LAW OF THE SEA AND FISHERIES

I. Fisheries

A. South Pacific Regional Fisheries Management Organisation

One of the most significant law of the sea developments in 2009 was the conclusion of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean[1] (South Pacific Fisheries Convention) in Auckland in November. The negotiations for this Convention were initiated by New Zealand in association with Australia and Chile, and negotiations were chaired by New Zealander Bill Mansfield. The support from the New Zealand government is evident in the fact that the Secretariat of the new South Pacific Regional Fisheries Management Organisation (SPRFMO) is based in Wellington. The South Pacific Fisheries Convention is aimed at fish species that are not covered by the Western and Central Pacific Convention,[2] which manages highly migratory species such as tuna. Prior to this development there was a regulatory gap in relation to discrete high seas fish stocks (and some confined straddling species) such as jack mackerel and orange roughy in the high seas of the South Pacific.

The South Pacific Fisheries Convention is of interest to more than just states fishing in the South Pacific as it represents some fascinating developments in the law of the sea. The Convention has broken new ground in the way it has set out principles and, in particular, decision making procedures applicable to the SPRFMO's operation.

1. Compatibility

Article 4 of the Convention acknowledges the need for compatibility between measures on the high seas and in areas of national jurisdiction in the case of fish stocks that straddle these areas. Paragraphs 1 and 2 reflect the provisions of art 7 of the United Nations (UN) Fish Stocks Agreement.[3] However, paragraph 3 of the Convention notably gives priority to existing conservation measures, at least at the initial stages. Article 4(3) of the Convention directs that the "Commission's initial conservation and management measures shall take due account of, *and not undermine the*

1 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (opened for signature 1 February 2010, not yet in force).

2 Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (opened for signature 5 September 2000, entered into force 19 June 2004).

3 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (opened for signature 4 December 1995, entered into force 11 December 2001).

effectiveness of, existing conservation and management measures" established by coastal state Parties for areas under national jurisdiction and by Contracting Parties in respect of their vessels fishing in the high seas. This implies that the Commission cannot impose conservation measures that are less effective than those already in place. The reason for the reference to measures in place on the high seas is presumably because of the interim measures that were put in place to protect the marine environment from fishing activities. The reference to "initial" measures is undoubtedly in recognition that not all relevant states may join the SPRFMO immediately, and some time is needed to ensure that states have an opportunity to seek conservation interests that are at least as strong as those already in place.

An even more interesting development on the law relating to compatibility is in art 20(4). Where a fish stock straddles the Convention Area and an area under the national jurisdiction of a coastal State Contracting Party, the relevant coastal state or states may agree that the Commission can establish a total allowable catch that applies throughout the range of the fish stock. In such cases, the compatibility problem is resolved to the extent that the Commission can manage the entire stock. Of course, this is predicated on the express consent of the coastal state, and it will remain to be seen how many coastal states are willing to allow this, despite the fact that art 20(4)(c) states that SPRFMO conservation measures are without prejudice to a state's rights to manage the living resources in their maritime zones.

2. Decision making

As in most fisheries treaties, the Convention provides that the general rule is that decisions are made by consensus.[4] However, in the event that consensus is not possible the Convention comes up with some unique approaches to decision making. On matters of substance, decisions are taken by a 75 per cent majority of members voting.[5] The process then becomes unusual. First, the Convention provides that the decisions of the Commission shall be notified to all members and will become binding on all members of the Commission 90 days after the date of transmittal.[6] Any member of the Commission can object to the decision within 60 days, in which case the decision is not binding on the member. However, in addition, the member must specify the grounds for its objection and "adopt alternative measures that are equivalent in effect to the decision to which it has objected". The only admissible grounds for an objection are that the decision unjustifiably discriminates in form or in fact against the member of the Commission, or is inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.[7]

4 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean above n 1, art 16(1).
5 Ibid, at art 16(2).
6 Ibid, at art 17(1).
7 Ibid, at art 17(2).

This is a ground-breaking approach, because it does not allow for the objecting state to completely ignore the decision – the objector must still implement equivalent measures. In addition, the lodging of the objection begins a review process. A Review Panel is established within 30 days, which is required to report in a further 45 days its findings on whether the grounds specified for objection are justified and whether the alternative measures adopted are equivalent in effect to the decision to which objection has been presented. The details of the Review Panel process are contained in Annex II to the Convention.

There are a range of possible findings by the Panel:

i. The decision that is objected to discriminates in form or fact against the objecting members and
   a. The alternative measures are equivalent, so they bind the Party;
   b. With some modifications the alternative measures would be equivalent;
   c. The measures are not equivalent, and so the Panel makes recommendations.

   In the case of b and c, the objecting state can either follow the recommendations or institute dispute settlement procedures. In addition, the objecting member can request an extraordinary meeting to consider the recommendations. The meeting can decide to confirm or amend the recommendations of the Panel, or to revoke the decision to which the objection was presented.

ii. The decision that is objected to is inconsistent with the Convention or with international law.
   In this case, an Extraordinary Meeting shall be convened. The Meeting may agree to revoke the decision. Alternatively the Meeting may confirm its original decision, in which case the objecting member can institute dispute settlement proceedings.

iii. The decision is not discriminatory against the objecting members in form or fact and is not inconsistent with international law and
   a. The alternative measures are equivalent in effect, those measures shall bind the objecting member;
   b. The alternative measures are not equivalent, the objecting member may institute dispute settlement proceedings.

These procedures appear rather complicated, and have the potential to delay the proceedings of the Commission if they are used regularly. The added cost of calling Extraordinary Meetings could be considerable. These factors may dissuade members from entering objections to the decisions of the Commission. Another possibility is that the parties will become enmeshed in lengthy disputes over the objections.

3. Other observations

A further interesting feature of the Convention is the provision for emergency measures to be implemented by the Commission.[8] These can apply when: fishing presents a serious threat to the sustainability of fishery resources or the marine ecosystem; or a natural phenomenon or human caused disaster has, or is likely to have, a significant adverse impact on the status of fishery resources. Measures are to be temporary and reconsidered at the following meeting of the Commission. One could imagine a range of scenarios which could allow for emergency measures to be adopted, including where new information comes to light about the impact of fishing on the marine environment, in the case of volcanic activity or an oil spill, or even where climate change adversely affects fish stocks.

The Convention also contains precautionary measures to ensure that new or exploratory fisheries are developed with care so as not to threaten the sustainability of the fishery and protect the marine environment from adverse impacts of fishing activities.[9] Such measures may include the establishment of a development plan, mitigation measures to prevent adverse impacts on marine ecosystems, presence of observers and the conduct of research. While this has been incorporated in other regimes, notably the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),[10] this is an example of the Convention incorporating best practice into its design.

Overall, the Convention offers an exciting addition to the range of fisheries instruments in place to manage high seas fish stocks. As with most fisheries organisations, of course, it remains to be seen whether the political will of the Commission's members will match the high ambitions of the negotiators of the Convention.

B. Port State Measures Agreement

New Zealand was heavily involved in negotiations in the Food and Agriculture Organisation towards a new treaty, the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA), which was concluded on 22 November 2009. New Zealand signed this agreement on 15 December 2009. The PSMA is designed to establish a legal basis for states to take actions when fishing vessels reach port to prevent illegal fish from entering international markets. Fishing vessels will be required to request entry to ports and provide information to the port state. Port states will be entitled to deny access to ports and port services if there is evidence that the fishing vessel has engaged in illegal fishing.

8 Ibid, at art 20(5).
9 Ibid, at art 22.
10 Convention on the Conservation of Antarctic Marine Living Resources (opened for signature 5 May 1980, entered into force 7 April 1982).

New Zealand is already party to treaties that require port state measures. Under CCAMLR, New Zealand can inspect vessels that have operated in the Southern Ocean for evidence of illegal fishing. Any such evidence is reported to CCAMLR's Commission and may result in the vessel being included on a list of illegal fishing vessels.[11] The advantage of the PSMA is that states will not be required to rely on a particular RFMO's scheme to justify taking port state actions. A global coverage of port state measures will make it more difficult and more expensive for fishing vessels engaged in illegal activities to find a port to land their catches.

C. Other Fisheries Developments

The Extended Commission for the Conservation of Southern Bluefin Tuna (CCSBT) held an important meeting in the Republic of Korea in October 2009. The total allowable catch for members and cooperating non-members had previously been set in 2006, and this was the first significant revision since that time. The critical status of the stock had been noted by the Extended Scientific Committee which had recommended a meaningful reduction in total allowable catch to allow the stock to rebuild. This was expressed as a goal to reduce the total allowable catch by 80 per cent on existing levels over two years. The Extended Commission agreed to an overall reduction of 2,361 tonnes of southern bluefin tuna for the 2010-2011 season.[12] In contrast, New Zealand succeeded in increasing its allocation of tuna from 420 tonnes in 2006 to 709 tonnes in 2009. This reflects a correction for many years of low allocation accepted by New Zealand since the inception of the CCSBT.

On 11 December 2009 New Zealand signed the Te Vaka Moana Arrangement, a cooperative arrangement involving New Zealand, Cook Islands, Niue, Samoa, Tokelau and Tonga. The purpose of the Arrangement is to improve cooperation in science and policy, including work on development of networks, strategic planning and policy developments. Another goal is improved cooperation for monitoring, control and surveillance of fisheries activities, and this may include developing a joint subsidiary agreement under the Niue Treaty.

11 Ibid, "Port Inspections of Vessels Carrying Toothfish" Conservation Measure 10-03 (2009) and "Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures" Conservation Measure 10-06 (2008) <http://www.ccamlr.org/pu/e/e_pubs/cm/09-10/toc.htm>. New Zealand's right to conduct port State inspections was confirmed in *Omunkete Fishing (Pty) Ltd v Minister of Fisheries and the Minister of Foreign Affairs and Trade* HC Wellington CIV-2008-485-1310, 1 July 2008. For a brief summary of the case see J Mossop "Law of the Sea and Fisheries" (2008) 6 NZYIL 324 at 328.

12 Commission for the Conservation of Southern Bluefin Tuna "Report of the Thirteenth Annual Meeting of the Commission" (2008) [60] <http://www.ccsbt.org/docs/meeting_r.html>; Commission for the Conservation of Southern Bluefin Tuna "Report of the Extended Commission of the Sixteenth Annual Meeting of the Commission" in "Report of the Sixteenth Annual Meeting of the Commission" (2009) [49] <http://www.ccsbt.org/docs/meeting_r.html>.

II. Whales and Cetaceans

In 2009 New Zealand continued to participate in efforts to find a resolution to the deadlock between pro and anti-whaling countries at the International Whaling Commission (IWC). The Small Working Group that had been established in 2008 to attempt to find a consensus solution to the main divisive issues failed to do so by the 61st meeting of the IWC in Madeira, Portugal in June 2009.[13] The IWC extended the mandate of the Small Working Group until the 62nd meeting in Agadir, Morocco, in 2010. In addition, a small Support Group of 12 states, including New Zealand, was established to assist the Small Working Group to develop a consensus package. The Rt Hon Sir Geoffrey Palmer, New Zealand's Whaling Commissioner, was appointed as chair of the Support Group. In 2009 the Support Group meet twice: in Santiago in October, and in Seattle in December.

New Zealand hosted the second meeting of the signatories to the Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region in Auckland in July 2009. The Memorandum of Understanding (MOU) was negotiated under the Convention on Migratory Species of Wild Animals[14] in 2006 and is an attempt to coordinate cetacean conservation activities across the Pacific. Fourteen Pacific states have signed the MOU. The Auckland meeting discussed the efforts by signatory states to implement the MOU including: capacity building; scientific research into the status of cetaceans in the Pacific; policy development; and establishment of sanctuaries. The meeting also agreed to establish a Technical Advisory Group to support the MOU states.[15]

III. Marine Environment

In 2009 the government continued to consider ratifying the following environmental treaties: the Convention on Liability for Maritime Claims Protocol 1996;[16] the 1973 Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil;[17] and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.[18]

13 International Whaling Commission "*Chair's Report of the 61st Annual Meeting*" (2009) <http://iwcoffice.org/meetings/chair2009.htm>.

14 Convention on the Conservation of Migratory Species of Wild Animals (opened for signature 23 June 1979, entered into force 1 November 1983).

15 *Second Meeting of the Signatories to the Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region* UNEP/CMS/PIC2/Doc.3-01 (2009) (Report of the Secretariat) <http://www.cms.int/species/pacific_cet/2nd_Mtg_July09_NewZealand/2nd_PIC_Mtg_July09.htm>.

16 Convention on Liability for Maritime Claims Protocol 1996 (adopted 3 May 1996, entered into force 13 May 2004).

17 Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil Protocol 1973 (adopted 2 November 1973, entered into force 30 March 1983).

18 International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001, entered into force 21 November 2008).

The Transport and Industrial Relations Select Committee recommended New Zealand become a party to these Conventions in August 2008, and Cabinet has approved the drafting of implementing legislation but no further legislative action was completed in relation to these Conventions in 2009. Biosecurity New Zealand has been working to incorporate the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 into New Zealand's biosecurity legislation, but no legislative changes were made in 2009.

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