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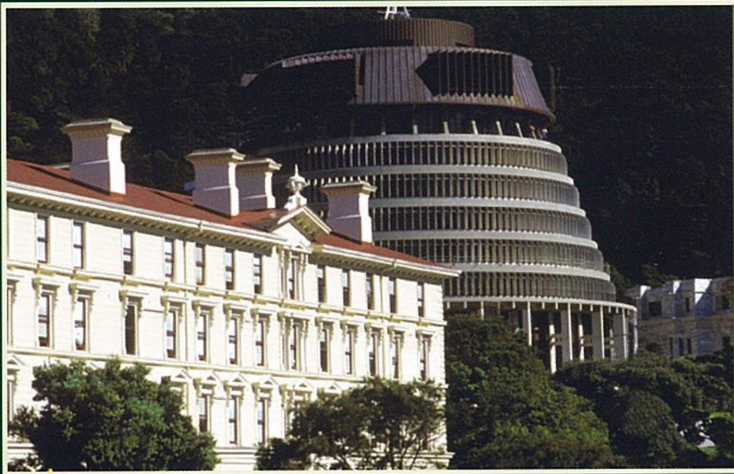

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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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CONTENTS

Foreword
Claudia Geiringer and Dean R Knight vii

Public Office Holder's Address

Challenges Facing the Family Court
Judge Peter Boshier 1

Articles

The Facts Available on "Facts Available": An Analysis of Article 6.8 and Annex II of the WTO Anti-Dumping Agreement
Michael Andrews 11

Breaking the Silence: An Analysis of Police Questioning Under Section 23(4) of the New Zealand Bill of Rights Act 1990
Amelia Evans 43

Untapped Potential: Administrative Law and International Environmental Obligations
Arla Marie Kerr 81

Picking Up the Pieces: Truth and Justice in Sierra Leone
Natalie Pierce 117

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UNTAPPED POTENTIAL: ADMINISTRATIVE LAW AND INTERNATIONAL ENVIRONMENTAL OBLIGATIONS

Arla Marie Kerr*

International instruments create binding legal obligations on States; however, they are not directly enforceable in domestic law. Yet, through administrative law, New Zealand courts have accepted that in some circumstances international obligations may affect domestic decision-making. This article explores the developments that have occurred in New Zealand administrative law regarding the courts' use of international environmental obligations in the course of their judicial review jurisdiction. Using the traditional tripartite framework of judicial review, the Resource Management Act 1991 and the Fisheries Act 1996 are examined to assess the degree to which case law under these legislative regimes reflects developments occurring in wider administrative law. Overall, the discussion demonstrates that while administrative law has significant capacity to engage with international obligations, its potential in the field of environmental decision-making is currently far from fulfilled. The article aims to provide practical insight into how the current jurisprudence in other areas of administrative law could be applied under the Resource Management Act 1991 and the Fisheries Act 1996.

I INTRODUCTION

The environment has been the subject of increasing international attention for several decades as the international legal community has responded to a growing global awareness of the problems emerging from lack of environmental regulation and protection.[1] At the domestic level, the New

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1 Kenneth Palmer "Introduction to Environmental Law" in Derek Nolan (ed) *Environmental and Resource Management Law* (3 ed, LexisNexis, Wellington, 2005) 1, 21 ["Introduction to Environmental Law"]. See World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987); Rio Declaration on Environment and Development (14 June 1992) 31 ILM 874; Agenda 21

Zealand government has shown commitment to these changing attitudes by legislating comprehensively for environmental management.[2] In response to these changes both in popular perceptions and legislative activity, this article explores one aspect of the increasing prominence of the environment in law: the potential for domestic administrative law to draw upon international environmental obligations. This article draws upon the traditional tripartite framework for judicial review to consider the way in which domestic courts interpreting the Resource Management Act 1991 (RMA) and the Fisheries Act 1996 (Fisheries Act) utilise (or in many cases could utilise) our international environmental obligations.

Illegality is the first ground of review to be explored. In New Zealand, the courts have accepted that international obligations can be brought into domestic decision-making through administrative law via the construct of relevant considerations. Case law under the RMA and the Fisheries Act is analysed to assess whether these developments have influenced the courts' approach to judicial review under these pieces of legislation.

Irrationality review provides an alternative method for administrative law to incorporate international obligations into domestic decision-making. This part canvasses the development of a variable standard of review, exploring the potential for an intensive standard to be employed in the context of decisions made under the RMA and the Fisheries Act. It also introduces the idea of a more principled approach to assessing the reasonableness of a decision, drawing upon lessons learned from New Zealand case law and developments in Canadian administrative law. The precautionary principle is used as an example of an international obligation which could provide a principled framework for intensive review of the reasonableness of a decision.

The final ground of review, procedural impropriety, allows the courts to engage with international obligations through the doctrine of legitimate expectation. This part assesses the viability of the approach which has emerged from the High Court of Australia holding ratification of an international instrument to create a legitimate expectation of conformity or consultation by domestic decision-makers.

(14 June 1992) 1095 MMCC 1120. See generally United Nations Framework Convention on Climate Change (9 May 1992) 1771 UNTS 107; Convention on Biological Diversity (5 June 1992) 1760 UNTS 79; Stockholm Convention on Persistent Organic Pollutants (22 May 2004) 40 ILM 532 and Cartagena Protocol on Biosafety to the Convention on Biological Diversity (29 January 2000) 39 ILM 1027.

2 See Resource Management Act 1991; Fisheries Act 1996; Hazardous Substances and New Organisms Act 1996; Climate Change Response Act 2002; Local Government Act 2002; Conservation Act 1987; Crown Minerals Act 1991. Note that the Climate Change Response Act 2002 was enacted directly in anticipation of our obligations under the Kyoto Protocol.

II ADMINISTRATIVE DECISION-MAKING AND INTERNATIONAL ENVIRONMENTAL LAW

The courts' supervisory jurisdiction envisages judicial review of executive and administrative acts to ensure they are in accordance with correct process and procedure.[3] In recognition of the dominant place of judicial review in administrative law, this article focuses on the institution of judicial review as a key tool in the courts' armoury to contribute to the overall process of international obligations having a real impact on domestic decision-making.

Illegality, irrationality and procedural impropriety as grounds of review have dominated the theory of judicial review since Lord Diplock's famous speech in *Council for Civil Service Unions v Minister for the Civil Service*.[4] Despite these grounds continually merging and influencing each other, the three traditional grounds of review still provide a useful framework for analysing the way the courts have grappled with the relevance of international environmental obligations to domestic decision-making. Each different ground raises relatively distinct issues, albeit they all draw on some of the more fundamental ones – the classic example being the boundary between procedural and "merits" review.

The starting point is the traditional view, based on dualist theory, that unincorporated international instruments do not have any domestic legal force.[5] However, New Zealand courts have rejected arguments which suggest our international obligations can have *no* impact on decision-makers.[6] Even the most conservative view of international instruments' role in administrative law recognises that they can, although need not, be used as an aid to the interpretation of a statute, even in relation to a broadly conferred discretion.[7] An obvious ambiguity in the statute is no longer required.[8] However, the courts' capacity to intervene will be defeated by express or comprehensive

3 Philip A Joseph *Constitutional and Administrative Law* (3 ed, Brookers, Wellington, 2007) 815 [*Constitutional and Administrative Law*].

4 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (HL) Lord Diplock.

5 Palmer "Introduction to Environmental Law", above n 1, 24; Sir Robert Jennings and Sir Arthur Watts (eds) *Oppenheim's International Law* (9 ed, Longman, London, 1992) 53.

6 *Tavita v Minister of Immigration* [1993] 2 NZLR 257, 266 (CA) Cooke P for the Court [*Tavita*].

7 Melissa Poole "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 VUWLR 91, 92; Paul P Craig *Administrative Law* (5 ed, Sweet and Maxwell Ltd, London, 2003) 568; Joseph *Constitutional and Administrative Law*, above n 3, 876–878; *New Zealand Air Line Pilots' Association v Attorney-General* [1997] 3 NZLR 269, 289 (CA) Keith J; *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 61 (CA) Keith J.

8 *New Zealand Air Line Pilots' Association v Attorney-General*, above n 7; *Sellers v Maritime Safety Inspector*, above n 7; *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA).

statutory provisions.[9] This willingness to engage with a decision-maker's discretion raises interesting questions regarding the boundary between procedure and merits review.

While the courts have made it clear that they are prepared to give international obligations increasing prominence in the domestic context,[10] they appear very aware of their appropriate constitutional boundaries when doing so. Under the doctrine of separation of powers, the judiciary must not usurp the legislative function by directly incorporating international law into our domestic law.[11] As the judiciary is neither representative nor accountable, legitimate concerns arise from the courts giving effect to international obligations in domestic law.[12]

The willingness of the courts to supervise executive engagement with international obligations has traditionally been largely in the realm of human rights.[13] As a result of this dominance, the capacity for administrative law to bring international obligations into environmental decision-making, is relatively underdeveloped. The following part briefly analyses the legitimacy of transferring principles of administrative law that have emerged in the human rights context across to the environmental context.

The prominence of human rights in recent case law could be attributed to their perceived importance, as against environmental rights. Traditionally, "rights" have been viewed as existing in a hierarchy, with environmental rights viewed as below other more traditional human rights. However, environmental rights are increasingly being recognised as being fundamental to certain human rights.[14] For example the right to life, which is a fundamental civil right, cannot be ensured when one's environment is threatened. So, the traditional hierarchical construct is not necessarily determinative of rights' respective importance.[15] New Zealand's domestic legislative context also

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9 *New Zealand Air Line Pilots' Association v Attorney-General*, above n 7; *Sellers v Maritime Safety Inspector*, above n 7; *Wellington District Legal Services Committee v Tangiora,* above n 8.

10 *Tavita*, above n 6; *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA); *Rajan v Minister of Immigration* [1996] 3 NZLR 543 (CA); *Elika v Minister of Immigration* [1996] 1 NZLR 741 (HC); *Mil Mohamed v Minister of Immigration* [1997] NZAR 223 (HC); *New Zealand Air Line Pilots' Association v Attorney-General*, above n 7.

11 *Brind v Secretary of State for the Home Department* [1991] 1 AC 696, 748 (HL) Lord Bridge.

12 See Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 67, 71.

13 Ibid, 66.

14 Karrie Wolfe "Greening the International Human Rights Sphere? Environmental Rights and the Draft Declaration of Principles on Human Rights and the Environment" (2003) 9 APPEAL: Review of Current Law and Law Reform 45, 46.

15 Some commentators have gone so far as to say there is a human right to the environment. While there are considerable advantages to conceptualising environmental rights as human rights, there are also distinct disadvantages. See Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996).

provides some illumination on the relationship between environmental and human rights. The scope and application of our major environmental legislation in contrast to legislation protecting human rights signifies the government's commitment to legislating strongly and comprehensively for environmental management.[16]

This analysis supports a conclusion to be drawn that the use of administrative law jurisprudence developed in the human rights context may be justified in the environmental sphere, despite traditional perceptions that human rights are more important, and thus warrant increased judicial attention. Environmental rights and obligations can, and should, stand beside human rights in an administrative law setting.

III NEW ZEALAND'S ENVIRONMENTAL LEGISLATION

In New Zealand, legislation is the primary source of environmental law.[17] As there is a large number of statutes directly relating (and even more indirectly relating) to the management of various aspects of the environment, this article uses two pieces of legislation as examples to demonstrate the potential relevance of international environmental obligations in administrative law. The RMA and the Fisheries Act immediately present themselves as two of the most significant pieces of environmental legislation in New Zealand: the RMA, by dint of its extremely wide definition of "environment" in section 2,[18] and the Fisheries Act, given the social and economic importance of our commercial and recreational fishing industries.

Furthermore, both statutes raise interesting issues regarding the potential for administrative law to engage with international environmental obligations. The RMA, due to its comprehensive reach yet silence in relation to international obligations, raises serious questions as to the legitimacy of incorporation of international obligations within its internal decision-making processes. Conversely, the Fisheries Act's direct incorporation of such obligations raises questions for the precise role these obligations should play.

Many parts of the RMA embody concepts of international law. In some instances the RMA clearly reflects a narrower version of international obligations, for example, the use of the concept of sustainable management in section 5, as opposed to the sustainable development concept which is

16 For example the Resource Management Act 1991 compared to the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.

17 Kenneth Palmer "The Sources and Institutions of Environmental Law" in Nolan, above n 1, 31, 37.

18 Resource Management Act 1991, s 2: "Environment includes - (a) Ecosystems and their constituent parts, including people and communities; and (b) All natural and physical resources; and (c) Amenity values; and (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters."

recognised in many environmental international instruments to which New Zealand is a party.[19] Some of our international obligations also provide substance to concepts which are implicit in the RMA. For example, the RMA arguably implicitly adopts a precautionary approach, which is reflected in many of New Zealand's international obligations.[20]

The Fisheries Act establishes a legislative framework for the management of New Zealand's fisheries. Significantly, section 5(a) explicitly requires decision-makers to "act in a manner consistent with New Zealand's international obligations in relation to fishing". Furthermore, section 9 and section 10 embody obligations arising under the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity.[21]

IV ILLEGALITY

Illegality review protects against decision-makers abusing their discretionary powers by exercising them for an improper purpose, on irrelevant grounds or without regard to relevant considerations.[22] These relevant considerations can be either mandatory or permissive, the former the only type the courts will require decision-makers to consider.[23] Significantly, mandatory relevant considerations do not have to be expressly stated in the legislation: the courts have been prepared (in certain contexts) to imply them from the statutory scheme.[24] It is in this regard that a supervising court has scope to bring relevant international obligations into play.

Human rights law has produced many developments regarding the courts' identification of mandatory relevant considerations. This part briefly explores those developments to establish a base from which to analyse the potential for their use in relation to environmental rights and obligations.[25]

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19 Convention on Biological Diversity, above n 1, art 1; United Nations Framework Convention on Climate Change, above n 1, art 3.

20 Simon Berry "Precautionary Principle in International and Domestic Law – Electro-Magnetic Radiation and Radio Frequency Emissions" (LawAsia Conference, Christchurch, 8 October 2001) para 6.4; Convention on Biological Diversity, above n 1, preamble; United Nations Framework Convention on Climate Change, above n 1, art 3; Rio Declaration on Environment and Development, above n 1, principle 15.

21 Particularly the United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, art 61; Convention on Biological Diversity, above n 1, arts 6–10.

22 Joseph *Constitutional and Administrative Law*, above n 3, 885.

23 Peter Cane *Administrative Law* (4 ed, Oxford University Press, Oxford, 2004) 221.

24 Ibid.

25 This article has not considered the explosion of case law in the United Kingdom in recent years, post the enactment of the Human Rights Act 1998 (UK), which has taken judicial review and human rights to new found territory. See Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6 ed, Oxford University Press, Oxford, 2007). There is scope for the impact of these developments to be considered in light of the concepts discussed in this article.

In *Ashby v Minister of Immigration* and then in *Tavita v Minister of Immigration* (*Tavita*), the members of the Court of Appeal made several comments paving the way for unincorporated instruments to become mandatory relevant considerations.[26] However, the extent to which this enables a decision-maker to inquire into the weight given to those considerations remains unsettled.[27]

In tandem with the acceptance of a mandatory relevant consideration model at the first instance level, an alternative method of conceptualising the relevancy of international instruments in administrative law can be seen in recent jurisprudence.[28] Rather than the international instrument being treated as a mandatory relevant consideration, there is a rebuttable presumption that prescribes the bounds within which a statutory discretion must be exercised. The presumption requires the statute to be read in a way that is consistent with New Zealand's international obligations,[29] but it will be rebutted if the legislation is not capable of being read consistently with the relevant international obligation.

A The Resource Management Act 1991

The developments discussed above demonstrate the potential for administrative law to affect a statutory power of discretion by bringing international instruments into the decision-making matrix. This section will address, first, the degree to which the courts *are* bringing international obligations into decision-making under the RMA and, secondly, whether that is the appropriate degree, in light of the developments which have occurred in human rights jurisprudence. Two main areas under the RMA are considered: the general exercise of statutory discretion (largely under section 104 in determining resource consent applications) and policy plans (regional and national).[30]

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26 *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 223–224 (CA) Cooke J [*Ashby*]; *Tavita*, above n 6, 265–266 Cooke P for the Court.

27 *Raju v Chief Executive, Department of Labour* (12 August 1996) HC WN AP 307/95, 3 McGechan J; *Mil Mohamed v Minister of Immigration*, above n 10, 228 Chisholm J; *M v Minister of Immigration* (17 August 2000) HC WN AP 84/99, 11–12 Goddard J; *Puli'uvea v Removal Review Authority*, above n 10, 522 Keith J.

28 *New Zealand Air Line Pilots' Association v Attorney-General*, above n 7; *Sellers v Maritime Safety Inspector*, above n 7; *Wellington District Legal Services Committee v Tangiora*, above n 8. It should be noted that the first two cases cited in this footnote consider international obligations outside of the human rights context. The relevant contexts were civil aviation and high seas jurisdiction respectively. It should also be noted that the idea of a presumption of consistency with international obligations is not new or controversial; however, the recent trends away from requiring an ambiguity and in favour of applying the presumption to a broad discretionary power are somewhat more contentious. See Geiringer, above n 12, 77.

29 Geiringer, above n 12, 77.

30 One further area of interest beyond the scope of this article is the body of case law emerging from the New South Wales Land and Environment Court under the Environment Planning and Assessment Act 1979 (NSW). This legislation introduces the concept of "ecologically sustainable development", which is defined as one of the objects of the legislation. The Land and Environment Court has extended the application of

The broad discretion conferred under section 104 when a consent authority considers an application for resource consent is a useful example of the significant potential impact of a requirement of recourse to international obligations. The cases discussed below demonstrate that the courts have accepted, to some degree, the relevancy of some of the international instruments; however, they appear to be only used in a limited sense.[31] There appears to be a reluctance to find certain international obligations are mandatory relevant considerations, possibly due to implications which would flow from such an approach (namely the significant burden it would place on decision-makers). However, these cases demonstrate that the courts are not confronting the issue directly. Clarity and openness is needed given there have been so many developments in other areas of law and the potential for these developments to have significant impacts if they were to be followed.

In the Environment Court, two cases heard by Judge Sheppard are evidence of general hesitation towards the use of international instruments. In *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, Judge Sheppard refrained from considering the Convention on Biological Diversity,[32] relying on the fact it had been enacted after the RMA (this justification has not been followed in subsequent cases).[33] Subsequently, in *Transit New Zealand and Ors v Auckland Regional Council*, Judge Sheppard suggested (albeit in the context of an appeal) that in the absence of inconsistency there could be some circumstances where reference to international instruments might be necessary and justified. However, he did not engage in any meaningful way with the role international instruments could play.[34]

The Court of Appeal's approach to international instruments under the RMA does not provide any further guidance. In *Canterbury Regional Council v Newman*, McGechan J ignored submissions (from both counsel) to consider the relevance of international instruments to an appeal under the

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these principles to impact on any decisions made by the Director-General under the legislation, by dint of the requirement that the Director-General takes into account the "public interest". A recent decision held that consideration of the "public interest" includes the decision-maker considering the principles of "ecologically sustainable development". See *Telstra v Hornsby Shire Council* [2006] NSWLEC 133, para 123 Preston CJ and *Gray v Minister for Planning and Ors* [2006] NSWLEC 720, para 41 Pain J.

31 *Environmental Defence Society (Inc) v Auckland Regional Council and Ors* [2002] NZRMA 492, para 28 (EC) Judge Whiting.

32 Convention on Biological Diversity, above n 1.

33 *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* [1997] NZRMA 356 (EC). This point has not been directly overruled: see *Powelliphanta Augustus Inc (Formerly Save Happy Valley Coalition Inc) v Solid Energy New Zealand Ltd* (30 April 2007) HC CH CIV 2006-409002993. However, it has not been followed: see for example *Mighty River Power Ltd v Waikato Regional Council* (23 and 24 October 2001) EC A 146/2001. Counsel referred to the Convention on Wetlands of International Importance Especially as Waterfowl Habitats (Ramsar) (2 February 1971) 996 UNTS 245, as lending weight to an interpretation under section 6 of the Resource Management Act 1991.

34 *Transit New Zealand and Ors v Auckland Regional Council* (18 August 2000) EC AK A 100/2000 11–12 Judge Sheppard.

RMA.[35] While the imprecision of the international instruments could be at issue, the justification could be more fundamental: this kind of use of international obligations has not been prevalent in any area other than in human rights, regardless of the precision of the obligations, suggesting courts and counsel have simply not registered its relevance in other areas. Significantly, this silence does not appear to be indicative of any outright objection to international obligations affecting decision-making under the RMA. Of further note, in the same year Judge Whiting commented that although international treaties did not, in themselves, have any force of law, they were relevant, and the extent depended on the specific context of the legislation.[36]

Given the hesitation of the courts about engaging with the language and theory of relevant considerations, it is useful to assess whether the presumption of consistency model could be used as an alternative. In *Canterbury Regional Council v Newman*, the arguments made by both counsel were effectively for a presumption of consistency with the Rio Declaration.[37] This alternative approach appears to have considerable merit in the context of the RMA: it leaves a degree of discretion to the decision-maker (preserving the supervisory court's constitutional role of not inquiring into the merits) yet still actively impacts on the exercise of the discretion by narrowing the boundaries of the discretionary power. The mandatory relevant consideration model, by contrast, runs the risk of merely providing a box to tick (although in *Tavita*, Cooke P appeared to advocate for a stronger model than this). However, it should be acknowledged that a presumption of consistency model would also raise concerns because of the practical burden it would place on administrators, particularly in the context of the RMA (where town planners are the primary decision-makers).

In addition to the exercise of statutory discretion, there is also potential for international instruments to play some role regarding policy plans (at regional and national level). Despite the courts' traditional reluctance to imply mandatory relevant considerations into comprehensive legislative regimes,[38] there have been attempts to review policy plans on this basis.[39] Early cases demonstrate reluctance by the courts to import extra obligations into this process.[40] Judge

35 *Canterbury Regional Council v Newman* [2002] 1 NZLR 289, 301 and 303 (CA) McGechan J.

36 *Environmental Defence Society (Inc) v Auckland Regional Council and Ors*, above n 31, paras 24–28 Judge Whiting.

37 *Canterbury Regional Council v Newman*, above n 35, 303 McGechan J.

38 Cane, above n 23, 222.

39 Regional policy statements are statutory requirements under section 60 of the Resource Management Act 1991. Similar provisions exist for the creation of regional plans, regional coastal plans and national policy statements. To date there is only one national policy statement, the New Zealand Coastal Policy Statement, which is discussed below.

40 *Saint Columba's Environmental House Group v Hawkes Bay Regional Council* [1994] 12 NZRMA 560, 575 (PT) Judge Kenderdine.

Kenderdine has commented that environmental obligations might not warrant the attention given by the Court of Appeal to human rights obligations in *Tavita*.[41] As discussed above, there are strong arguments to be made to the contrary.[42] In a later case Judge Kenderdine rejected submissions to require a Regional Policy Statement to consider the effects of the General Agreement on Trade and Tariffs/World Trade Organisation rules, citing constitutional concerns of the judiciary usurping the legislative function as justification.[43] It would appear from these early developments that while it may be permissible for international instruments to be incorporated into a regional policy statement, it has not been considered an appropriate function of the courts to impose an obligation to do so on local authorities.

However, such constitutional concerns as cited by Judge Kenderdine have since been challenged.[44] Given the current emphasis on the context of the international instrument and the domestic legislation, the proper role of the courts in incorporating international obligations into policy plans under the RMA potentially remains open.[45] Yet, at issue in these RMA cases is a significant broad-based discretionary power to create policy statements. To place limits on such discretion demonstrates the potency of the judicial review jurisdiction, and consequently, the realistic fears it may raise.

The RMA was also intended to be supplemented by high-level national policy plans.[46] At present, very few have been completed.[47] National policy statements present an ideal opportunity for central government to clarify the extent to, or the way in which, its international obligations apply in the resource management context. Rather than the courts inferring that such obligations are relevant to decision-making in a particular context, national policy statements could fulfil that role. However, in the present highly politicised climate, the completion of further statements is likely to be some years away.[48] In the meantime, administrative law may have a legitimate and significant role to play.

41 Ibid.

42 See the discussion in Part III New Zealand's Environmental Legislation.

43 *Proutist Universal v Nelson City Council* (28 June 1996) EC NEL W 121/96, 51 Judge Kenderdine.

44 *New Zealand Air Line Pilots' Association v Attorney-General*, above n 7, 289 Keith J.

45 To the author's knowledge, there have been no further cases considering the courts' role in requiring reference to international instruments in policy plans.

46 See Kenneth Palmer "Resource Management Act 1991" in Nolan, above n 1, 85, 163.

47 This is relatively unsurprising given that the New Zealand Coastal Policy Statement is the only mandatory plan required: Resource Management Act 1991, s 57.

48 See Ulrich Klein "Integrated Resource Management in New Zealand – A Juridical Analysis of Policy, Plan and Rule-Making Under the RMA" (2001) 5 NZJEL 1, 36.

The 1994 New Zealand Coastal Policy Statement directly includes a reference to New Zealand's international environmental obligations.[49] This invites suggestion of the government's acceptance that international obligations can contribute materially to domestic environmental regulation, and also of an intention to influence the interpretation of those obligations at the domestic level through the issuance of guidelines. The one guideline that has been released[50] (and supporting information on government websites[51]) effectively restates the obligations without providing any real guidance as to their application to New Zealand. There has been no case law on these particular obligations, and thus no opportunity to consider the reaction of the courts to this form of national executive guidance.[52] While this could be due to decision-makers perfectly recognising and responding to their obligations, the lessons learned from other areas of law would suggest otherwise. Perhaps instead, it is simply an area which is going unnoticed. Indeed, the absence of developments in this area may be indicative of a wider apathy towards international environmental obligations in the domestic context.

From the above analysis it is evident that there are no clear indications from any level of our judiciary as to the position of international obligations in decision-making under the RMA. Some cases suggest that international obligations are entirely irrelevant,[53] while others seem to accept their relevancy in some circumstances.[54] Despite this inconsistency, it is apparent that neither the mandatory relevant consideration model nor the presumption of consistency model has been clearly invoked. Given the substantial case law and scholarly interest which similar developments in human rights law created, such developments should be seriously considered in the environmental law context.

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49 Department of Conservation *New Zealand Coastal Policy Statement* (Department of Conservation, Wellington, 1994), chapter 6. It states: "[w]here the government has accepted international obligations which affect the coastal environment, the intention is that guidelines shall be issued from time to time by the government outlining the manner in which these obligations can best be carried out and implemented."

50 Grant J Hewison *A Guideline of New Zealand's International Obligations Affecting the Coastal Environment* (Department of Conservation, Wellington, 1994).

51 Ministry for the Environment *Multilateral Environmental Agreements* www.mfe.govt.nz (accessed 15 September 2007).

52 Judge Kenderdine noted the relevance of the international concept of the precautionary principle (due to its inclusion in the New Zealand Coastal Policy Statement) as opposed to the precautionary approach which is implicit in the Resource Management Act 1991. However, she did not expressly discuss the role of the international instruments which make the precautionary principle an obligation on the New Zealand government: see *Golden Bay Marine Farmers v Tasman District Council* (27 April 2001) EC CHCH W 42/2001, paras 420–421.

53 *Transit New Zealand and Ors v Auckland Regional Council*, above n 34, 11–12 Judge Sheppard.

54 *Environmental Defence Society (Inc) v Auckland Regional Council and Ors*, above n 31, para 21 Judge Whiting; *Transit New Zealand and Ors v Auckland Regional Council*, above n 34, 11–12 Judge Sheppard.

There are two juxtaposed factors to consider when assessing the courts' approach to international instruments under the RMA. The first is the traditional view that the more comprehensive the legislative framework, the less likely the courts will be to superimpose mandatory relevant considerations upon that framework.[55] The second was reflected by Somers J when he stated in *Ashby v Minister of Immigration* that "there may be some matters so obviously and manifestly necessary to be taken into account that a Minister acting reasonably would be bound to take them into account".[56]

The RMA provides a very comprehensive framework for decision-makers involved in environmental management. However, there are some key provisions in the RMA which confer a wide discretion upon the decision-maker. For example, under section 104 (the provision conferring power to determine an application for a resource consent) the decision-maker is required to consider Part II, "any actual and potential effects on the environment of allowing the activity", and the various relevant policy statements and plans.[57] These considerations leave a wide window of discretion to the decision-maker – wide enough for an international obligation to be read into (or be required to be considered). Our international obligations regarding the precautionary principle (for example under the Convention on Biological Diversity) can be used as an example of the role that administrative law could play in clarifying the boundaries of this discretion. The determination of "effects" under section 104, for example, leaves substantial scope for the incorporation of the precautionary principle.

Under a mandatory relevant consideration model the obligation at issue must be "obviously and manifestly necessary" to a reasonable decision-maker's decision.[58] Under the RMA, although there may be room for international obligations to be considered, it is one significant step further to say there is a gap that needs to be filled. This was the point emphasised by Judge Kenderdine in *Saint Columba's Environmental House Group v Hawkes Bay Regional Council*.[59] However, given the increasing prominence of environmental rights, it would appear there is a legitimate argument to be made that some international environmental obligations could meet the standard of manifest importance.

While a mandatory relevant consideration model may be met with some resistance, this would not rule out the potential role for courts in requiring a presumption of consistency with relevant international obligations, for example, the precautionary principle. The latter approach could have

55 Cane, above n 23, 222.

56 *Ashby*, above n 26, 233–234 Somers J.

57 Resource Management Act 1991, s 104.

58 *Ashby*, above n 26, 233–234 Somers J.

59 *Saint Columba's Environmental House Group v Hawkes Bay Regional Council*, above n 40, 575 Judge Kenderdine.

the advantage of more actively shaping administrative decisions, at least as compared to the weaker interpretation of the mandatory relevant consideration model. A further advantage of invoking a presumption of consistency is that it does not require the relevant international obligation to have attained the same level of manifest importance, but rather a simple capability of consistency with the governing statute. However, a presumption of consistency still suffers from the same practical limitations concerning the reluctance of the courts to require decision-makers to consider international obligations in addition to already complex domestic legislation. Regardless, it is clear the courts are some way off adopting either approach in the RMA context.

B The Fisheries Act 1996

The issues that arise under the Fisheries Act are entirely distinct from those under the RMA. This is due to the stark difference in the treatment of international obligations in the respective legislative frameworks. Section 5(a) of the Fisheries Act eliminates the initial question that is raised under the RMA of whether New Zealand's international obligations can be relevant: under the Fisheries Act they *must* be relevant. While at first light this clarifies the situation, a more in-depth analysis demonstrates that this statutory requirement is far from clear in its application and has been relatively neglected by the courts. The following discussion will assess the role international obligations have played to date in judicial review of decisions made under the Fisheries Act and the extent to which the courts are utilising the jurisprudence available to them from other areas of the law.

Under the Fisheries Act 1983, the predecessor to the current Act, a question was raised as to the ability of the courts to consider developments of international law in interpreting the legislation. A trio of judgments in the High Court made it clear that an ambulatory approach was appropriate and also that the invocation of international obligations had to be premised on the presence of an ambiguity in the legislation.[60] This approach stood in sharp contrast to the developments which were taking place in human rights jurisprudence in the late 1990s.[61] It is also interesting to note that no distinction was made (nor has been made in later cases, or under the RMA) between "soft" and "hard" international instruments.[62]

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60 An ambulatory approach requires the interpretation of domestic New Zealand statutes as constantly updated by reference to developments in international law: *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* (24 April 2007) HC WN CP 237/95, 85 McGechan J; *Greenpeace NZ Inc v Minister of Fisheries* (27 November 1995) HC WN CP 492/93, 18 Gallen J; *Roaring Forties Seafoods Ltd v Minister of Fisheries* (1 May 1997) HC WN CP 64/97, 4 Ellis J.

61 *New Zealand Air Line Pilots' Association v Attorney-General*, above n 7; *Sellers v Maritime Safety Inspector*, above n 7; *Wellington District Legal Services Committee v Tangiora*, above n 8.

62 Antonio Cassese *International Law* (2 ed, Oxford University Press, Oxford, 2005) 196–197. The significance of this distinction for present purposes is the courts' apparent unconcern with referring to soft law instruments (which are not binding on a State) alongside hard law instruments (which are binding).

Given the willingness of our courts to engage with international instruments in relation to human rights, one could expect the jurisprudence under the new Fisheries Act to take a more progressive approach to relevant international obligations. However, the case law has not reflected this. Very few cases even discuss the requirement under section 5(a) to act in a manner consistent with our relevant international obligations. Due to the controversy that consideration of international obligations has caused in other areas, and the recent introduction of an amendment Bill to the Fisheries Act (discussed below), it is likely this is due to an (inadvertent or deliberate) oversight on the part of reviewing courts, rather than perfect administration. This discussion outlines the key features of judicial review cases under the Fisheries Act, and also the potential for the courts' current role to increase.

The majority of recent cases that have considered the place of international obligations have done little more than to cite their importance, before dismissing them as substantially unhelpful in aiding the interpretation of the relevant provisions. For example, a Catch History Review Committee in 2005 stated, in relation to the relevance of the Convention for the Conservation of Southern Blue Fin Tuna[63] to the interpretation of section 34(2), that:[64]

> …whilst I accept that it is important that New Zealand is seen to be complying with its obligations under this Convention and its integrity in this regard is to be upheld, indeed cherished, the Convention of itself cannot influence the interpretation to be placed upon the words "lawful taking" under s 34(2) of the Act.

This statement suggests that even the traditional approach (of allowing relevant international instruments to assist in interpretation) is not being utilised. This raises a serious question of whether the Fisheries Act is being administered correctly, particularly in light of Cooke P's concerns, expressed in *Tavita*, that New Zealand's apparent commitment to international instruments might fairly be criticised as window-dressing.[65] The irresistible inference from this decision is that requiring decision-makers to "act in a manner consistent" with international obligations, as mandated by section 5(a), has not been understood as requiring them to do anything differently in response to those obligations. While a careful line has to be drawn preventing the courts from dictating an actual outcome, the obligation under section 5(a) is clearly stronger than under a mandatory relevant consideration model. It is surely appropriate for the courts exercising their supervisory jurisdiction to give real weight to a positive direction that international obligations shall not only be considered, but shall be acted upon.

In *Squid Fishery Management Co Ltd v Minister of Fisheries and Anor* (*Squid Fishery Management*), William Young J, delivering the judgment of the Court, cited the relevancy of New

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63 Convention for the Conservation of Southern Blue Fin Tuna (10 May 1993) 1819 UNTS 360.

64 *Independent Fisheries Ltd v Ministry of Fisheries* (26 August 2005) Catch History Review Committee 2019/05, para 57 Committee Chairman Castle.

65 *Tavita*, above n 6, 266 Cooke P for the Court.

Zealand's obligations under UNCLOS, in accordance with section 5(a).[66] He emphasised the dual principles arising from articles 61 and 62: the right to utilise a resource and the responsibility to protect that resource from exploitation.[67] These principles reflect the underlying tensions created in the Fisheries Act itself in section 8.[68] While it is promising that the Court recognised the relevance of UNCLOS, the case centred on the correct approach to take in relation to the precautionary principle, yet none of our international commitments to that principle were discussed.[69] The Court's approach to the impact of section 5(a) appears superficial, justifying concerns even beyond fears of window-dressing. The presence of section 5(a) creates an even higher standard than would a judicially-imposed mandatory relevant consideration model – on this basis, the current approach is arguably inconsistent with not only our international obligations, but our domestic legislation as well.

More recently, in *Omunkete Fishing (Pty) Limited v Minister of Fisheries*, Mallon J, hearing a judicial review application on the exercise of powers under section 113 of the Fisheries Act,[70] interpreted the section in light of our international obligations under the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).[71] Mallon J said:[72]

> It is not outside the purpose and scope of the Act for such conditions to include compliance with CCAMLR conservation measures. New Zealand's international obligations are recognised under the Act and the provisions are to be interpreted consistently with its international obligations.

This recognition of the role section 5 has to play in the interpretation of the Fisheries Act should be applauded. In this case the Court was prepared to give real effect to our international obligations.

The issues highlighted by *Squid Fishery Management* were highlighted by the introduction of the Fisheries Act 1996 Amendment Bill (Amendment Bill) in early 2007. One of the driving factors

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66 *Squid Fishery Management Co Ltd v Minister of Fisheries and Anor* (13 July 2004) CA 39/04, para 10 William Young J for the Court [*Squid Fishery Management*]. Note that he mistakenly refers to section 5(b) which concerns the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

67 United Nations Convention on the Law of the Sea, above n 21, arts 61 (conservation of living resources) and 62 (utilisation of living resources).

68 Fisheries Act 1996, s 8(1): "The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability."

69 For example, Rio Declaration on Environment and Development, above n 1; Convention on Biological Diversity, above n 1.

70 Section 113 allows the chief executive to impose conditions on a vessel bringing fish into New Zealand waters (which has been landed outside New Zealand waters).

71 Convention on the Conservation of Antarctic Marine Living Resources (20 May 1980) 1329 UNTS 48.

72 *Omunkete Fishing (Pty) Limited v Minister of Fisheries and Anor* (1 July 2008) HC WN CIV 2008-485-1310, para 67 Mallon J.

behind the amendments sought was litigation in the High Court which frustrated attempts to lower the total allowable catch of orange roughy to be consistent with the precautionary principle.[73] While the litigation cited by the Minister as the catalyst for this Amendment Bill never actually made it to trial, in that case Wild J gave interim orders that the total allowable catch and total allowable commercial catch at issue be reinstated to their previous higher levels.[74] Despite this being an interim judgment, this still flies in the face of our international commitments. The effect of the judgment was that the orange roughy fishery (which at that point was widely considered to be in the process of collapsing[75]) continued to be fished at 2002 levels, despite the Minister's attempts to lower it.

The Amendment Bill clarified actions required to be taken under section 10 of the Fisheries Act, which was intended to reflect our international commitment to the precautionary principle.[76] The Ministry of Fisheries said the Amendment Bill makes it clear (where the present legislation does not) that "decision-makers should not, where the best available information is incomplete or otherwise deficient, delay or avoid taking measures to ensure sustainability".[77] However, this Amendment Bill seems to have stalled. In response to more recent litigation in relation to orange roughy stocks, an amendment to section 13 of the Fisheries Act was passed.[78] The impact of this amendment on the application of the precautionary approach under the Fisheries Act is discussed below in Part V.[79]

Squid Fishery Management and other cases discussed above highlight the deficiency in the role played by section 5(a). While there may be some ambiguity as to the status of the precautionary principle in the Fisheries Act, there is none in this regard at international law, at least at the most fundamental level.[80] The precautionary principle is expressly affirmed in several international

73 Office of the Minister of Fisheries *Proposed Amendment of the Fisheries Act 1996: Precautionary Approach* www.mfish.govt.nz (accessed 13 July 2007); see *ORH1 Exploratory Fishing Company Ltd and Anor v Minister of Fisheries and Anor* (19 October 2006) HC WN CIV 2006-485-2099.

74 *ORH1 Exploratory Fishing Company Ltd and Anor v Minister of Fisheries and Anor*, above n 73, para 2 Wild J.

75 See Scoop Independent News "Orange Roughy Cuts Welcomed but Overdue" (21 September 2006) www.scoop.co.nz (accessed 20 September 2007).

76 Fisheries Act 1996 Amendment Bill, no 109–1 (Explanatory note) 1–2.

77 Ibid, 2.

78 Fisheries Act 1996 Amendment Bill (No 2), no 240.

79 Part V Irrationality.

80 See Rio Declaration on Environment and Development, above n 1, principle 15. The Rio Declaration is the most widely cited definition of the precautionary principle; it makes it very clear that uncertainty should be resolved in favour of environmental protection.

instruments to which New Zealand is a party,[81] and the suggestion that uncertainty of information could result in utilisation (as opposed to sustainability) of a resource is directly contrary to all of these instruments. This is a prime example of the potential of section 5 not being utilised by the courts. In contrast, *Omunkete Fishing (Pty) Limited v Minister of Fisheries* suggests that some judges are willing to give proper effect to section 5.

In summary, under the Fisheries Act the issues are relatively simplified when contrasted to those that arise under the RMA. Section 5(a) expressly requires decision-makers to interpret or act in a manner consistent with our relevant international obligations. Section 5(a) goes further than creating mandatory relevant considerations – the decision or action must be substantively consistent with the obligations. Section 5(a) effectively acts as a statutory non-rebuttable presumption of consistency with our international obligations. However, the case law in this area shows little recognition of this direction from Parliament that international obligations should shape decision-making in this context. There are three explanations for this inaction. First, decision-makers are acting consistently with their international obligations (as discussed in relation to the RMA, this is unlikely). Secondly, courts are consciously refusing to engage with the relevancy of international obligations (this would be a clear error of law in light of section 5(a) and unlikely, given the human rights jurisprudence and the absence of indication to this effect in the case law). Finally, counsel and possibly courts are failing to acknowledge the potential of section 5(a) to play a substantial role (or even *some* role) in the interpretation of the legislation. The latter factor appears to be the most likely conclusion, suggesting that there is considerable scope for administrative law to remedy this situation. An obligation rests on both counsel and judges to correctly interpret and apply the Act.

The RMA and the Fisheries Act provide striking examples of two different approaches to international obligations within domestic legislative frameworks. The above analysis shows that neither has been particularly effective. The RMA establishes a comprehensive framework of environmental management and is silent as to the relevance of international obligations, yet could be bolstered by reference to them. The Fisheries Act establishes a comprehensive framework for fisheries management and explicitly sets out the relevance of international obligations, yet decision-making is not aided by them. It appears that there is a gap between the realities of judicial review in this area and the potential which exists, or is even demanded, by their respective contexts. This stands in stark contrast to developments which have occurred in human rights law. The courts should address issues which are raised before them, taking the opportunity to clarify the potential impact of international instruments within domestic environmental regulatory regimes.

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81 Ibid; United Nations Framework Convention on Climate Change, above n 1; Convention on Biological Diversity, above n 1.

V IRRATIONALITY

This part explores the utility of the concept of reasonableness in building international environmental obligations into decisions made under the RMA and the Fisheries Act. The courts' current approach to determining the appropriate standard of review of a statutory discretion is analysed, before considering whether decisions made under the RMA and the Fisheries Act could ever be subject to a more intensive standard of review than the traditional *Wednesbury* standard. The final section will canvass the potential for international obligations such as the precautionary principle to provide a principled framework for an intensive standard of review.

When considering developments which have occurred regarding irrationality review, some of the core principles should be borne in mind. At the heart of irrationality lies the concept of discretion: the notion that even in questions of law and fact there is not one right answer, but a range of "reasonable" ones.[82] The heart of a court's supervisory role in judicial review proceedings is to ensure that discretion is exercised rationally and reasonably, without ever substituting the court's decision for that of the decision-maker.[83] It is suggested that a principled approach to the concept of reasonableness could allay traditional concerns about the courts inquiring into the merits of a decision.

A Standards of Review

The traditional standard applied by the courts when assessing the reasonableness of a discretionary decision is the *Wednesbury* test: whether the decision is "so absurd that no sensible person could ever dream that it lay within the powers of the authority".[84] While the stringency of this standard is traditionally justified as necessary to ensure the court does not ever overstep its constitutional boundary and inquire into the merits of a decision, it has been heavily criticised for being (among other things) unattainable in practice.[85]

As a result of this criticism, the courts have developed what has become known as a sliding scale of intensity of review when reviewing a discretionary decision on the ground of irrationality. There are many cases which have acknowledged that in different contexts it may be appropriate for the court to adopt a different (lower) standard of review.[86] The main factors which have been

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82 Cane, above n 23, 185.

83 Craig, above n7, 609.

84 *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (CA) Lord Greene MR.

85 Joseph *Constitutional and Administrative Law*, above n 3, 931.

86 Ibid, 837–838. See *Canterbury Pipe Lines Ltd v Christchurch Draining Board* [1979] 2 NZLR 347, 357 (CA) Cooke J; *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 149 (CA) Cooke J; *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341, 353 (CA) Woodhouse and Cooke

emphasised as justifying these varying standards are, broadly, the nature of the case and the competence and experience of both the court and the decision-maker.[87] While the courts have employed the language of a wide range of standards of review, it can be questioned whether in practice this results in a range of different standards.[88] Yet despite this criticism, even an ostensibly flexible approach must be preferable to the rigid standard of *Wednesbury* unreasonableness.

The following discussion analyses whether, in light of the relevant case law, it could be appropriate for the courts to impose a lower threshold of unreasonableness when reviewing discretionary decisions. The case law under the Fisheries Act does not shed any light on this matter: no cases have been argued on the basis of a varying scale of review.[89] In contrast, under the RMA there has been a series of cases culminating in a Supreme Court decision in 2005 which discussed (among other complex issues) the appropriate standard of review in the context of a decision of a consent authority not to notify a resource consent application.[90] This case (and the sequel of sorts *Progressive Enterprises Ltd v North Shore City Council* (*Progressive Enterprises*))[91] highlighted the potential for the courts to adopt a more searching standard of review in the RMA context.[92]

JJ; *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72, para 70 (HC) Baragwanath J [*Progressive Enterprises*].

87 *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601, 606 (HC) Baragwanath J; Joseph *Constitutional and Administrative Law*, above n 3, 931. Other cases and commentators have noted similar factors as being relevant. See Dean Knight "A Murky Methodology: Standards of Review in Administrative Law" in Claudia Geiringer and Dean Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 192, also published in (2008) 6 NZJPIL 117; *Wolf v Minister of Immigration* [2004] NZAR 414, para 72 (HC) Wild J; Michael Taggart "Administrative Law" [2006] NZ Law Rev 75, 83 ["Administrative Law Review 2006"].

88 Knight, above n 87, 201.

89 The following are examples of cases which have considered challenges on the basis of *Wednesbury* unreasonableness with no discussion of a variable standard of review: *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries*, above n 60; *Squid Fishery Management,* above n 66; *Vautier Shelf Company No 14 Ltd v Chief Executive of Ministry of Fisheries* (24 July 2000) HC WN CP 20/97; *Leigh Fishermen's Association Inc v Minister of Fisheries* (11 June 1997) HC WN CP 266/95.

90 *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] 2 NZLR 597 (NZSC) [*Discount Brands*].

91 *Progressive Enterprises*, above n 86.

92 Section 108 of the Resource Management Amendment Act 2005 substantially affects the High Court's jurisdiction to consider applications for judicial review of decisions made under sections 93 or 94. The amendments effectively transfer that jurisdiction to the Environment Court. This section does not come into force until a date is appointed by the Governor-General. The delay in coming into force is in recognition of concerns that the Environment Court, in its current state, does not have sufficient resources to manage the inevitable increase in workload. When the section does come into force it will be interesting to see how the Environment Court grapples with these developing public law principles.

B The Search for a 'Reasonable' Decision

In *Discount Brands Ltd v Westfield (NZ) Ltd* (*Discount Brands*), the Supreme Court issued five separate judgments, each addressing (some more explicitly than others) the appropriate standard of review in the context of a decision not to notify a resource consent application.[93] Unfortunately, none of the Supreme Court Judges explicitly stated the approach they were taking to the question of the appropriate standard of review. However, on close analysis, it is evident all the Judges do in fact engage in a more intensive review than the orthodox *Wednesbury* unreasonableness standard would have allowed for.

In *Progressive Enterprises*, a High Court decision, Baragwanath J discussed several key contextual factors as potentially justifying a higher intensity of review: the institutional competence of the decision-maker (and the supervising court) and the nature of the issues; the procedural rather than substantive nature of the decision; and the fact public participatory rights were at issue.[94] After considering that matrix of contextual factors, Baragwanath J adopted a "precautionary approach": "at the section 93 stage any real doubt whether the development would have more than minor adverse effects must be resolved in favour of the environment by requiring notification".[95] He noted that his approach drew heavily from Elias CJ and Tipping J's approaches in *Discount Brands*.[96] This appears to be an application of the precautionary principle. However, Baragwanath J did not explain either why the precautionary principle was relevant to a non-notification decision under the RMA, or how it would work in practice beyond that one sentence.

Baragwanath J's approach was criticised in a recent High Court decision, *Auckland Regional Council v Rodney District Council and Anor*.[97] Harrison J disagreed with Baragwanath J's reading of *Discount Brands*, particularly the conclusion that Tipping J's comments could be construed as being "consistent with the hard look approach".[98] He went on to say:[99]

> I do not agree that the aims and principles of the Resource Management Act generally justify a more intensive or invasive power to review a consent authority's non-notification decision than would otherwise be appropriate for this Court in exercising its supervisory function.

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93 *Discount Brands*, above n 90.

94 *Progressive Enterprises*, above n 86, para 72 Baragwanath J.

95 Ibid, para 73 Baragwanath J.

96 Baragwanath J also noted that this approach was not inconsistent with Blanchard J advocating for intensive *Wednesbury* unreasonableness, and was within Keith J's more intensive standard; ibid.

97 *Auckland Regional Council v Rodney District Council and Anor* (24 August 2007) HC AK CIV 2007-404-0034464, paras 42–43 Harrison J.

98 Ibid, para 42 Harrison J.

99 Ibid, para 43 Harrison J.

Citing Blanchard J and Tipping J, Harrison J concluded that the appropriate test is one of reasonableness, not what the court thinks should have happened. Harrison J seems to have understated both the emphasis the Supreme Court placed on the specific context of a non-notification decision under the RMA and the intensity of the standard the Supreme Court was willing to employ.[100] Furthermore, Harrison J suggests that the approach advocated for by Baragwanath J invites the court to substitute its own decision for that of the consent authority: arguably, Baragwanath J's approach sets parameters to the consent authority's decision rather than requiring a specific outcome.[101]

Despite Harrison J's opinion to the contrary, the Supreme Court's decision in *Discount Brands* does appear to support an intensive standard of review of a decision whether to notify a resource consent application.[102] However, although the intensity of review appears to be more intensive than *Wednesbury* unreasonableness, it is not clear what the suggested standard of "careful scrutiny" would involve.

C The Decision-Making Frameworks of the RMA and the Fisheries Act

This section addresses whether contexts beyond section 93 of the RMA could justify a similar intensive standard of review. Under the RMA, a decision whether to grant a resource consent under section 105 occurs in a significantly different context than a decision taken under section 93. The former decision is subject to a right of appeal to the High Court established under section 299.[103] However, it has been noted that analogies can be drawn between the courts' statutory appellate function and the function of supervisory courts.[104] In *Countdown Properties (Northlands) Ltd v Dunedin City Council* (*Countdown Properties*), the High Court set out the correct approach to an appeal under the RMA.[105] Notably, the grounds for appeal strongly resemble the irrationality and illegality grounds of judicial review.[106] A court could have an opportunity to consider the

100 See *Discount Brands*, above n 90, para 25 Elias CJ, para 54 Keith J, para 116 Blanchard J, paras 144–145 Tipping J.

101 *Auckland Regional Council v Rodney District Council and Anor*, above n 97, para 48.

102 Michael Taggart has also concluded that the Supreme Court adopted a more intensive standard of review than usually justified: Taggart "Administrative Law Review 2006", above n 87, 76.

103 Note that this is different from the right of appeal to the Environment Court, which hears cases de novo, under section 120 of the Resource Management Act 1991.

104 Knight, above n 87, 180.

105 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145, para 12 (HC) Barker J for the Court.

106 The Court noted "that this Court will interfere with decisions of the Tribunal only if it considers the Tribunal has: (a) Applied a wrong legal test; or (b) Came to a conclusion without evidence or one to which on evidence, it could not reasonably have come; or (c) Took into account matters which it should not have

appropriate intensity of review of a decision made under section 105 in two situations. First, the court could accept that a judicial review action was directly open. While the statutory right of appeal does not automatically exclude this, in order for the court to accept jurisdiction, it is likely it would require that judicial review could be shown to add something which the appeal process could not.[107] The second possibility is that the inquiry in the appeal is so similar to that in a judicial review that the same principles could be utilised.[108] In *Countdown Properties*, for example, Barker J said one of the inquiries was whether the decision-maker came to a conclusion without evidence or which on the evidence it could not reasonably have come to.[109] This effectively asks the same question as an irrationality inquiry.[110] So, while judicial review may not add anything to an appeal, an argument can be made that the two processes are sufficiently similar for the principles of judicial review to apply in the appeal context.

Under section 105, some of the key factors which were discussed in *Discount Brands* and *Progressive Enterprises* as justifying an increased standard of review are absent. Significantly, the decision whether or not to grant a resource consent application is entirely substantive (compared to the Supreme Court's view of the decision under section 93 as being procedural).[111] The rights at stake are based on notions of private property rather than more fundamental democratic participatory rights. Given a supervisory court's traditional expertise lies in the latter domain,[112] the institutional competence of the courts to assess the reasonableness of the decision to grant a resource consent is significantly diminished compared to the section 93 context.

On this theoretical level, it would appear that the context of a decision to grant a resource consent does not justify an intensive standard of review. However, on a closer reading of the approach taken in *Progressive Enterprises,* Baragwanath J (following Elias CJ and Tipping J in *Discount Brands*) appears to emphasise the precautionary principle as an independent factor supporting increased scrutiny.[113] This suggests that an intensive standard of review does not rest

taken into account; or (d) Failed to take into account matters which it should have taken into account." Ibid, para 12 Barker J for the Court.

107 See Judicature Amendment Act 1972, s 4; *Fraser v Robertson* [1991] 3 NZLR 257, 260 (CA) Cooke P.

108 See *Wolf v Minister of Immigration*, above n 87, para 41 Wild J.

109 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 105, 12 Barker J for the Court.

110 See *Wolf v Minister of Immigration*, above n 87. The decision concerned a statutory right of appeal (under the Immigration Act 1987), yet Wild J employed language traditionally used in the judicial review context, for example "mandatory relevant considerations" and "*Wednesbury* unreasonableness".

111 *Discount Brands*, above n 90, para 54 Keith J; para 25 Elias CJ; Taggart "Administrative Law Review 2006", above n 87, 79.

112 *Discount Brands*, above n 90, para 54 Keith J.

113 *Progressive Enterprises*, above n 86, para 73 Baragwanath J.

solely on factors such as the nature of the issues and institutional competence, but rather on wider considerations of the nature of the RMA itself. In the context of reviewing a decision whether or not to grant a resource consent application, the same reasoning based on the general nature of the RMA exists to support a conclusion that an intensive standard of review shaped by the precautionary principle should be applied.

The soundness of this approach is supported by consideration of how the precautionary principle would affect decisions in practice. Importantly, while the precautionary principle narrows the decision-maker's discretion considerably by eliminating uncertainty of information as a basis for inaction, it does not dictate a certain outcome. Crucially there is still a degree of discretion left to the decision-maker in balancing the various factors at play in the application.

Under the Fisheries Act, the most commonly challenged decisions are decisions made by the Minister of Fisheries to set the total allowable catch for a species of fish.[114] As stated above, to the author's knowledge there have been no cases of judicial review where variable standards of review have been pleaded.[115] Instead, simple *Wednesbury* unreasonableness has been relied on; unsurprisingly (given its inflexibility and the difficulties in actually proving it) the courts have not engaged in any real analysis of the reasonableness of the decisions. However, this absence of argument is not necessarily indicative of the context of the decision not being amenable to an intensive standard of review. Rather, it could simply be an example of the *Wednesbury* test not being challenged (either because it is the correct standard of review in this context or more simply because counsel have not been aware of the developments in other contexts).

In terms of institutional competence, a supervising court reviewing a decision made by the Minister of Fisheries to set a total allowable catch would be very aware of the high level of scientific and policy content which goes into the decision. As is evident from the judicial review cases where the courts have looked in detail at such decisions,[116] the decisions are extremely complex and the issues considered are well beyond the traditional realms of legal process. In this respect, the two considerations Baragwanath J focused on, the nature of the issues in the case and institutional competence, are very much entwined. However, that is not to say the court has no role to play in reviewing such a decision. Not all the issues which arise in the Minister's decision are policy-based – there are legal boundaries to the decision. It is these boundaries which a supervising court can control. Such an approach requires the court to be alert to the appropriate level of deference and restraint, but be willing to engage in a more sustained review than *Wednesbury* suggests. Careful

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114 *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries*, above n 60; *Roaring Forties Seafoods Ltd v Minister of Fisheries*, above n 60; *Greenpeace NZ Inc v Minister of Fisheries*, above n 60.

115 See *Squid Fishery Management*, above n 66; *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries*, above n 60; *Vautier Shelf Co No 14 Ltd v Chief Executive of Ministry of Fisheries*, above n 89.

116 See generally *Squid Fishery Management*, above n 66.

scrutiny enables a court to ensure the discretion is exercised within legitimate boundaries, while not substituting the original decisions with its own.

D The Precautionary Principle in an Assessment of Reasonableness

The following section will demonstrate how decision-making under the RMA and the Fisheries Act could be shaped by our international environmental obligations should the courts be prepared to engage in heightened scrutiny of the reasonableness of particular decisions. In contrast to the criticisms raised against the mandatory relevant consideration model,[117] the developments towards an intensive standard of review have not produced such widespread contention.[118] *Progressive Enterprises* is indicative of a willingness to use concepts arising from international obligations to guide the concept of reasonableness. However, it is submitted that in the present context it is not sufficient to intervene in a decision merely on the basis of "the precautionary approach" – some guidance to the concept must be given for it to be meaningful. It is at this stage that the specific content of our international obligations becomes relevant. In *Waitakere City Council v Lovelock*, Thomas J argued that the crucial element in an analysis of reasonableness was asking *why* a decision might be unreasonable: the court must be able to say "a decision is unreasonable because …".[119] This is akin to an approach which has developed in Canada from the Supreme Court *Baker v Canada (Minister of Citizenship and Immigration)* decision.[120] In that case, the majority applied a "reasonableness simpliciter" standard of review, which allows the court to undertake a more probing inquiry than "patent unreasonableness" (equivalent to *Wednesbury* unreasonableness) without determining the correctness of the decision.[121] Significantly, the majority held that the reasonableness of an exercise of discretion is shaped by certain fundamental values.[122] While international obligations were not among those expressly singled out, the majority's treatment of the Convention on the Rights of the Child[123] suggest that it at least was seen as clearly relevant to the

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117 See for example *Puli'uvea v Removal Review Authority*, above n 10, 522 Keith J; *Schier v Removal Review Authority* [1999] 1 NZLR 703, 708 (CA) Keith J.

118 See *Discount Brands*, above n 90; Taggart "Administrative Law Review 2006", above n 87.

119 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, 413 (CA) Thomas J.

120 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 [*Baker*]; David Dyzenhaus, Murray Hunt and Michael Taggart "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 OUCLJ 5, 14.

121 *Baker*, above n 120, 858 L'Heureux-Dubé J.

122 Ibid, 855 L'Heureux-Dubé J: "that discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter."

123 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3.

case at hand. However, the practical importance of the international obligations remains unclear.[124] At any rate, the Canadian approach demonstrates the potential for the concept of reasonableness to shape the exercise of domestic discretionary powers by reference to international obligations. The following discussion uses the precautionary principle as an example of how a principled approach to reasonableness could, in practice, affect decisions made under the RMA and the Fisheries Act.

There has been a series of cases in which the Environment Court considered the relevance of the precautionary principle to decisions to grant resource consent applications under the RMA.[125] At the outset, it must be noted that these are appeals, rather than judicial reviews. Therefore, the key differences between appeal and review must be borne in mind. These appeals must also be distinguished from those which are heard by the High Court, which are confined to questions of law arising from Environment Court decisions. Despite these distinctions, and although these cases do not elaborate on the actual content of the precautionary principle, they do show the circumstances in which the Environment Court has accepted the principle can apply.

Notably, the Environment Court's use of the precautionary principle in this context is completely independent of any express legislative requirement in the RMA. Rather, as discussed above,[126] it has been accepted that a precautionary approach is implicit in both the scheme of, and specific provisions within, the RMA.[127] The Environment Court has made a point of distinguishing between the concept at international law and its reflection in aspects of domestic law.[128] In *Shirley Primary School v Telecom Mobile Communications*, the Court held that the precautionary approach is only relevant to the extent that it can be seen to be reflected in the RMA itself; the additional consideration of the international context would be double-counting.[129] This reasoning has been picked up in successive cases.[130] More recently in *Ngati Kahu Ki Whangaroa Co-operative Society*

124 *Baker*, above n 120, 860, 862 and 864 L'Heureux-Dubé J. The danger that this could result in the court inquiring into the merits of the decision has been noted by successive courts (without overruling the *Baker* approach): see for example *Suresh v Canada* [2002] 1 SCR 3, para 27 Judgment of the Court.

125 *McIntyre v Christchurch City Council* [1996] NZRMA 289 (EC); *Rotorua Bore Users Association Inc v Bay of Plenty Regional Council* (27 November 1998) EC A138/98 Judge Bollard; *Ngati Kahu Ki Whangaroa Co-operative Society Limited and Ors v Northland Regional Council and Ors* [2001] 7 NZRMA 299 (EC).

126 Part II Administrative Decision-Making and International Environmental Law.

127 Berry, above n 20, para 6.4.

128 *Shirley Primary School v Telecom Mobile Communications* [1999] NZRMA 66 (EC) 112–113 Judge Jackson.

129 Ibid.

130 See for example *Kemp v Queenstown Lakes District Council* [2000] NZRMA 289, 293 (EC) Judge Jackson; *Shirley Primary School v Telecom Mobile Communications*, above n 128, 134-135 Judge Jackson; *Clifford Bay Marine Farms Ltd and Ors v Marlborough District Council* (24 September 2003) EC BLE C 131/03, para 67 Judge Jackson.

Ltd and Ors v Northland Regional Council and Ors, the Environment Court held that the precautionary principle may be a relevant part of the decision-making process.[131] A similar approach was taken by Judge Kenderdine two years later in relation to a proposed change to a regional coastal plan in *Golden Bay Marine Farmers v Tasman District Council*.[132] In that case, the precautionary principle was expressly set out in the New Zealand Coastal Policy Statement. Despite these indications of support, in the same year in *Clifford Bay Marine Farms Ltd and Ors v Marlborough District Council*, Judge Jackson reverted back to the approach that the precautionary principle would not add anything to what was already in the RMA.[133] However, he did note that the inclusion of the precautionary principle in the New Zealand Coastal Policy Statement and the New Zealand Biodiversity Strategy would require more caution in some situations.[134] This seems to suggest not that consideration of the precautionary principle cannot add anything to a normal interpretation exercise under the RMA, but that the RMA *alone* does not warrant independent consideration of the precautionary principle. However, this is inconsistent with the trend which has emerged from the Environment Court; the ostensible reason for their previous reluctance has been based on the understanding that the precautionary principle could not add anything to an interpretation exercise under the RMA.

Several conclusions can be drawn from this brief foray into the Environment Court's use of the precautionary principle in applying the RMA. First, there is considerable inconsistency in judges' approaches. Secondly, while some judges have suggested otherwise, there is some support for the proposition that recourse to the precautionary principle may be useful. Given the precautionary principle is not defined in the RMA, consideration of the definition and application of it in international instructions would seem useful.

Squid Fishery Management is the leading case considering the application of the precautionary approach under the Fisheries Act.[135] William Young J acknowledged that a precautionary approach was open to the Minister of Fisheries when setting a maximum allowable limit.[136] He held that it was implicit in section 15(2)[137] that the Minister could only take measures which he "considers

131 *Ngati Kahu Ki Whangaroa Co-operative Society Ltd and Ors v Northland Regional Council and Ors*, above n 125, para 161 Judge Sheppard.

132 *Golden Bay Marine Farmers v Tasman District Council*, above n 52, paras 420–421 Judge Kenderdine.

133 *Clifford Bay Marine Farms Ltd and Ors v Marlborough District Council*, above n 130, para 67 Judge Jackson. It is interesting to note that all the cases the author has found that appear to take a restrictive approach are judgments of Judge Jackson.

134 Ibid, para 70 Judge Jackson.

135 *Squid Fishery Management*, above n 66.

136 Ibid, para 77 William Young J for the Court.

137 Fisheries Act, s 15(2).

necessary".[138] Thus, the Minister's cautious response in lowering the limit was not open to him as he did not consider such caution to be necessary (because the information was unclear). While this may be a legitimate reading of the language of section 15(2) on its face, it is not in accordance with the precautionary approach, as mandated by section 10 and section 5(a). William Young J held that the Minister would have to form a view of the point at which utilisation of the squid resource threatened the sustainability of the sea lion population.[139] It appears that although the Court of Appeal was willing to endorse the precautionary approach in theory, there was no judicial support for the Minister's attempt to apply the approach in practice. The very nature of taking a precautionary approach is taking measures in favour of sustainability in light of scientific uncertainty – the Court of Appeal's approach suggests the very opposite.

It should be noted that in a recent High Court decision, *Antons Trawling Company Limited and Anor v Minister of Fisheries*, Miller J's approach raised further concerns as to the Court's approach to section 10. In the context of setting total allowable catch under section 13 Miller J took a narrow approach to the impact of section 10.[140] Miller J held that section 10 did not allow the Minister to set a total allowable catch under section 13 where there was an absence of information (in that case, no assessment of stock levels). Despite section 10 stating that the absence of information should not be used as a reason to postpone taking measures to achieve the purpose of the Act, Miller J held that a new total allowable catch could not be set in circumstances where there was no assessment of stock levels.

In direct response to this litigation, section 13 of the Fisheries Act was amended in September 2008. The amendment inserted subsection 2A which reads that a Minister *must* not use the absence of, or any uncertainty in, that information as a reason for postponing or failing to set a total allowable catch for a stock. This amendment appears to have tipped the balance back towards ensuring the Minister has the ability to make decisions in accordance with the precautionary approach. As discussed above in Part IV, the Amendment Bill clarifying the role of the precautionary approach in section 10 of the Fisheries Act appears to have stalled.

This lack of commitment to the precautionary approach provides support for the conclusions drawn above that there is a gap between the potential role the precautionary approach could play in decision-making under the Fisheries Act and how the courts are utilising – or not utilising – it in practice.

From the preceding analysis it is clear that the approaches taken under the two legislative frameworks differ significantly. Under the RMA, there is openness to the use of the precautionary

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138 *Squid Fishery Management*, above n 66, para 79 William Young J for the Court.

139 Ibid.

140 *Antons Trawling Company Limited and Anor v Minister of Fisheries* (22 February 2008) HC WN CIV 2007-485-2199, para 50 Miller J.

approach in the decision-making process, albeit substantial inconsistency in different courts' analyses. In contrast, under the Fisheries Act, it seems that the precautionary approach is being read down, despite its express inclusion in the legislation. The following section will propose a framework within which the courts could make appropriate and legitimate use of the precautionary approach under both frameworks.

E A Principled Approach to Reasonableness

In order for the courts to do something more meaningful with an intensive standard of review than merely ask whether a decision was "reasonable", it is necessary to elaborate on the concept of reasonableness in specific contexts. In the Fisheries Act, the precautionary principle is imported through section 10 and section 5(a) and in the RMA it is implicit throughout the wider legislative framework. Thus, the precautionary principle is a classic example of an international environmental obligation which has the potential to provide content to a reasonableness inquiry under these two statutes. However, requiring decision-makers to adhere to the precautionary principle, without providing them with further guidance, can create uncertainty (as is evident from the cases discussed above).

The precautionary principle embodies three key ideas which can shape the concept of reasonableness. They are drawn in part from guidelines which were released early last year by the International Union for Conservation of Nature Council as a practical aid to applying the precautionary approach.[141] The first is "flexibility". This entails a decision-maker not fettering their discretion by adhering solely to proven scientific information[142] – a decision-maker cannot conclude there is no effect on the environment simply because there is no conclusive scientific evidence. Under the RMA, section 3(f) already makes it clear that decision-makers should have regard to potential effects of low probability but high potential impact. However, the precautionary principle goes beyond this in explicitly setting out that uncertainty of information should not be a reason for inaction. The RMA itself does not make this clear.

The second element is "openness". In the present context this could mean a requirement to give reasons. While this is not an across-the-board requirement in administrative law, it is consistent with

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141 International Union for Conservation of Nature [IUCN] "Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management" (67th Meeting of the IUCN Council, Geneva, 14–16 May 2007). The IUCN Council is the principal governing body of IUCN. IUCN is the world's largest and most important conservation network, bringing together 83 States, 110 government agencies, more than 800 non-governmental organisations, and some 10,000 scientists and experts from 181 countries in a unique worldwide partnership: see www.iucn.org (accessed 20 August 2007).

142 Elizabeth C Fisher "The Precautionary Principle as a Legal Standard for Public Decision-Making: The Role of Judicial and Merits Review in Ensuring Reasoned Deliberation" in Ronnie Harding and Elisabeth Fisher (eds) *Perspectives on the Precautionary Principle* (Federation Press, Annandale, 1999) 83, 93.

a growing trend in legislation, policy and case law.[143] More specific than merely giving reasons is a need for explicit explanation of the measures being taken and the uncertainty at issue.[144] This gives the supervising court tools to review the adequacy of the reasons for the decision rather than having to focus on the outcome.[145] For example, in *Squid Fishery Management*, the Minister's decision to take a precautionary approach to the setting of the maximum allowable limit on fishing-related mortality may not have been successfully challenged if the Minister had clearly set out his belief in the uncertainty of the information and the measures which needed to be taken as a consequence.[146]

The third aspect of this framework is establishing a "deliberative decision-making process". This requires the supervising court to define relevant considerations in accordance with its traditional role, and then to further define the boundaries of the discretion by giving some content to those considerations. This could entail, for example, consideration of stakeholders and their interests, use of the best available information (not limited to scientific information), threats to be characterised, uncertainties to be assessed and options to be investigated (including a desire to maintain proportionate and equitable outcomes).

In summary, the precautionary principle is significant in that it embodies international obligations on the New Zealand government and also commitments made in domestic legislation. On closer analysis, it also reflects concepts more fundamental to the common law, such as open and thorough decision-making. International obligations like the precautionary principle occupy a unique place in the courts' review jurisdiction – their relevance and utility may be clear, but the legitimacy of requiring strict adherence to them must be questioned. The preceding discussion sets out a potential framework which could guide consideration of whether a decision was reasonable in accordance with the precautionary principle. It is suggested that such a principled approach is necessary if courts are to actively engage in an intensive standard of review while remaining committed to ensuring the decision-maker's discretion is maintained.

VI PROCEDURAL IMPROPRIETY

This part assesses the degree to which the ground of procedural impropriety can import environmental obligations at international law into decision-making under the RMA and the Fisheries Act. The primary aspect of procedural impropriety which raises issues of contention is the

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143 See for example the Official Information Act 1982, s 23; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 554 (CA) Cooke P; *Lewis v Wilson & Horton Ltd* [2000] 2 NZLR 546, 567 (CA) Elias CJ; Joseph *Constitutional and Administrative* Law, above n 3, 984–989; Fisher, above n 142, 94; Dyzenhaus, Hunt and Taggart, above n 120, 6.

144 IUCN "Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management", above n 141, guideline 9.

145 Dyzenhaus, Hunt and Taggart, above n 120, 6.

146 *Squid Fishery Management*, above n 66.

potential for the doctrine of legitimate expectation to raise the prospect of conformity with our international obligations or, failing that, a right to a hearing. This approach has its origins in the High Court of Australia decision *Minister for Immigration and Ethnic Affairs v Teoh* (*Teoh*).[147] The following section outlines the doctrine which emerged from *Teoh*, the reaction of other jurisdictions (including New Zealand) to that doctrine, and its ramifications for the use of international environmental law in domestic decision-making.

Legitimate expectation in its traditional sense requires natural justice to be observed where a person has a legitimate or reasonable expectation that they will be treated fairly.[148] In order for the decision-maker to defeat that expectation, that person must be given the opportunity to be informed and heard.[149] If the decision-maker fails to do so, their decision can be set aside on the ground of procedural impropriety.

Cooke P's comments in *Tavita*, regarding the unattractiveness of implying that the executive is free to ignore our international commitments, foreshadowed the High Court of Australia's approach to legitimate expectation in *Teoh*.[150] *Teoh* was an immigration case concerning, like *Tavita*, the Convention on the Rights of the Child. In *Teoh*, the majority of the High Court reaffirmed the traditional approach to unincorporated international instruments as an aid in interpreting ambiguous legislation.[151] However, the majority went significantly further than that in stating that:[152]

> [R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration".

Significantly, this legitimate expectation does not hinge on the individual having prior knowledge of the relevant international instrument or obligations.[153] The effect of this reasoning is that decision-makers must act in accordance with international obligations, or if they choose not to,

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147 *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273 (HCA) [*Teoh*].

148 Joseph *Constitutional and Administrative Law*, above n 3, 958.

149 Ibid, 851.

150 *Tavita*, above n 6, 266 Cooke P for the Court.

151 *Teoh*, above n 147, 287 Mason CJ and Deane J.

152 Ibid, 288 Mason CJ and Deane J.

153 The traditional rationale behind requiring the expectation to be "legitimate" or "reasonable" no longer exists, thus the expectation could be entirely lacking any basis in reality: see Wendy Lacey "A Prelude to the Demise of Teoh: The High Court Decision in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam*" (2004) 26 Sydney LR 131, 134–135 ["A Prelude to the Demise of *Teoh*"].

they are required to give affected individuals the rights to be heard as to why they should.[154] However, it must be noted that the obligation at issue in *Teoh* was arguably procedural in nature (requiring the best interests of the child to be treated as a primary consideration); it is questionable whether the same approach would have been taken by the High Court if the obligation at issue had been clearly substantive.

Despite several government attempts to negate the impact of the decision (in response to the Court's comments that the expectation could be defeated by executive or legislative indications to the contrary), it remains the authoritative Australian statement on the impact of ratification of an international instrument.[155] However, in 2005 the High Court (with a significantly different composition) substantially challenged the reasoning in *Teoh* in obiter comments in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (*Lam*).[156] Many of the comments made by the High Court Judges questioned the wisdom in not requiring the individual in question to have knowledge of the expectation.[157] McHugh and Gummow JJ delivered the most trenchant criticisms, focusing on *Teoh*'s effect of creating mandatory relevant considerations.[158] However, it has been suggested that this is an incorrect interpretation of *Teoh*.[159] In theory, *Teoh* does not require the decision-maker to consider the relevant international instrument if they have in fact acted consistently with it. It is only when they do not act consistently that they are required to have offered the opportunity of a hearing (and thus the international obligation implicitly becomes a mandatory relevant consideration). In practice, the onus on the decision-maker could be less burdensome than a mandatory relevant consideration model. *Teoh* does not require, or even presume, that the international obligation will actually shape the decision. In contrast, the mandatory relevant consideration model suggested by Cooke P in *Tavita* arguably places the international obligation high on the decision-maker's list of priorities.

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154 Sky Mykyta "Encouraging a Culture of Justification: A Comparison of *Teoh* and *Baker*" (2003) 8 Deakin L Rev 367, 372–373.

155 Wendy Lacey "In the Wake of *Teoh*: Finding an Appropriate Government Response" (2001) 29 FL Rev 219, 240.

156 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* [2003] 195 ALR 502 (HCA) [*Lam*]. Note the role of McHugh J, who delivered a strong dissent in *Teoh* and was one of the judges who delivered the majority judgment in *Lam*.

157 Ibid, paras 144–145 Callinan J, paras 95–96 McHugh and Gummow JJ.

158 Ibid, paras 101–102 McHugh and Gummow JJ.

159 Lacey "A Prelude to the Demise of *Teoh*", above n 153, 148.

Despite the criticisms in *Lam*, *Teoh* has not been overruled in Australia.[160] While it appears likely that the High Court of Australia would substantially change the *Teoh* doctrine if it came directly before the Court,[161] two key points should be noted. First, it has been suggested that the criticisms of *Teoh* in *Lam* are a direct reflection of Australia's increasingly conservative approach to legitimate expectation and the role of international law in domestic law generally.[162] Secondly, it is apparent that the finer details of the *Teoh* doctrine (for example, its relationship with the mandatory relevant consideration model discussed above) were not addressed by the *Lam* Court.

The doctrine discussed in *Teoh* has the potential to have a significant impact on environmental decision-making. In the Fisheries Act, by virtue of section 5(a), there is already a requirement that decision-makers act in a manner consistent with the precautionary principle (as it is an international obligation that is relevant to fishing). In a sense, this is effectively the first step of the *Teoh* doctrine. However, under *Teoh*, the decision-maker would have the choice not to act consistently, but instead to offer an opportunity of a hearing for affected parties to argue why the precautionary principle should be applied. This would plainly be inconsistent with section 5(a) – under the Fisheries Act decision-makers have no choice, but to act consistently with our relevant international obligations. The *Teoh* doctrine is, therefore, too narrow to add anything to the existing legislative regime.

Under the RMA, by contrast, the practical effects of applying the *Teoh* doctrine would be far-reaching, due to the large number of parties affected by many decisions made under the RMA (particularly in contrast to the individual nature of an immigration decision, as was at issue in *Teoh*). Also, some international environmental obligations are substantive,[163] and thus arguably beyond what was contemplated in *Teoh*. However, the precautionary principle is a classic example of an international obligation at least partly procedural in nature which could work within the *Teoh* doctrine by providing shape and direction to the decision-making process without requiring a particular outcome. Thus, under the RMA, there may be some scope for *Teoh* to provide another avenue for international environmental obligations to impact on decisions.

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160 See *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) VSCA 85, para 79 (CA) Warren CJ; Lacey "A Prelude to the Demise of *Teoh*", above n 153, 156; David Dyzenhaus "The Rule of (Administrative) Law in International Law" (2005) 68 LCP 127, 133–135.

161 "A Prelude to the Demise of *Teoh*", above n 153, 156; Liam Burgess and Leah Friedman "A Mistake Built on Mistakes: The Exclusion of Individuals under International Law" (2005) 5 Macquarie LJ 221, 237.

162 Simon Evans "Developments – Australia" (2006) ICON 517, 522. As noted above, the High Court in *Lam* had a significantly different composition than in *Teoh*.

163 For example, the Convention on Biological Diversity provides that "states shall, as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity": Convention on Biological Diversity, above n 1, art 11.

In addition to the practical concerns noted above, the fact that the New Zealand courts have consistently failed to apply the *Teoh* doctrine should be considered.[164] While *Teoh* has been discussed in many cases, it has been on the basis that we are following a different (yet similar) model developed from *Tavita*.[165] In fact, it has been suggested that these two approaches to unincorporated international instruments are mutually exclusive, as the two models impose different levels of compliance with international obligations on decision-makers.[166] However, that is not to say that *Teoh* is irrelevant in New Zealand. There may be potential to develop the *Teoh* doctrine in the New Zealand context, as an alternative to the strong mandatory relevant consideration model. This suggestion is bolstered by a series of cases in the United Kingdom that have shown support for the *Teoh* doctrine in obiter statements. In *Ahmed v Secretary of State for the Home Department*, Lord Woolf MR considered that although the facts of the present case did not justify it, a legitimate expectation as contemplated in *Teoh* could arise from the State entering into an international treaty.[167] While this approach has been endorsed on several occasions, including by the Privy Council, it has also been subject to strong criticism.[168] Interestingly, it appears there has been no discussion of *Teoh* in light of the High Court of Australia's reaction in *Lam*, despite *Teoh* being discussed in United Kingdom cases since *Lam*.[169] At present, it is still unclear whether the House of Lords would apply *Teoh* if the question was directly before it. The other main jurisdiction which has

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164 It is also of note that the impact of *Teoh* was not discussed by Claudia Geiringer in her article, "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law": Geiringer, above n 12.

165 *Elika v Minister of Immigration*, above n 10; *Talialau v Minister of Immigration* (4 May 1999) HC AK M 171-SW99; *Lalli v Attorney-General* (27 April 2006) HC AK CIV 2006-404-435. The exception to this approach is Thomas J's part-concurring, part-dissenting judgment in *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, 184–185 (CA), where he noted that "the Australian approach is of interest".

166 Michael Taggart "Administrative Law Review" [2003] NZ Law Rev 99, 108 ["Administrative Law Review 2003"].

167 *Ahmed v Secretary of State for the Home Department* [1999] Imm AR 22, 583–584 (CA) Lord Woolf MR.

168 The following judgments expressed support for *Teoh* in their obiter statements: *R v Uxbridge Magistrates' Court, Ex Parte Adimi* [2001] QB 667 (CA); *Thomas v Baptiste* [2000] 2 AC 1 (PC, Trinidad and Tobago); *Higgs v Minister of National Security* [2000] 2 AC 228 (PC, The Bahamas); *Fisher v Minister of Public Safety and Immigration (No 2)* [2000] 1 AC 434 (PC, The Bahamas); *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50 (PC, Jamaica); *R v Director of Public Prosecutions, Ex Parte Kebilene* [2000] 2 AC 326 (HL); *Naidike and Others v Attorney-General of Trinidad and Tobago* [2005] 1 AC 538 (PC, Trinidad and Tobago). The following cases rejected the *Teoh* approach: *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] QB 811, para 51 (CA) Simon-Brown LJ; *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161 (CA); *Behluli v Secretary of State* [1998] Imm AR 407 (CA).

169 *Naidike and Ors v Attorney-General of Trinidad and Tobago*, above n 168, 559 Baroness Hale of Richmond; *Musaj v Secretary of State for the Home Department* (2004) SLT 623, paras 20–22 (OH) Lady Smith.

bearing on New Zealand is Canada. In *Baker*, the Supreme Court of Canada heard considerable argument based on *Teoh*, but refrained from following it.[170] In fact, despite *Teoh* forming the focus of the judgment below, the Supreme Court's judgment does not mention *Teoh* at all.[171] Since then, there has been no indication of any support for the *Teoh* doctrine in Canada, either from the judiciary or commentators.[172] Given that an alternative approach to the relevance of international instruments was developed in *Baker*, this is perhaps unsurprising.

The favourable treatment of *Teoh* by some United Kingdom judges must be contrasted with the overwhelming mass of academic (and judicial) commentary raising fundamental concerns with the approach.[173] In contrast, the mandatory relevant consideration model has met with general support, aside from criticisms of Cooke P's stronger model and the traditional fear of "backdoor" incorporation (which is at issue with any consideration of international obligations in administrative law). The mandatory relevant consideration model also has the potential to give greater effect to our international obligations. It would appear, overall, that the mandatory relevant consideration model has the advantage of having a stronger theoretical basis and a greater potential to shape domestic decision-making. The *Teoh* doctrine provides another perspective on the role of administrative law in relation to international environmental obligations, but may prove to offer little real benefit for administrative law in New Zealand.

VII CONCLUSION

This article has canvassed some modern trends in administrative law regarding the treatment of international obligations within domestic decision-making in New Zealand. Illegality review is the traditional area of administrative law where courts have, in the exercise of their supervisory jurisdiction, been willing to engage with international obligations. Still, case law regarding decisions

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170 *Baker*, above n 120; Dyzenhaus, Hunt and Taggart, above n 120, 13.

171 Dyzenhaus, Hunt and Taggart, above n 120, 14.

172 A few cases have cited *Teoh* in passing since *Baker.* In *Mount Sinai Hospital v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281, 305 Binnie J cited it as authority for a legitimate expectation not being dependent on the knowledge of the individual concerned. In *Torres-Samuels (Guardian ad litem of) v Canada (Minister of Citizenship and Immigration)* [1998] 166 DLR 611, 625 (BCCA) Esson J noted the approach to *Teoh* in *Baker* and also (incorrectly) commented that it had since been overruled by legislation. Several of the leading textbooks do not mention *Teoh*: see for example David Mullan *Administrative Law* (3 ed, Carswell, Scarborough, Ontario, 1996); Sara Blake *Administrative Law in Canada* (4 ed, LexisNexis Canada, Markham, Ontario, 2006); Mykyta, above n 154, 367.

173 Taggart "Administrative Law Review 2003", above n 166; Elizabeth Handsley "Legal Fictions and Confusion as Strategies for Protecting Human Rights: A Dissenting Voice on *Teoh*'s Case" (1997) 2 Newc LR 56; Glen Cranwell "Treaties and Australian Law – Administrative Discretions, Statutes and the Common Law" (2001) 1 QUTLJJ 49; "A Prelude to the Demise of *Teoh*", above n 153; Mykyta, above n 154; Hilary Charlesworth and others "Deep Anxieties: Australia and the International Legal Order" (2003) 25 Sydney LR 423; Michael Taggart "Legitimate Expectations and Treaties in the High Court of Australia" (1996) 112 LQR 50; Dyzenhaus, Hunt and Taggart, above n 120.

made under the RMA and the Fisheries Act reflects a notable absence of recognition for the developments which have occurred in other areas of the law, particularly in the human rights field. Under the RMA there is considerable inconsistency in the courts' approaches to the relevance of international environmental obligations; under the Fisheries Act, the courts have often simply neglected to address the issue, even when squarely raised. In light of this silence, this article suggests that there is currently untapped potential for illegality review to actively shape decisions made under these regimes by reference to international obligations. Both the mandatory relevant consideration model and a presumption of consistency model could be invoked under the RMA without disrupting the legislative scheme, and while section 5(a) of the Fisheries Act changes the context slightly, the two methods still provide guidance for effective engagement with international obligations in the interpretation and administration of that Act. The discussion of irrationality review ventures into somewhat more uncharted territory, but suggests that there are indications in the case law that the courts may be more receptive to international obligations in the environmental law context. The emerging support for both a context-dependent intensive standard of review and a principled concept of reasonableness provides an opportunity to consider the role that international obligations could play. Under both the RMA and the Fisheries Act the precautionary principle can be seen as an example of where an international obligation could give real shape and direction to the traditionally nebulous concept of reasonableness. Finally, the legitimate expectation doctrine is considered as an alternative model of utilising international obligations; however, the analysis suggests that while the approach may be receiving support in some quarters, it may be unsuited to the New Zealand context, particularly given the comparative advantages of using an illegality or irrationality construct.

While all three grounds of review discussed in this article have merit as providing potential methods for administrative law to engage with international obligations, they all encounter issues around a reviewing court encroaching into the prohibited realm of inquiring into the merits of a decision. At one end of the spectrum lies the *Teoh* doctrine; it is arguably an essentially procedural inquiry giving no room for the court to require the international obligation to have actually dictated the outcome of the decision. Imposing relevant considerations lies in the middle-ground. A conservative application of the relevant consideration model creates no requirement that the international obligation affect the substance of the decision. However, the stronger approach advocated by Cooke P in *Tavita* does give the court some scope to look at the way in which a relevant consideration was treated by the decision-maker. Arguably, this still does not cross the constitutional boundary as the decision-maker maintains the final discretion. Irrationality review raises the most concerns about merits review. However, as demonstrated by the use of the precautionary principle as an example, there is scope for the courts to read direction and boundaries into a statutory discretion without removing the discretion altogether.

The conclusions which have emerged from the analysis in this article can be viewed as falling into two broad themes. First, developments that have occurred in other areas of administrative law

regarding the use of international obligations in domestic decision-making are not being utilised in reviewing decisions made under the RMA and the Fisheries Act. For example, the potential for a court to use international obligations to provide a principled framework when engaging in an intensive review of an exercise of discretion under the RMA has not been considered in any depth. Secondly, there are some areas where it appears that the courts have taken the wrong approach. For example, the disregard in the majority of the case law for the substantial compliance with international obligations that section 5(a) in the Fisheries Act mandates. While the former conclusion is interesting and could provide impetus for change, the latter has more significance. A strong argument can be made that the courts' approach, rather than demonstrating appropriate constitutional deference, is actually threatening parliamentary sovereignty by disregarding the New Zealand government's clear policy programme. Overall, this analysis invites the conclusion that while administrative law does have a substantial and largely untapped contribution to make to environmental decision-making in New Zealand, the particular form that this can and should take is yet to be revealed.