

Foster: New Zealand's Coastal Jurisdiction
NEW ZEALAND'S COASTAL JURISDICTION

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I. INTRODUCTION

The purpose of this note is to outline and comment upon the position of New Zealand on the related matters of its territorial sea, fishing zone and continental shelf.

Prior to the passage of the *Territorial Sea and Fishing Zone Act 1965*¹ and the *Continental Shelf Act 1964*,² New Zealand had avoided a clear all-embracing definition of the territorial sea and its limits, and making any express claims to the continental shelf which lies off its rather extensive coastline.

The *New Zealand Boundaries Act 1863*,³ enacted by the Parliament of the United Kingdom to define the territorial extent of the then colony, merely stated that, "The colony of *New Zealand* shall . . . be deemed to comprise all Territories, Islands, and the Countries lying between the One hundred and sixty-second Degree of East Longitude and the One hundred and seventy-third Degree of West Longitude and between the Thirty-third and Fifty-third Parallels of South Latitude."⁴ Specific reference was made to the land areas that comprised New Zealand; no reference was made to any bodies of water adjacent to its coastline.

Subsequent enactments did nothing to clarify the position. Although there were several statutes⁵ under which jurisdiction was exercised over the sea areas adjacent to the coast for particular purposes they made no attempt to define the territorial sea.

Only two acts delimited New Zealand's waters with any form of precision: Section 2 of the *Fisheries Act 1908*⁶ provided that the terms " 'waters' or 'New Zealand waters' should mean the sea

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1. STAT. N.Z. 1965, No. 11.

2. STAT. N.Z. 1964, No. 28.

3. 26 & 27 Vict., c. 23 (1863) (U.K.).

4. 26 & 27 Vict., c. 23 § 2 (1863) (U.K.).

5. See, e.g., Customs Act 1913, 3 N.Z. STAT. REPR. 1908-1957, No. 63; Oil in Territorial Waters Act 1926, 11 N.Z. STAT. REPR. 1908-1957, No. 27; Waters Pollution Act 1953, 16 N.Z. STAT. REPR. 1908-1957, No. 104; and Crimes Act 1961, STAT. N.Z. 1961, No. 43.

6. 5 N.Z. STAT. REPR. 1908-1957, No. 65.

within one marine league of the coast of New Zealand . . .,” and section 2 of the *Whaling Industry Act 1936*,⁷ stated that “‘coastal waters’ means . . . waters within a distance of three nautical miles from any point on the coast . . . measured from low-water mark of ordinary spring tides.” Several points must be noted about these definitions. Neither of these statutes provided that the delimitations were those of New Zealand’s territorial sea. Nor is there uniformity in their terminology—one speaks of “New Zealand’s waters” the other of “coastal waters”; one states the breadth of these waters shall be “one marine league,” the other provides that the breadth is “three nautical miles.” Again there is no uniformity in the references made by these statutes to the areas of waters (gulfs, bays, ports, etc.) contained in the total area of water defined. Nor is any distinction made between the regimes of internal waters and territorial sea. And only in one act is reference made to the line on the coast from which the breadth of New Zealand’s waters was to be measured. In fact it appears that the particular delimitations were incorporated only for the purpose of defining the territorial scope of application of the enactments in which they are contained.

However, despite the lack of any legislative definition of the territorial sea, there can be no doubt that successive New Zealand governments subscribed to the traditional English view that a littoral state was entitled to exercise jurisdiction over that area of sea adjacent to its coast extending three nautical miles seaward measured from the low-water mark.⁸ This attitude, if not explicit, is implicit in the New Zealand legislation relating to coastal jurisdiction.

II. THE TERRITORIAL SEA

New Zealand’s *Territorial Sea and Fishing Zone Act 1965* touched upon all of the major problems involved in the delimitation of the territorial sea: Its breadth, the baselines from which it was to be measured, and the method of measurement from these baselines.

1. *Breadth*

Perhaps the most controversial question in the law of the sea

7. 16 N.Z. STAT. REPR. 1908-1957, No. 12.

8. See Statement by the Right Hon. Keith Holyoak, Prime Minister of New Zealand, on August 11, 1965.

is that of the breadth of the territorial sea. The solution of this problem has been sought unsuccessfully by the International Law Commission and three international conferences. Nor has state practice facilitated the resolution of this question in that coastal states have laid claims to territorial seas ranging from three to two hundred nautical miles in breadth.

Faced with this problem of conflicting and widely divergent state practice, the New Zealand Government chose to abide by its traditional position in delimiting the breadth of the territorial sea. Accordingly, section 3 of the Act provides that New Zealand's territorial sea "comprises those areas of sea having as their inner limits the baselines described in sections 5 and 6 of this Act and, as their outer limits, a line measured seawards from that baseline every point of which is distant three nautical miles from the nearest point of the baseline."

That this delimitation cannot be regarded as contentious is obvious. Contemporary state practice supports the view that at international law the territorial sea is certainly not less than three miles and probably not more than twelve miles. Section 3 represents no new assertion of territorial sovereignty—it is merely declaratory of New Zealand's traditional position.

2. *Baselines*

Once the breadth of the territorial sea is determined, there is the question of choosing the baselines from which it is to be measured. Various methods have been suggested for determining baselines. Two of those methods which have gained the widest acceptance by states and which are now to be found embodied in the *Convention on the Territorial Sea and the Contiguous Zone*⁹ are the low-water baseline and the straight baseline.

According to the first of these methods the baseline is "the low-water line along the coast as marked on large scale charts officially recognized by the coastal state."¹⁰ The baseline follows the sinuosities of the coast and is regarded as the normal baseline. However, it was recognized that the use of the low-water baseline was prone to create severe difficulties of definition where the coastline was deeply indented, or surrounded or fringed by islands,

9. Art. 3, 4 and 5. For the text of the Convention on the Territorial Sea and the Contiguous Zone, see II *U.N. Conference on the Law of the Sea, Plenary Sessions, 132 et seq.*; U.N. Doc. A/Conf. 13/38.

10. *Id.* at Art. 3.

shoals, or rocks. Accordingly, in such circumstances, straight baselines may be used; the territorial sea is measured from a baseline consisting of straight lines drawn from fixed points on the coast, coastal islands, shoals or rocks. The straight baseline method of determining the inner limits of the territorial sea, can only be adopted if (a) "the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity";¹¹ (b) "economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage" dictate the use of such baselines;¹² (c) the baselines do "not depart to any appreciable extent from the general direction of the coast";¹³ (d) the sea areas lying within the lines are "sufficiently closely linked to the land domain to be subject to the regime of internal waters";¹⁴ (e) the straight baselines do not "cut off from the high seas the territorial sea of another state";¹⁵ and (f) "the coastal state clearly indicates straight baselines on charts, to which due publicity must be given."¹⁶

The New Zealand Act has made use of the low-water baseline except in relation to bays for which a special regime has been created. Section 5(1) stipulates that "Except as otherwise provided in section 6 . . . the baseline from which the breadth of the territorial sea . . . is measured shall be the low-water mark along the coast. . . ." Section 9 (1) clarifies the term "low-water mark":

[T]he low water mark in any specified area shall be the line of low water at mean low-water spring tides as depicted on the largest scale New Zealand Government nautical chart for the time being of that area, or, where no such chart of that area exists, the largest scale British Admiralty chart for the time being of that area.

Three significant features should be noted about the definition of the New Zealand coastline by the Act. First, "permanent harbour works which form an integral part of a harbour system" are treated "as forming part of the coast."¹⁷ Next the coast includes "the coast of all islands."¹⁸ An island is a naturally formed

11. *Id.* at Art. 4(1).

12. *Id.* at Art. 4(4).

13. *Id.* at Art. 4(2).

14. *Id.*

15. *Id.* at Art. 4(5).

16. *Id.* at Art. 4(6).

17. STAT. N.Z. 1965, No. 11 § 10.

18. *Id.* at § 5(1).

area of land, surrounded by water but which is above water at high tide.¹⁹ As the statute gives no indication as to the location of the islands whose coasts form an integral part of the coast of New Zealand, presumably it includes all those islands lying within the area defined by the *New Zealand Boundaries Act 1863*. Finally, for the purpose of defining the low-water mark along the coast, certain low-tide elevations are treated as islands by the Act: "[A] low-tide elevation which lies wholly or partly within the breadth of sea which would be territorial sea if all low-tide elevations were disregarded for the purpose of the measurement of the breadth thereof shall be treated as an island."²⁰ Such low-tide elevations are naturally formed areas of land which, though submerged at mean high-water spring tides, are surrounded by, but above water at mean low-water spring tides.²¹

As mentioned, the low-water mark baseline is not used in the case of bays. The *Territorial Sea and Fishing Zone Act 1965* adopted the definition of a bay contained in the *Convention on the Territorial Sea and Contiguous Zone*.²² By section 2 of the Act a bay is

an indentation of the coast such that its area is not less than that of the semi-circle whose diameter is a line drawn across the mouth of the indentation. For the purposes of this definition the area of indentation shall be taken to be the area bounded by low-water mark around the shore of the indentation and the straight line joining the low-water marks of its natural entrance points; and where because of the presence of islands, an indentation has more than one mouth the length of the diameter of the semi-circle referred to shall be the sum of the lengths of the straight lines drawn across each of the mouths; and in calculating the area of the indentation the area of any islands lying within it shall be treated as part of the area of the indentation.

Then in section 6, the Act provides three different ways for demarcating the baseline of the territorial sea adjacent to a bay. (a) Where the bay has only one mouth which does not exceed twenty-four nautical miles between the low-water marks of the natural entrance points, the baseline is a straight line joining the

19. *Id.* at § 2.

20. *Id.* at § 5(2).

21. *Id.* at § 2.

22. Art. 7(2) of the *Convention on the Territorial Sea and Contiguous Zone*, see note 9 *supra*.

low-water marks. (b) If the bay, because of the presence of islands has more than one mouth, and the distances between the low-water marks of the natural entrance points do not exceed twenty-four nautical miles, the baseline is a series of lines drawn across each of the mouths joining the low-water marks. (c) Finally, if neither of these two methods can be implemented, the baseline is a straight line twenty-four miles in length "drawn from low-water mark to low-water mark so as to enclose the maximum area of water that is possible with a line of that length." These methods of demarcation are in conformity with those enunciated in the *Convention on the Territorial Sea and Contiguous Zone*.²³

3. *Measurement of the Territorial Sea*

In choosing the method for determining the outer-limit of the territorial sea the New Zealand Government rejected the method by which the coastline is merely reproduced three miles out to sea (*i.e.*, a line following all the sinuosities of the coast). Instead, the technique known as the "envelop of all arcs of circles" was adopted. By this method circles, having a radius equal to the breadth of the territorial sea, are "drawn from all points on the coast [at low-water mark in the case of New Zealand] . . ., or from the seaward limit of those interior waters which are contiguous with the territorial sea."²⁴ Thus, every point on the line marking the outer-limit of the territorial sea is three nautical miles from the nearest point of the baseline.

4. *Bed of the Territorial Sea*

The Act, in section 7, provides that the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast and on the seaward side by the outer limits of the territorial sea, subject to any estate granted or to be granted, shall "be deemed to be and always to have been vested in the crown."

III. INTERNAL WATERS

Section 4 of the *Territorial Sea and Fishing Zone Act 1965* defines New Zealand's internal waters as consisting of "any areas

23. *Id.* at Art. 7(3), (4) & (5).

24. Boggs, *Delimitation of the Territorial Sea*, 24 AM. J. INT'L L. 541, 544 (1930).

of sea that are on the landward side of the baseline. . . .” Before section 6 was enacted, establishing a special regime for bays, it was generally recognized that the baseline from which New Zealand’s territorial sea was to be measured was the low-water mark even in the case of bays. Consequently, no substantial areas of sea formed part of her internal waters. The use of closing lines at the mouths of bays has drastically altered this situation. Not only do New Zealand’s internal waters now consist of areas that were once her territorial sea, but areas of water which were formerly regarded as high seas are also incorporated in the regime of internal waters.

IV. THE FISHING ZONE

The *Territorial Sea and Fishing Zone Act 1965*, as its title indicates, did more than simply declare the precise limits of New Zealand’s territorial sea. It introduced a completely new concept to the law of New Zealand—that of a fishing zone.

1. *The Fishing Zone*

The fishing zone of New Zealand, comprises those areas of the sea contiguous to the territorial sea . . . and having, as their inner limits, the outer limits of the territorial sea and, as their outer limits, a line measured seaward from those inner limits every point of which is distant nine nautical miles from the nearest point of the inner limit line.²⁵

The New Zealand Government deliberately refrained from making a claim to a twelve-mile territorial sea. Instead, it adhered to the traditional three-mile territorial sea and established a nine-mile fishing zone contiguous to it.

Within the fishing zone, New Zealand’s jurisdiction is limited to the operation of part I of the *Fisheries Act 1908*, the *Whaling Industry Act 1935*, and of any other enactments which are declared to apply with respect to the fishing zone.²⁶ These enactments are to apply to the zone as if it in fact constitutes part of the territorial sea. By the joint operation of the *Fisheries Act 1908*, as amended in 1963,²⁷ and the *Shipping and Seamen Amendment Act 1964*,²⁸ it is an offence for any boat to engage in commercial

25. STAT. N.Z. 1965, No. 11 § 8(1).

26. *Id.* at § 8(2).

27. STAT. N.Z. 1963, No. 69.

28. STAT. N.Z. 1964, No. 127.

fishing operations within the zone unless (a) it is registered in New Zealand, and (b) it has a boat fishing permit. As foreign vessels generally are unable to acquire New Zealand registration, the cumulative effect of the various statutes is to render the fishing zone the exclusive preserve of persons ordinarily resident in New Zealand operating ships which are registered in New Zealand and the masters of which are not aliens.

The fact that a coastal state may assert jurisdiction over an area of the high seas adjacent to its territorial sea for the purpose of regulating fishing cannot be seriously questioned. It is true that insofar as the issue of fishing limits were concerned, the two Geneva Conferences of the Law of the Sea failed to produce a uniform rule of law on this matter. But it is nonetheless significant that every country participating in the 1960 Conference voted for at least one of the proposals which provided for a fishing zone. This indicated that the concept would become an important factor in the practice of states with regard to their adjacent seas. Accordingly, in the post-Conference period a rapid development in state practice has been evident. A substantial number of states unilaterally have established fishing zones beyond the limits of their territorial seas.²⁹ This often resulted in a confrontation between the littoral state and the states whose fishermen were excluded from the exploitation of the resources of the zone. The result of these confrontations is that a growing number of bilateral agreements were reached which, while recognizing the establishment of the fishing zone, provided for a "phasing-out" period for the duration of which period foreign fishermen could still exploit the fisheries in the waters of the zone.³⁰ The third major development in the period after 1960 was the conclusion of the *European Fisheries Convention* in 1964.³¹ By the terms of this Convention each of the thirteen signatory states are entitled to create fishing zones in their coastal waters. However, every state which exercises

29. See, e.g., Sudan (1960), Albania (1960), Morocco (1962), South Africa (1963), and Canada (1964).

30. See, e.g., Exchange of Notes Settling Fisheries dispute Between the Government of the United Kingdom and the Government of Iceland, Reykjavik, March 11, 1961, Brit. Treaty Series No. 17, 1961; Anglo-Danish Fishery Agreement, 1959, 337 U.N.T.S. 416; United Kingdom-Norway Fisheries Agreement, 1961, Brit. Treaty Series No. 25, 1961.

31. See Final Act of the European Fisheries Conference, London, December 3, 1963-March 2, 1964, with Fisheries Convention Protocol of Provisional Application and Agreements as to Transitional Rights, Misc. No. 11, 1964, Cmnd. 2355.

this privilege is obliged to recognize, within certain prescribed limits, the traditional fishing rights of other member states in its fishing zone.

Although bilateral and multilateral agreements cannot, of course, affect the rights of third states, these patterns of state practice are indicative of two facts: (a) [T]hat the reservation of a twelve-mile fishing zone (measured from the baselines of the territorial sea) is not *per se* contrary to international law; and (b) that the interests of foreign states who have habitually fished the waters of the zone should be provided for by "phasing-out" measures. The New Zealand legislation clearly conforms with the first condition, but no where in the *Territorial Sea and Fishing Zone Act 1965*, nor in any other legislation, did it provide for a "phasing-out" period despite knowledge on the part of the Government that foreign fishermen had for several years exploited the waters adjacent to the territorial sea. It is difficult to understand why no provision was made in the Act for a "phasing-out" period, when in justifying the creation of the fishing zone, the New Zealand Government relied heavily on the practice of Canada, the United Kingdom and the countries of Europe.³² All of these states had either initially provided for the protection of foreign fishing interests in their legislation, or subsequently reached agreement with the other states involved to the same effect.

The result of this "over-sight" by the New Zealand Government was a dispute with Japan over the validity of the zone. Japan protested the loss of her "traditional" fisheries off the coast of New Zealand and proposed submitting the issue to the International Court of Justice.³³ This suggestion was declined by New Zealand on the grounds, among others, of the delay involved, the probability of the Court requiring a suspension of the zone until judgment was given, and the cost of the proceedings.³⁴ Finally the dispute was settled through negotiations and the compromise reached was given effect in the *Agreement on Fisheries Between New Zealand and Japan*.

2. *Agreement on Fisheries Between New Zealand and Japan*³⁵

The *Agreement on Fisheries between New Zealand and Japan*

32. See statement by the Right Hon. Keith Holyoak, Prime Minister of New Zealand on August 11, 1965.

33. Statement by Right Hon. Keith Holyoak, Prime Minister of New Zealand on Japanese fishing, March 28, 1966.

34. Note, 3 N.Z.U.L. REV. 98, 99 (1968).

35. *Agreement on Fisheries between New Zealand and Japan* (with Re-

was signed by the representatives of the Governments of New Zealand and Japan in Wellington on July 12, 1967. The Agreement, which became effective on the thirtieth day after the date of exchange of instruments of ratification, which occurred on June 26, 1968, is surprisingly short. It contains only five Articles, but annexed to the Agreement is an Exchange of Notes relating to Articles II and III which are not in themselves complete.

Article I defines the sea area contiguous to the coast which shall be governed by the Agreement: "For the purpose of this Agreement, 'the Area' means the waters which are contiguous to the territorial sea of New Zealand and extend to a limit of twelve nautical miles from the baseline from which the territorial sea of New Zealand is measured." "The Area" to which the Agreement relates is co-extensive with the fishing zone delimited by section 8 (1) of the *Territorial Sea and Fishing Zone Act 1965*.³⁶

Article II, after imposing a blanket prohibition on all Japanese fishing activities within "the Area," provides for a "phasing-out" period extending until December 31, 1970, within the outer six-mile belt north of 41° 30' South Latitude and East of 170° 30' East Longitude. The Agreement does not confer on Japanese fishermen an unrestricted right of fishing within that sector of "the Area" to which the "phasing-out" provision applies but lays down certain conditions which must be adhered to by the Japanese vessels exploiting that sector. The conditions are that the vessels engaged in fishing within the defined sector: (a) Are duly licensed by the Government of Japan; (b) engage only in bottom fish long-line fishing; and (c) do not exceed either the number or tonnage of mother ships allowed within the sector. The agreement does not however specify either the number or the tonnage of the mother ships which may fish off the coast but leaves these matters open to be decided by the two Governments. By an Exchange of Notes on July 12, 1967,³⁷ it was agreed between the Governments of New Zealand and Japan that no more than seventeen mother ships of a specified tonnage would be licensed to engage in fishing within the sector. It would appear that this agreement may be varied from time to time by the parties to the Agreement, no contrary intention being discernible in the Article.

lated Documents), Wellington, July 12, 1967; No. A-10. This section of the Note is largely derived from a legislation note in 3 N.Z.U.L. REV. 120 (1968).

36. See text accompanying note 25 *supra*.

37. See note 35 *supra*.

By Article III, the two Governments may make arrangements in accordance with which their respective jurisdictions will be exercised. Such an arrangement was reached in the Exchange of Notes. It was agreed that “[w]ithout prejudice to New Zealand jurisdiction, it will be primarily the responsibility of the Government of Japan to deal with any infringement of the provisions of the Agreement by a Japanese vessel.” When the Japanese authorities have been informed of an infringement of the Agreement by the New Zealand authorities, and, in appropriate cases, evidence has been furnished, the Japanese authorities will take whatever action is necessary against such vessels, keeping the New Zealand authorities informed of all measures taken. This arrangement, however, may be terminated by either Government on three months’ notice. The right of the New Zealand authorities to visit Japanese vessels within “the Area” and to inspect their licences is contained in Article IV.

Provision is also made in Article V for the two Governments to hold consultations regarding the implementation of the Agreement.

The Agreement is, of course, not binding on third parties. Consequently, any third state may refuse to accept the limits set out therein. Should a third state obtain, through negotiations, greater fishing rights within “the Area” than those conferred on the Japanese by the Agreement, there is no provision for the immediate extension of the Japanese rights. However, such a situation is unlikely to arise in view of the fact that only the Japanese have ventured to exploit the fishery resources within the twelve-mile fishing zone, and the only other state, Russia, which has intentions of exploiting the fisheries of the South Pacific around the New Zealand coast, has declared that it will honour the fishing zone.

3. *Fisheries (Agreement with Japan) Act 1967*³⁸

It will be recalled that the *Agreement on Fisheries between New Zealand and Japan*, although signed on July 12, 1967, was not ratified until June 26, 1968. In an Exchange of Notes on July 12, 1967,³⁹ the two Governments undertook to give “provisional effect to the Agreement and its related documents in so far as may be practicable within the limits of their constitutional

38. STAT. N.Z. 1967, No. 16.

39. See note 35 *supra*.

authority.” The *Fisheries (Agreement with Japan) Act 1967* constituted New Zealand’s effort to give effect to that undertaking.

The whole scope of the Agreement is not covered by the provisions of the Act which makes only the minimum changes in the law necessary to give effect to the Agreement. The Act in effect provides for a “phasing-out” period in accordance with the terms of the Agreement. Two sections are worthy of some mention. The first, section 3(2), provides that where a small boat is used by any vessel for the purpose of fishing, then the mother vessel shall be deemed to be fishing at the time and place where the small boat is so used. The other section, section 4, is concerned with the burden of proof in proceedings instituted for an offence against any of the provisions of Part I of the *Fisheries Amendment Act 1963*. The burden of establishing that a vessel was duly licensed by the Government of Japan to fish in the “specified area” (which is co-extensive with “the Area” delimited in the Agreement) is cast on the defendant. However, the section also provides that a certificate of the Minister of External Affairs on this matter shall be treated as conclusive.

The Act is to expire on January 13, 1970,⁴⁰ the same day as the Agreement is due to expire.

V. THE CONTINENTAL SHELF

To complete the picture of New Zealand’s coastal jurisdiction regard must be had to the *Continental Shelf Act 1964* and the *Submarine Cables and Pipelines Protection Act 1966*. The *Continental Shelf Act 1964*, although enacted prior to New Zealand’s ratification on January 18, 1965, of the *Convention on the Continental Shelf*, is generally regarded as a legislative assertion by New Zealand of the various rights recognized by the Convention. The Convention itself represents the culmination of a trend going back to at least 1942, and it contains the principles which are generally accepted by the international community and in international law.

1. *Definition of the Continental Shelf*

The definition of the continental shelf in section 2 of the Act closely follows that found in the Convention.⁴¹ Continental shelf means

40. STAT. N.Z. 1967, No. 16 § 5.

41. Art. 1. For the text of the Convention on the Continental Shelf see

those submarine areas adjacent to the coast of New Zealand, but beyond the territorial limits of New Zealand, the surface of which lies at a depth no greater than two hundred metres below the surface of the sea, or, where the natural resources thereof are capable of exploitation, at any greater depth.

The only difference between this definition and that found in the Convention is not substantial. The Act uses the words "beyond the territorial limits of New Zealand," whereas the Convention uses the phrase "outside the area of the territorial sea." This is not a substantive change and should not give rise to any difficulties.

The definition of the continental shelf contained in the Act and the Convention effects a compromise between the need to draw a line and the need to make allowance for developing techniques of exploration. It is a flexible definition for it may well be assumed that technological advances will soon allow exploitation at a greater depth than two hundred metres which appears to be the present practical limit. Accordingly, the definition allows for the progressive enlargement of the area of New Zealand's continental shelf to the ultimate limit, namely, the boundary of a third state's continental shelf. Given New Zealand's location, however, it is not likely that she will reach this ultimate limit in the foreseeable future.

2. *Jurisdiction over the Continental Shelf*

The *Convention on the Continental Shelf* expressly refrains from granting the coastal state "sovereignty" over the shelf or its natural resources. What the Convention in fact does is to recognize that the coastal state may exercise certain "sovereign rights" over the continental shelf for the purposes of exploring it and exploiting its natural resources.⁴² These "sovereign rights" are declared by the Convention to be exclusive in the sense that, whether or not the coastal state exercises these rights, any third state wishing to undertake the exploration or exploitation of the continental shelf has first to obtain the coastal state's consent.⁴³ Thus, no longer does a littoral state's claim to its continental shelf depend on "occupation" or an express proclamation. Section 3 of the *Continental Shelf Act 1964* vests in the Crown the "sovereign

II U.N. Conference on the Law of the Sea, Plenary Sessions, 142 et seq.; U.N. Doc. A/Conf. 13/L.55.

42. *Id.* at Art. 2.

43. *Id.* at Art. 2(2).

rights” which are reserved by the Convention to the coastal state; “All rights that are exercisable by New Zealand with respect to the continental shelf and its natural resources for the purpose of exploring the shelf and exploiting those resources are hereby vested in the Crown.”

The natural resources which are referred to in section 3 are defined in section 2 as being the mineral and other natural non-living resources of the seabed and subsoil and living organisms belonging to sedentary species, that is, organisms which at the harvestable stage either are immobile on, or under, the seabed, or are unable to move except in constant physical contact with the seabed or subsoil.

In sections 4 and 5 of the Act there is created a system of licensing for mining operations on the continental shelf for petroleum and other mineral resources. With regard to petroleum mining, section 4 provides for the application of the *Petroleum Act 1937*⁴⁴ to the continental shelf as if in fact it were specifically mentioned in the *Petroleum Act*. The Governor General in Council is empowered to modify or exclude any of the provisions of the *Petroleum Act 1937* so far as is necessary to give full effect to section 4. A more detailed system of regulation is provided by section 5 for the mining of minerals other than petroleum on the continental shelf. This was made necessary as the *Continental Shelf Act 1964* only provides for the application of the safety measures in the *Mining Act 1926*⁴⁵ and the *Coal Mines Act 1925*⁴⁶ to mining operations on the shelf. By section 5, no person can prospect for, or mine, minerals on the continental shelf unless he has first obtained a licence from the Minister of Mines. A breach of this provision is punishable by summary conviction. The grant of a licence is left to the Minister’s discretion, and where minerals are recovered by the licensee, he must pay to the Crown the royalties specified in his licence.

The extent of New Zealand’s jurisdiction over the living organisms of the continental shelf is delimited in section 6. This section applies the provisions of Part I of the *Fisheries Act 1908* and of Part I of the *Fisheries Amendment Act 1963* (insofar as they are concerned with oysters and oyster beds) to the continental shelf and to persons taking oysters from the continental

44. 11 N.Z. STAT. REPR. 1908-1957, No. 27.

45. 10 N.Z. STAT. REPR. 1908-1957, No. 15.

46. 2 N.Z. STAT. REPR. 1908-1957, No. 39.

shelf and to ships which may be used for that purpose.

3. *Installations on the Continental Shelf*

It is reasonable to assume that in the exploration and exploitation of the natural resources of the continental shelf, it will be necessary for coastal states to construct and use installations of various kinds on the continental shelf. This fact was recognized by the *Convention on the Continental Shelf*.⁴⁷

The New Zealand *Continental Shelf Act 1964* does not itself regulate, control, or prohibit the construction, maintenance or use of any installations or devices necessary for the exploration, and exploitation of the natural resources of the continental shelf. Instead, the Act confers a comprehensive regulation making power on the Governor General in Council.⁴⁸ The Governor General is authorized to make regulations by Order in Council for all or any of the following purposes: To regulate the construction, erection or use of installations or devices; to prohibit the construction, placing or use of any installation or device which would interfere with recognized and essential sea lanes; to establish safety zones of a maximum breadth of five hundred metres; to prescribe measures in the safety zone for the protection of the installation or device; to regulate or prohibit entry by ships into the safety zone; to prescribe measures to protect the natural resources within a safety zone; to prescribe the notice to be given of the construction, or placing of installations or devices; to prescribe permanent means of warning ships and aircraft of the presence of installations or devices; to provide for the removal of abandoned or disused installations or devices; and to prohibit or restrict such exploration or exploitation of the continental shelf as would interfere with navigation, fishing, or conservation of the living resources of the sea, or could interfere with national defence or with oceanographic or other scientific research or with submarine pipelines or cables. Further, the Governor General is empowered to provide for such measures as will give full effect to the Act and to prescribe penalties for breaches of any of the regulations promulgated under section 8. It is interesting to note that for the purpose of section 8 the continental shelf includes the seabed and subsoil of the territorial sea.

One matter that the Act does expressly provide for, however, is the application of the criminal and civil law of New Zealand to

47. Art. 5 of the *Convention on the Continental Shelf*, see note 41 *supra*.

48. STAT. N.Z. 1964, No. 28 § 8.

persons on, or near, such installations or devices. Section 7 stipulates that for the purposes of every enactment and

of every rule of law for the time being in force in New Zealand,—

(a) Every act or omission which takes place on or under or above or about any installation or device (whether permanent or temporary) constructed, erected, placed, or used in, on, or above the continental shelf in connection with the exploration of the continental shelf or the exploitation of its natural resources shall be deemed to take place in New Zealand; and

(b) Every such installation or device shall be deemed to be situated in New Zealand, and for the purposes of jurisdiction shall be deemed to be situated in that part of New Zealand above highwater mark at ordinary spring tides which is nearest to that installation or device; and

(c) Every Court in New Zealand which would have jurisdiction (whether civil or criminal) in respect of that act or omission if it had taken place in New Zealand shall have jurisdiction accordingly.

The section also contains specific provisions relating to the power of arrest, entry, search or seizure; the operation of the *Customs Act 1913*;⁴⁹ the modification of New Zealand enactments, whether passed before or after the *Continental Shelf Act 1964*, with respect to the continental shelf; the effect of the section on the liability of any person for acts or omissions done beyond New Zealand or the jurisdiction of a New Zealand court; and the requirement of a certificate from the Attorney General before proceedings are instituted in a New Zealand court which has jurisdiction only by virtue of section 7 of the Act. For the purposes of section 7 a “device” includes “any ship or floating platform or aircraft that is used in connection with any installation or device.”

4. *Submarine Cables and Pipelines*

The *Continental Shelf Act 1964* and the *Territorial Sea and Fishing Zone Act 1965* were followed by the *Submarine Cables and Pipelines Protection Act 1966*.⁵⁰ This Act represented another step by the New Zealand Government to incorporate into the law of New Zealand the various provisions embodied in the 1958 Geneva Conventions.

49. 3 N.Z. STAT. REPR. 1908-1957, No. 63.

50. STAT. N.Z. 1966, No. 5.

Although New Zealand has not yet ratified the *Convention on the High Seas* (which it signed on October 29, 1958), it has accepted the obligations imposed by the Convention on contracting states with regard to the protection of submarine cables and pipelines.⁵¹ However, it should be noted that, whereas the Convention only purports to deal with cables and pipelines placed on the bed of the high seas,⁵² the Act applies to cables and pipelines located not only under the high seas, but also on the bed of New Zealand's territorial sea and internal waters.⁵³ Any part of a cable and pipeline located on the landward side of the low-water mark or which is not ordinarily beneath the surface of the sea is excluded from the operation of the Act.⁵⁴

The object of the Act is twofold: To protect submarine cables and pipelines by excluding vessels from certain areas; and to compensate and punish for any damage to these devices. To attain these aims, the Act imposes both criminal and civil liability on those guilty of damaging submarine cables and pipelines.

By section 3, criminal liability is expressly limited to any person within the territorial limits of New Zealand; any person on board a New Zealand ship on the high seas; and New Zealand citizens or residents on board any ship on the high seas.⁵⁵ Section 4 provides that "any person who, wilfully, breaks or injures or causes or permits a ship to break or injure a submarine cable or . . . pipeline" is guilty of a summary offence. For the purposes of this section the word "wilfully" is defined to include the situation where a person causes an event which he knew or ought to have known would probably cause damage to a cable or pipeline, being reckless whether such damage occurs or not.⁵⁶ It is a de-

51. Art. 26, 27, 28 & 29. For the text of the Convention on the High Seas see II *U.N. Conference on the Law of the Sea, Plenary Meetings*, 135 *et seq.*; U.N. Doc. A/Conf. 13/L.53.

52. *Id.* at Art. 27.

53. STAT. N.Z. 1966, No. 5 § 2.

54. *Id.* at § 3(2).

55. The limitations on New Zealand's criminal jurisdiction found in the Submarine Cables and Pipelines Protection Act 1966 are much more severe than those contained in the Crimes Act 1961, STAT. N.Z. 1961, No. 43. Section 8 of the latter statute extends New Zealand's criminal jurisdiction to offences committed by any person on board any Commonwealth ship; any ship if the offender arrives in New Zealand on that ship in the course of, or at the end of a journey during which that offence was committed; and to offences committed by British subjects (not necessarily New Zealand citizens) on board any ship on the high seas, or within the territorial waters of any Commonwealth country.

56. STAT. N.Z. 1966, No. 5 § 4(3).

fence to a prosecution under section 4 if it can be shown that the breakage or injury was caused for the sole purpose of saving life or a ship after all necessary precautions had been taken.⁵⁷

The creation of further offences is provided for under section 7. The Governor General in Council is empowered to establish protected areas within the internal waters and territorial sea, and restricted areas within the fishing zone, where it is thought necessary or desirable for the protection of submarine cables and pipelines. Once such an area is created, and subject to the terms of the Order in Council, it is a summary offence for a person to conduct or allow to be conducted any fishing operations in the area, or to anchor or allow any ship to be anchored in the area. Under this section liability is incurred whether or not the fishing operations or anchoring caused injury to cables or pipelines in the protected or restricted area. A defence similar to that in section 4 is available in that section 7 will not apply where the anchoring was made necessary by *force majeure* or for the purpose of saving life or a ship in distress. It is obvious from the terminology of the section and the scope of the defence that it cannot be invoked by a person prosecuted for pursuing fishing operations in a protected or restricted area.

As the aim of section 7 plainly is to protect those areas where cables and pipelines lie and to warn shipping out of those areas, the section raises two points of interest. First, insofar as it authorizes the establishment of protected areas in the territorial sea and internal waters the section appears to derogate from the principle of innocent passage. However, as it is generally accepted that a coastal state may promulgate rules and regulations affecting its territorial sea and internal waters, provided they do not seriously interfere with the right of innocent passage, section 7 cannot be considered to be contrary to international law. The second point, and possibly a matter of greater concern, is the making of restrictions in the fishing zone. At first sight this provision appears open to the serious objection that it conflicts with the principle of the freedom of the seas. However, within those areas of the fishing zone which comprise part of the high seas, the provisions of section 7 will only apply to those persons and ships enumerated in section 3 which excludes foreign ships from the operation of the criminal liability sections of the Act. And, of course, foreign

57. *Id.* at § 4(2).

fishing vessels, subject to the terms of the New Zealand-Japan Fisheries Agreement, are prohibited from engaging in fishing operations within the zone.

To ensure adherence by policing authorities to the jurisdictional limitations imposed by section 3, section 9 stipulates that no proceedings for the trial or punishment of any person charged with an offence under the Act shall be commenced without the consent of the Attorney General.

Civil liability for damage to submarine cables and pipelines, by section 9, is to be determined "in accordance with the general law for the time being in force in respect of liability in tort." This means that, unless the damage to the cable or pipeline is caused intentionally, liability will only attach on proof of negligence. As the general tort law is to apply, foreign ships which cause injury to New Zealand cables or pipelines while on the high seas may become liable for such damage.

Two other sections, sections 5 and 6, impose a measure of liability on the owners of cables and pipelines. Section 5 imposes a liability akin to absolute liability on the owners of cables and pipelines who in the course of laying or repairing them, cause a break in, or injury to, another's cable or line. In addition to any other liability they might incur, they have to bear the cost of repairing the break or injury, notwithstanding neither were they negligent nor, had they committed an offence. No jurisdictional limitations are imposed on the operation of this section for section 3 only applies to criminal offences under the Act. Accordingly, it appears that section 5 purports to operate extraterritorially in that it is not limited to persons normally subject to New Zealand's jurisdiction. Foreign owners of cables or pipelines who damage a cable or pipeline belonging to another in the course of laying or repairing their own are thus under an obligation to bear the cost of repair. If this is the proper interpretation of the effect of the section, the New Zealand Government has assumed a more extensive jurisdiction than that conferred by the *Convention on the High Seas*, which expressly provides that

Every state shall take the necessary legislative measures to provide that, if persons *subject to its jurisdiction* who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the re-

pairs.⁵⁸

The Convention envisages a coastal state enacting legislation imposing liability on its citizens and residents who cause such damage, not on all persons, as it seems the New Zealand Act purports to do. This problem could have been averted if jurisdictional limitations similar to those contained in section 3 had been extended to section 5.

A further obligation is imposed on owners of a cable or pipeline by section 6. They have to indemnify the owners of ships who sacrifice an anchor or fishing gear in order to avoid injuring the cable or pipeline. However, before such indemnity is paid, the shipowner has the difficult task of proving he had taken "all reasonable precautionary measures" before he sacrificed his equipment. This section is in conformity with the Convention.⁵⁹

Finally, section 13 provides that the Governor General in Council has a general regulatory power on all such "matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for the due administration thereof."

VI. CONCLUSIONS

In the *Territorial Sea and Fishing Zone Act 1965* and the *Continental Shelf Act 1964* the New Zealand Government has created four definite regimes in the marine areas adjacent to the coast of New Zealand. These regimes are those of (a) internal waters, (b) territorial sea, (c) fishing zone, and (d) continental shelf. On the whole, however, these two statutes together with the *Fisheries (Agreement with Japan) Act 1967* and the *Submarine Cables and Pipelines Protection Act 1966* add little that is new to international law. The importance of these enactments lies in the fact that they do much to codify and incorporate into the national law of New Zealand existing rules of international law relating to matters which are not entirely the subject of national control or regulation.

58. Art. 28 of the Convention on the High Seas, *see* note 51 *supra* (emphasis added).

59. *Id.* at Art. 29.