Interpretation of the Territorial Sea and Exclusive Economic Zone Act 1977

by

P.J. Ridings

INTRODUCTION

The following analysis has been developed from the minutes of the Advanced International Law Class of 1977. The members of that class were Douglas Bailey, Donald Bennett, John Goodman, Paul Maskell, Murray Pearson and Penelope Ridings.

In 1977, with the new Exclusive Economic Zone on the point of being established, it seemed appropriate to study the Bill creating that zone. Consequently, the class prepared an analysis and commentary on the Bill, with each student assigned to lead the discussion on a portion of it. It fell to Ms Ridings to organise the comments of the class and to update it in terms of the Act.

The result is a useful commentary on a piece of legislation which is vital to New Zealand. Anyone undertaking in future to revise or amend this Act, will have to take into consideration many of the points made herein.

Jerome B. Elkind

New Zealand has established a 200 nautical mile exclusive economic zone at a time when this aspect of the law of the sea is in constant flux. Originally the class considered the Territorial Sea and Exclusive Economic Zone Bill, but when the Act was passed some clauses which caused concern had been altered. Again, some recommendations which the class advocated were provided for in the regulations, and by the time this article is published there will no doubt be more regulations to the same effect. Because of these changes, the article is a critique of the Act alone.

Section 1: Short Title and Commencement

Section 29, which provides for interim measures relating to foreign fishing vessels being made by Order in Council, came into effect on the

passing of the Act. These interim measures operated from 1 October 1977 until 1 April 1978 when Part II of the Act came into force. Originally the South Pacific nations aimed to act jointly in declaring their exclusive economic zones.[1] This aim has not been realised.

Section 2: Interpretation

"Bay": This is the same definition as in the Territorial Sea and Fishing Zone Act, 1965.

"Fish": The definition excludes sedentary species, i.e.,

> Living organisms belonging to sedentary species, that is to say organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant contact with the seabed or subsoil.[2]

Section 3 of the Continental Shelf Act 1964 provides that their exploitation where they are on the continental shelf, is vested in the Crown. The Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea (hereafter referred to as "the Conference") also follows this approach.[3] The schedule of the Act extends the continental shelf of New Zealand to the edge of the continental margin or to 200 miles where the continental margin does not extend to that distance. This now accords with Article 76 of the text of the Conference.

The definition of "fish" may be compared with the definition in the United States Fishery Conservation and Management Act 1976:[4]

> Fin fish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals, birds and highly migratory species.

While sedentary species are included in the American Act, marine mammals are excluded. It is submitted that the New Zealand approach is preferable. Including mammals in the definition of fish would seem to afford them better protection.[5]

"Fishing": The definition includes attempting to take fish. It also includes a person fishing with handlines in the hope of catching enough for a meal. This occurred in 1976 when a foreign fishing vessel was found in such circumstances within the three mile limit (allegedly sheltering from bad weather). The offenders were not penalised, but the possibility remains that in future penalties will be imposed on such offenders.

"Fishing craft": Any vessel, aircraft or other craft that is capable of being used for fishing is included in the definition. By implication it includes craft used for scientific research.

"Highly migratory species": Unlike the United States, New Zealand includes these species in the term "fish". The Act defines highly migratory

1 Declaration on Law of the Sea and a Regional Fisheries Agency, Eighth South Pacific Forum, Press Communique, (South Pacific Bureau for Economic Co-operation), 1977, Art. 4.
2 Continental Shelf Act 1964, s.2(b).
3 Informal Composite Negotiating Text, Art. 68.
4 S.3(6).
5 As to highly migratory species, see post, p.263.

species as "species that, in the course of their life cycle, migrate over great distances of ocean". This is neither clear nor precise. It would be preferable to have an annex listing the fish which were to be regarded as highly migratory. The annex could be similar to the one before the Conference.[6] That annex includes various species of tuna, mackerel, marlin, swordfish, dolphin and oceanic sharks.

Some members of the class felt that it was advantageous to have a wide definition of highly migratory species, rather than an exclusive definition. This would meet the possibility of other species being discovered which are highly migratory.

"Island": This is the same definition as in the Territorial Sea and Fishing Zone Act 1965 (repealed) which preceded this Act. Article 10(1) of the Geneva Convention on the Territorial Sea and Contiguous Zones 1958, (which New Zealand has not ratified) simply states: "An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide". The Act however, states that it is land surrounded by and above water at mean high-water spring tides. As spring tides are higher than ordinary tides, New Zealand has a smaller territorial sea than she could have following the Convention formula. The class was unable to suggest any localities in New Zealand that would be affected to justify such a definition. The same can be said of the definition of "low-tide elevation".

"New Zealand": The effect of this definition is to declare a territorial sea adjacent to the Ross Dependency. In no other Act can there be found a reference to New Zealand as including the Ross Dependency, nor to the Ross Dependency having a territorial sea of its own. Professor O'Connell states that a coastal state does not have a territorial sea *ipso jure,* but must provide for one under its own municipal law.[7]

Article IV(2) of the Antarctic Treaty states:

> No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Declaring a territorial sea, where there previously was none, is asserting sovereignty. Thus, in considering whether New Zealand has justified her claim to sovereignty, this Act cannot be used. It may also be argued that this is an enlargement of an existing claim, for if the territorial sea is part of the national boundary, as many writers believe,[8] declaring a territorial sea would indeed be an enlargement of an existing claim, and would be a violation of the Antarctic Treaty.

In addition, it is usually assumed that New Zealand has claimed

[6] Informal Composite Negotiating Text, Ann. 1.
[7] O'Connell, "The Juridicial Nature of the Teritorial Sea", (1971) 45 B.Y.I.L., 303, 357.
[8] Jones, *The Law of the Sea – Oceanic Resources,* 65.

sovereignty over the Ross Ice Shelf.[9] If this is correct, New Zealand has declared a territorial sea adjacent to it in violation of Article VI of the Antarctic Treaty as it would be affecting what was formerly regarded as high seas.

"New Zealand fishing craft": The first part of the definition is contained in a number of other Acts. Briefly, a New Zealand fishing boat is one which is registered under Part I of the Fisheries Amendment Act 1963. No fishing boat can be registered unless the owner is a resident of New Zealand, or where an incorporated company is owner, New Zealand residents have over half of the voting power.[10] The simplicity of the definition in the first paragraph is erased by the confusion in the third:

> In which no person who is not a New Zealand citizen has any legal or equitable interest (except by way of security only for any advance made by him to the owner).

It would be easier to comprehend had the paragraph stated:

> In which no foreigner has any legal or equitable interest (except by way of security only for any advance made by him to the owner).

The latter part of the paragraph means that a fishing boat which has a foreign mortagee is still a New Zealand fishing vessel. It is the first part of the paragraph which presents the difficulties. A foreign shareholder in a New Zealand company is not considered to have a legal or equitable interest in a fishing vessel owned by the company. The company has the legal or equitable interest in the vessel. Since a company is regarded as a legal person, a vessel owned by, or chartered to a joint venture comprised of a foreign and a New Zealand company would not be a New Zealand fishing vessel. Consequently, unless the Act is amended, joint ventures will be treated as purely foreign fishing ventures.

"Owner": The definition is taken from the Fisheries Act as amended. It includes any body of persons by whom the craft is owned, and any charterer, subcharterer, lessee or sub-lessee of the craft. It may be more comprehensible to insert the word "person", so that the section reads: ". . .includes any person or body of persons. . ."

"Take": The definition is wide enough to include tracking fish by sonor, from an aircraft, or any other such technique.

"Total allowable catch": This is derived in part from the text of the Conference.[11] There is however, one major criticism of the definition. It does not provide for consideration of proper conservation and management measures when deciding the total allowable catch. New Zealand does not have a good record in the conservation of species, of which but one example is the depletion of the oyster fishery in Foveaux Strait. In

[9] Auburn, *The Ross Dependency* (1970) LL.B.(Hons) Dissertation, 95. According to Auburn, it is doubtful whether New Zealand has a valid claim even to the Ross Dependency in international law.

[10] Fisheries Amendment Act 1963, s.7.

[11] Informal Composite Negotiating Text, Art. 61.

assessing the total allowable catch, it is preferable to lean towards conservation as does the United States.

Section 5: Baseline of Territorial Sea

Subsection 2 of this section seems to be confusing. This is largely due to bad drafting. The subsection should read:

> For the purposes of this section, a low-tide elevation that lies wholly or partly within the breadth of sea that would be territorial sea [,] if all low-tide elevations were disregarded for the purpose of the measurement of the breadth of the territorial sea [,] shall be treated as an island.

Sections 6 and 7

Both these sections are a repetition of the Territorial Sea and Fishing Zone Act, 1965.

Section 8: Regulations in Territorial Sea

The class felt that the Act is open to criticism as piecemeal legislation, for too much is left to Ministerial discretion. It was argued that the Act should be a comprehensive code with provisions for mining and protection of the environment, in addition to fisheries management. Instead these matters are left to be provided for by regulation. The disadvantage is that a further Act will probably be needed to deal with that which has been omitted. This only confirms the criticism recently voiced by Professor Palmer of Victoria University and others, that much hastily considered and ill-drafted legislation is passed each year, which must constantly be amended and revised in subsequent years.

There are also strong arguments against broad ministerial discretion. For example, under the regulations, the Minister could rewrite the Act to deal with seabed mining. The class felt it was desirable to have the basic provisions in the statute, rather than to have recourse to regulations which are at once based on a discretion of unconscionable breadth, and at the same time possibly open to challenge as being ultra vires the Act. It should also be noted that the Act does not bind the Crown.

The regulations which can be made under section 8(c) do not include those for installations or structures which are *on* the seabed as opposed to being *in* the territorial sea. These are however, covered by section 27, which includes the territorial sea and the seabed in the exclusive economic zone. Such installations could also be provided for under the Continental Shelf Act 1964 and the Mining Act 1971. Yet, there is one important exception: the Ross Dependency. As the Ross Dependency now has a territorial sea, but not an exclusive economic zone, the regulations concerning it must be made under section 8. In addition, the Continental Shelf Act and the Mining Act do not yet apply to the Ross Dependency. Consequently, it seems that New Zealand can make no regulations for

installations and structures *on* the seabed of the territorial sea of the Ross Dependency. While it may be argued that provision for these would be made under section 8(e) of the Act, a Court of Law may decide that any such regulations would be ultra vires.

Section 9: The Exclusive Economic Zone

Section 9 sets up the boundaries of the exclusive economic zone. New Zealand's boundaries intersect with those of Norfolk Island and the Minerva Reef which is claimed by Tonga. However, New Zealand does not recognise the Minerva Reef as being a land elevation.

The Ross Dependency is excluded from the exclusive economic zone, although the Governor-General in Council may extend the application of Part II of the Act to it.

Some members of the class felt that this section does not accomplish its purpose since it merely sets boundaries and does not define the exclusive economic zone, in that it does not claim sovereign rights for New Zealand in the zone. The long title does claim that New Zealand is exercising her sovereign rights and can be used as an aid to interpretation. However, it would seem to be of doubtful assistance here. The main difficulty is with the degree of sovereignty to be exercised. It is certainly not the same sovereignty as a coastal state has in the territorial sea, for this would be declaring a 200 mile territorial sea. The Act should have stated more clearly the kind of sovereignty New Zealand assumes in the exclusive economic zone; i.e., sovereign rights for the purposes of exploration and exploitation, and conservation and management of the natural resources of the zone.[12]

Section 11: Calculation of Total Allowable Catch

This section requires the Minister of Fisheries to set a total allowable catch for every fishery within the zone. It grants the Minister a discretion as to *when* he may calculate the total allowable catch.

The total allowable catch is intended to be a conservation measure, and indeed the concept of the maximum sustainable yield would appear to require conservation. However, there is nothing in the Act stating that conservation and management practices *must* be taken into account. The class thought that these practices should be explicit in the Act, even though they may be implicit in the definition of "fishery" and "total allowable catch".

Some members of the class thought that the South Pacific Regional Fisheries Agency[13] will be the main body to decide upon the total allowable catch of each fishery within the South Pacific. They felt that it

[12] *Ibid.*, Art. 56(1)(a).
[13] This Agency was established at the 8th South Pacific Forum, 1977, supra n.1.

will be the main decision-making and management body for fisheries within the South Pacific. Others felt that this was an idealistic view and that the Agency will merely be an intergovernmental body regulating fisheries (such as highly migratory species) common to all countries within the body.[14]

Section 12: Calculation of Allowable Catch by Foreign Fishing Craft

Section 12 provides for the Minister to determine the portion of the total allowable catch which New Zealand has the capacity to harvest. The remaining portion then constitutes the allowable catch for that fishery for foreign fishing craft.

Section 13: Apportionment of Allowable Catch for Foreign Fishing Craft

This section poses problems in view of the attitude that the New Zealand Government is taking on foreign fishing. The Minister may apportion the allowable catch for foreign fishing craft among other countries. Unlike the wording of the text of the Conference, the imperative is not used in the section. Thus, under the Act, New Zealand could exclude Japan completely from the zone.

Section 13(2) deals with the countries that may be allowed to fish within New Zealand's zone. The factors which may be taken into account are:

(a) Whether the fishing craft of countries to which the apportionment applies have engaged habitually in fishing within the exclusive economic zone;
(b) Whether such countries have co-operated with New Zealand in fisheries research and in the identification of fish stocks within the zone;
(c) Whether such countries have co-operated with New Zealand in the conservation and management of resources within the zone, and in the enforcement of New Zealand law relating to such resources;
(d) The terms of any relevant international agreement;
(e) Such other matters as the Minister after consultation with the Minister of Foreign Affairs determines to be relevant.

The countries within category (a) are Japan, USSR, South Korea, Taiwan and possibly the United States of America. Both Japan and South Korea have co-operated with New Zealand in scientific research in the area. The Soviet Union's contribution in this matter seems to be nil.

In relation to category (c), both Taiwan and Japan have been found illegally fishing within New Zealand waters. Since the regulations under

[14] Art. 9(b) of the Declaration on the Law of the Sea and a Regional Fisheries Agency confirms this view. It states that the activities of the Agency should include the facilitation of a regional approach to management "...without detriment to the sovereign rights of coastal countries". Supra n.1.

the Act have been passed, the Soviet Union and South Korea seem to have co-operated with enforcement procedures. With respect to the aid that countries have given in conservation measures, the Japanese have been willing to restrict their fishing in favour of New Zealand fishermen. In June 1977 it was reported that Japanese trawlers were to voluntarily restrict their fishing in three areas: the Canterbury Bight, Hawkes Bay, and to the east of the Hauraki Gulf.[15] In addition the trawlers were to stop trawling off the New Zealand coast for tarakihi, flounder, john dory, gurnard, elephant fish and mackerel. This voluntary restriction by the Japanese seems however, to have passed largely unnoticed.

Under the fourth category, international agreements have been signed with the Soviet Union and South Korea. Negotiations have not been conducted with Taiwan, since New Zealand does not recognise that country and so cannot conclude a bi-lateral agreement with her. The class believed however that this has been provided for under the definition of "international agreement" in the Act, which includes ". . .any understanding concluded by the Government of New Zealand and the government of any other country". Perhaps an understanding will be concluded with Taiwan similar to the trade understanding which permits New Zealand to import goods from Taiwan.

There is another difficulty if negotiations for fishing access are to be conducted on a governmental level. A ship usually has the nationality of the country in which it is registered. However, some of the Taiwanese fishing vessels are registered in Japan and many of the South Korean fishing vessels are registered in Panama. These arrangements cause confusion over the nationality of the fishing vessel in regard to the allocation of quotas.

The final consideration, that of "other matters", is likely to be given high priority. For example, if Japan does not improve its trading relationship with New Zealand, it may be completely excluded from the zone, even though she generally comes within all the other considerations.

Article 62(3) of the text of the Conference states:[16]

> . . .the coastal state *shall* take into account all *relevant* factors, including, *inter alia*; . . .the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

In any Convention concluded at the Conference, the imperative is likely to be used. If New Zealand signs such a Convention and does not permit Japan to fish within the zone, Japan could object strongly. The New Zealand Government might claim that Japan is excluded because of actions which are detrimental to New Zealand's export earnings. It might well be asked however, whether this is a relevant factor in the granting of

[15] "Japan will Restrict Fishermen", *The New Zealand Herald*, 18 June 1977.
[16] Emphasis mine.

fishing access, for

> [i]f the arbitrary use of considerations which have relatively nothing to do with the issue at hand, can force a state out of the zone of a coastal State, Article 62(3) is meaningless.[17]

Perhaps the New Zealand Government realises the true position. It seems that Japan will be excluded from the zone in its first year of operation. However, the quota that Japan would have been allocated is being held in reserve for Japan until such time as an agreement is signed.[18]

Section 15: Grant of Licences

Subsection 1 of this section empowers the Minister to grant licences to foreign fishing vessels. Some members of the class thought that this subsection should limit the duration of the licences.

The provision in subsection 2(a) for ensuring that foreign fishing craft do not exceed the total allowable catch, is difficult to enforce. Because of this, some of the conditions in subsection 3 should be made mandatory. For example, foreign fishing vessels could be required to report to port before leaving New Zealand waters,[19] or alternatively, observers could be mandatory on fishing craft. However there are difficulties with this latter suggestion, given the likely shortage of observers, and the inevitable language difficulties.

Some of the conditions that may be imposed under subsection 3 are difficult to enforce. The species of fish in particular, but also their size, age and quantities are difficult to police without observers on board the craft. Some vessels are equipped with fish factories which process the fish before the vessel reports to port and before it leaves the zone. The areas within which a fishing vessel may fish are enforceable with the aid of transponders provided for under paragraph (p).

Paragraph (f) provides for conditions being made regarding the transhipment of fish. There is however, the problem of fishing vessels transferring catches to vessels which are outside the zone. (South Korean trawlers are alleged to have transferred their catches to Japanese vessels outside the zone.) In any event, it was agreed that New Zealand would benefit most if the processing of fish caught in New Zealand waters were carried out in New Zealand.

Entry into New Zealand ports should be mandatory, not only when the fishing vessel is leaving New Zealand waters, but also when it arrives.[20] The fishing gear of the vessel can then be checked, a transponder fixed and observers placed on board. Co-operation with observers should be

[17] Ridings, *Law of the Sea – Consequences for the Future* (1978) LL.B.(Hons) Dissertation, 36.
[18] "Japan's Fishing Quotas will be Held in Reserve", *The New Zealand Herald* 1 March, 1978.
[19] Cf. Exclusive Economic Zone (Foreign Fishing Craft) Regulations 1978, 1978/63, Reg. 20.
[20] *Ibid.*, cf. Reg. 19.

enforced, for otherwise it may be most difficult for them to carry out their duties.[21]

The conditions relating to compensation in the event of damage (paragraph (h)); information being required by the Ministry of Agriculture (paragraph (i)); and possibly the transfer of technology to New Zealand (paragraph (k)), should be mandatory. The licence should be displayed prominently on the wheelhouse of the vessel.[22] The marking and identification of the fishing vessel should be clear and easily identifiable from a distance.[23]

The final condition (paragraph (r)) is a catch-all provision relating to conservation and management which may prove advantageous. Section 15 is the basis for a good system of checks upon foreign fishing craft if used to advantage in the regulations.

Section 16: Renewal of Licences

The duration of the renewal period is left to Ministerial regulation under section 21(1)(b). Some members of the class felt that it should be statutory, so that fishing countries can see the duration of the licences and the renewal period before they start negotiations. Other members felt that this might be a subject for negotiation.

Section 17: Variation of Licences

In this section the word "expedient" involves problems of definition because its breadth could justify variation of licences for almost any reason. Consequently, the class thought that there should be guidelines as to when a variation could be granted.

Under subsection 2 the variation of the licence shall be given "as soon as practicable" to the licensee. This caused the same problem. The majority of the class argued for the addition at the end of subsection 2 of the phrase:

> . . .and shall be regarded as noted by the licensee at the expiry of X hours or reasonable time and thereafter binding.

The minority view was that there should be constructive notice of the variation, so that the licensee could not evade the Act by claiming ignorance.

Under section 201(c)(2)(F) of the United States Fishery Conservation and Management Act, the licensee is required to maintain an agent in the United States to whom all applications for variation are made, to whom notices of variations are given and to whom notices of legal process can be issued.

The option that the New Zealand Government has taken is to require

[21] *Ibid.*, cf Reg. 38.
[22] *Ibid.*, cf. Reg. 16.
[23] *Ibid.*, cf. Reg. 24.

the licensee to deliver the licence to the Director-General for endorsement within 72 hours of the craft next entering a New Zealand port.[24] This can be done through the National Fisheries Representative nominated under Regulation 3.[25]

Section 18: Licensing Fees

The class viewed this section with some concern because of its potential for establishing discriminatory fees. States, when negotiating for fishing rights, should be able to ascertain the fees that they are likely to be charged. It was agreed that the United State's provision relating to fees should have been studied more closely. Section 204(b)(10) of the Fishery Conservation and Management Act states:

> Reasonable fees shall be paid tosthe Secretary by the owner or operator of any foreign fishing vessel for which a permit is issued pursuant to this subsection. The Secretary, in consultation with the Secretary of State, shall establish and publish a schedule of such fees, which shall apply nondiscriminatorily to each foreign nation. In determining the level of such fees, the Secretary may take into account the cost of carrying out the provisions of this Act with respect to foreign fishing, including, but not limited to, the the cost of fishery conservation and management, fisheries research, administration and enforcement.

Section 19: Licensing offences

This section imposes penalties where a foreign fishing craft is not licensed under the Act, or is used for fishing in contravention of the conditions of a licence.

Subsections 4 and 6, which impose penalties upon "every owner or master", or "every licensee or master", are too imprecise. It is difficult to know whether the legislature means both parties or only one of them. (It is probable that under the ordinary rules of agency there would be vicarious liability.) Nonetheless this should be explicit in the Act, for the deterrent value of the penalties imposed would then be greater.

The class approved of subsection 8 by which observers placed on board foreign fishing vessels may not be prosecuted for violations by the vessel. Such prosecutions would be likely to discourage New Zealanders from undertaking the job. It is also commendable that the penalties provided are high.

Section 20: Suspension and Cancellation of Licences

Subsection 1 of this section provides for the suspension or cancellation of a licence where an offence has been committed under the Act. However, subsection 2 is much broader. Not only does it use the flexible word "expedient", but it provides for suspension or cancellation after

[24] *Ibid.*, Reg. 11.
[25] *Ibid.*, Reg. 4.

consultation with the Minister of Foreign Affairs. This raises the possibility of arbitrary decision-making. Consultation with the Minister of Foreign Affairs also puts the matter into the political arena. There should be guidelines for the licensee and the applicant. The Act is after all, presumably intended to promote long term conservation measures and should reflect that intent rather than cater to short term political considerations. The United States Act sets out the grounds for suspension and cancellation of licences in much clearer terms and leaves much less room for political discretion.

Section 21: Review by Courts

This section curtails the power of the Courts to act as reviewing bodies. Consequently licensees cannot object if their licences are cancelled by administrative discretion or for political reasons.

Section 22: Fisheries Regulations

There are a number of regulations that can be made under this section. Some of these have already been considered under Section 15.[26]

Under paragraph (i) regulations may be made for conservation and management. However, it was felt that this was inadequate because such measures are not obligatory.

Paragraph (j) may be contrasted with the United States Act which expressly excludes highly migratory species. Since the New Zealand Act includes them, there may well be disputes between New Zealand and the United States on this issue. The United States has large super-seiners which catch skipjack tuna within a 200 mile radius of New Zealand. Provision for highly migratory species was not made under the interim measures in section 29. As yet the regulations have made no mention of these species.

Paragraph (k) is interesting because it does not exclude observers from penalties, as section 19(8) does. It will be very difficult to differentiate between regulations under section 22 and the terms and conditions in the licences. An observer may be liable under regulations made pursuant to section 22 for something over which he or she has no control.

Subsection 2 provides for different regulations to be made for different areas and species, and will pose problems of enforcement. There is also the problem of incidental catches. A trawler fisherman often nets species of fish which he neither intends nor is allowed to catch. If the fish are thrown back, it is likely that they will die, or will already be dead. If incidental catches are kept, will they have to be separated from the species that the vessel is supposed to take? If so, the incidental catch would probably have to be taken off the vessel when it reports into port before leaving New Zealand waters.

[26] Ante, pp.269-270.

As regards subsection 3, the class preferred section 204(b)(10) of the United States Act.[27] Under such a provision a schedule of fees for foreign fishing vessels would be published.

Section 23: Fishing for Research Experimentation and Sporting Purposes

If foreign fishing craft are used for the purpose of fisheries research, or experimentation, or sport, the prior consent of the Minister must be obtained. This might have been included in the section on licences as in the Whaling Industry Act 1935 where there are licences for cetology research. As far as sport is concerned, the Government is trying not to discourage tourism. However, the class felt that this too should be licensed.

Section 24: Apprehension of Offenders

Subsection 1 empowers officers to stop, board and search a foreign fishing craft which the officers have reasonable cause to believe has committed an offence under the Act. In the Bill subclause 1 used the two terms "reasonable cause to believe" and "reason to believe". However, under the Act the term "reasonable cause to believe" is used throughout.

Under subsection 2 the officers may be aided by assistants, who may be members of the officer's crew, members of the public, or observers on foreign fishing craft. The parallel is that of a constable's powers under the Crimes Act 1961, to call on bystanders for aid.

Subsection 4 provides that a decision whether to lay an information or charge, shall be made "as soon as reasonably practicable". This phrase is necessary, for the Crown must check charts, fish, equipment etc., in the port and advise the foreign fishermen of their rights. Generally the charge must be suitably researched before an information is laid.

Subsection 5 states:

> The release of a foreign fishing craft from detention shall not affect any subsequent forfeiture of the craft in respect of the conviction of any person for an offence.

This subsection can be interpreted very widely, for the type of conviction is not specified. It could arguably be an offence under some other Act. The phrase "specified in subsection 1 of this section" should be added both to this subsection and to subsection 8.

Most of the class felt that subsection 6 should be changed to read:

> . . .the craft shall be forfeited to the Crown and shall, in addition to any fine that may be imposed by any Court on the convicted person, be disposed of in such manner as the Minister shall order.

The same drafting it was thought, should be used in subsection 10. The minority believed this to be poor drafting and concluded that the subsections should remain as they are.

[27] See discussion of s.18, at p.271 ante.

The Bill did not mention the possibility that detained fish might deteriorate. Under the Act however, subsection 9 provides that the Crown shall not be liable for deterioration. The Act does not mention anything about fish that are forfeited in a deteriorated condition owing to the fault of the foreign fishermen so that it would seem that the Crown could do nothing about such deterioration.

Subsection 11 provides that a person who is apprehended under subsection 1 shall appear before a Court as soon as reasonably practicable. It does not mention bail or the time that the person can be detained. The explanatory notes to the Bill stated: "Individual offenders will be dealt with in accordance with the ordinary rules of bail". The class felt that this should have been included in the Act for clarity.

Subsection 12 states that the costs of keeping a fishing craft or fish in custody are a debt due to the Crown, and are recoverable in any court of competent jurisdiction. The problem is whether the Crown could bring an action in the foreign fishing country concerned, and whether it would thus be waiving sovereign immunity. However, subsection 13 provides that the court in which an offender is convicted may order the costs of detention to be paid by the offender.

Subsection 14 provides for the release of a foreign fishing craft or its fish from custody if every person charged with an offence is acquitted. It does not however, provide for the contingency of some persons being acquitted, or every person being discharged of the offence. It seems that if every person is discharged, the fishing craft and its fish may still be kept in custody.

Subsection 17 could be extended further to include under the term "foreign fishing craft", any other evidence relating to an offence under the Act. This evidence would then be seized under section 24(1)(c), and would be similar to section 311(b)(E) of the United States Fishery Conservation and Management Act.

Section 25: Security for Release of Foreign Fishing Craft

This section provides for bonds to be given as security for the release from custody of foreign fishing craft. These may in practice be difficult to levy. The class thought that there should be an additional provision relating to the notification of the flag state of the detention of the foreign fishing craft and the penalties for which the craft is liable. This is provided for under both Article 73(4) of the text of the Conference and Article 7 of the U.S.S.R. Edict creating the Soviet Union's exclusive economic zone.[28]

Section 26: Administrative Penalties for Minor Offences

This section is a last minute adjustment providing for penalties for

[28] (1976) 15 *International Legal Materials 1381, 1382.*

minor offences committed within the zone. However, it may undermine the value of the strict penalties provided for elsewhere in the Act, for the borderline between a major and a minor offence may be hard to define. It could depend upon the nationality of a particular craft and whether it can be seized. The advantage of the section is that penalties may be imposed upon foreign fishing craft without their having to be seized, provided that they admit, or merely fail to deny the offence. Yet the owners or masters of most craft are likely to deny the offence, in which case New Zealand's naval manpower would have to be used to apprehend the craft up to a month after the offence has been committed. There may then be difficulties with evidence. The section is only advantageous if guilt is admitted.

Section 27: General Regulations in Zone

This section is almost identical to section 8 and many of the comments made about that section apply here.[29]

The Act has omitted a subclause 2 which appeared in the Bill, and which related to any other enactments being declared by the regulations to apply within the zone, or any part of it. Admittedly it was difficult to understand the provision, but it was probably meant to apply the Mining Act 1971 within the zone at a later date. The exclusion of subclause 2 may mean that seabed mining will have to be provided for in the regulations or in an amendment to the Act. This can lead to excessive Ministerial discretion or to more piecemeal legislation.

Section 28: General Provisions as to Offences in Zone

Subsection 1 extends New Zealand's jurisdiction for offences under this Act to 200 nautical miles. It must be recalled that section 24(1) provides for an officer to apprehend a foreign fishing craft if there has been an offence against this Act or regulations, or an offence against ". . .any other New Zealand law, relating to fishing within the exclusive economic zone". It thus seems that if any such Act were passed it would have to include a provision such as section 28(1), for otherwise the offence would not be deemed to have been committed in New Zealand, and problems concerning jurisdiction would arise.

Subsection 2 provides a statutory defence for craft which are aiding the fishing craft, provided their activity relates only to fish taken outside the zone. (This provision contemplates mother ships).

Section 29: Interim and Transitional Measures

The Bill has been amended by the addition of subsection 2 which

[29] See ante pp.265-266.

enables penalties to be imposed, and subsection 3 which deems the offence to have occurred in New Zealand. The regulations which have been issued pursuant to this section provide that sections 24, 25 and 26 of the principal Act apply.[30] One alteration to this section suggested by the class, was to change the "limitation" in line 8, to "regulation", because the regulations under this section not only limit fishing by foreign fishing craft, but also regulate fishing activity.

Section 30: Modifications to give effect to International Agreement

> The Governor-General may, from time to time, by Order in Council, limit any provision of this Act relating to the exclusive economic zone so far as it is necessary to do so to give full effect to any convention that is adopted by the Third United Nations Conference on the Law of the Sea.

This section involves considerable difficulty. The first problem is the word "limit" in the second line of the section. The marginal note uses the word "modifications", even though the explanatory note to the Bill and the section use the word "limit". The term "limit" itself is ambiguous. Does the section mean that any provision of the Act can only be limited, but not extended? The word "limit" seems to imply the granting of less benefit to New Zealand and the lack of authority to extend the Act to accord with a Convention concluded. Thus, it was agreed that the word "limit" should be altered to "modify". This would make it more compatible with the marginal note, which cannot otherwise be used in interpretation of the section.

The marginal note and the section itself also differ as to the meaning of "international agreement". "International agreement", as used in the marginal note, means a convention to which New Zealand is a party. The section however, implies that New Zealand does not have to be a party to a convention adopted by the Third United Nations Conference on the Law of the Sea in order to limit the Act to give effect to it. If the legislators intended to give the Governor-General power to limit the Act, whether or not New Zealand is a party to the proposed convention, they should have omitted the words "international agreement" from the marginal note.

The class thought that perhaps the phrase "any provision of this Act" is too wide. Since the section empowers the Governor-General to make regulations, there is some case for specifying precisely what the Governor-General may alter, rather than having such a wide term.

There were also difficulties experienced with the phrase "so far as it is necessary to do so to give full effect to. . ." Some felt that it was mere verbiage. There is however, a subjective element in the word "necessary". It must be necessary according to the Governor-General, but who is to question a finding of necessity? The word "necessary" implies discretion on the part of the Government. It would appear that Section 401 of the

[30] The Exclusive Economic Zone (Interim Measures for Foreign Fishing Craft) Regulations 1977, 1977/246, Reg. 6.

United States Act[31] is preferable.

Section 31: Official Charts

Some members of the class suggested that the word "purporting" in line 2 of subsection 2 be omitted so as to give a procedural safeguard to the defendant. Consequently subsection 3, which provides that the person signing the certificate shall be presumed to be duly authorised to sign it, should be omitted altogether. The majority thought however, that the section was sufficient as it stood. Under section 15(3)(q) it is likely that the charts which the foreign fishermen carry, will be those referred to in subsection 1, or copies thereof. There is still however some confusion over which charts would be used. Perhaps it would be advisable to amend section 15(3)(q) so that the "specified nautical charts", are those specified in section 31(1).

Section 32: Onus of Proof in Respect of Offences

This section places the burden of proof upon the defendant in the proceedings outlined in the section.

Section 33: Amendments, Repeal and Savings

One implication of the addition of subsection 2 is that any reference to the territorial sea of New Zealand in a regulation, or other document, includes the new territorial sea adjacent to the Ross Dependency. This reinforces New Zealand's desire to stress her sovereignty over the Ross Dependency.

Subsection 4 provides that nothing in this Act shall limit or derogate from the provisions of any other enactment. There was the suggestion that this subsection should also provide that the Act is not to be read subject to any provision in any other enactment, but was rejected because statutes such as the Marine Pollution Act 1974 and the Water and Soil Conservation Act 1967 (as amended) augment this Act.

Conclusion

The major criticisms of the Act can be summarised as follows. First, it does not state that New Zealand has sovereign rights for the purposes of exploration and exploitation, and conservation and management of the natural resources of the zone. These are the rights of the coastal state under international law and should be expressed as such. This leads to the second criticism: the Act does not emphasise conservation and management practices. It is possible under the Act for the Government to abuse the resources of the zone. Third, New Zealand should have ascertained whether it was violating the Antarctic Treaty before it declared a

[31] (1976) 15 *International Legal Materials* 635, 649-650.

territorial sea adjacent to the Ross Dependency. Fourth, the allocation of the foreign fishing allowable catch can be based on purely political considerations. It should be based on considerations which are expressed in international law. Fifth, there is a great deal in the Act which is left to Ministerial discretion. Wide discretion is unwarranted in legislation in which foreign countries are involved, for it leads to the application of political considerations. Finally, the Act should have been a comprehensive code dealing with all aspects of the exclusive economic zone. As the Act stands, it will have to be amended to deal with these matters.

Despite these criticisms, if the Act is used intelligently the resources of the exclusive economic zone should be managed effectively.