IN THE MATTER OF

THE RIGHTS AND OBLIGATIONS

OF COASTAL STATES UNDER UNCLOS REGARDING

FISHERIES CONSERVATION AND MANAGEMENT

ADVICE

Contents

1. Abbreviations and terms used in this Advice

1. Some abbreviations used in this Advice are set out in the table below. The remainder are explained in the course of the Advice.

Term	Abbreviation
1982 United Nations Convention on the Law of the Sea	UNCLOS
1995 United Nations Fish Stocks Agreement[1]	UNFSA
Common Fisheries Policy of the European Union	CFP
European Union	EU
Exclusive economic zone	EEZ
International Council for the Exploration of the Sea	ICES
International Tribunal for the Law of the Sea	ITLOS
Maximum sustainable yield	MSY
United Nations Food and Agriculture Organization	FAO
United Nations International Maritime Organization	IMO

2. Prior to the entry into force in 2009 of the Lisbon Treaty,[2] the 'European Community' was the relevant embodiment of the EU for many, or all, purposes related to fisheries, environmental protection and treaty-making. However, with the entry into force of the Lisbon Treaty, the 'European Community' was replaced by the unifying term 'European Union'. For ease of reference, this Advice will refer uniformly to the European Union (EU), rather than making any distinction between the terms 'European Community' and 'EU'. Therefore, where extracts from documents are set out in this Advice, any references in those extracts to 'European Community' have been replaced with references to 'EU'.

[1] The full name of this treaty is: 1995 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.
[2] The full name of this treaty is: 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community.

3. Unless otherwise stated, references in this Advice to particular Parts, Articles or Annexes are references to provisions of UNCLOS. In extracts from UNCLOS set out in this Advice, the term 'this Convention' means UNCLOS. Throughout the Advice, I have generally spelled the word 'organization' with a 'z' in keeping with the spelling used in UNCLOS.

2. Introduction

4. I am instructed by the Scottish Fishermen's Federation (SFF) to provide an analysis of the provisions of UNCLOS regarding each of the following: **(a)** the general obligations of coastal States regarding (i) fisheries conservation and (ii) protection of the marine environment from the effects of fishing activities; **(b)** the obligation of coastal States regarding a shared stock (i.e. a stock occurring within the EEZs of two or more coastal States); and **(c)** the obligation of coastal States to provide access to surplus of allowable catch within their EEZs. In respect of the obligations referred to in '(a)', '(b)' and '(c)' above, I am instructed to consider the potential application of UNCLOS' provisions on settlement of disputes.

5. At various points in this Advice, I have set out a conclusion. Each conclusion is *not* intended to be a summary of the preceding part of the Advice. Instead, it is intended solely to pull out salient points from the part concerned. The conclusions, collectively, are *not* intended to be a substitute for reading my Advice. Indeed, my Advice should be read in full. Many of the points made in my Advice are *not* referred to in the conclusions and for some parts of my Advice, I have *not* provided any conclusion.

6. At the outset, it should be emphasised that items '(b)' and '(c)' above, while related, are, in my view, distinct from each other. In my opinion, obligations regarding shared stocks are one thing; obligations regarding provision of access to surplus are another. It is my view that the provision of access to surplus may potentially be to surplus of *any* stock in an EEZ; it does not have to be a stock that is shared between the State seeking access and the State potentially providing access. Conversely, in my opinion, the obligations under UNCLOS regarding shared stocks apply irrespective of whether any of the coastal States concerned is providing access to surplus of its allocation of the shared stock. These points will be elaborated in sub-sections 7.3 and 7.4 below.

7. The purpose of this analysis is to assist the SFF in understanding the obligations, and rights, of the UK as a coastal State at the point at which it ceases to be a Member State of the EU. In that some of the UK's obligations covered by this analysis, notably those under items '(b)' and '(c)' above, will or may relate to the EU (whether as a neighbouring coastal State or more generally), I have also included in this analysis three preliminary sections (see sections 3, 4 and 5 below) in order to help the SFF understand the EU's ongoing position in relation to UNCLOS.

3. The EU and the Common Fisheries Policy

8. Under the CFP, the EU has exclusive competence regarding 'the conservation of marine biological resources'. This is clear from Article 3(1)(d) of the Treaty on the Functioning of the European Union (hereafter, '**TFEU**'), which states that the EU 'shall have exclusive competence in … the conservation of marine biological resources under the common fisheries policy'.

9. The term 'marine biological resources' is not defined in the TFEU itself. However, it is defined in the current 'Basic Regulation' of the CFP, which is Regulation 1380/2013 of the European Parliament and of the Council,[3] as amended. This regulation has applied since 1 January 2014. Its Article 4(1)(2) defines the term 'marine biological resources' as 'available and accessible living marine aquatic species, including anadromous and catadromous species during their marine life'.

10. In principle, in my view, there is room for debate about whether the term 'marine biological resources' as used in the TFEU, i.e. primary legislation, has exactly the same meaning as given by Regulation 1380/2013, i.e. secondary legislation. However, for current purposes, I shall assume that the term does indeed have exactly the same meaning in the TFEU and in Regulation 1380/2013. On that basis, under the CFP, the EU has exclusive competence for the conservation of 'available and accessible living marine aquatic species, including anadromous and catadromous species during their marine life'.

11. For ease of reference for current purposes, I shall refer to the conservation of 'available and accessible living marine aquatic species, including anadromous and catadromous species during their marine life' as, simply, 'fisheries conservation'. On that basis, the EU can be said to have exclusive competence for fisheries conservation.

[3] Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ 2013 L354/22.

12. The situation regarding the placing of restrictions on fishing activities for the purposes of marine environmental protection, rather than for the purposes of fisheries conservation, is more complicated. For ease of reference, I shall refer to fishing activities targeted at marine biological resources as, simply, 'fishing'. It is arguable that, in contrast to fisheries conservation, the protection of the marine environment from fishing is *not* part of the exclusive competence of the EU under the CFP.[4]

13. However, that argument has not (yet) been tested in any litigation before the Court of Justice of the European Union. Meanwhile, in my opinion, the European Commission has consistently taken the view that the power to place restrictions on fishing for the purposes of marine environmental protection *does* derive from the EU's exclusive competence on fisheries conservation and that view seems to have been accepted by most, if not all, Member States in practice.

14. Within the EU, the subject of competence tends to be discussed in relation to two mutually exclusive, but closely-related, levels: 'internal' and 'external'. In summary, the term 'internal' relates to matters internal to the EU whereas the term 'external' relates to relations with third States. The field of external competence includes, amongst other things, the EU's competence to make treaties (i.e. with third States). There is a large body of law and commentary regarding the extent of the EU's treaty-making competence under EU law, both in general and in relation to fisheries.[5]

15. For the EU to be able to become a party to UNCLOS, two things are needed: (a) the terms of UNCLOS need to provide for the EU to become a party; and (b) the EU needs the appropriate powers, express or implied, to become a party to treaties. As to the first of these, see section 4 below. As to the second, in my view, it is very clear that the EU has the capacity in principle to make treaties. This capacity is, most

[4] See further: D.Owen, *Interaction between the EU Common Fisheries Policy and the Habitats and Birds Directives*, London, IEEP, 2004.
[5] See further: R.Churchill and D.Owen, *The EC Common Fisheries Policy*, Oxford University Press, 2010, Chapter 5.

recently, established by Article 216(1) TFEU. What is less clear, in my opinion, is the material scope of the EU's treaty-making powers under EU law – whether in relation to UNCLOS or other treaties – regarding fisheries specifically, and, in turn, whether or not such powers fall within the exclusive competence of the EU. It is beyond the scope of this Advice to address this matter further, although it is touched on again in sections 4 and 5 below.

4. The EU as a party to UNCLOS

16. UNCLOS was adopted on 10 December 1982 and entered into force on 16 November 1994. Currently, it has 168 parties.[6] All 28 EU Member States are parties, as is the EU itself. The UK has been a party to UNCLOS since 25 July 1997.[7]

17. UNCLOS expressly envisages that 'international organizations' may become parties to it.[8] Under Annex IX, the term 'international organization' for such purposes is defined as 'an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including competence to enter into treaties in respect of those matters'.[9] The EU falls within this definition.

18. Annex IX allows an international organization to sign UNCLOS if a majority of that organization's member States have done so.[10] In accordance with that condition, the EU signed UNCLOS on 7 December 1984.[11] Annex IX requires an international organization, at the point of signing, to make a declaration 'specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States which are signatories, and the nature and extent of that competence'.[12] The EU duly made a declaration.[13] On the subjects of fisheries and environmental protection, the declaration reads as follows:

> The [EU] points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in the field of sea fishing it is for the [EU] to adopt the relevant rules and regulations

[6] See: <www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.
[7] See: <www.un.org/Depts/los/reference_files/status2010.pdf>.
[8] Article 305(1)(f) and Annex IX.
[9] Annex IX, Article 1.
[10] Annex IX, Article 2.
[11] See: <www.un.org/Depts/los/reference_files/status2010.pdf>.
[12] Annex IX, Article 2.
[13] The full text of the EU's declaration is available at: <www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.

(which are enforced by the Member States) and to enter into external undertakings with third states or competent international organisations.

[…]

… with regard to rules and regulations for the protection and preservation of the marine environment, the Member States have transferred to the [EU] competences as formulated in provisions adopted by the [EU] and as reflected by its participation in certain international agreements (see Annex).

19. Annex IX requires a member State of an international organization, at the time when that State becomes a party to UNCLOS or at the time when the organization becomes a party, whichever is later, to make a declaration 'specifying the matters governed by this Convention in respect of which [the member State] has transferred competence to the [international] organization'.[14] The declaration is to 'specify the nature and extent of the competence transferred'.[15] As noted above, the UK become a party to UNCLOS in 1997. At that point, the EU was not yet a party (see below). In accordance with Annex IX, the UK made a declaration.[16] Regarding the EU, the UK's declaration states that:

The [UK] recalls that, as a Member of the [EU], it has transferred competence to the [EU] in respect of certain matters governed by [UNCLOS]. A detailed declaration on the nature and extent of the competence to the [EU] will be made in due course in accordance with the provisions of Annex IX of [UNCLOS].

20. Annex IX allows an international organization to formally confirm (i.e. become a party to) UNCLOS when a majority of its member States have done so.[17] In the case of the EU, that condition was met in 1996. However, it was not until 1

[14] Annex IX, Article 5(2).
[15] Annex IX, Article 5(6).
[16] The full text of the UK's declaration is available at: <www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.
[17] Annex IX, Article 3.

April 1998 that the EU deposited its instrument of formal confirmation and became a party to UNCLOS.[18]

21. Annex IX requires an international organization, in its instrument of formal confirmation, to include a declaration 'specifying the matters governed by this Convention in respect of which competence has been transferred to the [international] organization by its member States which are Parties to this Convention'.[19] The declaration is to 'specify the nature and extent of the competence transferred'.[20] The EU duly made its declaration.[21] Regarding fisheries, the EU's declaration stated, amongst other things, that:

> The [EU] points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence in this field it is for the [EU] to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organisations. This competence applies to waters under national fisheries jurisdiction and to the high seas. Nevertheless, in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting [EU] law. [EU] law also provides for administrative sanctions.
>
> […]
>
> With regard to fisheries, for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological development and development cooperation, there is shared competence.

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[18] See: <www.un.org/Depts/los/reference_files/status2010.pdf>. See also: Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the UN Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the Implementation of Part XI thereof, OJ 1998 L179/1.
[19] Annex IX, Article 5(1).
[20] Annex IX, Article 5(6).
[21] The full text of the EU's declaration is available at: <www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.

22. **Conclusion:** The EU is an 'international organization' for the purposes of Annex IX and, in that capacity, it has become a party to UNCLOS. Both of the EU's declarations, i.e. the one made on signature and the one made on formal confirmation, refer to a transfer of competence to the EU in the field of 'the conservation *and management* of sea fishing resources' (emphasis added). In my view, it is clear that the EU's treaty-making competence is exclusive regarding fisheries conservation specifically. However, in my opinion, what is less clear is the extent to which the EU's exclusive treaty-making competence extends beyond (mere) fisheries conservation into other aspects of fisheries management. In addition, questions arise over whether UNCLOS envisages, and hence allows for, fields where competence is shared between the EU and the Member States, rather than resting exclusively with either the EU or the Member States. Addressing those matters in relation to UNCLOS is beyond the scope of this Advice.[22] In my view, such matters are potentially relevant if the UK government, after the point at which the UK has left the EU, for any reason wishes to take issue, in the context of UNCLOS, with the alleged division of competence between the EU and the Member States. I would be happy to advise SFF further on this subject if asked to do so.

[22] For further treatment of this subject, including in relation to the EU's declarations under UNCLOS, see: R.Churchill and D.Owen (cited above), pp.306–313 and 317–318.

5. Division of EU / Member State roles under UNCLOS

23. Annex IX contains, in addition to its provisions on declarations as summarised in section 4 above, provisions regarding the substantive rights and duties of (a) an international organization which is a party to UNCLOS and (b) that organization's member States that are parties to UNCLOS.

24. First, it requires an international organization's instrument of formal confirmation to contain 'an undertaking to accept the rights and obligations of States under this Convention in respect of matters relating to which competence has been transferred to it by its member States which are Parties to this Convention'.[23] The EU duly included such an undertaking in its instrument of formal confirmation, as follows:[24]

> By depositing this instrument, the [EU] has the honour of declaring its acceptance, in respect of matters for which competence has been transferred to it by those of its Member States which are parties to the Convention, of the rights and obligations laid down for States in the Convention ...

25. In turn, in Article 4(3), Annex IX contains a very important provision as follows:

> [the international organization concerned] shall exercise the rights and perform the obligations which its member States which are Parties [to this Convention] would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States. The member States of that international organization shall not exercise competence which they have transferred to it.

[23] Annex IX, Article 4(1).
[24] See: <www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.

26. As a corollary to Article 4(3), Annex IX states that:[25]

> States Parties [to this Convention] which are member States of an international organization which is a Party to this Convention shall be presumed to have competence over all matters governed by this Convention in respect of which transfers of competence to the [international] organization have not been specifically declared, notified or communicated by those States …

27. In my view, one consequence of Article 4(3) of Annex IX is that the EU, instead of its Member States, has accepted those obligations under UNCLOS that relate to fisheries conservation. This is by virtue of the EU's exclusive competence regarding fisheries conservation in combination with the EU's two declarations to that effect.

28. Annex IX states that: 'Parties [to this Convention] which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention.'[26] (Article 5 of Annex IX is the provision requiring declarations by international organizations and their member States regarding their respective competences: see above.) Therefore, in my view, it is the EU, rather than its Member States, that has responsibility for failure to comply with those obligations under UNCLOS that relate to fisheries conservation.

29. As noted above, both of the EU's declarations refer to a transfer of competence to the EU regarding 'the conservation *and management* of sea fishing resources' (emphasis added). It is beyond the scope of this Advice to consider in any detail (a) how the subject matter of Articles 61, 62 and 63(1) of UNCLOS (which form the focus of section 7 below) may be divided between fisheries conservation per se and other aspects of fisheries management and (b) to what extent the EU's declarations regarding fisheries 'management' may validly enable the EU, rather than

[25] Annex IX, Article 5(3).
[26] Annex IX, Article 6(1).

its Member States, to accept those obligations under Articles 61, 62 and 63(1) that relate to management rather than conservation per se.

30. In the light of the room for uncertainty regarding the precise meaning of fisheries 'management' as used in the EU's declarations, it is relevant to note that Annex IX states that where a party to UNCLOS requests an international organization or its member States which are States Parties for information as to who has responsibility in respect of any specific matter, 'joint and several liability' of the international organization and its member States will arise from '[f]ailure to provide this information within a reasonable time or [from] the provision of contradictory information'.

31. Although the EU has exclusive competence regarding fisheries conservation, it has chosen to delegate some powers in that field to the Member States. In summary, the relevant delegating (or 'empowering') provisions include, amongst others, Articles 19 and 20 and Article 11 of Regulation 1380/2013.[27] To the extent of this delegation, it is arguable that the constraints of Article 4(3) of Annex IX should not apply to the Member States in that limited respect.

32. **Conclusion:** As can be seen from the points made above, it is my view that there is some room for debate about where the division lies between the EU and its Member States regarding acceptance of specific fisheries-related rights and obligations under UNCLOS. In my opinion, this is potentially relevant if the UK government, after the point at which the UK has left the EU, for any reason wishes to take issue, in the context of UNCLOS, with the alleged division of competence between the EU and the Member States. In any event, at the point at which the UK leaves the EU, and assuming it remains a party to UNCLOS, it is my view that the UK will accept all of the rights and obligations attributed to States under UNCLOS. I should add that Article 309 of UNCLOS states that: 'No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.' At the point at which the UK leaves the EU, I would expect either the

[27] This regulation is referenced the footnotes to Section 3 above.

EU or the UK, or both, to make a declaration notifying the other parties to UNCLOS of the changed situation. (In my view, Annex IX does not provide expressly for this possibility.)

6. Coastal State maritime zones under UNCLOS

6.1 Introduction

33. The UK has the following maritime zones: **marine internal waters**; a **territorial sea**; a **continental shelf**; and an **exclusive economic zone** (EEZ). (The term 'continental shelf' has both a legal meaning and a meaning derived from geology and geomorphology. In this Advice, the term 'continental shelf' will be used to mean the continental shelf in its legal sense.) In the time available, I have not been able to check whether the UK also has a contiguous zone;[28] however, this zone relates exclusively to law enforcement, rather than law making, and so will anyway not be considered further in this Advice. Likewise, in the time available, I have not been able to check whether the UK's EEZ has completely replaced some offshore zones, including an exclusive fisheries zone, previously claimed by the UK. It is beyond the scope of this Advice to explain the legal basis for each of the above zones in domestic law, but if SFF would like advice on that matter I would be happy to provide it.

34. Marine internal waters and the territorial sea are zones of territorial sovereignty,[29] whereas the continental shelf and EEZ are zones of so-called 'sovereign rights'. Sovereign rights are something less than territorial sovereignty. In 1956, the International Law Commission commented that a coastal State's sovereign rights in respect of the continental shelf 'cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf'.[30] Although that commentary related specifically to the continental shelf, in my view it serves to make the more general point that sovereign rights, whether in the context of the continental shelf or the EEZ, are those rights 'necessary for and connected with' the undertaking of particular activities. The particular activities in question in the context of the continental shelf and the EEZ are summarised in sub-sections 6.5 and 6.6 below.

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[28] Article 33.
[29] Article 2(1).
[30] *Yearbook of the International Law Commission*, 1956, Volume II, p.297.

35. In sub-sections 6.2–6.6 below, I shall summarise, for each of marine internal waters, the territorial sea, the continental shelf and the EEZ, the geographical extent of the zone and, with a focus on fisheries, the regime applicable there. However, I emphasise that these sections are just a summary. If SFF would like advice specifically on geographical extent or on aspects of the regime that are not covered below, I would be happy to provide it.

6.2 Summary of geographical extent of coastal State maritime zones

36. **Marine internal waters** do not extend seawards of the so-called 'baseline'. (The baseline is an important concept in international law of the sea but will not be considered further in this summary.) Assuming no geographical constraints created by the proximity of neighbouring States: (a) the **territorial sea** extends seawards from the baseline to a maximum of 12 nautical miles (nm) from the baseline; (b) the **EEZ** extends seawards from the seaward limit of the territorial sea to a maximum of 200 nm from the baseline; and (c) the **continental shelf** extends seawards from the seaward limit of the territorial sea to 200 nm from the baseline or, if certain physical criteria are met and subject to recommendations by the Commission on the Limits of the Continental Shelf (CLCS), to beyond 200 nm out to a specified maximum limit.[31]

37. In contrast to marine internal waters, the territorial sea and the EEZ, which each include the seabed and subsoil and the superjacent water column, the continental shelf includes only the seabed and subsoil.[32] From the preceding paragraph, it can be seen that the seabed and subsoil of the continental shelf overlaps with the seabed and subsoil of the EEZ from the seaward limit of the territorial sea to 200 nm from the baseline. (See also sub-section 6.6 below.)

[31] Article 76.
[32] Article 76(1). See also Article 76(3).

6.3 Territorial sea: regime summary, with a fisheries focus

38. Under UNCLOS, the regime for the territorial sea is provided mainly by Part II. As noted in sub-section 6.1 above, the territorial sea is a zone of territorial sovereignty.

39. The coastal State's territorial sovereignty in the territorial sea is qualified by a major exception whereby foreign-flagged ships enjoy a right of innocent passage there.[33] However, the definition of 'innocent passage' under UNCLOS excludes, amongst other things, 'any fishing activities' and 'the carrying out of research or survey activities'.[34] (These activities are regarded as rendering the passage of a vessel 'prejudicial to the peace, good order or security of the coastal State' and hence not 'innocent'.) Thus, in my view, foreign-flagged ships may not carry out those activities as part of the right of innocent passage.

40. **Conclusion:** Under UNCLOS, in my view, the coastal State has exclusive rights in respect of fishing activities in its territorial sea: foreign-flagged vessels may not fish there without the express consent of the coastal State. (A right of fisheries access by foreign-flagged vessels to the territorial sea may potentially arise in other ways, for example through historic access rights, but not under UNCLOS.) In my opinion, there is no requirement for the coastal State to provide access to surplus fish stocks in its territorial sea (cf. in the EEZ, on which see sub-section 6.6 below).

6.4 Internal waters: regime summary, with a fisheries focus

41. Under UNCLOS, marine internal waters themselves, as opposed to the baseline which defines their outer limit, are dealt with only very briefly – largely by a single article, Article 8. As noted in sub-section 6.1 above, like the territorial sea, marine internal waters are a zone of territorial sovereignty.

[33] Article 17.
[34] Article 19. Regarding research, see also Article 245 on marine scientific research.

42. Unlike in the territorial sea, there is no right of innocent passage for foreign-flagged ships in marine internal waters except in limited circumstances, namely '[w]here the establishment of a straight baseline in accordance with the method set forth in article 7 [of UNCLOS] has the effect of enclosing as internal waters areas which had not previously been considered as such'. Where, in those limited circumstances, a right of innocent passage does exist, the points made in sub-section 6.3 above about the definition of innocent passage apply likewise.

43. **Conclusion:** Under UNCLOS, in my view, the coastal State has exclusive rights in respect of fishing activities in its marine internal waters: foreign-flagged vessels may not fish there without the express consent of the coastal State. (A right of fisheries access by foreign-flagged vessels to marine internal waters may potentially arise in other ways, for example through historic access rights, but not under UNCLOS.) In my opinion, there is no requirement for the coastal State to provide access to surplus fish stocks in its marine internal waters (cf. in the EEZ, on which see sub-section 6.6 below).

6.5 Continental shelf: regime summary, with a fisheries focus

44. The regime for the continental shelf is provided mainly by Part VI of UNCLOS. As noted in sub-section 6.1 above, the continental shelf is a zone of so-called 'sovereign rights'. Under Article 77(1), the coastal State 'exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources'.[35] Thus, to apply the point made in sub-section 6.1 above about the meaning of sovereign rights, a coastal State's sovereign rights in respect of its continental shelf do not amount to territorial sovereignty but, in my view, may be seen as those 'necessary for and connected with' the exploration of the shelf and the exploitation of the shelf's natural resources.

[35] Regarding exploration of the continental shelf, see also Article 246 on marine scientific research.

45. The term 'natural resources', in the context of the continental shelf specifically, is defined in Article 77 as 'the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species'.[36] Thus there is a living resource element to the natural resources of the continental shelf; this comprises, but is limited to, so-called 'sedentary species'. The term 'sedentary species' is in turn defined as 'organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil'.[37] In my opinion, examples of species commonly-cited as 'sedentary species' are abalone, clams and oysters,[38] but this is not an exhaustive list.

46. The sovereign rights of the coastal State over the continental shelf arise without the need for any express proclamation by the coastal State and do not depend on occupation of the shelf by the coastal State.[39] The exercise of the sovereign rights 'must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention',[40] e.g. the freedom of navigation in waters above the shelf (or, in the case of that part of any continental shelf extending beyond 200 nm from the baseline, the freedom of fishing in waters above the shelf).[41] However, the sovereign rights are 'exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State'.[42]

47. **Conclusion:** The only living element of the continental shelf's natural resources is so-called 'sedentary species'. Under UNCLOS, in my view, the coastal State has exclusive rights in respect of fishing activities for sedentary species on its continental shelf: foreign-flagged vessels may not target such species without the

[36] Article 77(4).
[37] Article 77(4).
[38] R.R.Churchill & A.V.Lowe, *The Law of the Sea*, 3rd edition, Manchester University Press, 1999, p.151.
[39] Article 77(3).
[40] Article 78(2).
[41] Articles 78, 86, and 87(1).
[42] Article 77(2).

express consent of the coastal State. (A right of fisheries access by foreign-flagged vessels to the sedentary species of the continental shelf may potentially arise in other ways, such as possibly under the CFP, but not under UNCLOS.) Because, as noted in sub-section 6.6 below, Article 68 states that Part V (on the EEZ) does not apply to sedentary species, it is my opinion that there is no requirement for the coastal State to provide access to surplus sedentary species on its continental shelf.

6.6 EEZ: regime summary, with a fisheries focus

48. The regime for the EEZ is provided mainly by Part V of UNCLOS. As noted in sub-section 6.1 above, the EEZ is a zone of so-called 'sovereign rights'. Under Article 56, the coastal State has two categories of sovereign rights (as well as three categories of jurisdiction), as follows: (a) those 'for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil';[43] and (b) those 'with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds'.

49. The term 'natural resources', in the context of the EEZ, is not defined in UNCLOS. But, in my view, the 'living' element of the term undoubtedly includes fisheries resources. It is therefore the sovereign rights in category '(a)' in the preceding paragraph (rather than those in category '(b)') that are relevant for the purposes of this Advice. Thus, to apply the point made in sub-section 6.1 above about the meaning of sovereign rights, a coastal State's sovereign rights in respect of its EEZ do not amount to territorial sovereignty but, in my view, may be seen as including, amongst others, those 'necessary for and connected with' exploring, exploiting, conserving and managing the EEZ's natural resources, including its fisheries resources.

[43] Regarding exploration of the EEZ's natural resources, see also Article 246 on marine scientific research.

50. Part V of UNCLOS, on the EEZ, contains a significant number of provisions on the conservation and management of fisheries resources. There are two articles (Articles 61 and 62) establishing general obligations on this theme. These are followed by five articles (Articles 63–67) on specific stocks or species: Article 63 covers shared stocks (i.e. stock occurring within the EEZs of two or more coastal States) and straddling stocks; Article 64 covers highly migratory species; Article 65 covers marine mammals; Article 66 covers anadromous stocks; and Article 67 covers catadromous species. Of Articles 61–67, this Advice addresses just Articles 61, 62 and 63(1). If SFF would like advice on Articles 63(2), 64, 65, 66 or 67, I would be happy to provide it.

51. Article 68 states that Part V of UNCLOS does not apply to so-called 'sedentary species' (as defined in Article 77: see sub-section 6.5 above). In my view, the effect of Article 68 is that the obligations regarding conservation and management of fisheries resources in the EEZ, notably those under Articles 61 and 62, do not apply to 'sedentary species'. (See also the following paragraph.)

52. As noted in sub-section 6.1 above, the EEZ includes the seabed and subsoil. That means that the EEZ and the continental shelf overlap regarding the seabed and subsoil from the seaward limit of the territorial sea to 200 nm from the baseline. That overlap presents some scope for confusion as to how EEZ sovereign rights regarding the seabed and subsoil should be exercised. Article 56(3) seeks to solve that problem: it states that EEZ sovereign rights 'with respect to the seabed and subsoil' are to be exercised in accordance with Part VI (which is the part of UNCLOS dealing with the continental shelf regime). In my view, with the exception of 'sedentary species' (as defined in Article 77), the effect of Article 56(3) does not export the exercise of EEZ sovereign rights regarding fisheries resources to the continental shelf regime; instead those rights are to be exercised under the EEZ regime in Part V.

53. In contrast to the continental shelf rights, the sovereign rights of the coastal State regarding the EEZ must first be claimed by that State before they can be

exercised.[44] Once claimed, the sovereign rights are exclusive: after the claim has been made, no one can exercise those rights without the consent of the coastal State. However, third States do enjoy certain non-fisheries rights in the EEZ, such as the freedom of navigation.[45] A coastal State, when exercising its rights and performing its duties in the EEZ, must have 'due regard' to the rights and duties of other States;[46] and third States, when exercising their rights and performing their duties in the EEZ, must have 'due regard' to the rights and duties of the coastal State.[47]

54. **Conclusion:** Under UNCLOS, in my view, foreign-flagged vessels may not fish in the EEZ without the express consent of the coastal State. In this sense, the coastal State has exclusive rights in respect of fishing activities in its EEZ. Under Article 62 of UNCLOS, there is a requirement for the coastal State to provide access by third States to surplus fisheries resources in its EEZ. However, such third States must comply with terms and conditions (consistent with UNCLOS) established by the coastal State (see sub-section 7.4 below).

[44] D.J.Attard, *The Exclusive Economic Zone in International Law*, Clarendon, 1987. Pages 54-61.
[45] Article 58(1).
[46] Article 56(2).
[47] Article 58(3).

7. Coastal State fisheries obligations under UNCLOS

7.1 Scope of this section: tasks '(a)', '(b)' and '(c)'

55. In accordance with my instructions (see section 2 above), this section will consider the provisions of UNCLOS regarding each of the following: **(a)** the general obligations of coastal States regarding (i) fisheries conservation and (ii) protection of the marine environment from the effects of fishing activities; **(b)** the obligation of coastal States regarding a shared stock (i.e. a stock occurring within the EEZs of two or more coastal States); and **(c)** the obligation of coastal States to provide access to surplus of allowable catch within their EEZs. I have referred below to each of these as tasks '(a)', '(b)' and '(c)'. Each of these will be addressed with reference to the potential application of UNCLOS' provisions on settlement of disputes.

7.2 Task '(a)': General obligations

Introduction

56. Task '(a)' in sub-section 7.1 above concerns the general obligations of coastal States regarding (i) fisheries conservation and (ii) protection of the marine environment from the effects of fishing activities. It relates to the EEZ, but it also relates to marine internal waters, the territorial sea and the continental shelf. As will be seen below, there are significantly more provisions on fisheries conservation regarding the EEZ than there are regarding marine internal waters, the territorial sea and the continental shelf.

Marine internal waters, territorial sea and continental shelf

57. In the case of **marine internal waters** and the **territorial sea**, the situation is the same for both of these zones: in my view, UNCLOS does not place any obligations on the coastal State relating expressly to fisheries conservation (or

fisheries management more generally). However, as noted below under the heading 'Protection of marine environment from effects of fishing', it is my opinion that Part XII of UNCLOS, on protection and preservation of the marine environment, contains several general duties that are potentially applicable to fishing activities in such waters.

58. In principle, it is possible that some stocks occurring in the EEZ will straddle into, or migrate into, the territorial sea (and perhaps into marine internal waters) and hence that measures taken in conformity with obligations concerning the EEZ will, even if no such measures are taken in the territorial sea (or marine internal waters), bring benefits for those parts of the stock occurring landwards of the EEZ.

59. In the case of the **continental shelf**, the only living element of the natural resources of the continental shelf is so-called 'sedentary species'. In my view, in respect of these species, the continental shelf regime does not place any obligations on the coastal State relating expressly to fisheries conservation (or fisheries management more generally). Nor, in my opinion, does the EEZ regime – by virtue of Article 68 (see sub-section 6.6 above). However, as noted below under the heading 'Protection of marine environment from effects of fishing', it is my view that Part XII of UNCLOS, on protection and preservation of the marine environment, contains several general duties that are potentially applicable to fishing activities for sedentary species on the continental shelf.

EEZ: Article 61

60. Article 61 comprises paragraphs (1) to (5). **Article 61(1)** states that the coastal State 'shall determine the allowable catch of the living resources in its [EEZ]'. Although this provision is worded as a duty by virtue of the word 'shall', the wording suggests to me a broad discretion for the coastal State. The question is whether is whether this discretion is constrained by any of the other provisions of Article 61.

61. **Article 61(2)** states that:

> The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the [EEZ] is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.

62. In my opinion, the core of Article 61(2) is the requirement to ensure that 'maintenance of the living resources in the [EEZ] is not endangered by over-exploitation'. I shall refer to this as a 'backstop', on the basis that Article 61(2) establishes a requirement for the coastal State to ensure against the said endangerment. However, being 'endangered' strikes me as a fairly serious situation. To use an analogy with the precautionary approach as set out in UNFSA (see 'EEZ: 1995 United Nations Fish Stocks Agreement' below), being 'endangered' strikes me as being more like a 'limit' reference point than a 'target' reference point. Therefore there is some doubt in my mind as to how onerous, in fisheries management terms, the backstop in Article 61(2) really is. However, I would be interested to receive the technical view of SFF about that.

63. Article 61(2) has other elements which should be mentioned. **First**, the stated means of ensuring against endangerment of the EEZ's living resources is 'proper conservation and management measures'. In using such measures for that purpose, the coastal State is required to 'take into account the best scientific evidence available to it'. At first glance, this duty is something of a paradox. On the one hand, it refers to '*the best* scientific evidence' (emphasis added). On the other hand, such evidence is merely to be taken into account. (This contrasts with references in the UNFSA to measures being 'based on' the best scientific evidence available.[48]) However, because the ultimate requirement is to ensure that maintenance of the EEZ's living resources is not endangered by over-exploitation, it is my view that the coastal State will anyway need to apply sufficient weight to the scientific evidence to be sure of meeting this requirement. (I note that ITLOS, in its Advisory Opinion in Case No.21,

[48] UNFSA, Articles 5(b), 6(3)(b), 6(7) and 16(1).

delivered in April 2015,[49] appears to interpret Article 61(2) as requiring conservation and management measures to be 'based on' the best scientific evidence available. However, ITLOS does not make clear its basis for this interpretation.)

64. **Secondly**, in its final sentence, Article 61(2) places an obligation on the coastal State and 'competent international organizations, whether subregional, regional or global'. The coastal State and these organizations are, as appropriate, to cooperate to 'this end'. In my view, 'this end' is the one of ensuring that maintenance of the EEZ's living resources is not endangered by over-exploitation. The term 'competent international organizations' (plural) is used in UNCLOS in various contexts, including fisheries, protection and preservation of the marine environment, marine scientific research and transfer of technology. It is not defined at any point. In the context of shipping, the term 'competent international organization' (when used in the singular form) as used in UNCLOS is generally interpreted to mean the IMO. In my view, the term 'competent international organizations' (plural) as used in UNCLOS in the context of fisheries means, amongst other things, the FAO and regional and sub-regional fisheries management organizations. In my *preliminary* view, (a) it is broad enough to include ICES but (b) it is not intended to mean the EU, because the EU is anyway a party to UNCLOS.

65. **Article 61(3)** requires the coastal State's conservation and management measures referred to in Article 61(2) (on which, see above) to be:

> … designed to maintain or restore populations of harvested species at levels which can produce the [MSY], as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

[49] Available at: <www.itlos.org/cases/list-of-cases/case-no-21>.

66. In my opinion, Article 61(3) does not require a coastal State to achieve population levels corresponding to MSY. Instead, in my view, in determining the population level to be achieved for a given harvested species, the level needed for MSY is a starting point but, in turn, (a) that level can be 'qualified by relevant environmental and economic factors' and (b) the coastal State may take into account fishing patterns, stock interdependence and certain standards.

67. Because the population level needed for MSY can be 'qualified by relevant environmental and economic factors', it is my view that the population level aimed for by the coastal State pursuant to Article 61(3) may legitimately end up being more than what is needed for MSY (notably by invoking 'relevant' environmental factors) or, subject to the backstop in Article 61(2), less than what is needed (notably by invoking 'relevant' economic factors).

68. Article 61(3) follows the term 'relevant environmental and economic factors' with the words 'including the economic needs of coastal fishing communities and the special requirements of developing States'. Thus only two specific factors are identified. In my view, these two factors are not exhaustive. This is because: (a) if they were exhaustive, their use would render the phrase 'relevant environmental and economic factors' itself unnecessary; and (b) the two cited factors are principally economic (and possibly also social) in nature – suggesting to me that they cannot be exhaustive of the meaning of the phrase because that would potentially render the word 'environmental' unnecessary. (I note that Burke concurs that 'the listing is not exhaustive'.[50]) Therefore, in my opinion, pursuant to Article 61(3), the coastal State may invoke any factor to justify a departure from a population level corresponding to MSY so long as that factor is 'relevant' and either 'environmental' or 'economic' (or both).

69. Burke considers whether social or political factors are excluded by virtue of the phrase 'relevant environmental and economic factors'. He concludes that: 'It

[50] W.T.Burke, *The New International Law of Fisheries – UNCLOS 1982 and Beyond*, Clarendon Press, 1994, p 49.

would be inconsistent with the basic authority of the coastal state, as established in article 56 [of UNCLOS], to read this phrase restrictively and exclude social or political concerns from the management'.[51] Thus, according to Burke, social and political factors may too have a role in justifying a departure from a population level corresponding to MSY. However, I would wish to conduct further legal research before adopting a view on that point.

70. As noted above, the coastal State may take into account fishing patterns, stock interdependence and certain standards. Although the structure of Article 61(3) is not entirely clear about the purpose of taking these things into account, it is my *preliminary* view that, like the 'relevant environmental and economic factors', they may be used by the coastal State as a justification for deviating from achieving population levels corresponding to MSY. In my *preliminary* view, the term 'fishing patterns' could mean, amongst other things, patterns of fishing by third States in the coastal State's EEZ and the term 'generally recommended international minimum standards' could mean, amongst other things, the relevant provisions of the 1995 FAO Code of Conduct for Responsible Fisheries. However, these matters, as well as stock interdependence, are merely matters for 'taking into account': Article 61(3) is silent about how much weight is to be attached to them.

71. **Article 61(4)** contains what is, in my view, a reference to an aspect of the ecosystem-based approach. It requires coastal States, when taking the 'measures' referred to in Article 61(2) and (3), to:

> … take into consideration the effects on species associated with or dependent upon 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.

72. In my view this is a relatively weak duty, the following reasons. First, it is a duty merely to take the specified effects 'into consideration'. Secondly, it uses the

[51] Burke (cited above), p 54.

wording ‘with a view to’. The use of ‘with a view to’ in Article 61(4) contrasts with ‘shall ensure’ in Article 61(2). The contrasting use of these two phrases within Article 61 suggests to me that ‘with a view to’ is not intended to be as strong as ‘shall ensure’ and, instead, is more akin to an aspiration. Therefore, it is my *preliminary* view that Article 61(4) cannot be regarded as a ‘backstop’ (cf. Article 61(2)). Thirdly, the aim is to maintain or restore populations of species ‘above levels at which their reproduction may become seriously threatened’. I do not know whether a serious threat to reproduction of a population is a better or worse situation than a population becoming ‘endangered’ (i.e. the wording used in Article 61(2)). Again, I would be interested to receive the technical view of SFF about that.

73. **Article 61(5)** does not expressly mention the coastal State. It requires that specified data is, where appropriate, to be ‘contributed and exchanged on a regular basis’ through sub-regional, regional or global competent international organizations. Regarding the meaning of the term ‘competent international organizations’, see the text on Article 61(2) above. The specified data is as follows: ‘[a]vailable scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks’. The process of contribution and exchange through competent international organizations is to be ‘with participation by all States concerned, including States whose nationals are allowed to fish in the [EEZ]’.

74. **Conclusion:** Overall, it is my view that Article 61(1) and Article 61(3) are consistent with each other in providing the coastal State with a large amount of discretion, Article 61(1) being in relation to the allowable catch and Article 61(3) being in relation to the population levels to be achieved. Although Article 61(1) and (3) do not expressly refer to each other, I assume that they are related in that, in principle, a target level of population (set under Article 61(3)) should determine the allowable catch (set under Article 61(1)). The question arises as to whether this discretion is constrained by Article 61(4) or (5). In my view, Article 61(5) does not provide a constraint. This is because it relates merely to the contribution and exchange of data. In my *preliminary* view, Article 61(4) does not provide a constraint either. This is because, in particular, it uses the wording ‘with a view to’ rather than,

as with Article 61(2), 'shall ensure'. As to whether the discretion is constrained by Article 61(2), it is clear to me that this provision creates a 'backstop' requirement to ensure that 'maintenance of the living resources in the [EEZ] is not endangered by over-exploitation'. However, there is some doubt in my mind as to how onerous this requirement is in fisheries management terms.

75. A large amount of discretion gives a coastal State much flexibility in how it develops a fisheries management regime in its EEZ. For a coastal State wishing to manage its fisheries prudently, this is useful. Either side of this approach there is, in principle, scope for extremes. For a coastal State that wishes to exploit its fisheries but is not interested in doing so prudently, discretion is likewise useful. In my view, the only real constraint provided by Article 61 to such a State is the backstop set out in Article 61(2). For a coastal State that does not wish to exploit its fisheries, discretion is similarly useful. This raises the question of whether a coastal State could validly use its discretion under Article 61 to prohibit fishing for one or more stocks, i.e. to set the allowable catch at zero, for example in response to calls from environmental non-governmental organizations for large-scale no-take zones. It is beyond the scope of this Advice to address that specific question. However, I would be happy to advise SFF on this matter if asked to do so. (In this regard, see further 'EEZ: Article 62(1)' below.)

EEZ: 1995 United Nations Fish Stocks Agreement

76. Before moving on to Article 62, I shall consider briefly UNFSA. UNFSA is an implementing agreement of UNCLOS. The text is available online.[52] UNFSA relates exclusively to straddling stocks (that is to say, stocks straddling between areas under national jurisdiction and the high seas) and highly migratory stocks. Most of its provisions relate to the high seas. However, some of its provisions relate to areas within national jurisdiction, as explained in the following paragraph.

[52] <www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm>.

77. Article 3 of UNFSA states that the treaty's Article 6 (entitled 'Application of the precautionary approach') and Article 7 (entitled 'Compatibility of conservation and management measures') apply also 'to the conservation and management of [straddling stocks and highly migratory stocks] within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction'. In addition, Article 3 states that:

> In the exercise of its sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction, the coastal State shall apply *mutatis mutandis* the general principles enumerated in article 5 [of UNFSA].

78. **Conclusion:** It is beyond the scope of this Advice to cover the contents of Articles 5, 6 and 7 of UNFSA. However, these important provisions are applicable to areas under national jurisdiction to the extent referred to in the treaty's Article 3, and, in my view, they should not be neglected by SFF. (I reiterate that they relate exclusively to straddling stocks and highly migratory stocks.) I would be happy to advise on their contents if asked to do so and, if appropriate, advise likewise on the dispute settlement provisions of UNFSA.

EEZ: Article 62(1)

79. Next, I shall consider the general obligations under Article 62(1). This provision requires the coastal State to 'promote the objective of optimum utilization of the living resources in the [EEZ] without prejudice to article 61'. I will make three points about this provision, the first regarding the use of the word 'optimum', the second on the duty to 'promote' and the third regarding the relationship with Article 61.

80. **First**, Article 62(1) is a prelude to provisions that follow in Article 62 about access by foreign-flagged vessels to surplus allowable catch in the EEZ. In my view, the word 'optimum' could therefore potentially be seen as a word chosen by the

drafters of UNCLOS to indicate production of the best possible result from the EEZ's allowable catch.

81. However, Article 62(1) refers to 'optimum' utilisation, rather than, say, 'maximum' or 'full' utilisation. Both 'maximum' and 'full' had been suggested (by the United States in 1972 and 1974 respectively) in negotiations leading to what is now Article 62(1), but ultimately those proposals did not endure.[53] The term 'optimum' was proposed in 1975,[54] and stuck thereafter.

82. The term 'optimum utilization' is not defined in UNCLOS (and, in the context of living resources, is used only in one other provision of the treaty, namely Article 64 – on highly migratory species). Nandan *et al.* state that: 'The term "optimum" … differs from "full" and "maximum," and in biological and economic terms may suggest a lower level of utilization.'[55] Less tentatively, Burke states that '[t]his choice [of wording] emphasizes that the management objective need not be classified or measured only in terms of the largest possible catch of fish' and that the term 'optimum' allows 'consideration of a variety of objectives in management'.[56] Rothwell & Stephen state that '[t]he notion of optimum utilisation is not necessarily synonymous with full utilisation'.[57] Overall, it is my *preliminary* view that 'optimum' utilisation allows something less than maximum or full utilisation and allows consideration of a variety of management objectives.

83. **Secondly**, the duty in Article 62(1) is to 'promote the objective of' optimum utilisation. Nandan *et al.* observe that 'the obligation to "promote the objective" of optimum utilization … contrasts considerably with "ensuring" that objective or "seeking" that objective on all occasions';[58] for example, in contrast, 'ensure' is used in Article 61(2). Burke notes that the duty in question 'seems neither onerous nor especially demanding, other than in *possibly* forbidding extreme options such as,

[53] S.N.Nandan, S.Rosenne and N.R.Grandy, *United Nations Convention on the Law of the Sea 1982 – A Commentary*, Vol.II, Martinus Nijhoff Publishers, 1993, pp.619-20, 626-7 and 635.
[54] Nandan *et al.* (cited above), pp.627-9.
[55] Nandan *et al.* (cited above), p.635.
[56] Burke (cited above), p.60.
[57] D.R.Rothwell and T.Stephens, *The International Law of the Sea*, Hart, 2010, p.299.
[58] Nandan *et al.* (cited above), p.635.

without reason, any use of commonly exploited species' (emphasis added).[59] SFF may be tempted to take some comfort from this comment by Burke. However, I note that Burke uses the caveat 'possibly', which suggests to me that he is uncertain about whether Article 62(1) would definitely have this effect. In any event, as noted in the following paragraph, Article 62(1) is 'without prejudice to article 61' and hence without prejudice to the coastal State's broad discretion under Article 61.

84. **Thirdly**, the duty to promote optimum utilisation is expressly stated in Article 62(1) as being 'without prejudice to article 61' – including the coastal State's discretion under both Article 61(1), regarding the allowable catch, and Article 61(3), regarding the population level of harvested species to be achieved (see 'EEZ: Article 61' above). For example, Kwiatkowska states that, by virtue of the wording of Article 62(1), the duty in Article 61(1) 'cannot be affected by the objective of optimum utilization'.[60] Likewise, Burke states that: 'The phrase "without prejudice to Article 61" is ample evidence that the coastal state has priority in choosing whose interests are to be served when an appropriate yield is determined.'[61]

85. On the subject of optimum utilisation in the context of the EEZ, Birnie *et al.* state that: 'Whether [the coastal State] has a right *not* to exploit otherwise abundant fisheries is doubtful …'.[62] This statement somewhat echoes that of Burke regarding 'extreme options' (see above). Like Burke, the authors' choice of wording suggests (not unreasonably) some uncertainty. Unfortunately they do not elaborate on their statement, and so it is hard to know whether it is merely their interpretation of the duty to promote the objective of optimum utilisation, in isolation, or instead an interpretation of the entirety of Article 62(1)—i.e. the duty to promote the objective of optimum utilisation *without prejudice to Article 61*. If intended to be the latter, it is unclear to me how the authors have sought to take into account the coastal State's discretion under Article 61.

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[59] Burke (cited above), p.61.
[60] B.Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, Martinus Nijhoff Publishers, 1989, p.49.
[61] Burke (cited above), p.216.
[62] P.Birnie, A.Boyle and C.Redgwell, *International Law & the Environment*, 3rd edition, Oxford University Press, 2009, p.717.

86. **Conclusion:** Article 62(1) introduces the concept of 'optimum utilization'. It is my *preliminary* view that this concept allows something less than maximum or full utilisation and allows consideration of a variety of management objectives. In my view, it would not be prudent for SFF to rely on the existence of Article 62(1) as a legal guarantee against the establishment of, say, large-scale no-take zones by coastal States in their EEZs. This is not least because Article 62(1) is 'without prejudice to article 61' and hence without prejudice to the coastal State's broad discretion under Article 61.

Protection of marine environment from effects of fishing

87. Of the provisions reviewed above regarding Article 61 (see 'EEZ: Article 61'), only Article 61(4) relates directly to matters broader than the fisheries resource itself. However, Part XII of UNCLOS, on protection and preservation of the marine environment, contains several general duties that are potentially applicable to fishing activities in the EEZ. Part XII has a strong focus on pollution of the marine environment, but some of its provisions apply more generally.

88. The link between fisheries conservation and Part XII of UNCLOS has recently been re-emphasised by ITLOS in its Advisory Opinion in Case No.21 (delivered in April 2015).[63] ITLOS stated therein that:[64]

> [ITLOS] recalls … that living resources and marine life are part of the marine environment and that, as [ITLOS] stated in the *Southern Bluefin Tuna Cases*,[65] "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".

[63] Available at: <www.itlos.org/cases/list-of-cases/case-no-21>.
[64] ITLOS Advisory Opinion in Case No.21, para.216.
[65] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures*, Order of 27 August 1999, ITLOS Reports 1999, p.280, at p.295, para.70.

89. In the time available, I am not able to provide a comprehensive review of the relevant provisions of Part XII. However, in my view, the most important relevant provisions are: Articles 194(5), 197 and 206. In my opinion, each of these provisions applies to the coastal State not just in respect of the EEZ but in respect of all of the coastal State's maritime zones.

90. **Article 194(5)** states that: 'The measures taken in accordance with this Part [i.e. Part XII] shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.' Article 194 is entitled 'Measures to prevent, reduce and control pollution of the marine environment'. Hence there is room for an argument that Article 194(5) relates only to pollution effects rather than the impact of fishing more generally. However, in the case of *Mauritius v UK*, the arbitral tribunal concerned held that, by virtue of the text of Article 194(5), 'Article 194 is accordingly not limited to measures aimed strictly at controlling pollution and extends to measures focussed primarily on conservation and the preservation of ecosystems'.[66] The approach taken by the arbitral tribunal in *Mauritius v UK*, although not binding on other international courts or tribunals, supports an interpretation of Article 194(5) that is not constrained by the title of Article 194. For reasons of time, I am not able to look into this further; but I would be happy to advise SFF on this matter if asked to do so.

91. **Article 197** states that:

> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

[66] In the matter of the Chagos Marine Protected Area Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea between The Republic of Mauritius and The United Kingdom of Great Britain and Northern Ireland, Award, 18 March 2015, para.538.

92. **Article 206** states that:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

93. Obviously, UNCLOS is not the only treaty applicable, or potentially applicable, to the UK that establishes environmental protection duties that could be relevant to fishing within national jurisdiction. It is beyond the scope of this Advice to consider treaties other than UNCLOS. However, UNFSA was mentioned above (see: 'EEZ: 1995 United Nations Fish Stocks Agreement') in the context of fisheries conservation and management and so, for the sake of consistency, I shall mention here that, in my view, some parts of its Article 5 ('General principles') are directly relevant to the impacts of fishing on the wider marine environment. The text of UNFSA is available on-line.[67]

7.3 Task '(b)': Shared stocks in the EEZ

94. Task '(b)' in sub-section 7.1 above relates to the obligation of coastal States regarding a shared stock (i.e. a stock occurring within the EEZs of two or more coastal States). Thus task '(b)' relates only to the EEZ. UNCLOS establishes an obligation regarding shared stocks, although it does not actually use the term 'shared stock'. The obligation concerned is set out in Article 63(1), which reads as follows:

> Where the same stock or stocks of associated species occur within the [EEZs] of two or more coastal States, these States shall seek, either directly or through

[67] <www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm>.

appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

95. As noted in sub-section 7.2 above, under Article 61 each coastal State is under general obligations regarding fisheries resources in its own EEZ. However, even if each coastal State fulfils its obligations under Article 61, it is my view that there is still considerable scope for different coastal States to take different approaches (see 'EEZ: obligations under Article 61'). In the case of a stock that is shared between the EEZs of two or more coastal States, the existence of different approaches within the different EEZs concerned may not be helpful to the overall management of that stock. In my view, the purpose of Article 63(1) is to help to address that.

96. In this sub-section, I shall break down the text of Article 63(1) into its constituent elements and consider each in turn. I should add that Article 63(1) has recently been interpreted by ITLOS, in its Advisory Opinion in Case No.21 (hereafter, '**the Opinion**').[68] The Opinion was delivered in April 2015. It is not binding and is given only to the States that requested it (a group of West African coastal States forming the so-called 'Sub- Regional Fisheries Commission' or 'SRFC').[69] However, in my view, the Opinion should be regarded, by all parties to UNCLOS, including the UK and the EU, as an important and valuable source in the interpretation of Article 63(1). Therefore I have cited the Opinion in various places below.

97. The **first point** to note is that Article 63(1) refers to 'the same stock or stocks of associated species'. In my view, this phrase is potentially subject to more than one interpretation. In my *preliminary* view, the phrase means that Article 63(1) applies *either* where a single stock is shared *or* where stocks of species that are associated with each other (e.g. cod and haddock) are shared.

98. The **second point** to note is that Article 63(1) uses the verb 'occur'. There is

[68] Available at: <www.itlos.org/cases/list-of-cases/case-no-21>.
[69] ITLOS Advisory Opinion in Case No.21, para.76.

room for argument about what 'occur' means and whether, say, an appearance by a few vagrant fish represents an 'occurrence' of the stock as whole. However, in my view, 'occur' means that it is sufficient for the stock (or stocks) concerned to simply be present on either side of the boundary between the EEZs in question. Thus, in my opinion, migration may be one reason why the stock occurs on either side; but, equally, a stock may occur on either side simply because its habitat is located on either side.

99. The **third point** is that the scope of Article 63(1) is restricted to stocks shared between EEZs. Thus, in my view, Article 63(1) does not apply to stocks shared exclusively between territorial seas or exclusively between marine internal waters (and nor, in my opinion, does any other provision of UNCLOS have such an application).

100. The **fourth point** to note is that the duty in Article 63(1) is not one to agree; instead it is one to 'seek' to agree. At first glance, a duty merely to 'seek' to agree may not seem very strong. However, ITLOS, in its Advisory Opinion in Case No.21, delivered in April 2015, stated that this duty is one of 'due diligence' which requires:[70]

> … the States concerned to consult with one another in good faith, pursuant to article 300 of [UNCLOS]. The consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.

101. It is beyond the scope of this Advice to consider in any detail what is meant in international law by 'due diligence' of States. Instead, for current purposes, I shall simply emphasise that ITLOS has identified the following as resulting from the duty to 'seek … to agree' being an obligation of due diligence: consultations are to be in 'good faith' (pursuant to Article 300); consultations should be 'meaningful';

[70] ITLOS Advisory Opinion in Case No.21, para.210.

'substantial effort' should be made by all States concerned; and the measures sought should be 'effective'. None of that is to be found expressed in the text of Article 63(1); instead, rightly in my view, ITLOS has implied it into Article 63(1). Consistent with the duty in Article 63(1) being one to 'seek' to agree, rather than to agree, ITLOS has used the words 'with a view to' (see above).

102. In my view, it is implicit from the above points made by ITLOS that a duty of consultation is a part of the duty to 'seek' to agree. ITLOS, in its Advisory Opinion, makes this clearer a little later in its Opinion, stating that SRFC Member States (i.e. the West African coastal States that requested the Opinion: see above) 'must consult each other when setting up management measures for … shared stocks to coordinate and ensure the conservation and development of such stocks'.[71]

103. In its reference to consultation in good faith, ITLOS refers to Article 300 of UNCLOS. This provision is entitled 'Good faith and abuse of rights'. Amongst other things, it states that 'States Parties [to this Convention] shall fulfil in good faith the obligations assumed under this Convention'. That obligation is applicable to all parties to UNCLOS in respect of all their obligations under UNCLOS; in this case, ITLOS has emphasised its application to the obligation under Article 63(1) specifically.

104. The **fifth point** to note is that the measures referred to in Article 63(1) are the 'measures necessary to coordinate and ensure the conservation and development of [shared] stocks'. Thus although the obligation on coastal States is merely one to 'seek' to agree, albeit using due diligence, the measures that they are to seek to agree upon (a) are those which are 'necessary' (for the stated purposes) and (b) regarding conservation and development specifically, they are those which 'ensure' that outcome.

105. Beyond its reference to 'the measures necessary to coordinate and ensure the conservation and development of [shared] stocks', Article 63(1) lacks detail on what

[71] ITLOS Advisory Opinion in Case No.21, para.212.

measures coastal States must seek to agree upon. However, the (non-binding) 1995 FAO Code of Conduct for Responsible Fisheries provides some assistance here. In my view, paragraphs 7.1.3, 7.3.1, 7.3.2 and 12.17 of the Code are particularly relevant. It is beyond the scope of this Advice to elaborate on these paragraphs. However, I would be happy do so if asked by SFF. The FAO Code of Conduct is available on-line.[72]

106. The **sixth point** to note concerns the term 'conservation and development'. This term is not used elsewhere in UNCLOS. However, ITLOS, in its Advisory Opinion in Case No.21, has interpreted the term 'development' as used in Article 63(1) as follows:[73]

> … the term "development of such stocks" used in [Article 63(1)] suggests that these stocks should be used as fishery resources within the framework of a sustainable fisheries management regime. This may include the exploitation of non-exploited stocks or an increase in the exploitation of under-exploited stocks through the development of responsible fisheries, as well as more effective fisheries management schemes to ensure the long-term sustainability of exploited stocks. This may also include stock restoration, guided by the requirement under article 61 of the Convention that a given stock is not endangered by over-exploitation, thus preserving it as a long-term viable resource.

107. In my view, ITLOS is a little tentative with its interpretation of the word 'development', in that it uses the term 'suggests that' rather than, say, 'means that'. However, in my opinion, the thrust of the interpretation by ITLOS is nonetheless clear: 'development' means 'use' but any such use is to be exclusively within the context of sustainability.

108. Thus ITLOS starts by equating 'development' with use 'within the framework of a sustainable fisheries management regime'. It then provides at least two

[72] <www.fao.org/docrep/005/v9878e/v9878e00.htm>.
[73] ITLOS Advisory Opinion in Case No.21, para.198.

examples: (a) use of fisheries resources in cases where they are currently non-exploited or under-exploited, 'through the development of responsible fisheries'; and (b) 'more effective fisheries management schemes to ensure the long-term sustainability of exploited stocks'. Either as part of the latter, or separately, ITLOS also refers to stock restoration. (ITLOS refers to such restoration as being 'guided by' the backstop requirement in Article 61(2). In my opinion, this should not be taken to mean that the requirement in Article 61(2) is non-mandatory.)

109. The **seventh point** to note is that, under Article 63(1), the coastal States' efforts to agree are to be either direct or 'through appropriate subregional or regional organizations'. The term appropriate subregional or regional organizations is different to the term 'competent international organizations, whether subregional, regional or global' as used in Article 61 (see sub-section 7.2 above). In my view, the term used in Article 63(1) includes, amongst others, regional and sub-regional fisheries management organizations. However, as noted, the efforts to agree not need be exclusively through organizations: they can also be made directly between the coastal States concerned.

110. The **eighth point** to note is that Article 63(1) is 'without prejudice to the other provisions of' Part V, i.e. the Part of UNCLOS on the EEZ. In my view, this means, amongst other things, that Article 63(1) is without prejudice to coastal States' sovereign rights under Article 56 (see sub-section 6.6. above) and does not detract from coastal States' general obligations under Article 61.

111. I would add that ITLOS, in its Advisory Opinion, states that:[74]

> … the conservation and development of shared stocks in the [EEZ] of an SRFC Member State require from that State effective measures aimed at preventing over-exploitation of such stocks that could undermine their sustainable exploitation and the interests of neighbouring Member States.

[74] ITLOS Advisory Opinion in Case No.21, para.211.

112. In mentioning the 'SRFC', ITLOS is referring to the Sub-Regional Fisheries Commission, i.e. the organization of West African coastal States that requested the Opinion (see above). The above extract from the Opinion suggests to me that in the view of ITLOS, each coastal State is under an obligation to adopt 'effective measures aimed at preventing over-exploitation of [shared] stocks that could undermine their sustainable exploitation and the interests of neighbouring … States'. However, it is not clear to me what justification ITLOS is using to reach the above point. In my view, such an obligation does not arise from Article 63(1) or, at least in those specific terms, from the general obligations set out in Article 61. In my opinion, if coastal States were to fail to agree on 'the measures necessary to coordinate and ensure the conservation and development of [shared] stocks', each coastal State concerned would be faced with managing its part of the shared stock independently. In that respect, the general obligations in Article 61 would still apply to each of the coastal States concerned. However, as noted in sub-section 7.7 above, coastal States enjoy a large amount of discretion under Article 61. Thus there is scope for widely varying approaches and hence, as ITLOS remarks in the extract above, scope for the performance of one State to undermine the sustainable exploitation of shared stocks and the interests of that State's neighbours.

113. **Conclusion:** Article 63(1) establishes an obligation on coastal States in respect of stocks which are shared between their EEZs. It refers to 'the measures necessary to coordinate and ensure the conservation and development of such stocks'. The coastal States concerned are to 'seek' to agree on such measures. ITLOS, in its Advisory Opinion in Case No.21, has stated that this obligation to 'seek' to agree is one of 'due diligence'. The reference in Article 63(1) to 'development' of stocks has been interpreted by ITLOS within the context of sustainability. Article 63(1) is without prejudice to the other provisions of Part V of UNCLOS. In my opinion, if coastal States were to fail to agree on 'the measures necessary to coordinate and ensure the conservation and development of [shared] stocks', each coastal State concerned would be faced with managing its part of the shared stock independently.

7.4 Task '(c)': Access to surplus in the EEZ

114. Task '(c)' in sub-section 7.1 above relates to the obligation of coastal States to provide access to surplus of allowable catch within their EEZs. Thus task '(c)' relates only to the EEZ. The relevant provision of UNCLOS is Article 62. Article 62(1) has been addressed in sub-section 7.2 above. The present sub-section will address Article 62(2)–(5).

115. **Article 62(2)** states that:

> The coastal State shall determine its capacity to harvest the living resources of the [EEZ]. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in [article 62(4)], give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

116. It can be seen that Article 62(2) refers to something called 'surplus of the allowable catch'. In order to identify the amount of this surplus, if any, a coastal State needs to know two things: **(a)** the allowable catch of the living resources in its EEZ (it is required to determine this under Article 61(1)); and **(b)** its capacity to harvest the living resources of the EEZ (it is required to determine this under the first sentence of Article 62(2)). Put very simply, it is my view that the amount of 'surplus of the allowable catch' will be '(a)' minus '(b)' (assuming that these two are expressed in the same units, e.g. tonnes of fish).

117. Where there is a surplus, i.e. '[w]here the coastal State does not have the capacity to harvest the entire allowable catch' of the living resources in its EEZ, Article 62(2) requires it to 'give other States access' to that surplus by means of 'agreements or other arrangements'. In doing so, it must have 'particular regard to the provisions of articles 69 and 70 [on the rights of land-locked and geographically

disadvantaged States], especially in relation to the developing States mentioned therein'.

118. In the time available, I am not able to explain Articles 69 and 70 (including the associated provisions, Articles 71 and 72). In this Advice, I will simply note that both Article 69(1) and 70(1) provide land-locked and geographically disadvantaged States, respectively, with 'the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the [EEZ] of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62'. If SFF would like advice on Articles 69 and 70, I would be happy to provide it.

119. As noted in sub-section 7.7 above, a coastal State has a large amount of discretion in determining '(a)'. In my view, a coastal State likewise has a large amount of discretion in determining '(b)'. (On the meaning of '(a)' and '(b)', see paragraph 116 above.) This is because the first sentence of Article 62(2) simply requires a determination of capacity but does not specify how this determination is to be carried out. In principle, for its own reasons, a coastal State might seek to determine a low figure for '(a)' and/or a high figure for '(b)' in order to reduce the amount of surplus for the purposes of Article 62(2). As to whether the validity of its actions in this respect could be challenged in an international court or tribunal, see section 7.5 below.

120. Regarding determination of a high figure for '(b)', questions arise, albeit beyond the scope of this Advice, as to whether '(b)' could be increased by, say, chartering or use of joint ventures. If SFF would like advice on this matter, I would be happy to try to assist.

121. **Article 62(3)** states that:

> In giving access to other States to its [EEZ] under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

122. Article 62(3) requires the coastal State to take into account 'all relevant factors' when deciding which other States it will provide with access to any surplus. A non-exhaustive list of four such factors is provided (see extract above). Overall, it is my opinion that the coastal State has a large amount of discretion under Article 62(3). Even regarding the examples provided, these, like any other 'relevant factors', are merely to be taken into account: Article 62(3) is silent about how much weight is to be attached to them. That said, Articles 69 and 70, on land-locked and geographically disadvantaged States, bring some rights for those States (see above).

123. **Article 62(4)** starts by stating that '[n]ationals of other States fishing in the [EEZ] shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State' and that such laws and regulations must be consistent with UNCLOS. Articles 62(4) then sets out a non-exhaustive list of subjects that the laws and regulations may relate to. For reasons of time, I have not considered that list here. However, I shall make two points. The first is that, in my view, the list indicates a broad discretion for the coastal State in terms of the subjects that may be covered. Secondly, one of the subjects in the list is 'payment of fees and other forms of remuneration'.[75] In my view, this latter point illustrates that although Article 62(2) refers to an obligation on the coastal State to 'give' access, it is under no obligation to provide the access for free. Under **Article 62(5)**, the coastal State is to give 'due notice of conservation and management laws and regulations'.

[75] Article 62(4)(a).

124. **Conclusion:** If the allowable catch of the living resources in a coastal State's EEZ is greater than the coastal State's capacity to harvest that catch, there will be a so-called 'surplus'. In principle, for its own reasons and using the large amount of discretion provided to it by Article 61(1) and Article 62(2), a coastal State might seek to determine a low figure for the allowable catch and/or a high figure for its capacity in order to reduce the amount of surplus. However, *if* there is a surplus, Article 62(2) requires the coastal State to 'give other States access' to that surplus by means of 'agreements or other arrangements'. Although Article 62(2) uses the word 'give', it is my view that the coastal State is under no obligation to provide the access for free. Article 62(3) requires the coastal State to take into account 'all relevant factors' when deciding which other States it will provide with access to any surplus. Overall, it is my opinion that the coastal State has a large amount of discretion in this respect (although land-locked and geographically disadvantaged States have some special rights regarding access). It is also my opinion that the coastal State has a large amount of discretion, under Article 62(4), in deciding the subject matter of laws and regulations, consistent with UNCLOS, that it may apply to any third States fishing in its EEZ.

7.5 UNCLOS' provisions on settlement of disputes

125. Part XV of UNCLOS deals with the settlement of disputes between the parties to UNCLOS. With one significant exception, Part XV requires disputes concerning the interpretation or application of UNCLOS' fisheries provisions to be settled in accordance with the provisions in section 2 of Part XV.[76] The said section 2 provides for 'compulsory procedures entailing binding decisions', which means, in short, that: (a) any one party to UNCLOS can invoke those procedures against any other party to UNCLOS; and (b) the decisions arising from those procedures, i.e. from the international courts and tribunals involved in those procedures, are binding on both parties.

[76] Article 297(3)(a).

126. The said significant exception, set out in Article 297(3)(a) in section 3 of Part XV, states that:

> . . . the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the [EEZ] or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

127. In my view, this exception is very broad in that it relates to 'any dispute' relating to the coastal State's 'sovereign rights with respect to the living resources in the [EEZ] or their exercise'. It lists some specific matters. However, in my view, these are not exhaustive.

128. All of the matters listed in Article 297(3)(a) are ones that have been mentioned earlier in this Advice. Thus, for example, it is my view that the coastal State would not be required to accept the application of the section 2 procedures (i.e. 'compulsory procedures entailing binding decisions') to any dispute over the following: (a) whether or not it had a surplus of allowable catch, for the purposes of Article 62(2); (b) which States is had, or had not, allocated any surplus to, under Article 62(3); or (c) whether or not its particular conservation and management regime had ensured that the maintenance of fish stocks is not endangered by over-exploitation (as required by Article 61(2)).

129. A dispute covered by the exception in Article 297(3)(a) is not totally exempt from UNCLOS' dispute settlement procedures. First, UNCLOS implies that its parties are still required to attempt settlement of the dispute by recourse to section 1 of Part XV.[77] That section contains general provisions on peaceful settlement but none regarding compulsory procedures entailing binding decisions. Secondly, failing

[77] Article 297(3)(b).

settlement by recourse to section 1, a dispute regarding any of the following specific allegations may be submitted to so-called 'conciliation' under section 2 of Annex V to UNCLOS at the request of any party to the dispute:[78]

> (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the [EEZ] is not seriously endangered;
>
> (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
>
> (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

130. However, conciliation under UNCLOS has its flaws. The conciliation commission may not 'substitute its discretion for that of the coastal State'[79] and, in any event, such conciliation does not entail binding decisions.[80] Nonetheless, the possibility of scrutiny by a conciliation commission may be some incentive to a coastal State to, for example, avoid an allegation of manifest failure to adopt appropriate conservation and management measures. In practice, UNCLOS' provisions on conciliation have so far been employed on only one occasion. (That one occasion was this year, despite UNCLOS have been in force since 1997. The conciliation was initiated by Timor-Leste against Australia and concerns maritime boundaries.)

131. It is also possible that a breach by the coastal State of, say, its general obligations under Article 61 or its obligations regarding surplus under Article 62 could be pursued under section 2 of Part XV (i.e. the procedures on 'compulsory

[78] Article 297(3)(b).
[79] Article 297(3)(c).
[80] Annex V, Articles 14 and 7(2).

procedures entailing binding decisions') by means of arguing a breach of the duty in Article 300. This provision requires all parties to UNCLOS to 'fulfil in good faith the obligations assumed under this Convention' and to 'exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right'. However, in my view, such an argument has not so far been properly tested. The defending coastal State might well argue that such a challenge was seeking to undermine the clear limitation, expressly applied in an unqualified way, in Article 297(3)(a). In the time available, I am not able to look into this further. However, I would be happy to advise SFF on this matter if asked to do so.

132. A question arises whether the exception in Article 297(3)(a) would prevent litigation under section 2 of Part XV (i.e. the use of 'compulsory procedures entailing binding decisions') in the case of one party to UNCLOS alleging breach by another party of the latter's due diligence duty to 'seek' to agree under Article 63(1) (the provision on shared stocks in the EEZ: see sub-section 7.3 above). On the one hand, the defending coastal State might well argue that the matter inevitably relates to 'its sovereign rights with respect to the living resources in the [EEZ]' and therefore falls within the scope of Article 297(3)(a). On the other hand, the initiating coastal State might well argue that the specific issue of due diligence in relation to a process of seeking to agree is a separate matter.

133. In the case of *Mauritius v UK*, the arbitral tribunal concerned accepted that Article 63 is, on its face, a measure in respect of fisheries and in its application to the EEZ is subject to the exclusion in Article 297(3)(a). It did not find support for any alternative approach in the awards of other international courts or tribunals.[81] It also rejected an argument that 'that Article 297(3) should be construed narrowly in its application to Article 63 … on the grounds that the entire purpose of the special regime [under Article 63] is to enable populations to be managed as a unified whole'. It rejected this argument because it could see 'no textual basis for such a construction' in UNCLOS.[82] The approach taken by the arbitral tribunal in *Mauritius v UK*,

[81] *Mauritius v UK*, Award, 18 March 2015 (cited above), para.300.
[82] *Mauritius v UK*, Award, 18 March 2015 (cited above), para.301.

although not binding on other international courts or tribunals, supports the first of the two arguments in the preceding paragraph. That said, it is not entirely clear to me whether the tribunal was considering Article 63 only in the context of straddling stocks, rather than also in relation to shared stocks.[83] For reasons of time, I am not able to look into this further; but I would be happy to advise SFF on this matter if asked to do so.

134. A similar question arises in respect of alleged breaches by a coastal State of Article 194(5) (see sub-section 7.2 above): would the exception in Article 297(3)(a) prevent litigation under section 2 of Part XV (i.e. the use of 'compulsory procedures entailing binding decisions') in the case of one party to UNCLOS alleging breach by another party of the latter's obligation to protect the marine environment of its EEZ under Article 194(5) from threats arising from fishing activities? In *Mauritius v UK*, the arbitral tribunal held that, in the case of a challenge to the establishment by the UK of an EEZ marine protected area that had been characterised by the UK in the course of its development as an environmental protection measure, it was not reasonable for the UK to then expect to obtain blanket protection under Article 297(3)(a) by arguing before the tribunal that the protected area was 'merely a fisheries measure'.[84] In my view, this approach, although not binding on other international court or tribunals, points towards some limits in the reach of Article 297(3)(a) in an environmental protection context. Again, for reasons of time, I am not able to look into this further; but I would be happy to advise SFF on this matter if asked to do so.

135. **Conclusion:** In my view, the exception under Article 297(3)(a) provides a significant amount of protection to coastal States regarding their potential for exposure to UNCLOS' 'compulsory procedures entailing binding decisions'. In my view, the exception is very broad in that it relates to 'any dispute' relating to the coastal State's 'sovereign rights with respect to the living resources in the [EEZ] or their exercise'. Despite Article 297(3)(a), coastal States remain exposed to the risk of conciliation under section 2 of Annex V, albeit only in specific areas. However, such

[83] *Mauritius v UK*, Award, 18 March 2015 (cited above), para.299.
[84] *Mauritius v UK*, Award, 18 March 2015 (cited above), para.291.

conciliation does not entail binding decisions. I would be happy to advise SFF on whether an action based on Article 300 would side-step the protection provided by Article 297(3)(a) and, taking into account the findings of the arbitral tribunal in *Mauritius v UK* as well as the findings of other international courts and tribunals, on whether – or to what extent – Article 297(3)(a) is likely to provide protection in the event of an alleged breach of the duty either under Article 194(5) in respect of environmental threats arising from fishing activities or under Article 63(1).

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