LAW OF THE SEA AND FISHERIES

I. Introduction

2013 was a busy year for law of the sea issues in New Zealand, particularly on the domestic legislative front. A number of actions to strengthen environmental protection as well as streamlining economic development in New Zealand's maritime zones are in process. As well, New Zealand has continued to participate actively in international organisations such as regional management fisheries organisations. A noteworthy development was the intervention by New Zealand in the International Court of Justice (ICJ) case between Australia and Japan relating to whaling in the Southern Ocean.

II. Environmental Protection

A number of legislative and regulatory developments occurred in 2013 as part of a wider plan to put in place more effective environmental regulation of New Zealand's exclusive economic zone (EEZ) and continental shelf. In 2012 the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act was passed, which established a decision making framework for the management of the country's maritime zones beyond the territorial sea. That Act came into effect on 28 June 2013. In addition, the first regulations under the Act were promulgated, and some minor changes were made to the Act itself.

One significant change made by the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013 was the introduction of a new category of activity. The original form of the Act provided for permitted, discretionary and prohibited activities. However, the government decided that a new classification was needed, known as non-notified discretionary activities. This category is aimed at covering routine, brief or exploratory activities that require oversight but with a more streamlined process than other activities. A marine consent is required for these activities but the application will not be publicly notified. The identification of activities that fall into this category will be made in the future by regulation. In December, the Ministry for the Environment announced a proposal that exploratory oil and gas drilling would be a non-notified discretionary activity from 2014. Another change to the primary Act involved transferring responsibility for regulation of various discharges from Maritime New Zealand to the recently formed Environmental Protection Agency (EPA). These discharges include those covered by the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) and the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter 1972 (London Convention).

The Exclusive Economic Zone and Continental Shelf (Environmental Effects – Permitted Activities) Regulations 2013 (EEZ Regulations) establish which activities are permitted under the Exclusive Economic Zone (Environmental Effects) Act. Permitted activities include marine scientific research, mineral prospecting or exploration. Those conducting a permitted activity must comply with a range of conditions, including: carrying out an initial environmental assessment; notifying the EPA of the work to be done; mitigating adverse environmental effects; and minimising the amount of material removed from the seabed. They must also prepare a report for the EPA within 60 days of the completion of the activity, detailing the activity undertaken, the duration and location of the activity and the estimated environmental impact of the activity.

Other permitted activities include: seismic surveying; repairing, altering or expanding a permitted marine structure; and the laying of a submarine cable on the seabed. Conditions are attached to each of these activities.

The Maritime Transport Amendment Act 2013 made a number of changes to the Maritime Transport Act, which is the primary Act applying to shipping in New Zealand. Among the changes was an update to prepare for the ratification of the 1996 Protocol to the Convention on the Limitation of Liability for Maritime Claims. New Zealand's delay in ratifying this Protocol was highlighted following the grounding of the cargo ship *Rena* in 2011 and the subsequent oil spill.[1]

III. Fishing

A. Foreign Charter Vessels Bill

In response to the 2012 Ministerial Inquiry into foreign chartered fishing vessels operating in New Zealand,[2] the Government introduced the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill. The Bill received its first reading in February 2013 and it was reported back from the Primary Production Select Committee in August 2013. The Bill's purpose is to ensure that all foreign charter fishing vessels are reflagged to New Zealand while operating in New Zealand's EEZ from May 2016. Some exceptions to this requirement will be allowed when the vessel is targeting highly migratory species such as tuna, or a New Zealand vessel is unavailable. The Select Committee considered whether the Australian approach, of deeming foreign charter vessels to be operating under Australia's jurisdiction while within its waters, would be preferable. However, the Select Committee decided that this approach would not allow the government to meet its objectives of improving the conditions of crew on board the vessels.[3] The Bill is due to be considered again by Parliament in 2014.

1 See Joanna Mossop "Law of the Sea and Fisheries" (2011) 9 NZYIL 329 at 333.
2 See Joanna Mossop "Law of the Sea and Fisheries" (2012) 10 NZYIL 232 at 233.
3 Primary Production Select Committee, Commentary on the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill, 25 August 2013 at 3.

B. Written Statement Regarding the Request for an Advisory Opinion from the Sub-Regional Fisheries Commission (SRFC)

In November 2013 New Zealand submitted a written statement to the International Tribunal for the Law of the Sea (ITLOS) in respect of an advisory opinion requested by the SRFC.[4] The questions asked by the SRFC were very general, and related to illegal, unreported and unregulated (IUU) fishing and state responsibility. Therefore, ITLOS issued an invitation to interested states party to the Law of the Sea Convention[5] to present written statements on the questions posed by the SRFC. New Zealand's written statement focused on several aspects of the case.

First, New Zealand considered that ITLOS has jurisdiction to respond to the advisory opinion. Although there is no express provision for advisory opinions by the Tribunal in the Law of the Convention, art 21 of the Statute confers a broad jurisdiction on the Tribunal which could include the provision of an advisory opinion which is requested pursuant to an agreement which confers such jurisdiction on the Tribunal. However, New Zealand observed that the questions posed to ITLOS were very broad and the Tribunal should consider exercising its discretion to narrow the scope of the questions asked.

In relation to the question about the obligations of the flag state where IUU fishing activities are conducted in the EEZ of another state, New Zealand referred to a number of obligations on the flag state conferred by a range of international instruments. Its submission argued that this amounted to a duty on the flag state to exercise effective control over its vessels. New Zealand also pointed out that a state whose nationals are fishing in the jurisdiction of another state also has obligations to regulate their activities.[6]

The second question asked to what extent a flag state shall be held liable for IUU activities conducted by vessels sailing under its flag. New Zealand argued that the failure of a flag state to discharge its duty to exercise control over its vessels is an internationally wrongful act.[7]

The third question related to the responsibility of an international organisation for violations of its licenced fishing vessels of the law of the coastal state. New Zealand contended that if an international organisation enters into a fisheries agreement which provides for licenced access by vessels flagged to a member State of the organisation and the member state is expected to ensure compliance with the terms of the agreement, if it fails to exercise effective jurisdiction and control over that vessel, both the member

4 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* Written Statement of New Zealand (27 November 2013) <www.itlos.org>.

5 United Nations Convention on the Law of the Sea 1834 UNTS 397 (opened for signature 10 February 1982, entered into force 16 November 1994) [LOS Convention].

6 At [36].

7 At [49].

state and the international organisation are responsible at international law.[8] Alternatively, if the member state is acting as the organisation's agent, the actions of the state could be attributed to the organisation.[9]

Finally, the rights and obligations of the coastal state in ensuring the sustainable management of straddling and highly migratory species were outlined as set out in the LOS Convention and the United Nations (UN) Fish Stocks Agreement. In particular, states should act so as not to undermine the obligations to conserve and manage fish stocks.[10]

C. Headquarters Agreement Between the South Pacific Regional Fisheries Management Organisation and New Zealand

In late 2013, the above treaty was referred to the Foreign Affairs, Defence and Trade Select Committee for consideration.[11] The Committee subsequently reported to Parliament that it supported the treaty and had no objections to it being concluded. The Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean was concluded in 2009 and established the South Pacific Regional Fisheries Management Organisation (SPRFMO).[12] New Zealand has agreed to host the Secretariat of the Organisation, which will be the first international organisation to be headquartered in New Zealand. New Zealand played a key role in the negotiations for the establishment of SPRFMO: New Zealander Bill Mansfield chaired the negotiations and was subsequently elected as chairperson of the organisation in 2013.

D. Agreement on Port State Measures

The Foreign Affairs, Defence and Trade Committee also considered whether New Zealand should ratify the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009.[13] New Zealand signed the Agreement in 2009. The National Interest Analysis for the treaty found that it was in New Zealand's interests to reduce IUU fishing. The Agreement aims to deter IUU fishing by making it more difficult for IUU vessels to access port services. The Select Committee agreed that it was appropriate to ratify the Agreement.

8 At [60].
9 At [61].
10 At [75].
11 Foreign Affairs, Defence and Trade Committee *International Treaty Examination of the Headquarters Agreement between the South Pacific Regional Fisheries Management Organisation and the Government of New Zealand* (21 November 2013).
12 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean TRE-160003 (opened for signature 14 November 2009, entered into force 24 August 2012).
13 Foreign Affairs, Defence and Trade Committee *International Treaty Examination of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (13 December 2013).

IV. Whaling

On 6 February 2013 the International Court of Justice accepted the intervention by New Zealand in the *Whaling in the Antarctic (Australia v Japan)* case on the basis of art 63(2) of the Statute of the International Court of Justice.[14] Although Japan had not objected to the admissibility of the Declaration of Intervention, it pointed out "certain serious anomalies" that would arise from the admission of New Zealand as an intervenor.[15] Japan considered the intervention of New Zealand, which closely shares the perspective of Australia in relation to whaling in the Southern Ocean, could threaten the safeguards of procedural equality between the parties. For example, Australia was entitled to a judge *ad hoc* due to its status as a party to the case. Because New Zealand was an intervenor only, the New Zealand judge on the ICJ, Sir Kenneth Keith, would not be counted as representation on the bench by a party "in the same interest".[16] However, the Court did not accept this argument, reiterating that intervention in a case did not confer the status of a party on the intervening state. Therefore the presence of the New Zealand judge had no effect on the right of Australia to appoint a judge *ad hoc*.[17]

New Zealand filed written observations on the interpretation of the International Convention for the Regulation of Whaling (ICRW) on 4 April 2013.[18] New Zealand's submissions emphasised the following points. First, New Zealand argued that the ICRW is a system of collective regulation for the conservation and management of whales. Because art VIII is an integral part of the Convention it must be interpreted so as to not undermine the object and purpose of the ICRW. Whaling under art VIII could only be conducted for the purposes of scientific research and not any other purpose such as the sale or supply of whale meat. New Zealand argued that whether or not whaling was conducted for the purpose of scientific research was not a matter for unilateral determination by a state issuing a special permit. Rather, it is an objective matter that the Court can assess based on the stated purpose of the research programme, as well as the facts and circumstances surrounding its development and interpretation. An important consideration is that the number of whales killed must be consistent with reference to scientific objectives.

14 *Whaling in the Antarctic (Australia v Japan) Declaration of Intervention of New Zealand*, International Court of Justice, Order of 6 February 2013 [*Whaling in the Antarctic – Order*].

15 At [17].

16 Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945), art 31(5) [Statute of the Court].

17 *Whaling in the Antarctic – Order*, above n 14, at [21].

18 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of New Zealand, *(Written Observations of New Zealand)* ICJ 2010 General List No 148 (4 April 2013) [Written Observations of New Zealand].

Oral submissions were presented to the ICJ between 26 June and 16 July 2013. New Zealand's submissions were presented by the Attorney-General, the Hon Christopher Finlayson, and Ms Penelope Ridings of the Ministry of Foreign Affairs and Trade.

V. Other Matters

A. Response to Protests of Oil Exploration Activities at Sea

In 2012, the skipper of a New Zealand flagged fishing vessel was prosecuted for entering an exclusion zone around an oil exploration vessel conducting a survey of the seafloor. At the District Court, the prosecution failed because the judge found that the Maritime Transport Act 1994 could not be used in relation to offences conducted outside the territorial sea.[19] The New Zealand Police appealed this decision to the High Court, and in March 2013 the High Court quashed the District Court decision.[20]

The High Court pointed out that New Zealand has a number of international obligations, including taking measures to ensure safety at sea for ships flying its flag.[21] Although the Maritime Transport Act's provisions did not expressly create extraterritorial application, the Court considered that extraterritorial jurisdiction applied by necessary implication. The Court also confirmed the power of the Police to stop and board vessels beyond the territorial sea and arrest offenders accordingly. This decision has been appealed to the Court of Appeal.

The protest action and subsequent case of *Police v Teddy* prompted the New Zealand government to introduce changes to legislation to clarify the jurisdiction and powers of New Zealand authorities beyond the territorial sea. The first was an amendment to the Maritime Transport Act which made it clear that all provisions in the Act applied to New Zealand vessels wherever they may be.[22] It was also clarified that rules made under the Act could apply in New Zealand waters beyond the territorial sea.[23]

The second change to legislation was more substantial. In 2013, the New Zealand government announced that changes were to be made to the Crown Minerals Act 1991 that would affect the ability of private vessels to protest against oil exploration activities at sea by approaching or interfering with the operation of the oil exploration vessels. New offences were added to the legislation, making it a crime to damage or interfere with a vessel undertaking

19 See Joanna Mossop "Law of the Sea and Fisheries" (2012) 10 NZYIL 232 at 235.

20 *New Zealand Police v Teddy* [2013] NZHC 432.

21 LOS Convention, art 94. See *New Zealand Police v Teddy*, above n 20, at [9].

22 Maritime Transport Amendment Act 2013, s 6, amending s 4 of the Maritime Transport Act 1994. However the amendments do not retrospectively apply to resolve Mr Teddy's prosecution.

23 Maritime Transport Amendment Act 2013, s 81, amending s 451 of the Maritime Transport Act 1994.

oil exploration related activities.[24] In addition, the amendment provided that the government could establish "non-interference zones" around the survey vessels and it would be an offence to enter those zones "without reasonable excuse".[25] The non-interference zone can be established by notice and extend up to 500 metres from the outer edges of the survey vessel and any towed equipment.[26] Finally, the amendments authorise a New Zealand enforcement officer to board vessels suspected of committing these offences, and detain the ship or arrest a person on board.[27] Interestingly, the enforcement power is not limited to New Zealand vessels.

The amendments to the Crown Minerals Act were introduced by the government quickly and without any opportunity for public input through a Select Committee consideration.[28] A public outcry ensued, objecting to the lack of scrutiny and alleging breaches of law of the sea and human rights obligations.[29]

It is true that there is no express right in the Law of the Sea Convention (LOSC) to establish a non-interference zone around vessels operating in the exclusive economic zone or above the continental shelf. An express right does exist in relation to installations and structures on the continental shelf, and it seems that the non-interference zone in the Crown Minerals Act is partly modelled on art 60 of the LOSC. New Zealand has argued that the amendments "provide an effective deterrent, and readily workable operational powers, to act against unlawful interference with legitimate exploration and production activities".[30]

The legal justification is that New Zealand is protecting vessels acting to exploit New Zealand's sovereign rights in relation to oil and gas reserves in the EEZ and continental shelf.[31] However, art78 of the LOSC stipulates that the exercise of the rights of the coastal state over the continental shelf "must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States".[32] There is a genuine question whether

24 Crown Minerals Act 1991, s 101B(1).
25 At s 101B(2).
26 At s 101B(6) and (7).
27 At s 101C.
28 N Pender and P McMillan "SOP Sinks Mining Protesters" *LawTalk* (Issue 817) (New Zealand, 26 April 2013).
29 "Join [sic] Statement on Crown Minerals Bill Amendment 2013" at <www.greenpeace.org>; Imogen Crispe, "Prominent NZers Fight Environmental Protest Ban" (9 April 2013) <www.3news.co.nz. For an analysis of whether the amendments breach New Zealand's Bill of Rights Act, see Matthew McMenamin "Protest at Sea: An Analysis of the Crown Minerals Amendment Act 2013" in Paul Morris & Helen Greatrex (eds) Human Rights Research [2013] HRR 8.
30 Hon Simon Bridges "Moves to strengthen protection of offshore petroleum and minerals activity" (press release, 31 March 2013).
31 LOS Convention, art 77.
32 For a discussion of the criteria that could be used to evaluate whether art 78 has been violated, see J Mossop "Regulating Uses of Marine Biodiversity on the Outer Continental Shelf" in Davor Vidas (ed) *Law, Technology and Science for Oceans in Globalisation* (Martinus Nijhoff, Leiden, 2010) at 319.

s 101B of the Crown Minerals Act is an unjustifiable interference with the freedom of navigation of vessels operating in the vicinity of the survey ships. On the one hand, there is a clear interest in New Zealand ensuring that survey vessels are able to operate unhindered and in conditions of safety. On the other hand, it is arguable that the use of a non-interference zone of up to 500 metres is more than would be necessary to achieve the objectives of the Act. There is a clear distinction between the effect of a 500 metre safety zone around an installation which does not change position on an operational basis, and a 500 metre zone around a vessel which is constantly moving. Much will depend on the way in which the Act is enforced. It is possible for the government to impose a non-interference zone that is less than 500 metres. In addition, much will also depend on the interpretation of what is "a reasonable excuse" for entering the non-interference zone: if a Court (or New Zealand authorities) accepts that exercising the freedom of navigation without an intention to interfere with the operation of the survey vessel will be a reasonable excuse, then there may be little actual interference with most vessels' freedom of navigation.

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