catch and quota;
- limits to fishing effort;
- fish size limits or other measures to promote optimum utilisation of targeted species;
- gear restrictions;
- area and seasonal closures.

As the Convention on Straddling Fish Stocks and Highly Migratory Fish Stocks is expressly intended to elaborate on, and be consistent with, UNCLOS, it appears that the international community accepts that the "conservation and management measures" referred to in both articles 61 and 118 are not restricted to determining the allowable catch.[21]

Articles 56 and 61(2) read together have the effect of authorising the coastal State alone to determine the total allowable catch and decide what other proper conservation and management measures it will take.[22] The arbitral award of 15 July 1986 between Canada and France (*La Bretagne* Award)[23] addressed the ambit of a coastal State's authority under article 56 of UNCLOS. Canada had prohibited the filleting of fish aboard French trawlers in the groundfishery in the Gulf of St Lawrence, although the French trawlers were permitted to fish in the area. Canada based its assertion of authority on its sovereign rights in respect of conserving the natural resources of its EEZ. The Tribunal found in favour of Canada, reinforcing that it is a matter for the coastal State to determine what are the proper conservation and management measures to be implemented.

In the identification of species that would benefit from the implementation of conservation and management measures, the coastal State is required "to take into account the best scientific information available to it". States concerned

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20 Article 4 of the Negotiating Text; refer Annex F to the *Report of the New Zealand Delegation*, above note 19.

21 This accords with the view expressed by Burke, above note 5, 47.

22 Above note 5, Burke, 46.

23 (1986) 90 Rev Gen Int'l Pub 716 (in French); and see Burke, above note 5, 42.

with the conservation or utilisation of fish stocks in the EEZ are encouraged to co-operate with each other and to exchange and share information that they have gathered concerning the conservation of fish stocks.

The United Nations Conference on Economic Development's Rio Declaration[24] sets out a number of principles. Principle 15 sets out the precautionary approach –

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The Chair of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks noted a basis for the precautionary approach in UNCLOS in that fisheries managers are obliged to base their decisions on the best scientific information available.[25] He suggested that the precautionary approach could be seen as a reasonable reflection of this requirement, given that the data available to scientists are not always sufficient for managers to act. There was "predictable opposition" to this approach from the distant water fishing nations which asserted that UNCED intended that the precautionary approach should apply only to matters such as pollution.[26]

There is some justification for the argument of the distant water fishing nations in the report of the Preparatory Committee for UNCED, which referred to the precautionary principle in the context of marine pollution and not that of living marine resources.[27] However, although the precautionary principle was originally developed in relation to pollution, it has taken on a wider application in recent years.[28] Principle 15 is expressed broadly in a way which may support

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24 June 1992. (1992) 31 ILM 874.

25 *Report of the New Zealand Delegation*, above note 19, 11.

26 *Report of the New Zealand Delegation*, above note 19, 11.

27 *Official Records of the General Assembly, Forty-Sixth Session, Supplement No 48* (A/46/48).

28 Warwick Gullett "Environmental Protection and the 'Precautionary Principle': A Response to Scientific Uncertainty in Environmental Management" (1997) 14 EPLJ 52, 55. Gullett comments that "[the principle has been advanced most successfully in relation to marine

its application beyond the area of pollution without straining the language. Indeed, fisheries management lends itself to the application of the precautionary approach as reliable information about fish stocks is often lacking, yet it is essential to the management of fisheries on a sustainable basis. Hewison argues that the formulation "best scientific evidence available" permits States to apply the precautionary approach in determining conservation measures.[29]

3 *Maximum sustainable yield*

The conservation and management measures that States are required to undertake to protect fish stocks from over-exploitation are to be designed to maintain and restore populations of harvested fish species to levels at which they are able to produce the maximum sustainable yield (MSY), as qualified by relevant environmental and economic factors. "MSY" is not defined in UNCLOS.

There has been some debate as to whether the word "maximum" qualifies "sustainable" or "yield", that is, whether sustainability is to be maximised or yield is to be maximised. The New Zealand Fishing Industry Board argues that "maximum" qualifies yield not sustainability. This accords with the judgment of Gallen J in *Greenpeace New Zealand Inc v the Minister of Fisheries and others*[30] and is consistent with the grammar of the phrase. If "maximum" qualified "sustainable", it would be correctly expressed as an adverb, viz "maximally". In *Greenpeace*, Gallen J considered the meaning of "MSY" as used in the Fisheries Act 1983, and described it as "the maximum production which can be obtained on an indefinitely sustained basis from a particular stock".[31]

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pollution, but has also been applied to areas including hazardous wastes, climate change, ozone depletion, biodiversity, fisheries management and general environmental management." He gives a number of examples of the principle being applied in relation to general environmental management, including Principle 15 of the Rio Declaration.

29 Above note 7, Hewison, 359-360. He also cites United Nations General Assembly Resolution 44/225 recommending a moratorium on driftnet fishing on the high seas as an example of the precautionary approach.

30 HC Wellington, Gallen J, 27 November 1995, CP 492/93.

31 Above note 30, 19.

Hewison interprets "MSY" as –[32]

> the amount of fish that can be taken on a sustained basis without diminishing the species' reproductive capacity or without adversely affecting associated or dependent species.

The essence of these definitions is that whatever the level of exploitation of a stock, that stock must be able to continue to be a viable part of its ecosystem indefinitely. At the extreme, Burke proposes a definition which would allow a coastal State to exploit the stocks in its EEZ to a point just "short of endangering the resource" where this is in the interests of the coastal State.[33]

Qualified MSY may also be described as optimum sustainable yield (OSY) or optimum yield (OY). Iverson[34] defines OY as the yield that –

1. will provide the greatest overall benefit to the nation, with particular reference to food production and recreational opportunity; and
2. is presented on the basis of MSY from such fishery as modified by relevant economic, social or ecological factors.

(a) "As qualified by ..."

The words "as qualified by relevant environmental and economic factors" provide a basis for harvesting fish at rates other than MSY.[35] The economic factors which qualify MSY specifically include the economic needs of coastal fishing communities and the special requirements of developing States. The formulation "relevant environmental and economic factors" is extremely broad. Any conceivable environmental or economic factor may justify a departure from MSY where it is relevant. In addition, other factors are to be taken into account, viz –

- fishing patterns;

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32 Above note 7 Hewison, 360.
33 Above note 5, Burke, 55.
34 Above note 19, Iverson, 245.
35 Eugene Buck *United Nations Convention on the Law of the Sea: Living Resources Provisions* (Committee for the National Institute for the Environment, Washington DC, 1994), 2.

- the interdependence of stocks; and
- any generally recommended international minimum standards, whether subregional, regional, or global.

It is not clear from article 61(3) whether these three factors are examples of the environmental factors which may qualify MSY, or whether they affect the design of the conservation and management measures which are to produce MSY. They are prefaced by the phrase "and taking into account" which suggests that even if relevant they may not actually qualify MSY. Of the three factors, "generally recommended international minimum standards" would fall into neither of the categories of factors which may qualify MSY and so it appears more likely that all three factors are relevant to the design of the conservation and management measures.

In *Greenpeace*, Gallen J considered the meaning of "as qualified by" as it was used in the 1983 Act. He found that the general obligations of States under article 61 are "to some extent limited by the specific considerations set out in article 61(3)". However, the context of the 1983 Act was quite different from that of the 1996 Act.

(b) "Fishing patterns"

The use of the expression "fishing patterns" appears to acknowledge that people who have traditionally fished in certain fishing grounds in a certain way should be considered as they are likely to be affected by the setting of TACs for stocks traditionally fished by them. Fishing patterns would include location, target stocks, methods, and seasons, as well as who was fishing.[36] As well, fishing patterns may constitute social and cultural factors in some circumstances and there may be an overlap with the concept of the "economic needs of coastal fishing communities".

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[36] Above note 7, Hewison 364.

(c) "Interdependence of stocks"

"Interdependent" implies a mutually beneficial relationship between a target stock and another stock, both of which fishers seek to exploit. The use of the term "stocks" suggests that this phrase describes a relationship between two or more harvested species, rather than bringing into consideration a harvested species' interdependence with one that is not harvested.

(d) Generally recommended international minimum standards

The phrase "generally recommended international minimum standards" amounts to something less than customary international law; presumably being a reference to non binding standards or guidelines. That such standards are generally recommended would be sufficient to require a State to take them into account, even if that State did not accept them itself. The Food and Agriculture Organisation's *Code of Conduct for Responsible Fishing* may fall within the category of generally recommended international minimum standards.[37] Hewison suggests that such standards might include "standards relating to gear type, vessel construction, flagging, labor standards, reporting requirements, and penalties for violations".[38]

4 Implementation of the conservation and management measures

(a) "Associated and dependent species"

Article 61(4) requires a State taking conservation and management measures under paragraph (2) –

> to take into consideration the effects on species associated with or dependent on harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

This implies that the conservation and management measures will already have been determined and designed, but that they must be implemented in a way

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37 International Conference on Responsible Fishing, Cancún, 6-8 May 1992 (A/Conf.151/15).

38 Above note 7, Hewison, 365.

which considers the effects of fishing on associated or dependent species. Particular fishing methods, for example, may be more likely to result in bycatch of non-harvested species than others. The use of driftnets to catch tuna in the South Pacific is a good example as that method was particularly dangerous for species of dolphin and was ultimately banned altogether. The phrase "above levels at which their reproduction may become seriously threatened" may have been designed with marine mammals in mind. Marine mammals generally do not reproduce at the rate of most fish; they mature slowly and, as has been discussed above, they are particularly vulnerable to some fishing methods, such as the use of driftnets.

However, the use of "seriously" to modify "threatened" suggests that the associated or dependent species may be permitted to suffer the effects of fishing even to the point where their reproduction is threatened, but just short of it being seriously threatened. This does not appear to be a very strong indication of the need to protect threatened or other non-target species.

The use of the word "species" in the phrase "associated or dependent species" rather than "stock" implies that the species referred to are not just those which are the target of fishing but include those taken as bycatch and those that suffer other effects from the fishing of target stocks, such as the loss of a food source. By contrast, use of the word "stock" in combination with "interdependence" addresses the relationship between harvested species.

Hewison, in discussing the equivalent provision relating to the high seas (article 119) argues that this requirement should be read together with article 119(1)(a) (duty to take into account the interdependence of stocks) and article 120 (conservation and management of marine mammals in the high seas). "Associated species" may include incidental by-catch rather than just those species which are associated with the target species biologically or those in some way associated with the target species through the activity of fishing.[39]

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[39] WT Burke *United States Fishery Management* 76 Am J Int'l L 24 note 31, as quoted in note 250 of Hewison, above note 7 366.

The term "dependent species" covers those that feed on the target species or have some other ecologically dependent relationship with the target species.

5 *Obligation to promote the objective of optimum utilisation of the living resources*[40]

The use aspect of a coastal State's obligations is dealt with in article 62. The coastal State is required "to promote the objective of optimum utilisation" of the living resources of the EEZ, but without prejudice to article 61. This means that article 61 contains the primary obligation and that where there is a conflict with the obligation under article 62, the provisions of article 61 will prevail.[41] However, as "conservation" encompasses "use", albeit "wise use" there may be no conflict with article 61.

Use of the word "optimum" can be contrasted with "maximum" in MSY. Maximum utilisation is not the objective, rather, "optimum" has a sense of "best" or "most advantageous" suggesting that the level of use which is to be promoted is that which is likely to ensure a supply of fish indefinitely, and therefore suggesting that it may have the same meaning as "sustainable utilisation". Such supply of fish would also be in the long-term best interests of the coastal State. In any case, it is the coastal State which must determine what is the optimum level of utilisation and which is the best judge of its own long- and short-term interests. Use of "optimum" imports an element of subjectivity on the part of the coastal State, allowing it discretion in setting the target.

Burke finds the choice of "optimum" over "maximum" significant because the fishery provisions of the 1982 Convention generally follow the structure of the United States' proposal but differ from it in this specific instance.[42]

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40 Article 62.

41 Burke puts it thus – "This means that coastal State's authority under article 61 is not affected by any obligation in respect of optimum utilisation." Above note 5, 61.

42 Above note 5, Burke, 60. The United States proposed maximum utilisation and equitable allocation, requiring access for foreign fishing vessels under reasonable conditions to that portion of the allowable catch not harvested by the coastal State: see Burke, 36.

The obligation under article 62(1) does not require optimum utilisation to be achieved, it is an objective – something to strive towards.

6 *Foreign access to the surplus*

The implications of the coastal State having sovereign rights in its EEZ are important in the context of article 62(2) and the access of foreign States to the living resources of the EEZ. Burke argues that coastal States have the final authority to determine how foreign access to the living resources of the EEZ should be handled.[43] The rights of the coastal State are also "exclusive" in its EEZ to the extent that only that State may determine what conservation and management measures may be implemented, and to what extent the living resources may be utilised.

Article 62(2) provides the basis for the coastal State to provide other States with access to the living resources of its EEZ, where the coastal State has determined that it does not have the capacity to harvest the whole allowable catch. Although article 62(2) is expressed in mandatory terms, it is effectively up to the coastal State to determine what is its capacity to harvest the fish stocks in its EEZ and, therefore, whether there is a surplus. Where the coastal State determines that it cannot harvest the entire allowable catch, it is required to give access to the surplus of the allowable catch to other States "through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in [article 62(4)]". However, no particular State has a right to be granted access to that surplus. Hey argues that this is because it is the coastal State that is the judge of the conservation measures to be taken, whether there is a surplus, and what is its size; and the coastal State may choose which States to allow access to the surplus.[44]

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43 Above note 5, Burke, 39.

44 Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (Martinus Nijhoff Publishers, Dordrecht, 1989) 47.

Arguably, the broad discretion of coastal States in setting the allowable catch, determining its capacity and allocating access to any surplus is balanced by the obligation of States party to an international treaty to implement the treaty in good faith (pacta sunt servanda). O'Connell comments –[45]

> The coastal State could hardly be allowed to say that there is no surplus when, manifestly it does not have the capacity to harvest the entire allowable catch.

Article 300 provides –

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right.

The duty to act in good faith is reinforced by article 56(2) which requires the coastal State to have due regard to the rights and duties of other States and to act in a manner compatible with the provisions of the Convention, although O'Connell sees article 56(2) as "too abstract to be a curb on unreasonable conditions".[46] An arbitrary refusal to determine allowable catch, harvesting capacity and to allocate surplus will constitute a breach of the Convention, even though a dispute concerning these decisions of the coastal State may not be submitted to compulsory dispute settlement. Article 297(3)(b) provides for such disputes to be submitted to non-binding conciliation under Annex V of the Convention. Although a coastal State cannot be made to act reasonably in the exercise of its discretionary powers, the effect of articles 56(2), 297(3) and 300 taken together is that clearly a coastal State is under an obligation to act in good faith.

Factors which are relevant to the coastal State's decision to give access to any surplus to other States include:

- the significance of the fish stocks of the area to the economy of the coastal State concerned and its other national interests;

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45 DP O'Connell *The International Law of the Sea* (ed IA Shearer, vol 1 Clarendon Press, Oxford, 1982) 563.

46 Above note 45, O'Connell, 566.

- the provisions of articles 69 and 70 as to landlocked and geographically disadvantaged States;
- the requirements of developing States in the subregion or region in harvesting part of the surplus; and
- the need to minimise economic dislocation in States whose nationals habitually fished in the EEZ or which have made substantial efforts in research and identification of stocks.

Before any foreign State's fishing fleets may obtain access to fisheries in the EEZ of a coastal State, the coastal State must make a number of decisions based on the "best scientific evidence available". First, it must consider whether an allowable catch should be set for the stock in question, then, if an allowable catch is to be set, it must determine the allowable catch. It must also decide whether other conservation and management measures are warranted. Having established an allowable catch, the coastal State must then determine the capacity of its fishing vessels to fish the stock and on that basis determine whether there is any surplus stock which may be allocated to foreign vessels.

Once the existence of a surplus has been established, the coastal State may enter into agreements or arrangements with other States as to the conditions of access. The right of other States generally to share in any surplus is contingent on their acceptance of the laws of the coastal State.

Regardless of the special circumstances of a particular State, nationals of that and other States must comply with the conservation measures and laws of the coastal State which regulate fishing in the EEZ. Article 62(4) provides an extensive, but non-exhaustive, list of the matters which a coastal State may provide for in its laws. These domestic laws of the coastal State are required to be consistent with the provisions of UNCLOS, and a coastal State must give due notice of its conservation and management laws and regulations.

Access by foreign fishing fleets to any surplus living resources is very much a matter of negotiation between those States wanting access and the coastal State. If particular States are unable to agree on the conditions of access, or if a fishing State considers the coastal State's laws onerous to the point of being unreasonable, it may be that the coastal State is in breach of UNCLOS by failing to act in good faith. However, whether or not the coastal State is in breach of its obligations, there is no recourse to compulsory dispute resolution under the Convention.[47]

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[47] Article 297 provides no compulsory mechanism for resolving disputes relating to access to fish in the EEZ, although non-binding conciliation is available; see (297(3)(b)). Refer also to note 5 above, Balton at 142 and Burke at 47.

C *Marine Mammals*[48]

Articles 61 and 62 provide the general regime for the conservation, management and use of the living resources of the EEZ. Articles 63 to 67 contain provisions specific to straddle stocks,[49] highly migratory species, marine mammals, anadromous stocks[50], and catadromous species[51]. Sedentary species are specifically excluded from the ambit of Part V of the Convention.[52]

1 Special provision for marine mammals

There are some 116 species of marine mammals, 75 of which are cetaceans.[53] Cetaceans include whales, dolphins and porpoises. The Convention makes specific provision for marine mammals, perhaps in recognition of the fact that they are not fish and of the affinity that humans have for them.[54] The United States was a forceful advocate for the protection of marine mammals,[55] reflecting the strong public opinion in the United States in favour of protecting marine mammals.

Article 65 makes it clear that coastal States may prohibit, limit or regulate the exploitation of marine mammals more strictly than otherwise provided for in Part V. By implication, coastal States may not regulate less strictly than

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48 Article 65.

49 "Straddle" stocks is a short hand expression which covers what article 63 calls "stocks occurring within the [EEZ] of two or more coastal States or both within the [EEZ] and in an area beyond and adjacent to it".

50 "Anadromous" fish are those which ascend rivers to spawn.

51 "Catadromous" fish are those which descend to lower river or sea to spawn.

52 Article 68.

53 Cynthia E Carlson, "The International Regulation of Small Cetaceans" 21 San Diego L Rev 577, 580.

54 Cynthia Carlson comments that "as marine mammals are biologically different from other living marine resources (a term which generally refers to fishery resources), this article indicates a widespread recognition within the international community of the special characteristics of marine mammals", above note 53, 602.

55 Article 65 was drafted after article 64, and was amended later to clarify that the article was "never intended to permit less restrictive limitations or regulation of the exploitation of marine mammals than would be required by the Convention if there were no such article, and to direct particular attention to the need for appropriate organisational agreements for the protection of cetaceans". Oxman as quoted in Carlson, above note 53, 604.

provided for in Part V. Based on the drafting history of articles 64 and 65[56] and because article 65 is specific to marine mammals, Carlson favours article 65 as being intended to govern the regulation of marine mammals, rather than article 64. Article 64 does apply generally to highly migratory species, however, "highly migratory species" is defined in article 64 by reference to Annex I of the Convention, which contains a list of highly migratory species including some marine mammal species.[57] Carlson does not adequately resolve the conflict between articles 64 and 65. Arguably, article 65 is authority for a State to withdraw marine mammals from the ambit of articles 61, 62, and 64, but if it does not do so, those articles will continue to apply.[58]

Article 65 enjoins States to co-operate with each other with a view to conserving marine mammals. This obligation probably reflects the highly migratory behaviour of many species of marine mammals which therefore come within the jurisdictions of a number of States as well as traversing the high seas.

Article 61(4), which requires States to consider the effects of fishing on species associated or dependent on the target species, must also be considered in relation to marine mammals. Hewison suggests that the term "associated or dependent species" includes finfish, marine mammals, marine birds, and other marine wildlife such as turtles. These species are associated with target stocks in the sense of being caught along with some stocks. He also comments that the "emerging principles relating to the protection of biodiversity in the marine environment reinforce the obligation not to seriously threaten these species".[59]

Populations of marine mammals are especially susceptible to being reduced to a level which could endanger their reproduction because of their low reproductive rates, slow maturation, and relatively long life-spans. Marine mammals are

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56 Above note 55.

57 Dolphins and cetaceans are included at items 15 and 17 respectively.

58 Churchill and Lowe comment "in the case of marine mammals ... the coastal State is entitled to limit or prohibit the exploitation of such species, rather than establishing a total allowable catch and promoting the objective of optimum utlization": RR Churchill and AV Lowe *The Law of the Sea* (Manchester University Press, Manchester, 1985) 208.

59 Above note 7 Hewison, at 366 note 247.

caught in a number of ways, viz as the target species, as incidental (but still possibly intended) bycatch, and accidentally. The effects of fishing that could be a threat to marine mammals are not restricted to the actual catching of marine mammals whether intentionally or otherwise; they are also put at risk by being deprived of sources of food where they feed on target species.[60]

2 Cetaceans

In respect of cetaceans, article 65 requires States to work through the appropriate international organisations for their conservation, management and study.

The International Whaling Commission (IWC) is widely accepted as being the appropriate international organisation in respect of large whales.[61] Its mandate to protect other cetaceans is less certain, even though there is no definition of "whale" in the International Convention for the Regulation of Whaling 1946 (the Whaling Convention) which established the Commission. The Whaling Convention applies to "all waters" in which whaling activities take place. This raises the issue of whether the IWC has jurisdiction over whales in the EEZs of coastal States.[62] Carlson argues that if article 65 is read with article 120 –[63]

> it appears as if article 65 authorises international organisations to set minimum standards for the conservation and management of marine mammals *throughout* their migratory range, both within and beyond the EEZ of a signatory State.[64]

The IWC was established to protect and manage whale stocks for the benefit of the whaling industry. However, it has evolved into a more conservation-oriented organisation.[65] In the light of its original focus on managing large whales for exploitation, it is unclear whether it has the mandate to protect and

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60 Above note 7 Hewison at 367.
61 Above note 53, Carlson at 589; and Churchill and Lowe, above note 50, at 208.
62 Above note 53, Carlson at 604.
63 Article 120 provides "Article 65 also applies to the conservation and management of marine mammals in the high seas".
64 Above note 53, Carlson at 606. Emphasis in original.
65 Above note 53, Carlson at 578.

manage all whales as well as other cetaceans by whatever means they are caught. Carlson notes that the IWC is considered to be the appropriate international body for regulation of direct takes, rather than incidental takes, and suggests that a regional fisheries organisation would be the appropriate body in respect of incidental takes, especially of small cetaceans.[66] The United States' view prior to its signing of UNCLOS appears to have been that it should exercise its sovereign rights with respect to the taking of marine mammals in its EEZ in a way which was no less restrictive than the international standards.[67] The United States also acknowledged the IWC as the appropriate body in respect of cetaceans. In 1981, the IWC members agreed that the Whaling Convention was "flexible enough to provide for management of all cetacean populations".[68] However, as mentioned above, this jurisdiction probably relates to direct takes only.

In 1982, the IWC announced a moratorium on all commercial whaling activities with effect from 1986, by setting catch limits at zero.

3 *Regional fisheries organisations*

The South Pacific has two regional fisheries organisations – the South Pacific Forum Fisheries Agency (SPFFA) and the South Pacific Commission (SPC). New Zealand is a member of both organisations, the former being comprised of South Pacific nations and territories, and the latter including as well the United States, the United Kingdom and France. In 1989 the SPFFA issued the Tarawa Declaration condemning the use of driftnets in the South Pacific, which was endorsed by the SPC. The Tarawa Declaration was expressly based on UNCLOS.[69] Prior to the coming into force of the Wellington Driftnet

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66 Above note 53, Carlson note 113, p 606.

67 Letter R Eisenbud, General Counsel, Marine Mammals Commission (31 March 1983), as quoted in Carlson, above note 53, at 603, note 114,.

68 Report of the Preparatory Meeting to Improve and Update the International Convention on the Regulation of Whaling, 1946 (Reykjavik, May 1981) IWC/33/20 (1981), as quoted in Carlson at 617, above note 53.

69 Particularly articles 63, 64, 87, 116, 117, 118 and 119.

Convention 1989,[70] Mitchell commented that "incidental captures, mainly by purse seines, gill nets, and the like, appear to account for the greatest number of cetaceans killed at the present time".[71]

The driftnet fishing issue demonstrates the ability of the South Pacific States to act in a concerted regional way to address what they recognise as a regional issue.

D Summary of coastal States' obligations under UNCLOS

(a) Allowable catch

The coastal State has the sole right to determine the allowable catch for such of the living resources of its EEZ as are commercially harvested and which it considers would benefit from a restriction on catch levels. It is not obliged to set an allowable catch for all the living resources of its EEZ; rather, it has a discretion in determining for which stocks it will set an allowable catch. However, the coastal State is not entitled to exercise its discretionary powers in an arbitrary manner.

The determination of the allowable catch is only one of the "proper conservation and management measures" which a coastal State may employ. There are no specific restrictions on the measures that may be employed for conservation and management purposes. As with the determination of the allowable catch, the coastal State alone has the right to determine what other proper conservation and management measures it will take.

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70 The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific opened for signature at Wellington November 1989. 29 ILM 1449 (1990). In force from May 1991.

71 E Mitchell, *Porpoise, Dolphin and Small Whale Fisheries of the World: Status and Problems*, (8 IUCN Monograph No 3, 1975) as quoted in Carlson at 583, above note 53.

(b) Maximum sustainable yield

The obligation imposed on coastal States by article 61(2) may be simplified as – to ensure through proper conservation and management measures that the living resources of the EEZ are not over-exploited.

MSY represents the quantity of fish that can be taken on a sustained basis without endangering the viability of the stock. One of the objects of the conservation and management measures is the maintenance and restoration of populations of harvested fish species at, or to, levels at which they are able to produce MSY as qualified by relevant environmental and economic factors. The qualifying factors transform MSY into the optimum sustainable yield, that is MSY modified on the basis of relevant environmental and economic factors.

Article 61(3) also provides for some other factors to be taken into account. These factors may not always have the effect of modifying MSY even where they are relevant. Of them, only the interdependence of stocks could be interpreted as an environmental factor. Fishing patterns and generally recommended international minimum standards are neither environmental nor economic factors, although the former term may overlap with the concept of the "economic needs of coastal fishing communities" in some limited instances.

(c) Optimum utilisation

The obligation of a coastal State to promote the objective of optimum utilisation of the EEZ's living resources is secondary to its obligation to prevent over-exploitation. The two obligations are not incompatible. "Optimum utilisation" is clearly not the same thing as "maximum utilisation", but is more like "sustainable utilisation". The use of the word "over-exploitation" in article 61 indicates that some exploitation or use is contemplated.

(d) Foreign access

Having determined the allowable catch under article 61(1), a coastal State is required to determine its capacity to harvest the allowable catch under article 62(2). Where it determines that it does not have the capacity to harvest the

entire allowable catch, the coastal State is required to enter into agreements giving other States, but not specific other States, access to the surplus. Should a State act unreasonably in the performance of its obligations under UNCLOS, it may be in breach of the Convention, although its decisions are not susceptible to compulsory binding dispute settlement.

(e) Protection of marine species

In the implementation, rather than the design, of the conservation and management measures, a coastal State has obligations relating to the protection of associated or dependent species. Dependent species are generally those considered to be ecologically related to the target species, including non-fish species such as marine mammals and seabirds. However, other species may be associated with the target species in such a way that causes them to be taken as bycatch. The protection of associated and dependent species promoted by article 61(4) is not absolute protection; rather the size of populations of associated and dependent species must not be allowed to fall to levels at which their reproduction may become seriously threatened. In addition, it is specifically provided that coastal States may provide greater protection for marine mammals than that provided for in UNCLOS. The IWC appears to be generally accepted as having jurisdiction over the management of all cetaceans, however, its jurisdiction in respect of those taken incidentally is unclear.

II NEW ZEALAND'S LEGISLATION

New Zealand's fisheries legislation encompasses the Fisheries Acts 1983 and 1996, which regulate the activity of fishing, and, from the conservation perspective, a number of Acts which regulate activities affecting the sea and its living resources.

A Development of New Zealand's fisheries legislation

Until 1965, New Zealand had a 3 mile territorial sea, established by the Fisheries Act 1908.[72] In 1965, New Zealand passed the Territorial Sea and Fishery Zone Act[73] claiming a 9 mile fishery zone in addition to its territorial sea. The extension was intended to offer protection and assistance to the New Zealand fishing industry – "to reserve 12 miles of sea for New Zealand fishermen".[74]

In 1977, New Zealand enacted the Territorial Sea and Exclusive Economic Zone Act,[75] which established New Zealand's 200 mile EEZ, as well as providing for the delimitation of New Zealand's territorial sea. The Act made provision for the exploration and exploitation, and conservation and management of the resources of the EEZ, using the wording of article 56 of the draft UNCLOS. The seas of the EEZ were characterised as New Zealand fisheries waters with the Fisheries Act 1983 and the Marine Mammals Protection Act 1978 applying.[76]

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72 Section 2 defined "waters" or "New Zealand waters" as the sea within one marine league of the coast of New Zealand.

73 1965, No 11.

74 Speech of Prime Minister, Keith Holyoake, NZPD, no 343, p 1842, 11 August 1965.

75 The title of this Act was amended in 1996 to the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act.

76 Section 10, Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act.

The Territorial Sea and Exclusive Economic Zone Act requires the Minister of Fisheries to determine from time to time the total allowable catch (TAC) for every fishery within the EEZ, including the portion of each TAC that New Zealand fishing craft have the capacity to harvest. Any surplus in the TAC is to be allocated to foreign fishing craft. The Act contains provisions setting out the licensing regime for foreign fishing craft, but does not provide any guidance on the calculation of the TAC. The provisions of this Act which deal with the setting of TAC and the licensing of foreign fishing craft will be repealed by the Fisheries Act 1996 when the relevant substitute provision comes into force.[77]

Since the extension of the EEZ to 200 miles, New Zealand has developed a deep sea fishing industry within that area, which had previously been fished indiscriminately by distant water fishing nations such as Japan.[78] However, the "New Zealandisation" of fishing combined with the declaration of the EEZ did not halt overfishing. *New Zealand's National Report to UNCED – Forging the Links*, records that –[79]

> [o]verfishing became common place in some New Zealand waters during the 1970s as a result of a major expansion of the industry. By the early 1980s, inshore fish catches had declined drastically ....

The Fisheries Act 1983 purported to consolidate and reform the law relating to management and conservation of fisheries and fishery resources within New Zealand and New Zealand fisheries waters. In 1986, as a response to the great reduction in New Zealand's fish stocks which had occurred since the extension of the EEZ and the development of the New Zealand fishing industry, an amendment to the Fisheries Act 1983 introduced the quota management system (QMS) to New Zealand's fisheries management. The purpose of the QMS was to "conserve the major fish stocks and improve the economic efficiency of the fishing industry".[80] In 1990, a joint report by the Controller and Auditor-

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77 Section 314(2)(a) Fisheries Act 1996 is to be brought into force by Order in Council.

78 Above note 45, O'Connell 535, note 131.

79 Ministry of Foreign Affairs (Wellington, 1991) 59.

80 Spencer, Chris and Brian Ballantyne *New Zealand's EEZ mandate: Fishing tips & resource management opportunities for the hydrographic surveyor* (Paper presented to the 37th Australian Surveyors Congress 13-19 April 1996, Perth, Western Australia).

General and the Parliamentary Commissioner for the Environment described the QMS as being "designed to maximise the economic return without damage to the resource base".[81] Since 1991, the QMS has been under review. Many of the review group's recommendations have been enacted in the Fisheries Act 1996.

At the time of writing, New Zealand has two Fisheries Acts partially in force, viz the 1983 Act and the 1996 Act. The 1996 Act is being brought into force by Order in Council on a progressive basis. As it is brought into force, it progressively replaces the equivalent parts of the 1983 Act.[82] The main provisions of the 1996 Act which are in force contain the philosophy of the Act,[83] deal with taiapure and customary fishing,[84] and provide for cost recovery[85] and administration.[86] The substance of the revised QMS has not been brought into force and the 1983 Act provisions continue to apply. However, the Fisheries (Transitional Provisions) Regulations 1996[87] modify the operation of the 1983 Act to some extent pending the coming into force of certain of the provisions of the 1996 Act.

B The Fisheries Act 1996[88]

The purpose of the Fisheries Act is proclaimed in s 8 as "to provide for the utilisation of fisheries resources while ensuring sustainability". Section 8(2) defines "ensuring sustainability" and "utilisation" as follows –

> "Ensuring sustainability" means –
>
> (a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

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81 *Marine Fisheries Management – A Joint Report of the Controller and Auditor-General and the Parliamentary Commissioner for the Environment* (Wellington, 1990) 3.

82 Three commencement orders have been made to date, viz 1996/235, 1996/255 and 1997/40 bringing various provisions into force on 23/8/96, 1/10/96 and 1/4/97 respectively.

83 Parts I Preliminary, II Purpose and Principles and III Sustainability Measures.

84 Part IX.

85 Part XIV.

86 Part XV.

87 SR 1996/256.

88 All later references to the Fisheries Act are to the 1996 Act.

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment."

"Utilisation" means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

There was much debate when the Fisheries Bill was being considered by the Primary Production Committee of Parliament as to how exactly the purpose of the Bill should be expressed. Notwithstanding the debate over the distinction between "sustainable management" and "utilisation of fisheries resources while ensuring sustainability", it appears that, in practice, the Ministry of Fisheries considers both expressions to have the same meaning. In a recent statement, Warwick Tuck, the Chief Executive of the Ministry of Fisheries, commented that –[89]

The Ministry of Fisheries has, as its primary focus, the sustainable management of New Zealand's fisheries resources. ... The Fisheries Act clearly enunciates this concept of sustainable management, described in the Act as sustainable utilisation. This concept underpins everything in the Act from the setting of catch levels to the interaction of the Ministry with stakeholders and user groups.

This appears to be somewhat at odds with the intention of the then Minister of Fisheries as expressed in a written statement on the introduction of the Fisheries Bill into the House.[90] In that statement, the Hon Doug Kidd said –

As the words "sustainable utilisation" imply, the Bill is to become a statute dealing with utilisation. This means that the Fisheries Act will no longer be a vehicle that can be used to give total protection to marine species and areas.

To ensure that total protection of marine species and areas can continue to be afforded, the bill contains amendments to the conservation statutes to enable them to fulfil this role in the marine environment. Such a division between total protection and utilisation is highly desirous. It requires decisions on the always

89 Ministry of Fisheries *Fisheries Act 1996* (http://www.fish.govt.nz/fish_act/foreword.htm).

90 Written statement of the Minister of Fisheries, 6 December 1994, copy on file in the office of the Parliamentary Commissioner for the Environment.

present conflict between use and conservation to be made with all costs and benefits identified.

A number of terms are used in the Act to describe the "living resources" of the sea.[91] The distinction between two of them, "fisheries resources" and "aquatic life" is not clear as each is defined to include all conceivable marine life, although different formulations are used. Both terms are incorporated in the definition of "ensuring sustainability"; "fisheries resources" expressly in paragraph (a) and "aquatic life" through the reference to the "aquatic environment", which includes all aquatic life. Both terms would appear to be synonyms for marine "living resources", which is the expression used in UNCLOS.

The purpose of the Act should not be considered in isolation. The Act was intended to recognise New Zealand's obligations under UNCLOS and other international instruments, most notably the Biodiversity Convention, the Wellington Driftnet Convention, and the Convention for Conservation of Southern Bluefin Tuna.[92] Since enactment, New Zealand has also concluded the Convention on Straddling Fish Stocks and Highly Migratory Fish Stocks.

The Act also sets out a number of environmental principles[93] and information principles[94] which are to guide the manner in which the functions, duties, or powers provided for under the Act are to be exercised. The environmental principles incorporate New Zealand's international obligations under UNCLOS and the Convention on Biological Diversity.[95]

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91 Refer to s 2 which contains a number of definitions.

92 Also referred to in the explanatory note to the Bill as introduced were Agreements relating to the Forum Fisheries Agency, and the Treaty on Fisheries Between the Governments of certain Pacific Island States and the Government of the United States of America.

93 Section 9.

94 Section 10.

95 Ministry of Fisheries, above note 89.

The environmental principles to be taken into account are –

(a) Associated or dependant species[96] should be maintained above a level that ensures their long-term viability:

(b) Biological diversity of the aquatic environment should be maintained:

(c) Habitat of particular significance for fisheries management should be protected.

Principle (a) adopts a variation on the language of article 61(4) of UNCLOS, which requires the coastal State, in taking proper conservation and management measures, to consider the effects of the measures on species "associated or dependent upon harvested species with a view to maintaining or restoring populations of such associated and dependent species above levels at which their reproduction may become seriously threatened".[97]

Further guidance as to the Act's interpretation and its relationship with UNCLOS is provided in s 5 which requires that the 1996 Act be interpreted in a manner consistent with –

(a) New Zealand's international obligations relating to fisheries; and

(b) The provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

A number of terms have been imported directly into the Act from UNCLOS, viz "associated or dependent species", and "maximum sustainable yield". Others have been imported in a modified form, viz "allowable catch" is referred to as "total allowable catch", and "best scientific evidence available" has become "best available information". All of these terms are defined in s 2 of the Act.

1 The Quota Management System

The centrepiece of New Zealand's fisheries management and its response to the problems of over-exploitation inherent in a common property resource is the

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96 "Associated or dependent species" means any non-harvested species taken or otherwise affected by the taking of any harvested species (s 2 Fisheries Act 1996).

97 Similar wording is also found in article 119 which deals with the conservation of the living resources of the high seas.

quota management system (QMS). The QMS is a system which, in theory at least, recognises that the number of fish in the sea is not infinite.[98] When the Fisheries Bill was introduced, the Minister of Fisheries showed great faith in the QMS. He stated –[99]

> The [individual transferable quota (ITQ)] system is the most effective and efficient mechanism for fisheries management. It provides the correct incentives to encourage investment and is based on the realisation that if you give people a property right in a resource, they will look after it. With ownership there is a capital value ascribed to an asset. Many fishers have had to purchase their quota, so they now have a great respect for the fishery and an incentive to protect their investment. The ITQ system is the very reason the world's fisheries managers look to New Zealand as the leader in fisheries management.

Under the QMS, New Zealand's EEZ is divided into a number of quota management areas established in relation to particular fish stocks.[100] The establishment of a quota management area in respect of a stock is a prerequisite to calculating the TAC for that stock. Species which are the subject of fisheries management are classified into units and referred to as stocks.

The QMS depends on the setting of an annual TAC for stocks managed under that system. The TAC for any year contains the total allowable commercial catch (TACC), the allowance for recreational and Maori customary non-commercial fishing interests, the quantity required for research and the amount taken illegally each year.

On the basis of their catch histories, New Zealand commercial fishing interests are allocated individual transferable quota (ITQ), which is expressed as a percentage of the stock to which it relates. The ITQ generates an annual catch entitlement (ACE) in respect of the stock and quota management area for a specific year. The ACE confers on a quota owner an entitlement to harvest a quantity of a stock expressed in kilogrammes, and in accordance with a fishing

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98 Hon Doug Kidd, Foreword,above note 89.
99 Above note 83.
100 Section 28B, Fisheries Act 1983.

permit. ITQ is only allocated to persons who hold commercial fishing permits for the species the subject of the ITQ. The holding of both ACE and a fishing permit are prerequisites to commercial fishing for QMS stocks. Management of a fish stock under the QMS does not preclude the use of other control measures, such as method restrictions.[101]

The QMS is an elaborate system heavily dependant on research and scientific knowledge about the fish stocks and their ecosystems. For this reason, not all fish stocks are able to be managed under the QMS. The Ministry of Research, Science and Technology has commented that "of the fish stocks that form part of the quota management system, stock size relative to that which will produce maximum sustainable yield is known for only 40% of fish stocks".[102]

In order to take fish which are not managed under the QMS, a permit is still required. There is currently a moratorium on the issuing of new permits for non-quota management stocks (except tuna) to control the expansion of effort in these fisheries until they can be brought under the QMS.

In theory, the QMS is a system that could ensure the sustainability of New Zealand's fisheries resources. However, the co-operation of the fishing industry and individual fishing operators is essential to the success of the QMS in delivering sustainable fisheries. The New Zealand system is very complex to comply with, administer and enforce, leaving the way open to misreporting and overfishing.[103] As well, the fishing industry uses its lobbying power to influence the setting of TACs, and the legal system to challenge decisions of the Minister of Fisheries in setting TAC.[104]

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101 The ACE for squid is also subject to a method restriction.

102 *Under Sea Wealth?* (www.morst.govt.nz/RST2010/Strt/knowl.htm).

103 The Ministry of Fisheries' strategy, *Fisheries 2010,* identified a number of serious risks to New Zealand's fisheries, including: depletion due to persistent over-fishing; potential long-term damage to habitat caused by fishing; damage to threatened species and their habitat from fishing; and high levels of non-compliance with fisheries law.

104 For example: *Roaring Forties Seafoods Ltd v Minister of Fisheries* (HC Wellington, 1 May 1997, Ellis J, CP 64/97); and *New Zealand Federation of Commercial Fishermen Inc and Others v Minister of Fisheries* (HC Wellington, 15 October 1996, McGechan J, CP 237/96).

2 *Sustainability measures*

The Minister of Fisheries may set various measures to ensure sustainability of fish stocks. Part III of the 1996 Act provides a process for setting sustainability measures, including, matters to be taken into account, and a non-exhaustive list of measures which may be used to ensure sustainability.[105] The Minister is required to consult widely before setting any sustainability measures and to provide written reasons to those consulted for his decisions.[106]

In an emergency, the Minister of Fisheries may impose such measures as he or she considers expedient. The emergency measures that may be imposed are[107]

- closure of an area by prohibiting the harvesting of any fisheries resources;
- restricting the methods that may be used to take any fisheries resources;
- restricting the taking of any fisheries resources in any area by reference to the size, sex, or biological state of the resource;
- setting or altering the fishing season for any stock in any area;
- imposing additional reporting requirements for any stock, any area, or fishing method; and
- requiring the disposal of any fisheries resources in a specified manner.

UNCLOS authorises "other conservation measures" to be taken. These measures include gear restrictions, closed seasons, closed areas, protected species, and limited entry. New Zealand has combined a number of measures in its regulatory regime. In particular, New Zealand regulates its fisheries by –

- restricting the size of the catch;
- restricting the equipment that may be used (eg mesh sizes for nets and prohibition on the use of driftnets);
- closure of areas;
- closed seasons;
- the protection of particular species; and

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105 Section 11 Fisheries Act.
106 Section 12 Fisheries Act.
107 Section 16(7) Fisheries Act.

- limited entry.

The matters to which the sustainability measures may relate are consistent with the obligation imposed on coastal States by UNCLOS to take "proper conservation and management measures". The proper conservation and management measures authorise measures of a type similar to those listed in s 11(3) of the Fisheries Act, as well as authorising the protection of species and limited entry into the fishing industry. New Zealand provides for the protection of particular species in other legislation and restricts entry into the fishing industry by allowing only those interests with fishing permits to take fish commercially.

3 *Total allowable catch and maximum sustainable yield*

Article 61(1) of UNCLOS requires coastal States to determine the allowable catch of the living resources in their EEZs.

As noted in part I of this paper, under UNCLOS, the conservation and management measures (including the setting of allowable catches) are to be designed to maintain and restore populations of harvested fish species to levels at which they are able to produce the MSY, as qualified by relevant environmental and economic factors.

The Fisheries Act 1996 explicitly requires the TAC of stocks managed under the QMS to be set with reference to the MSY. New Zealand's use of MSY as the goal for fisheries management has come in for some criticism from the New Zealand Fishing Industry Board (NZFIB) and some fisheries scientists.[108] They argue that MSY is an out-dated concept. The NZFIB also contends that the use of MSY without any qualification is contrary to international law. This contention was put forward with reference to clause 11 of the Fisheries Bill which dealt with the setting of TAC with reference to MSY. However, clause 2

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[108] Ray Hilborn "Two steps forward – one step back" *Seafood New Zealand* (Wellington, April 1997).

of the Bill defined "MSY" in such a way that it was inherently qualified by environmental factors, viz "the population dynamics of the stock and any environmental conditions that influence the stock".[109] This definition was carried through to s 2 of the 1996 Act; economic factors coming into play under s 13 in the setting of TAC for stocks whose current level is above or below, but not at, the MSY-producing level.

Whereas article 61(3) requires MSY to be "qualified" by the relevant factors, s 2 of the 1996 Act requires the decision-maker to "have regard" to the population dynamics of the stock and environmental conditions. As discussed above, "qualified by" has the sense of limitation by the qualifying factors. The language of article 61(3) is mandatory, but, this is misleading as there is such generous scope for the exercise of discretion by the coastal State that article 61(3) is rendered permissive. On its face the Fisheries Act 1996 is more directory than mandatory; the wording "having regard to" is less strong than that of article 61(3). However, there is a real requirement for the decision-maker to turn his or her mind to the relevant environmental factors, although they may not be reflected in the final decision.[110] As noted above, the fishing industry has demonstrated its willingness to challenge decisions made by the Minister of Fisheries in the setting of TAC through judicial review proceedings.

The TAC for a stock is to be set at a level that maintains the stock at or above a level which can produce the MSY or restores it to such a level. However, where a stock is below the MSY-producing level, a number of factors impact upon the setting of TAC, and justify a departure from MSY. The Minister of Fisheries is to have regard to the interdependence of stocks when setting the TAC for a stock which is at or above the MSY-producing level.[111] In determining the TAC for a stock whose current level is below that which can

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109 Section 2 defines "MSY", in relation to any stock, as –

> the greatest yield that can be achieved over time while maintaining the stock's productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock.

110 *R v CD* [1976] 1 NZLR 436; *Donnithorne v Christchurch City Council* [1994] NZRMA 97.

111 Section 13(2)(a) and (c) Fisheries Act.

produce MSY, the Minister of Fisheries is to have regard to the interdependence of stocks *and* any environmental conditions affecting the stock. As well, the TAC set must enable the stock to be restored to the MSY-producing level within a period appropriate to the stock and its biological characteristics.[112]

It is not clear how information concerning the interdependence of stocks or other environmental conditions affecting stocks is to impact upon the MSY or the level of TAC set for a stock.

The Fisheries Bill, as introduced, envisaged that in certain circumstances a TAC could be set consistent with a stock size below that at which MSY is produced. The NZFIB supported this provision, but it was opposed by environmental groups and does not feature in the Act. The NZFIB, in its submission on the revised Bill, repeated its support for this provision arguing that its inclusion was consistent with New Zealand's international obligations under UNCLOS. This argument was based on article 61(3) which "establishes MSY as the objective, but allows the objective to be qualified in accordance with specified factors".[113] The NZFIB was concerned that to ensure that there would be scope for setting TAC that allowed stocks to be maintained at levels below the MSY-producing level and it seized on the wording of article 61(3) to support its argument.

For those stocks listed in the Third Schedule,[114] a TAC may be set otherwise than in accordance with s 13(2).[115] The criteria for stocks to be listed in the Third Schedule are –

- the biological characteristics of the stock make it impossible to estimate MSY;

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112 Section 13(2)(b) Fisheries Act.

113 Submission on the Fisheries Bill, New Zealand Fishing Industry Board, 4.

114 Currently the Third Schedule applies to southern scallops in the Southern Scallop Fishery and squid in all quota management areas.

115 Section 14 Fisheries Act, Alternative total allowable catch for stock specified in the Third Schedule.

- a catch limit for New Zealand has been determined as part of an international agreement; or
- the stock is managed on a rotational or enhanced basis.

  Currently the Third Schedule applies to southern scallops in the Southern Scallop Fishery (an enhanced stock) and squid in all quota management areas (as the biological characteristics of squid mean MSY cannot be estimated).

Reference to relevant economic factors which may qualify MSY as provided for in UNCLOS is found, along with social and cultural factors, in s 13. Section 13(3) requires the Minister to have regard to such social, cultural, and economic factors as he or she considers relevant, in considering the way in which, and rate at which, a stock is moved towards or above a level that can produce MSY.[116] The social, cultural, and economic factors do not affect MSY where the Minister sets a TAC that maintains the stock at or above the MSY-producing level under s 13(2)(a), presumably because no change to the level of the stock is envisaged.

Social and cultural factors are not referred to in article 61(3) of UNCLOS. Burke suggests that there is "ample authority" in Part V of the Convention as a whole to take social factors into account even though they are not specifically referred to. He does not comment on cultural factors,[117] however, it is arguable that cultural factors are a subset of social factors.

Although the provisions relating to the setting of TAC based on MSY are not identical to those contained in UNCLOS, the essential elements of article 61 are combined in a way which gives effect to the intent of article 61. UNCLOS sets out the general rule for the management and conservation of fisheries in EEZs in only two articles taking up less than two pages. New Zealand's Fisheries Act is a substantial enactment of some 370 sections and 12 schedules and contains

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116 Under s 13(2)(b) and (c) Fisheries Act.

117 Above note 39, Burke 24.

significantly more detail appropriate to the New Zealand situation than would be feasible in an international convention.

Even if the wording of the Fisheries Act is found not to adequately reflect the provisions of UNCLOS, the Act should be interpreted in the context of UNCLOS and coloured by that Convention.[118]

4 *Foreign Licensed Access*

As noted in part I, New Zealand unilaterally declared a fishery zone of 9 miles (in addition to its 3 mile territorial sea) in 1965. It was not the first State to claim a fishery zone, and it relied on the precedent set by the United Kingdom and Canada amongst others. At that time, foreign fishing in the waters around New Zealand had not long been established; the then Prime Minister, Keith Holyoake, stated –[119]

> We in New Zealand are more fortunate than any other country that has recently proclaimed a 12-mile zone, because no other country has established traditional fishing rights off our shores. ... The presence of foreign fishing fleets off the coast of New Zealand is a relatively new thing for us.

New Zealand made a reservation to the jurisdiction of the International Court of Justice (ICJ) as to the 9 mile fishery zone. Japan indicated an intention to seek a determination from the ICJ, but New Zealand declined to submit a question for determination by the Court. Notwithstanding Japan's relatively brief history of fishing in New Zealand waters, New Zealand reached a compromise with Japan in 1967 by agreeing to phase out Japanese fishing. The substance of the agreement was that Japan would police its own vessels, and New Zealand would supply proof of infringement of the agreement. O'Connell cites the New Zealand legislation as –

> critical in establishing international acquiescence in the concept of [9 mile fishery zones], linked with the notion of phasing out, which became a regular diplomatic

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118 *Greenpeace New Zealand Inc v Minister of Fisheries*, above note 30, 17.

119 NZPD 1842-43, 11 August 1965. Mr Holyoake did not consider five years of foreign fishing in New Zealand waters as sufficient to establish traditional rights.

> modality both to achieve a saving of face and to avoid a radical disruption of the fishery industry.[120]

He sees phasing out as a diplomatic expedient to reduce the impact of extended jurisdiction on foreign fishing States, rather than as recognition of a legal obligation.

By the time New Zealand claimed jurisdiction to 200 miles in 1978, foreign fishing fleets within 200 miles of New Zealand's coast were better established. In 1976, according to Major, Japan caught 160,000 tons, the USSR caught 100,000 tons, and Korea caught 60,000 tons of fish from the waters outside New Zealand's 12 mile limit. Following the enactment of the Territorial Sea and Exclusive Economic Zone Act 1977, New Zealand set the TAC for the participating foreign fleets at approximately one third of their catch prior to the declaration of the zone.[121]

Since the declaration of the 200 mile EEZ, New Zealand has conducted annual government to government negotiations with Japan, Korea and the USSR (now the Russian Federation).[122] In keeping with its earlier practice of phasing out foreign fishing in its newly acquired waters, New Zealand's policy was to reduce foreign allocations by 10% in each fishing year from 1985. The amount by which the allocations were reduced was offered by tender to the New Zealand industry, with any amount not taken up being returned to the foreign States.

The UNCLOS factors relevant to the giving of access to developing States are not so likely to be relevant in New Zealand decisions in considering the provision of access to foreign States, as the developing States in the South

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120 O'Connell, above note 45.

121 Philip Major, "Fisheries Development in New Zealand since UNCLOS III: A Case Study" Proceedings, Law of the Sea 19th Annual Conference in ED Brown and RR Churchill (ed) *The UN Convention of the Law of the Sea: Impact and Implementation* (Law of the Sea Institute, University of Hawaii, Honolulu, 1987).

122 Report of MAFFish, 1987, p 88. Extracts on file in the library of the Parliamentary Commissioner for the Environment.

Pacific region generally have substantial waters under their jurisdiction, and New Zealand is a considerable distance from them.[123] Of greater relevance to New Zealand is the need to minimise economic dislocation of the distant water fishing nations whose nationals have habitually fished in New Zealand's waters. As discussed, New Zealand has addressed this factor through its phasing out policy.

(a) Identification of a surplus

Part V of the Fisheries Act addresses foreign access to the fisheries of New Zealand's EEZ. Whereas the Fisheries Bill as introduced substantially reproduced the equivalent provisions of the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, the Fisheries Act contains a quite different formulation for determining whether there is any surplus. The earlier Act provided clearly for the Minister of Fisheries to determine the portion of the TAC that New Zealand fishing vessels had the capacity to harvest, and that any remaining portion of the TAC should constitute the allowable catch for foreign fishing vessels.[124]

Under the new regime, the calculation of any surplus stock available for foreign fishing fleets is made in either of two ways depending on whether or not the stock in question is subject to the QMS. Where a stock is subject to the QMS, the foreign allowable catch shall be the lesser of –[125]

- the portion of the TACC which may be taken in the EEZ determined for the stock by the Minister of Fisheries; or
- the amount of ACE held by the Crown in respect of the stock at the beginning of the fishing year which remains unsold after being offered for sale to persons entitled to own quota (which generally does not include any overseas person).

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123 However, in the past New Zealand has granted access to Fiji's tuna vessels by an exchange of letters, which are no longer in force.

124 Section 12 Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977.

125 Section 81(2) Fisheries Act.

As discussed earlier, the holding of ACE is a prerequisite to fishing and the entitlement to ACE depends on the holding of quota. There is no requirement that the owner of quota should fish its full entitlement and there may be reasons why it is prepared to hold quota which it does not fish (eg if it anticipates that its fishing effort will increase in the short term enabling it to use the quota at a later date or to make a profit in the market for quota). Alternatively, it may be prepared to hold quota in order to prevent some competitor obtaining it.

There is no requirement under UNCLOS that a coastal State should allocate as surplus the amount of fish which could be taken by the domestic industry, but which is not taken. It is the capacity of the industry that the coastal State must determine and the excess of allowable catch over capacity that is available. This has not stopped some States from arguing for the re-allocation of uncaught quota. In 1987, the USSR pressed unsuccessfully for access to the more desirable northern waters of New Zealand's EEZ and was focusing on the "substantial uncaught allocation held by the Japanese".[126]

Where the stock is not subject to the QMS, the foreign allowable catch is the lesser of –[127]

- the portion of the total catch limit (if any) for the stock determined by the Minister of Fisheries and which may be taken in the EEZ; and
- a catch that is sustainable after taking into account the total catch limit (if any) for, and the domestic harvesting capacity of, the stock.

The "domestic harvesting capacity"[128] for stocks not covered by the QMS is defined as the total domestic commercial catch reported for the previous fishing year by New Zealand fishing vessels within the New Zealand fisheries waters with an appropriate adjustment to allow for –

- any changes in the harvesting capacity of the domestic commercial fishing fleet due to

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126 MAFFish, above note 122, 90.
127 Section 81(3) Fisheries Act.
128 Section 81(5) Fisheries Act.

    * recent investment in fishing vessels and fishing equipment; and
    * catch trends; and
- non-commercial take and scientific take.

It is reasonably safe to assume that stocks which are managed under the QMS are all stocks which are harvested by the domestic fishing industry. Not all stocks outside the QMS may be fished by the New Zealand industry, although they may be sought after and harvested by foreign vessels. It is unlikely that New Zealand would want to put effort into bringing stocks into the QMS unless the New Zealand industry was interested in them. For this reason, the Fisheries Act provides for the determination of a foreign allowable catch for such stocks which does not depend on the existence of catch limits for those stocks, but which must be sustainable. This is a pragmatic and reasonable response to the possible demands of foreign States to be allowed to take fish from such stocks and the impracticality of New Zealand fixing an allowable catch for every stock in its EEZ.

(b) Allocation of any surplus

Where it has been determined that there is a surplus, the Minister of Fisheries may apportion the foreign allowable catch among foreign States.[129] In determining to whom and how to apportion the foreign allowable catch, the Minister is required to have regard to a number of matters set out in s 82(2), viz –

a) the degree to which fishing vessels of foreign countries have engaged in fishing in New Zealand's EEZ;
b) the degree to which such countries have co-operated with New Zealand in fisheries research and in the identification of stocks within the EEZ;
c) the degree to which such countries have co-operated with New Zealand in the conservation and management of fisheries resources within the EEZ, and in the enforcement of New Zealand's laws relating to such resources;

[129] Section 82 Fisheries Act.

d) the degree to which such countries have complied with any relevant international obligations; and

e) such other matters as the Minister, after consultation with the Minister of Foreign Affairs and Trade, considers to be relevant.

The matters in paragraphs (a) to (c) clearly are similar to the factors which article 62 of UNCLOS deems relevant to the coastal State's decision on access. The matter in (d) opens the door a little to non-fishing related factors as potentially New Zealand could withhold access from a State which did not comply with international obligations completely unrelated to fishing, although the international obligations under scrutiny must be "relevant". Then the matter in (e) throws the door wide open, although again matters considered under (e) must be relevant, and the exercise of the Minister's discretion will be constrained by what is reasonable in the *Wednesbury* sense. Although, the New Zealand legislation appears to have the potential to allow factors beyond those contemplated by UNCLOS to affect access decisions, this will be a matter of practice rather than of the law.

Article 62(3) of UNCLOS authorises the coastal State to take into account "its other national interests". This provision could potentially be used to justify consideration of non-fishing-related matters. Juda supports this view; he sees the considerations which may be relevant to access under UNCLOS as "practically unlimited" and cites the action of the United States Government in denying access to the USSR and Poland for political reasons, namely the Soviet invasion of Afghanistan and the Polish crackdown on Solidarity respectively.[130] In the past, New Zealand has also let political considerations affect its provision of access to a particular State – the USSR was restricted to fishing within the Sub-Antarctic Zone following the Soviet invasion of Afghanistan.[131]

In negotiating agreements to allow foreign States access to the surplus, the coastal State may bargain to obtain some benefits from the foreign States in

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130 Juda, above note 4, 25.

131 MAFFish, above note 122, 88.

exchange for access. UNCLOS allows little scope for a coastal State to obtain benefits which need bear little or no relation to the benefits it is providing. However, Hey notes that the dispute settlement provisions of UNCLOS (article 297(3)), which do not provide for binding decision-making by a third party and provide for conciliation only in limited circumstances, lend weight to her contention that the interests of the coastal State predominate in respect of the use of the living resources of its EEZ.[132] This may be so de facto, as the dispute resolution provisions at least reassure coastal States that fishing States will not be able to challenge their decisions.

In 1978, under the Territorial Sea and Exclusive Economic Zone Act, New Zealand threatened to deny allocations of squid to Japan unless Japan agreed to increase the import quota for New Zealand butter.[133] In the 1986/87 fishing year no across the board reduction in the foreign allocation was made under the phasing out policy partly in recognition of the access which New Zealand-caught squid had been granted to the Japanese market.[134] However, more recently New Zealand has attempted to treat the allocation of foreign allowable catch as an issue distinct from that of access to Japanese markets. This is appropriate as it seems doubtful that trade between States is relevant to decisions relating to access to fish New Zealand's waters.

(c) Licensing of foreign vessels

The apportionment of foreign allowable catch is made among States, but, the actual foreign vessels which will take the States' allocations must obtain a licence to fish in the EEZ. Article 63(4)(a) specifically authorises coastal States to make laws providing for a licensing regime and requires foreign States to comply with such laws.

Licences to take fish issued to the operators of foreign fishing vessels may be subject to all or any of a number of conditions listed in s 83(4) of the Fisheries

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132 Hey, above note 44, 48.
133 O'Connell, above note 45, 566.
134 MAFFish, above note 122, 90.

Act. These potential conditions range from restricting the areas of the EEZ in which the licensed operator may fish, to requiring the licensed vessels to enter New Zealand ports for inspection or other purposes, and to the installation on the vessel and the maintenance of any automatic location communication. The listed conditions all relate in some way to the activity of fishing or to the vessel, although they are not exhaustive. The Minister of Fisheries may impose conditions relating to "such other matters as [he or she] considers necessary or expedient".[135]

Whereas in considering whether to give a particular State access to any surplus, New Zealand, as a coastal State, must take into account all relevant factors, including those listed in article 62(3) of UNCLOS, arguably the licensing regime for individual vessels is not subject to the same constraint, that is, unless the coastal State takes matters into account which are peculiar to the particular flag State rather than to the vessel. Under s 83(3) of the Fisheries Act, the Minister of Fisheries is required to have regard to the previous offending history (if any) of the vessel's operator, owner, master or crew in relation to fishing activities, whether in New Zealand, foreign or international waters. The Minister may also have regard to such other matters as he or she considers to be relevant. In making a decision not to licence a particular foreign vessel to take fish in the EEZ, New Zealand is no longer dealing directly with another State. The refusal of New Zealand to license a particular vessel will not necessarily affect the number of vessels of the flag State allowed to fish in the EEZ nor the amount of fish they are allowed to take.

Whereas UNCLOS deals with relationships between States, the Act addresses the relationships between New Zealand and members of the fishing industry, both domestic and foreign. The licensing regime established by Part V of the Act to enable access of foreign fishing interests to the fish of New Zealand's EEZ addresses the issue at the level of the operator of a foreign fishing vessel.

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135 Section 83(4)(r) Fisheries Act.

New Zealand's refusal to license any particular foreign operator will not be open to challenge under UNCLOS.

The Minister of Fisheries commented in relation to the Fisheries Bill, that "[f]oreign licensed fishing has nearly been phased out in our waters, and [the provisions of Part V] will have minimal application".[136] However, this comment does not allow for the possibility of foreign States wanting to fish stocks which the New Zealand industry does not yet want, or have the capacity, to fish.

5 *Marine Mammals*

Article 65 of UNCLOS specifically addresses the management of marine mammals. Coastal States may prohibit, limit or regulate the exploitation of marine mammals more strictly than is otherwise provided for in Part V of the Convention. However, there is no obligation on coastal States to protect marine mammals absolutely. Article 61(4) affords some protection to marine mammals by requiring the effects of fishing on associated and dependent species to be considered in the implementation of conservation and management measures.

New Zealand's position on some marine mammals, as described by the Ministry of External Relations and Trade in 1991, is that "all cetaceans should be awarded maximum worldwide protection from exploitation".[137]

The intention of the Minister of Fisheries, expressed on the introduction of the Fisheries Bill, was that the Fisheries Act was to be a statute regulating use, and that the protection of marine species was addressed under conservation statutes.[138] To this end, the Fisheries Act 1996 provides for some amendments to the relevant conservation statutes, including the Marine Mammals Protection Act 1978 (MMPA) and the Wildlife Act 1953. The protection of some marine

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136 Minister of Fisheries, above note 89.

137 *New Zealand's National Report to UNCED – Forging the Links*, above note 79, 62.

138 Minister of Fisheries – refer text accompanying note 89 above.

species is also addressed through the provisions of the Driftnet Prohibition Act 1991. However, the environmental principles enacted by the Fisheries Act are relevant to the conservation and management of marine mammals, especially principle (a) which states –

> a) Associated or dependent species should be maintained above a level that ensures their long-term viability.

"Associated or dependent species" is defined in s 2 to mean –

> any non-harvested species taken or otherwise affected by the taking of any harvested species.

The definition of "harvested species"[139] is of no great assistance in trying to determine what species are "associated or dependent", although the implication is that there is no lawful authority for the taking of "associated or dependent species". This category of species would not include those for which lawful authority to take could be obtained. As noted above,[140] the phrase "associated or dependent species" in principle (a) mirrors article 61(3) of UNCLOS, but it is not clear whether it has the same meaning or whether such species are treated consistently by the Fisheries Act 1996. The term "species" is not defined in the Act, but, by implication from the definition of "stock", it includes fish, aquatic life (itself very broadly defined) and seaweed.

One of the sustainability measures provided for in the Fisheries Act 1996 effectively involves the setting of an allowable bycatch limit for marine mammals and other wildlife. Section 15(1) requires the Minister of Fisheries to take all reasonable steps to ensure that the "maximum allowable fishing-related mortality" level set by the relevant population management plans is not exceeded. The Minister may take such other measures as he or she considers necessary to further avoid, remedy, or mitigate any adverse effects of fishing on

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139 "Harvested species means "any fish, aquatic life, or seaweed that may for the time being be taken with lawful authority". "Aquatic life" covers all species of plant or animal life that, at any stage of its life history, must inhabit water, and specifically includes seabirds. Refer to s 2 Fisheries Act 1996.

140 Refer to text accompanying note 97 above.

relevant protected species. The population management plans are to be prepared under the Wildlife Act 1953 and the Marine Mammals Protection Act 1978 (MMPA), as amended by the Fisheries Act 1996.

The general rule established in the MMPA is that –

> no person shall ... take any marine mammal, whether alive or dead, in or from its natural habitat or in or from any other place without first obtaining a permit to do so from the Minister [of Conservation].[141]

The MMPA makes a distinction between marine mammals which are threatened and those which are not,[142] although it does not elaborate on what it is to be threatened. A species may be declared to be threatened by the Minister of Conservation by notice in the *Gazette*.[143] Before making such a declaration, the Minister is to have regard to any relevant international and New Zealand standards. Article 61(3) of the Convention provides for "generally recommended international minimum standards" to be taken into account in the design of conservation and management measures. A declaration that certain species of marine mammals are threatened (and the consequences that flow from that declaration) could be considered to be conservation measures within the meaning of article 61 and therefore, any "generally recommended international minimum standards" should be taken into account in preparing such declarations.

In respect of threatened species, the Minister of Conservation is required to determine a maximum bycatch level which should allow the species to achieve non-threatened status as soon as reasonably practicable within 20 years. For other species, the level is to be determined which should neither cause a net reduction in the size of the population nor seriously threaten the reproductive capacity of the species.

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141 Section 4 MMPA. Permits may be obtained for research, or for display or zoological purposes.

142 Section 2(3) Fisheries Act.

143 A recent addition to the class of "threatened species" is the Hooker's sea lion: [1997] *Brooker's Gazette* 119.

Although couched in terms which suggest that marine mammals and other wildlife are to be protected by these measures, in fact, the population management plans are a mechanism for setting an allowable bycatch limit. This may be compared with the mechanism used by the IWC, which set a catch limit of zero in respect of cetaceans the subject of commercial whaling. In addition, the Minister of Conservation requires the approval of the Minister of Fisheries to these plans, which could be interpreted as implying that fisheries utilisation is to predominate over conservation objectives.[144] This is the reverse of the situation under UNCLOS in which optimum utilisation is subordinated to the conservation and management measures. The Minister of Fisheries may concur with the draft plan after having regard to the impacts of implementing the maximum allowable fishing-related mortality level on commercial fishing and such other matters as the Minister considers relevant.[145] Some environmental groups have interpreted this provision as setting "kill quotas for protected species".[146] However, in theory, the setting of such levels is intended to recognise the reality that some marine mammals and other protected species will inevitably be caught incidentally to the fishing activity. After all, s 15 must be read in the light of the environmental principles in s 9 of the Fisheries Act.

Unfortunately, legitimising a certain level of bycatch sends the wrong signals to fishers and diminishes their incentive to operate in a way which minimises or avoids bycatch of marine mammals. An alternative way of addressing the issue of bycatch would be to provide for an offence of recklessly or negligently conducting fishing operations in a way which results in the bycatch of marine mammals. The provision for a maximum bycatch level provides scope for the fishing industry to lobby the Minister of Fisheries of the day, whereas there would be no such opportunity to influence the level the Minister if an offence was provided for.

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144 Section 3H(1)(m) MMPA.
145 Section 3H(1)(n) MMPA.
146 *Conservation News No 89*, December 1994.

The formulation "maximum allowable fishing-related mortality" is used where the Act could simply have provided for a "maximum allowable bycatch". This suggests that the Government was endeavouring to avoid being seen to allow the taking of marine mammals, including whales (for which the IWC has established an allowable catch of zero).

The Department of Conservation administers marine mammals and marine mammal sanctuaries in accordance with statements of general policy approved by the Minister of Conservation and any conservation management strategy and any conservation management plan applicable to the area concerned.[147] Sanctuaries have been declared around the Auckland Islands and Banks Peninsula.

The Driftnet Prohibition Act 1991 was enacted to implement the Driftnet Convention 1989. It prohibits all driftnet fishing in New Zealand fisheries waters, and driftnet fishing by New Zealand vessels or New Zealand citizens in the "Convention area" which covers areas of the South Pacific high seas and waters under the fisheries jurisdiction of any Party to the Convention. In addition, the Act prohibits any vessel from having a driftnet on board while in New Zealand fisheries waters.

New Zealand's approach to marine mammals is generally no less protective of them than UNCLOS requires. However, it is arguable that New Zealand falls short of UNCLOS in enabling the setting of maximum bycatch levels.

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[147] Section 3A MMPA.

III CONCLUSION

The philosophical provisions of the Fisheries Act, including the nature of sustainability measures, is in sympathy with the flavour of articles 61 and 62 of UNCLOS. The environmental principles in the Act reflect obligations under both UNCLOS and the Biodiversity Convention; and the information principles require a precautionary approach to be taken to fisheries management. A number of terms are imported from UNCLOS into the Act and defined there, however, the Act is expressly to be interpreted in a manner consistent with UNCLOS.

New Zealand's formulation of the obligation under UNCLOS to take conservation and management measures aimed at maintaining or restoring stocks at, or to, levels at which they are able to produce qualified MSY, contains all the essential elements of article 61(3). The Fisheries Act is more specific than the Convention. This is consistent with the nature of UNCLOS as an umbrella convention which leaves much of the detail to the domestic laws of States. New Zealand has decided what types of environmental factors are likely to be relevant to particular sorts of decisions, leaving still more detailed decisions to the discretion of the Minister of Fisheries in particular cases. Criticism of the formulation of MSY in the Fisheries Bill appears to be unfounded.

The obligation of a coastal State to grant access to its surplus relates to the fish that the domestic industry does not have the *capacity* to take, rather than to fish it does not take for other reasons.

New Zealand's pragmatic solution to the potential problem posed by the broad obligation in UNCLOS to "determine the allowable catch of the living resources of the EEZ" is to provide that where there is no catch limit for a stock, the catch taken must be sustainable.

New Zealand's phase out policy in respect of foreign fishing fleets is a reasonable way of ensuring that the domestic industry has the opportunity to fish to the limits of its capacity, while ensuring that any surplus is made available to foreign fleets.

In its provisions on the allocation of surplus, the Act requires that the Minister of Fisheries have regard to some matters which are expressed sufficiently broadly to encompass non-fishing related matters. Arguably, UNCLOS allows such matters to be considered, although the matters considered by the Minister under the Fisheries Act are required to meet a test of relevance which would restrict the matters considered to fishing-related matters.

In the past, New Zealand's negotiations with foreign States have involved factors unrelated to fishing activities, such as trade and political considerations. Such considerations are probably not relevant to access decisions, and it is appropriate that New Zealand has decided to separate such considerations from the fishing negotiations.

The licensing regime for foreign vessels to operate in the EEZ is a matter of detail which UNCLOS leaves to the discretion of the coastal State.

UNCLOS does not provide for the absolute protection of marine mammals, although States may choose to provide greater protection for marine mammals than required by UNCLOS. New Zealand has had legislation protecting marine mammals since 1978, and made additional provision in 1996. The authorisation of a "maximum allowable fishing-related mortality" level for marine mammals sends the wrong signals to fishers and is arguably in breach of New Zealand's obligations under UNCLOS. New Zealand's other efforts to protect marine mammals suggest a genuine intention to afford protection.

Where there is doubt as to the meaning of a New Zealand statute which purports to give effect to an international convention, the New Zealand Courts

may consider that international convention in interpreting the statute.[148] As the Fisheries Act 1996 does not repeat the exact language of UNCLOS, although it purports to implement New Zealand's obligations under it and other conventions, the Courts may refer to UNCLOS to resolve any difficulties in interpreting the Fisheries Act 1996.[149] The ability of the Courts to consider the meaning of the Fisheries Act in the light of UNCLOS is reinforced by s 5 of the Act.

On paper, New Zealand's system of fisheries management appears to be consistent with the spirit and intention of UNCLOS However, whether New Zealand has devised a system which will avoid the tragedy of the commons and justify extended coastal State jurisdiction will depend on the practical application of New Zealand's fisheries legislation.

There are a number of issues concerning the implementation of the Fisheries Act 1996, the resolution of which will have significant implications for the sustainability of New Zealand's fisheries resources. These include the implications of the Ministry of Fisheries' cost recovery regime on the basis of "he who pays the piper calls the tune", and the rigor, subject matter and independence of research undertaken in New Zealand's market-focused environment, which threatens the independence of scientists. I have become aware of these issues in the course of my research, and although they are not matters which I have been able to address in this paper, they are matters worthy of serious attention.

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148 Law Commission, *A New Zealand Guide to International Law and its Sources: Report 34* (Wellington, 1996) paras 71 –72.

149 *Greenpeace New Zealand Inc v Minister of Fisheries* above note 30.

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