LX SH SHIELDS, S.J. " Between the devil and the deep blue sea."

"BETWEEN THE DEVIL AND THE DEEP BLUE SEA."

The Territorial Sea and Exclusive Economic Zone Act, 1977.

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INTRODUCTION

The third United Nations Law of the Sea Conference is now in its seventh year of deliberations and as yet no convention has been formulated (1). However, several negotiating texts have been issued at various stages of the conference proceedings and it is recognised that the latest text ("the Negotiating Text") "represents, for the most part, a readily accepted compromise that is unlikely to change radically in future negotiations." (2)

Indeed, the articles of the Negotiating Text (3) relating to the Exclusive Economic Zone ("EEZ") were regarded as well settled in 1977 when the New Zealand Territorial Sea and Economic Zone Bill was introduced to the House of Representatives on the 26th May.

In presenting the Bill, the Minister of Foreign Affairs stated:

> "Clearly New Zealand would have much preferred to establish a 200 mile economic zone in accordance with a comprehensive treaty on the Law of the Sea. But this has not come to pass and foreign fishing fleets continue to put pressure on fish resources of interest to New Zealand fishermen. Extension of New Zealand jurisdiction to 200 miles has, therefore, become a matter of urgency to ensure proper management and conservation of fish stocks." (4)

This raises the question of the need for, or background to, the New Zealand legislation and its relationship to international law. This last issue arises since, although the Territorial Sea and Exclusive Economic Zone Act ("The Act") is essentially a unilateral extension of jurisdiction by domestic legislation,

"The definition of sea areas always has an international aspect, it cannot be dependent upon the will of the coastal state as expressed in its municipal law. The validity of the definition with regard to other states depends on international law." (5)

It is proposed, therefore, to examine the provisions of the New Zealand Act not only as a piece of domestic legislation, but also in the light of its relationship to current international law as evidenced by state practice in its adoption and recognition of customary rules of international law.

This paper will examine:

(1) The EEZ concept in international law.

(2) The New Zealand Act: (a) The background

(b) Its relationship to international law, having regard to: (i) International Conventions (including the provisions of the Negotiating Text).

(ii) State Practice as evidenced by domestic legislation.

(iii) State Practice as evidenced by bilateral agreements concluded by New Zealand in regard to the EEZ.

(iv) The relationship between the Act, (as Municipal Law) and International Law.

(1) The Evolu tion of the Exclusive Economic Zone Concept in International Law.

As international competition for economically vital resources places an ever greater pressure on the earth's land-occuring resources, alternative sources of supply have been sought in areas that promise some, (even if only temporary) relief from the problems of scarcity, price and political instability characterising many commodity sources at present.

Although mankind has been aware of the ocean as a source of food and minerals for centuries, new methods of exploration and exploitation have increased the viability of the oceans, (which constitute some 70 percent of the surface area of the Earth) in a manner unheard of as little as thirty five years ago, at the close of the Second World War and certainly not envisaged by the Geneva Convention on the Law of the Sea 1958.

Since 1945 the international community has had to cope with a rapidly expanding world population with a consequent pressure on food and economic resources. Post war technical developments have led to increased industrial demands for raw materials and the very foundation of the world's political structure has seen significant changes with the United Nations often a forum for debate aimed at introducing legal and political changes in the world order.

These pressures have been reflected in the actions of states in relation to marine resources. Governments have, in recognising the potential of marine areas as a means of avoiding some of the complications relating to land-based resources, found it expedient to assert jurisdiction over the sea, in order to secure maximum economic benefit for their Nations.

Often these claims to jurisdiction are radically different to the traditional regime of the oceans as typified by prewar state practice and the first Codification Conference on the Law of the Sea at The Hague in 1930; not only are the areas of jurisdiction larger than envisioned at that time but they also employ concepts (such as, for example, the Exclusive Economic Zone) which cannot be classified according to the traditional distinction between Territorial Sea and High Sea.

Since the Geneva Conference on the Law of the Sea, 1958, some 67 states have achieved independence. These generally underdeveloped states of the third and fourth world were not eligible to participate in the development and codification of the Geneva Conventions with the result that many of the concepts agreed upon there and theoretically still in force today are said to be unsuited to the needs and demands of a changing political order.

Although undergoing modifications at the Geneva Conference of 1958, in order to accommodate technological advances; the traditional principle of the freedom of the seas, dating as it did from the seventeenth century had given good service while the main use of the oceans was as a highway for commerce and security operations.

This "Mare Librum" doctrine, enunciated by the Dutch jurist Hugo de Grotius in 1625 (7), reflected the interests and desires of states at that time and, although originally challenged by the jurists of England (8) a state which did not have maritime trade interests comparable with those of the Netherlands at that time, gained increased support over the centuries. Small zones of territorial jurisdiction were, however, established by coastal nations as a necessary exception to total freedom of the high seas. These territorial sea claims usually approximated to the distance at which

adequate enforcement of criminal and security regulations could be maintained — the "cannon shot" distance of three miles was often employed by European nations, although practice varied according to geographic and security considerations. (9)

Fishing, like commerce and security, has been a traditional usage of the sea for centuries, yet it is only in the present century that it has undergone any significant transformation — with modern fishing vessels often able to stay at sea for six months at a time, their sophisticated radar and sonar equipment (often supplemented by satellite reports) enabling quick location of fish shoals which can be harvested by equipment of far greater capacity and efficiency than that of traditional methods. The world's fishing catch surpassed 70 million tonnes in 1974, an increase of over 100,000 tonnes from the previous year, yet controversy still exists on the question of whether or not the living resources of the ocean are exhaustible; It has been said that they are "difficult or impossible to deplete in a degree technologically irreversible"(10). Yet the current trend of scientific thought on the matter is more favourable to the view put forward by Christy and Scott that, since fishing resources vary so much in type, size, location, density of population and ease of capture "no single species is inexhaustible, nor is it free from the possibility of depletion." (11)

With the exception of subsistence level operations and sporting requirements which have, at any rate, little effect on the overall catch quota: fishing is an industry and subject therefore to economic forces which dictate the intensity of fishing effort. Consumer demand and marketing objectives concentrate fishing operations on single species or groups of species and it is here that competition induces conflict and international tension. Depletion of stocks, real or fancied, results in pressures to regulate fishing (12) — newly emergent states for example often had long coastlines and potentially

useful offshore resources, however they lacked the ability to develop these resources, or to compete with distant water interests in the area. They were faced with the possible threat of substantial depletion of their often vital resources and were unable to remedy this by fishing in other grounds or controlling the offshore areas since both methods are extremely costly and the Freedom of the High Seas emphasis in international law allowed for little coastal state jurisdiction or control. Accordingly, there began a move for a restructured formula for control over fishing resources which of necessity involved progressive restriction and modification of free competition on the oceans. The first such attempts consisted of agreements on conservation between principal seafaring nations,(13) these voluntary limitations on the range and capacities of distant water fleets were soon joined by limitations imposed by coastal states, after the First World War. The once commonly accepted Territorial Sea had consisted of a three mile zone from a low water mark baseline but practice became widely divergent, with some states claiming wider areas of control for particular purposes only, such as customs regulation, while others extended full territorial jurisdiction. An attempt to secure agreement on a common limit was made at the Hague Conference of 1930, but this was unsuccessful. After the Second World War, the claims escalated, with coastal states claiming further control over their offshore fishing areas. By the time of the first United Nations Conference on the Law of the Sea, 1958, thirty five states had claimed limits of six miles or less, twelve claimed nine to twelve and nine had already claimed over tweleve (14). The USA Presidential Proclamation on Coastal Fisheries (number 2668) of 1945 had already asserted the right of the United States to unilaterally declare conservation zones in areas of the High Seas contiguous to its coasts where US nationals alone fished. If areas were subject to exploitation by other interests, the zones could be established by agreement between the parties. The Santiago Declaration of 1952 (15) signed by Chile, Ecuador and Peru had added further to

the impetus to extend offshore control by introducing the concept of two hundred mile jurisdiction for some or all purposes.

The Convention on Fishing and Conservation of the Living Resources of the High Seas 1958 (16) recognised in Art. 6(1) the growing desire for coastal states to move away from the freedom of the seas principle and exert control over their offshore fisheries stocks, it was stated that:

> "A coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the High Seas adjacent to its territorial sea."

Art 7 of the same Convention provided for unilateral measures of conservation to be adopted by the coastal states in relation to the marine resources of the area in certain urgent circumstances such as where current information on the fishing has revealed that there is an urgent need for conservation measures.

The conservation measures adopted must be based on "appropriate scientific findings" (17) and must not discriminate "in form or in fact against foreign fishermen"(18).

However, despite the timeliness of this recognition of coastal state competence, the Convention never gained widespread acceptance and it took eight years before the requisite number of ratifications was achieved. In 1966 when the convention came into force, only eleven of the 37 original signatories had ratified it and it has come to be viewed as a compromise which suited neither side of the argument; on the one hand the conditions for the implementation of unilateral action were expensive and difficult:

> "Even such an advanced fishing nation as the United States has

not yet begun a thorough scientific evaluation of its fisheries in accordance with the terms of the Convention." (19)

While, alternatively, the failure of the Conference to reach agreement on the maximum width of the Territorial Sea (Art 24 of the Convention on the Territorial Sea and Contiguous Zone allowed a contiguous zone not extending more than 12 miles but was silent on the width of the Territorial Sea) resulted in some cases in a curtailment of some of the High Seas freedoms enjoyed by the Maritime Nations under the previous regime of three mile territorial jurisdiction.

However unsatisfactory the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas may have been, it did give, however, some recognition of the rights of the coastal state in relation to its offshore resources. This trend was given further recognition in the Convention on the Territorial Sea and Contiguous Zone 1958 (20) where it was provided that a coastal state could impose zones for the enforcement of customs, fiscal, immigration or sanitary regulations, although the provision of such a zone for the control of Fisheries was not included. The concept of an Exclusive Fishery Zone was proposed at the second United Nations conference on the Law of the Sea (22) in 1960 and although not gaining the necessary two-thirds majority to enable inclusion in a convention, nevertheless received the acceptance of a majority of states. Since then new technology and increasing needs for protein have placed pressures on fishery resources and resulted in the modification of the rather absolute principles of the 1958 convention on the High Seas by customary international law; the International Court of Justice in considering the merits of the United Kingdom v Iceland dispute over Fisheries jurisdiction in 1974 stated that:

"Two concepts have crystallised as customary law in recent years,

> arising out of the general consensus revealed at the 1960 conference. The first is the concept of the fishing zone ... the second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal state in a situation of special dependence on its coastal fisheries." (23)

The court stated that the concept of an exclusive fishing zone "up to a 12 mile limit from the baslines appears now to be generally accepted (24) and is an area in which a state may claim exclusive fishery jurisdiction independently of its Territorial Sea, yet the validity of a claim to such jurisdiction over a greater distance (25) was not so clear and the court concluded that there was no rule of customary international law which prohibited a claim of an exclusive fishery zone in excess of 12 miles, but nor was there a rule of customary international law which would give such a claim validity erga omnes, such validity would depend on surrounding circumstances in particular the degree to which such a claim has been accepted or acquiesced in. However, there is in the court's judgement, an implication that a claim to an exclusive fishery zone in excess of 12 miles is not generally recognised (26); the court found that Iceland's unilateral action constituted a violation of Act 2 of the High Seas Convention, which must mean that the waters outside the 12 mile limit were High Seas and not subject to exclusive fisheries jurisdiction. This conclusion is also borne out by the finding that Iceland had "preferential rights" in relation to the area under dispute since

> "The characterisation of the coastal state rights as preferential implies a certainly priority but cannot imply the extinction of the concurrent rights of other states." (27)

Therefore the coastal state cannot have exclusive jurisdictional rights as it would in an Exclusive Fishery Zone.

The Preferential rights doctrine echoes the 1958 Convention of the High Seas, in that it provides that a state may only claim such rights when:

(i) it is in a position of special social and economic dependence of fisheries;

(ii) when the fishery is so fully exploited that it is necessary to introduce a system of conservation to preserve the fish stocks in the interest of their natural and economic exploitation.

When such conditions are in existence, the coastal state is entitled to enter into agreements to effect a rational exploitation of the fishery which will fix the extent of its preferential rights in relation to those of other states with an interest in the fishery. It is not, however, entitled to extend exclusive jurisdiction.

The judgement of the court has been criticised (28), but if it represents customary international law, it would seem that the Economic Zone extended by the New Zealand Act accords neither with the concept of an Exclusive Fishery Zone nor with the exercise of a state's preferential rights.

The Negotiating Text does, however, provide for such a zone but does not have the force of an International Convention; its validity as a source of law in the absence of a Convention must therefore depend upon the degree of acquiescence and acceptance it has achieved among states; 77 states have claimed some sort of 200 mile jurisdiction yet these claims are divided between claims to a Fisheries Zone (23), an EEZ (38) and a Territorial Sea (16); it could not be said that the bare majority claiming an EEZ evidences international acceptance of the concept; it may be possible that a claim to 200 mile Fishery jurisdiction could be brought within the open ended conclusion on that point in the Icelandic Fisheries

Jurisdiction Case (29). It is therefore necessary to examine the provisions of any act purporting to extend such 200 mile jurisdiction to determine whether it claims a full Exclusive Economic Zone in accordance with the Negotiating Text, or whether it exercises jurisdiction over fisheries only while perhaps reserving any other rights until the Third Law of the Sea Conference formulates a convention which embodies the EEZ concept.

2 (i) The Background to the New Zealand Economic Zone Legislation

New Zealand is somewhat geographically isolated, a fact often bemoaned by exporters and travellers, yet this isolation becomes something of an advantage in relation to seabed and economic zone delimitation. In contrast to a state like Japan which has a large proportion of its neighbours less than 400 miles distant (i.e. the width of two 200 mile zones), New Zealand is separated from Australia, its nearest neighbour, by some 1200 miles. However, there are two small areas of ocean where the New Zealand and Australian zones do overlap — in the region of the Norfolk and Macquarie Islands, yet (unlike the Japanese situation) these areas are unlikely to be the focus of any tension between the two states, since the ownership of the islands is well settled and any dispute that does arise is likely to be amicably settled between the two similar politically inclined states. However Japan is faced with ownership disputes over various islands involving the USSR, the Peoples Republic of China and the Republic of Korea. Any attempt to clarify the ownership of the islands — which are vital basepoints for determining the extent of each nation's economic zone — has been and will be subject to severely conflicting political objectives. Once again Japan, on the North West Pacific rim controls at least five strategically important straits which facilitate military access to and from the Sea of Japan and the South China Sea. New Zealand, has at present, no waterways of such importance nor does it have Japan's historical and economic dependence on the fishing industry as a source of protein for a large population occupying islands where only 15 percent of the land is suitable for cultivation.

New Zealand has a long coastline, with ready access from the interior and an extensive continental margin on which is situated one of the ten largest oil and gas fields in the world. This long coastline enables New Zealand to claim jurisdiction over the seventh largest economic zone in the world

yet also makes New Zealand's coastal areas extremely vulnerable to damage from sea-borne pollution, and although at the present time oil carriage and the transport of dangerous goods in the seas near the New Zealand coast is not heavy, there is a possibility that the assertion of coastal state jurisdiction over straits currently in heavy use for the passage of such goods (31) may result in their closure and the consequent increase in such activity as well as military passage in the Tasman Sea.

Foreign vessels have undertaken fisheries operations in New Zealand waters since the late 1950s and such fishing effort has increased over the years with Japan (the first state to undertake operations in New Zealand waters, in 1957) being joined by Soviet, Korean and Taiwanese vessels. Complaints were often made of foreign vessels fishing in direct competition with their New Zealand counterparts, particularly where the waters beyond the 12 mile limits were shallow enough to allow harvesting by the smaller New Zealand operated trawlers; (generally in the Cook Strait and off the east coast of the South Island). Local trawlermen had complained of diminishing catches and damage to their gear by competing foreign fishermen. Foreign vessels were not subject to New Zealand regulations, and could thus use gear prohibited in New Zealand vessels such as smaller net mesh sizes and longer hook lines. This of course affected not only the economic aspect of the New Zealand fishing industry, but also threatened the survival of various species.

The need to conserve certain species is becoming more urgent as the results of careless management become apparent on a world-wide scale. The threat posed to marine mammals such as whales and porpoises has become a source of concern to interest groups throughout the world. Certain species of mammal such as the porpoise, although not a specific target of fishermen, may still constitute an "incidental catch" of the harvesting operation. These mammals

may accompany schools of fish such as tuna (indeed tuna fishermen often use porpoises as a means of locating schools) and can be caught as part of the fishing operation — it is difficult to avoid this and often more difficult to operate the net in such a way that the mammals can be released before suffocation.

However, the extended control provided in the Act over New Zealand Fisheries waters (32) allows the application of the Marine Mammals Protection Act 1978 to the whole of the 200 mile zone and consequently the taking of any marine mammal whether alive or dead, from its natural habitat is prohibited unless a permit is first obtained (33).

From both the economic and conservation point of view, commercial species also, are in need of responsible management. Some of the more marketable fish such as Trevally and Schnapper may live up to 40 years - consequently the species is slower to reproduce itself and the impacts of over fishing are quickly felt whereas ironically the less popular Barracouta and Jack Mackeral have a shorter life cycle and are thus able to withstand a heavier rate of fishing.

Foreign vessels often obtained information as to stock densities, locations and life cycles in the course of their fishing operations, this information would have been extremely useful in enabling New Zealand fisheries controllers to build up data on offshore resources, yet there was no legal obligation which required such data to be made available to the New Zealand government. Some countries such as Japan co-operated a great deal in this respect, often furnishing the Ministry of Agriculture and Fisheries with data and conducting surveys on the Ministry's behalf. While this enabled information to be gained in a far more advanced manner than New Zealand's limited scientific capacity could have attempted, the benefits were counteracted

by the refusal of some nations to supply catch data; in this situation New Zealand officials could only find out how much fish was actually caught by those states by consulting the FAO-Annual Digest of Fishing Statistics for the Pacific (34) which gave no details of the composition of the catch or the locations from whence the catch was taken.

This situation could only hamper scientific research in the zone and on the imposition of the Exclusive Economic Zone in 1978, fisheries researchers had experienced difficulty in attempting a scientific computation of the Total Allowable Catch upon which to base the foreign fishing quotas for the 1978 season. This situation is now hopefully a thing of the past as the Act(35) and bilateral fisheries agreements concluded under it contain requirements for scientific information to be made available to New Zealand and provisions for cooperation in research: the first full survey of the New Zealand pelagic fishery was carried out in 1978 using data gained by a Japanese trawler(36).

Restrictive licensing of the New Zealand fishing industry was abolished in 1963 and resulted in an immediate drive to develop the industry, with a proliferation in the number of fish catching and processing units being established. However, the industry was subjected to little control and this created problems in coordination of marketing and processing. The industry remained a largely domestic one — contributing one percent of New Zealand's total exports in the 1967/68 financial year(37).

The implementation of the nine mile fishery zone beyond the three mile territorial sea embodied in the Territorial Sea and Fishing Zone Act of 1965 and the five year phasing out period for Japanese vessels from the fishery zone as from that date gave the New Zealand industry a large export potential. This potential was recognised and in 1968 the National Development conference conducted a survey of the fishing industry, pointing out

avenues of expansion and rationalisation with the view to creating an industry better able to cope with the demands of international competition. Since then, finance for the industry has been made more readily available and is now, along with that for other primary export industries, administered through the Rural Banking and Finance Corporation. Loan authorisations under the scheme almost doubled in the 1977/78 financial year (38). The 1977 Budget further assisted the development of the industry by introducing a fishing vessel ownership scheme, lower interest rates for industry loans and those associated with boat building and an incentive based training scheme. The tax free importation of both new and second-hand vessels of over 21 metres in length has been allowed since 1977 (39) and provides a positive incentive for local fishermen to compete with the larger foreign vessels inside the Zone rather than rely on the provisions of the Act to constitute a means of protection against foreign competition.

The Zone, as established by the Act, encompasses some 1,400,000 square nautical miles and is over 14 times the total land area of New Zealand, however demersal (bottom dwelling) fish production within the zone has been estimated at between 10 and 23 kilograms per hectare per year while the average dairy farm produces 215 kilograms by comparison (40). The productivity of the zone is similar to that of other temperate regions and varies within the area according to factors such as depth, water temperature, nutrients and current upwelling of the four plateaux on the Continental Slope: Lord Howe Rise, Chatham Rise; Pukaki Rise and Campbell Plateau — all except Lord Howe Rise have considerable fish stocks. The Three Kings Islands, the Mernoo Gap and an area off the East Cape are subject to upwelling currents which bring nutrient laden waters to the surface where the light enables plankton to photosynthesize and provide abundant food for fish stocks.

However, the New Zealand zone does not seem to have the productivity of the four large Northern Hemisphere grounds (41) and the southern hemisphere as a whole contributes only 25 percent of the world fish catch (42), yet those figures are based on the actual tonnage of fish caught and it is possible that the Southern grounds, situated in many instances in undeveloped regions, have by no means been subjected to the same fishing effort as that expended in the Northern grounds. The New Zealand zone could therefore be seen as having great potential which must however, be exploited with care if it is to remain a viable resource.

The "creeping tide of jurisdiction" which has resulted in many states establishing 200 mile zones is likely to exclude (and has in fact already done so) some of the large distant water fishing nations from northern waters and it is likely that these nations will seek to make up the shortfall in their catches in the South Pacific region (43). The desire to ensure that this increased presence did not adversely affect Pacific fishery stocks led to the decision of the Fourth Session of the South Pacific Forum which required all members to declare 200 mile Exclusive Economic Zones by the end of March 1978 so far as possible (44).

The political/trade potential of the New Zealand EEZ has received perhaps more publicity than any other aspect of the Act — the New Zealand/Japan Beef for Fish controversy of 1977/78 is a case in point (45) and although the legislation enables bilateral agreements regarding access to the zone to be made, the agreements are on an inter-governmental basis and are subject to the ordinary rules governing such communication — for example, an agreement has not been concluded with Taiwan since that nation is no longer recognised by New Zealand. However, non-governmental agreements are not precluded and Taiwanese boats can and do participate in joint and co-operative ventures with New Zealand companies.

(ii) The Territorial Sea and Exclusive Economic Zone Act

The Territorial Sea and Exclusive Economic Zone Act 1977 ("the Act") was brought into force by order in Council on April 1 1978 (46) (authorised under S1(3) of the Act). However, although the full implementation of the Act was delayed for some months after it received the Governor General's assent - S29 came into force as soon as the Act was passed and this enabled regulations to be made "prescribing interim or transitional measures for the conservation and management of fisheries resources beyond the Territorial Sea of New Zealand but within 200 nautical miles of the baseline described in Sections 5 and 6 of this Act and for the limitation of fishing by foreign fishing craft in any areas to which these measures relate."

Regulations made under this section came in to force on 1 October 1977 (47) and were revoked upon the coming in to force of the principal Act (48).

The Act is divided in to three parts; part I defines and delimits the Territorial Sea; part II deals with the definition and operation of the Exclusive Economic Zone, and part III includes miscellaneous administrative provisions such as S29 and gives an unusually strong power for the Act to be modified by regulation in order to give effect to international agreement.

Part I: The Territorial Sea

S3 of the Act extends the Territorial Sea of New Zealand to 12 nautical miles — an increase of nine miles from that claimed in the Territorial Sea and Fishing Zone Act of 1965 (which is repealed by S33 of the Act).

A coastal state exercises virtu al total sovereign ty over its Territorial

Sea, a sovereignty that, except for the legal obligation to allow, in most cases, the innocent passage of foreign vessels, virtually equates with that exercised over land territory and internal waters.

"Internal waters" are defined in S4 of the Act as "being on the landward side of the baseline of the Territorial Sea of New Zealand". The exact extent of the area of sovereignty claimed is therefore dependent upon the manner in which the baselines are drawn: the selection of baselines is crucial, since a small rock far out to sea, if claimed as coastal state territory and used as a base point could increase the internal waters of a state to a large degree. However a state with a deeply indented coast or many offshore islands may well encounter difficulty in drawing baselines from which a Territorial Sea may be extended (49).

The New Zealand Act adopts the "low water mark along the coast" baseline as stated in Art 3 of the Geneva Convention on the Territorial Sea which applies in most cases where the shore is not "deeply indented and cut into" and there is no "fringe of islands along the coast in its immediate vicinity" and this distinction is also within that adopted by the Negotiating Text (50).

The same situation applies with regard to baselines adjacent to bays, where SS2 and 6 of the Act adopt the standards and language used in the 1958 Convention on the Territorial Sea and Contiguous Zone (51) and the Negotiating Text (52): where a "bay" (as defined in S2 of the Act) "has only one mouth and the distance between the low water marks of the natural entrance points of the bay does not exceed 24 nautical miles" a straight baseline may be drawn to enclose the area: thus areas such as the Hauraki Gulf are deemed internal waters by the operation of this method.

S 7 of the Act vests the sea bed and subsoil of the Territorial Sea and

internal waters in the Crown, but this is expressed to be subject to "the grant of any estate or interest therein" whether made pursuant to an Act or otherwise; the area granted "shall be deemed to be and always to have been vested in the Crown". This extension of ownership also applies to the Continental Shelf Act 1964 with the result that those parts of the Continental Shelf within the 12 mile limit are now vested in the Crown, previously New Zealand had only claimed ownership of "all rights that are exercisable over the Continental Shelf" and its natural resources — theoretically it would now be possible to alienate areas of the Continental Shelf rather than explore or exploit them under licence (as provided in the Continental Shelf Act) but the efficacy of this is doubtful since the Mining Act 1971 (53) reserves in favour of the Crown, every mineral existing in its natural condition on or under the surface of land alienated from the Crown on or after 1 April 1973 while all petroleum is, by virtue of the Petroleum Act 1937 (S3 Petroleum Amendment Act 1979) similarly vested in the Crown.

Part II: The Exclusive Economic Zone

Section 9 of the Act describes the EEZ as comprising the sea, seabed and subsoil "beyond and adjacent to the Territorial Sea of New Zealand", if one refers to the long title of the Act it may be seen that New Zealand has gained what are there termed as "Sovereign rights" (54) over 188 nautical miles of territory in addition to and distinct from the Territorial Sea. The nature of these "sovereign rights" is in relation to economic functions only; unlike the first part of the Act, which claimed total sovereign ty for New Zealand over the Territorial Sea and which "vested in the Crown" the seabed and subsoil of that area. There is no provision for the extension of ownership over the EEZ or for the exercise of any rights connected with ownership such as the ability to grant any estate in the Zone.

Principally the immediate effect of the Act is upon fisheries (55), although S27 makes provision for the future introduction of regulations to control other economic uses of the Zone, in particular, scientific research, the control of pollution and the establishment of artificial islands and structures.

The EEZ concept had its genesis in the post war trend of states exerting far larger degrees of control over those areas of sea and seabed adjacent to their coasts: yet exclusive economic jurisdiction is by no means the only way a coastal state can extend its control over offshore resources. The following methods could be chosen either in addition to or instead of economic jurisdiction:

(1) The selection of basepoints and baselines in such a way as to increase the areas of internal waters which are thereby under total sovereign ty and consequently extend the line from which the Territorial Sea may be drawn.

(2) The second such method is closely connected to the first and involves an assertion of a zone which takes account of the archipelagic nature of the claimant state and in many cases will enable baselines to be drawn around the whole group of islands rather than each individual island.

(3) It is possible to extend a wider Territorial Sea jurisdiction as has been implemented by nations such as Brazil, Grabon, Sierra Leone and Somalia and is embodied in the Santiago Declaration of 1952. However the claim to a Territorial Sea must also result in the shouldering of responsibilities for policing the area to ensure that the stricter rights of Territorial sovereign ty in relation to fisheries, pollution, customs and safety are adhered to. The Corfu Channel Case (56) notes that coastal states are obliged to give appropriate publicity to any navigation hazards within their

Territorial Sea of which they have knowledge, the difficulty of surveillance inherent in a larger zone renders compliance with this international law obligation somewhat difficult. Furthermore such an extension of control could well mean protests from maritime powers, if the zone was beyond the currently accepted 12 mile mark and interfered with freedom of communication or fisheries.

(4) A contiguous, or special purpose zone, may be implemented in accordance with the principles laid down in the Geneva Convention on the Territorial Sea and Contiguous Zone (57) such a zone could be implemented to control customs, fiscal, sanitary and immigration matters. The current negotiating text for the Third Law of The Sea Conference provides in Act 33 for such a zone, to extend no more than 24 miles beyond the baselines of the Territorial Sea in the EEZ.

(5) A pollution zone may be implemented; such a zone is usually incorporated alongside some other claim to jurisdiction; although the best example, that of the Canadian Artic Waters Pollution Prevention Act 1970 (which gives jurisdiction over the de licate environmental conditions of the Canadian Artic to a distance of 100 miles to the Governor who could, by regulation, prescribe shipping safety control zones where ships could be prohibited from navigating unless they complied with certain safey standards relating to construction and oil carriage) (58) was enacted in advance of the 1977 legislation declaring an Exclusive Fishery Zone.

(6) A fishery zone may be created; where the coastal state may regulate and conserve living marine resources; such a zone has received widespread support both at the first and second United Nations conferences on the Law of the Sea and in subsequent state practice with at least 15 states claiming such zones since 1970 (59).

(7) State jurisdiction may also be extended over the continental shelf, its legality based on a stretching of the definitive language of the Convention on the Continental Shelf 1958 by taking advantage of the second limb which allows for sovereignty to be extended "to where the natural resources thereof are capable of exploitation ..." (60).

In practice, there have been few such claims and although rising petroleum prices and problems of supply make such a zone all the more attractive, this very attractiveness ensures that in many areas very large claims are contested by opposite and adjacent states (61).

(8) At the present time the most controversial method of acquiring extended jurisdiction is to licence or issue permits for deep sea mining beyond national jurisdiction. The Third Law of the Sea conference was primarily called because of concern about the possible effects of deep sea mining and exploration in areas of the High Seas beyond national jurisdiction. (62)

The 24th Session of the United Nations General Assembly passed in 1969 the "Moratorium Resolution" (63) calling for cessation of exploitation of the resources of the deep sea bed and refusing to recognise any claim to such areas or their resources. However many industrial nations did not support this resolution and do not consider themselves bound by the resolution.

(9) It is also possible to appropriate areas of High Sea for exclusive state use, perhaps beyond the 200 mile limit, for such purposes as deep water ports and nuclear testing.

(3) The Exclusive Economic Zone Concept - (a) Definition

(i) International Conventions

The Exclusive Economic Zone Concept is embodied in Part V of the Negotiating Text and Act 56 provides that in the EEZ the coastal state has:

(a) "Sovereign rights for the purpose of exploring and exploiting conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent water, and with regard to other activities, for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and sounds;"

(b) and jurisdiction "as provided for in the relevant provisions of this convention" over:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment.

Art. 57 limits the EEZ to 200 nautical miles from the baselines from which the breadth of the Territorial Sea is measured and in exercising all the rights and duties given to the state under the Convention, a state "shall have due regard to the rights and duties of other states and shall act in a manner compatible with the provisions of this Convention." (64)

From the wording of the draft convention it is clear that the sovereign rights of the coastal state extend only to the economic use of the resources of the zone, the actual ownership of the zone is witheld. Art. 58 emphasies this by stipulating that the freedoms of navigation, overflight and submarine cable laying are maintained in the zone; if one compares this with the draft articles concerning the Territorial Sea it may be seen that Art. 2 states that the sovereignty of a state:

"extends to the air space over the Territorial Sea as well as to its bed and subsoil."

This distinction between the different "bundles of rights" exercisable by the coastal state in relation to the two areas is an acknowledgement of the demands of the maritime nations at the Law of the Sea Conference proceedings who feared that the vesting of sovereignity over the seabed and superjacent waters themselves might serve as a basis for the subsequent extension of the powers of the coastal state and thus jeopardise the freedoms of communication and navigation so vital to maritime nations such as the USSR:

"The granting of sovereign rights in the economic zone to the coastal state was not the equivalent of the granting of territorial sovereign ty and must in no way interfere with the other lawful activities of states on the High Seas especially with international maritime communications ... the rights of the coastal state must be exercised without prejuidice to the rights of any other states ... including the freedoms of navigation, overflight and the laying of cables and pipelines." (66)

(ii) State Practice: National Legislation

Of the states which have declared an Exclusive Economic Zone rather than any other form of increased jurisdiction such as a Fishery Zone or an Extended Territorial Sea, the majority do so in general conformity with the terms of the Negotiating Text, but only two states (67) have gone so far as to incorporate any reference to, or recognition of, Art. 56 (1)(c) and 56 (2) of the text which provides that the coastal state has duties as well as rights under the Convention and must have regard to the rights and duties of other states. Other states have asserted what amounts to a "property right" to the resources within their zones, claiming ownership of the zone itself and recognising no obligation to share with or allocate the surplus resources to

to other nations (68). The majority of states occupy a halfway position, claiming their sovereign rights as opposed to sovereign ty in the zone, but not, on the other hand, adopting any overt recognition of a duty in regard to other states. It must be noted that by 1979, thirty eight states had claimed "Exclusive Economic Zones and twenty three others had claimed 200 mile 'Fisheries Zones' (69), it is probable that the latter wish to reserve their position pending the conclusion of the Law of the Sea Conference and if the Negotiating Text is adopted as a Convention, to then claim full 'Economic' jurisdiction.

(iii) State Practice: The New Zealand Act

The long title (70) of the New Zealand act adopts the distinction between sovereign ty in relation to the Territorial Sea and sovereign rights in relation to the EEZ noted above. However, the regulation making power of S8 (in regard to the Territorial Sea) and S27 (in regard to the EEZ, part II of the Act) is the same in relation to both areas. The sole distinction occurs in S8(1)(e) where regulations may be made to give:

> "full effect to the sovereignity of New Zealand in relation to the Territorial Sea."

Whereas, S27(1)(e) allows such regulations to be made as to give:

> "full effect to the sovereign rights of New Zealand in relation to the zone."

Although the long title to the Act states that the Act is "to establish an Exclusive Economic Zone" it is doubtful if this has, in fact occured since although S9 describes the EEZ and S27 allows regulations to be made for the utilisation of almost all the conceivable economic uses of the zone, no such economic rights have as yet been exercised although fisheries regulations under S22 have been implemented. It would seem that the other economic rights to the zone have been held in reserve in order to ensure that any action under-

taken within the provisions of the Act is in accordance with international law: yet the prima facie establishment of an Exclusive Economic Zone rather than a Fisheries Zone will serve as a means of adding to the growth of state practice in claiming economic jurisdiction which may ultimately embody the EEZ concept in customary international law, regardless of whether a convention is concluded at the Third Law of the Sea Conference.

3(b) Conservation and Management Provisions within the Exclusive Economic Zone

(1) International Law as Embodied in International Conventions

Arts. 61 and 62 of the Negotiating Text impose a duty on the coastal state "to ensure through proper conservation and management measures that the maintenance of the living resources of the Exclusive Economic Zone is not endangered by over exploitation"(71). However a realisation of the economic and social realities of the world situation is embodied in Art. 62 where, subject to the paramount duty to conserve the living resources of the zone of Art. 61, the coastal state is required to "promote the objective of optimum utilisation"(72) by determining "its capacity to harvest ... the resources and where the ... state does not have the capacity to harvest the entire allowable catch, it shall, through agreements and other arrangements ... give other states access to the surplus of the allowable catch, having regard to the rights of states whose nationals have habitually fished in the zone or have made substantial efforts in research and identification of stocks" and "the rights of landlocked and geographically disadvantaged states"(73). The duty imposed is one of "economic conservation" or, as defined in the Text: "optimum utlisation" which is dependent upon the calculation of the "Total Allowable Catch" a figure which represents the "maximum sustainable yield from a fishery as qualified by relevant environmental and economic

factors including the economic needs of coastal fishing communities and the special requirements of developing states, and taking into account fishing patterns, the interdependence of stocks and any generally recommended sub-regional regional or global minimum standards."(74)

The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas is materially different from that of the draft convention embodied in the Negotiating Text: the conservation duty as laid down in Art. 2 of the 1958 convention is imposed in order to:

> "render possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products."

This carries out the aim of the preamble which emphasises the need to conserve stocks in order to better supply the world's food requirements.

This convention embodies none of the qualifications to the optimum sustainable yield adopted by the Negotiating Text; such as: environmental and economic factors, and the needs of developing, landlocked and "geographically disadvantaged" states and does not derogate from the rights of all fishing nations to engage in fishing operations on the High Seas beyond the maximum distance of state jurisdiction which was, at that time, 12 miles (75). The Convention did recognise that the coastal state had special interests in the waters adjacent to its shores and allowed these to impinge on the freedom of fishing principle in certain well defined circumstances (76). However, the Negotiating Text reverses this emphasis giving preference to the rights of the coastal state and then allowing those to be impinged in certain circumstances.

(ii) State Practice: National Legislation

State legislation in the area of conservation and management of fishery re-

sources is difficult to compare with the provisions of the Negotiating Text. In many instances a provisional zone has been implemented pending the outcome of the Law of the Sea Conference and existing fisheries regulations applied to this extended area. Many states require fishing vessels to be licensed but often this is used as a means of boat identification or deterring theft rather than a conservation or management procedure whereby the promotion of "the objective of optimum utilisation of the living resources" in the EEZ is implemented in accordance with Art. 62 of the Negotiating Text.

Many of the provisional and extended fishery zones are controlled by regulations or administrative decision, as for example in the United Kingdom (77) and Canada (78), with no specific legislative provisions governing the economic use of the zone.

Several states (79) prefer to set out general guidelines or principles relating to the exploitation of the zone, leaving the implementation of these to delegated legislators. The definition of conservation and management measures by these states often includes expressions such as: "measures required to rebuild, restore or maintain fishing resources and the marine environment"(80); "measures designed to ensure a supply of food, other products or recreational benefits on a continuing basis"(81); "to avoid irreversible or long term adverse effects and assure the future chace of generations for the use of those resources"(82).

Yet there are no guidelines given for the achievement of those objectives. The Mexican legislation (83) for example states that its aim is "to protect the living resources from over exploitation" and obliges the Federal Executive Branch to "take proper management and conservation measures" yet gives no guide as to what constitute "proper measures".

By contrast, the USA legislation has adopted the same definition as that of S2 of the New Zealand Act, in relation to the Total Allowable Catch, adding to the qualifications of economic, environmental, scientific and "any generally recommended subregional, regional or global standards" factors, the requirement that the maximum sustainable yield should give "the greatest overall benefit to the nation, with particular preference to food production and recreational effects."(84)

Although the definitions and perceptions of the conservation and management of the living resources of the zone vary a good deal between states, one factor stands out clearly and that is the emphasis given to the interest of the coastal state and the reluctance by it to assume any obligations, even those embodied in the Negotiating Text: of recognition of the special circumstances of developing, landlocked or geographically disadvantaged states.(85)

3(c) Licensing and Enforcement Provisions

(i) International Convention

Art. 62(4) of the Negotiating Text lays down the conditions for allowing access to the EEZ which may be established by a coastal state and various methods of control within the zone. The article provides that, although the list of possible regulations given is by no means exclusive and exhaustive, such regulations as the coastal state does implement must be "consistent with this Convention". The regulations may relate to the following:

- payment of fees "or other forms of remuneration";
- the fixing of quotas of each, either in relation to species, groups of stocks or total tonnage per vessel;

- regulation of seasons and areas of fishing, fish age and size;
- regulation of the types, size and numbers or amounts of vessels or gear;
- specifying the information required of fishing vessels;
- requirements relating to scientific research;
- the requirements that all or part of the catch must be landed in the ports of the coastal state;
- requirements for personnel to be placed on vessels as observers or trainees;
- conditions of technology and research transfer, and joint venture operations;
- enforcement procedures.

Although such measures as gear, vessel and equipment regulation, the fixing of quotas, payment of fees and regulation of "fishable" stocks are not unusual and are quite likely to have been used by many states in regulating, if not foreign vessels within their jurisdiction, then their own nationals: other possible conditions such as the right to place trainees on board a foreign vessel, transfer of technology, the right to demand that all catches be landed in the ports of a coastal state and the substitution of "other forms of remunderation" for payment are not perhaps so well accepted, and show a clear emphasis on the needs of developing countries, both as coastal states where "other remun eration" could include compensation in terms of advanced equipment and technology "related to the fishing industry"(86) and the coastal landing requirement could be used to develop the processing sector of the fishing industry and as a fishing nation, whose licensing fees could be met with a percentage of the catch, where the coastal states requirements for scientific research could give training in the conduct of such research, with the aid of observers placed on board and where the "coastal landing" requirement could be uased as a means of processing fish which could not perhaps be

processed or marketed in the foreign flag state.

A sharp contrast to the Negotiating Text may be found in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas: several articles of the Convention allow for "necessary measures for the conservation of the living resources..." to be taken; either by one nation engaged in fishing on the High Seas, or by agreement between fishing and coastal nations(87). Art. 6 recognises the "special interest in the maintenance of the productivity of the living resources in any areas of the High Seas" possessed by the coastal state, and Art. 7 allows it to take, subject to the strict requirements earlier noted (88) "unilateral measures of conservation."

The convention is silent on the question of enforcement measures, although, with the emphasis placed on negotiation and agreement between states, it is likely that such measures would be embodied in the relevant agreements, and that in Art. 7 the unilateral measures adopted by the coastal state would include enforcement and licensing requirements.

(ii) State Practice: The New Zealand Act

The Act implements a licensing system in the Exclusive Economic Zone and S14 prohibits any fishing by a foreign craft "except in accordance with a licence issued by the minister under S15 of this Act in respect of that fishing craft." Under S15 the Minister (of Fisheries) (89) is empowered to grant licenses and attach conditions to them - a list of the possible subject matter of the conditions is set out in S15(3)(a)—(r) and, although not embodying the same language as the Negotiating Text, are not inconsistent with Art. 62(4) and give a wide range of requirements which may be "necessary or expedient for the conservation or management of fisheries resources within

the zone."(90) The Minister has a discretionary power to suspend, cancel, grant, vary or renew any licence, while, under S22 the Governor General is empowered to fix the overall method of licensing, payment of fees and general administration of fisheries in the zone.

Regulations have been made under SS15 and 22 of the Act, dealing with licensing fees, licensing and general procedure within the zone (91) - the usual procedure to be undertaken by foreign fishing vessels under those regulations is as follows:

After setting aside that part of the Total Allowable Catch which will be harvested by the New Zealand Fishing Industry (including any cooperative or joint ventures) the surplus is allocated to those foreign nations who are authorised to fish in the zone. Vessels from states such as Taiwan or the United States which for various reasons do not have fishing agreements with the New Zealand government may participate in joint venture agreements with New Zealand interests, subject to government approval. The fishery stocks of the zone are divided in to three main groups: finfish, tuna and squid, for allocation purposes and operation proposals for each group are then submitted by the foreign nation.

These comprise: 1) A fishing plan with details of how the quotas will be taken, numbers and types of vessels and their catching capacities.

2) A transshipment plan with details of proposed fish carrier movements and the time spent in the EEZ with the expected amounts of fish to be transferred to and transported by carrier vessels.

3) A supply plan, giving details of amounts of fuel and supplies to be brought to the zone by supply ships and tankers.

On arrival in New Zealand waters, all fishing or related vessels must im-

mediately proceed to port for licensing. Each vessel is inspected to ensure it carries only gear necessary for the particular fishery operation for which it is being licensed. New Zealand regulations are explained in detail, charts of the zone are supplied together with catch logs in which a detailed record of the amount of fish caught and the location of the vessel at the time of capture must be recorded. The licence number and international call sign are painted on the side of the vessel.

The vessel is then cleared for fishing. Once at sea it is required to give regular position reports and a weekly catch report for the monitoring of quota filling. When the quota limit is nearly reached, the Fisheries Control centre notifies the vessel and instructs it to start preparations for departure from the area. Transshipment operations are closely observed by Ministry of Agriculture and Fisheries officers and fishing logs are checked with the amounts offloaded during each operation. Fisheries officers also sail on board vessels during their operations in the zone and regulations provide for their accommodation to be at the expense of the foreign interest concern ed. Overall surveillance is carried out with the aid of Orion, Andover, Skyhawk and Strikemaster aircraft operated by the airforce while navy and ministry staff are concerned with seaborne patrols.

At the end of its fishing operations in New Zealand waters, each licensed vessel must make a port call to obtain final clearance before leaving the zone - the remaining fish catch is checked and the fishing logs are returned for processing.

Fees are charged by the New Zealand government as part of the licensing procedure, and vary according to the different stocks sought and methods employed. The fees are laid down by regulation (91) and as at the beginning of 1980 fishing season stood at:

Squid (jigging)	$14,250 per year,	$95.00 per tonne over 150 tonnes
Squid (trawling)		$70.00 per tonne
Trawling		$17.00 per tonne in "Area E"
Tuna	$1,500 per year	
Tuna (southern bluefin)	$9,000 per year	
Carrier vessels		$1.00 per tonne transshipped from zone.

Local boats (including joint venture vessels) receive method permits which specify the gear to be used in accordance with the stocks being sought, and all vessels in the zone (including foreign vessels) must comply with the Fisheries Act 1908 and the Marine Animals Protection Act 1978 (92).

Thirty joint venture operations have been authorised in New Zealand waters and although the Act does not define their status as being either 'foreign' or 'local', in practice those that are authorised by the government are allocated quotas from the domestic Total Allowable Catch and: "first preference is given to 100 percent New Zealand owned and operated vessels, followed by joint venture boats and then licensed foreign boats"(93) in determining entry to fishing grounds within the zone. The joint venture issue has aroused ill feeling among commercial fishermen in New Zealand who assert that large, better equipped American and Japanese vessels on charter in New Zealand to joint ventures are unfairly appropriating stocks which would otherwise be taken by the smaller domestic boats. The New Zealand Federation of Commercial Fisheries liaison officer stated that joint venture operations are often run by (e.g. pulp and paper):

> "companies which have no interest in the fishery as such and are just in it for the profit, with no incentive for conservation."(94)

The Federation has also called for all foreign (i.e. less than 100 percent New Zealand owned and operated) vessels to be banned from the West Coast

Hake and Hoki fisheries, maintaining that the New Zealand fleet is large enough to work the area by itself; however the government maintains that New Zealand vessels get first priority in access to the grounds and in allocation of quotas - if a fishery is in danger of over-fishing, New Zealand vessels will be the last to be withdrawn, if such a conservation measure is needed.

However, perhaps the problem is deeper and lies not in the question of who should be excluded from fisheries or the old "pre EEZ" issue of bigger vessels crowding out the smaller New Zealand vessels, but in the way in which the Total Allowable Catch is computed. Neither the Act nor the Negotiating Text gives any guidelines as to the criteria to be used in coming to a figure, the definition used by the New Zealand Act (95) is, as will be seen, open ended and capable of manipulation in order to reach a figure that is politically rather than ecologically satisfactory to New Zealand. It is possible that if enough pressure were to be exerted through national interest groups, the government could manipulate the T.A.C. and thereby quotas available for harvest for the benefit of the local industry. However, it is submitted that this would be contrary to the long term development of the industry and introduce a degree of protectionism which may shield the industry from any need to adopt advanced and efficient means of operation.

In the area of international politics, the possibility of the Act's political use is very real indeed. S13(d) and (e) plainly allow a decision on apportionment of quotas to foreign vessels to be based on political considerations. The New Zealand Federation of Commercial Fishermen has requested (96) that all Russian boats should be banned from New Zealand waters, both because of the nation's presence in Afghanistan and because of damage alleged to be caused by Soviet vessels to New Zealand gear and vessels. On 22nd February 1980, the government announced the fin fish allocations for the year ending 31 March

1981; the Soviet quota was halved from its previous 1979/80 level to 32,500 tonnes and confined to "Area E" (on the South West of the South Island in very rough waters) "as a manifestation of New Zealand's condemnation of the Soviet invasion of Afghanistan."(97)

This raises the issue of the memo of understanding attached to the USSR/NZ bilateral fisheries agreement whereby it was understood that the right of New Zealand to adjust the USSR quota "due to unforeseen circumstances would be limited to circumstances relating to the living resources of the zone i.e." affecting fish stocks". Even if this proviso were not capable of bearing the interpretation that Soviet actions in the field of international relations were such as to constitute a threat to other nations and their resources (including fish stocks), the T.A.C. could be computed so conservatively that insufficient surplus was available for foreign harvest, the government would then have to exercise its discretion in allocating the available fish stocks to those nations permitted to fish in the zone.

(iii) State Practice: Bilateral Agreements

The three bilateral agreements concluded under the Act serve to implement and expand its provisions where they are applied to the vessels of Japan, USSR and the Republic of Korea. The agreements were concluded at government level and effectively aid enforcement of the Act by extracting agreements from the foreign nations to ensure that their vessels abide by the licensing and enforcement regulations imposed by New Zealand. The agreement with Japan in this respect was somewhat of a milestone, since during the negotiations before signature, Japan argued that its vessels were owned by private companies and not under government control. Neither Canada nor USA had been able to extract any sort of undertaking from Japan on that issue at a governmental level and thus the accession by Japan to the New Zealand requirements was

all the more welcome. One writer has commented that "this gives New Zealand more diplomatic clout in ensuring Japanese vessels observe the terms of entry"(98). It should also be noted that the ability of the New Zealand government to alter the allocation to Japan "due to unforeseen circumstances" has not been limited by a requirement such as that found in the memo of understanding attached to the Soviet agreement. This point was stressed by the New Zealand government during the negotiations on beef imports to Japan in July and August of 1978; the actual signing of the Fisheries agreement was delayed until a relaxation in the Japanese position on the import quota could be discerned. However even after the agreement was signed it was made clear by New Zealand officials that quota allocations under the agreement were to depend upon Japan's continued cooperation in relation to New Zealand imports of dairy products, beef and timber:

> "The fisheries agreement which has now been signed... recognises New Zealand's unilateral right to determine ... the surplus which is available to Japan and other foreign countries. It states that in exercising these quota setting rights, New Zealand will take into account a number of considerations including New Zealand interests. In this context, the New Zealand interst of particular importance is the level of access to the Japanese market provided for our agricultural exports and this view was made clear to the Japanese before they signed the agreement. In setting the Japanese fish allocation each year New Zealand will take into account the extent to which it considers progress has been made on the question of access to the Japanese market. This article constitutes the necessary legal recognition of that fact. Japan has not signed with any other country a fisheries agreement which includes a provision of this nature."
>
> - Press statement by the Prime Minister, Rt. Hon. R D Muldoon (99).

The Agreements acknowledge that the fishing vessels of foreign states will be subject to New Zealand Fisheries law and the terms of the licences issued to them under the Act. The foreign states assume the obligation to ensure that their vessels abide by the conditions of the agreement, the licensing conditions and New Zealand laws, including those relating to boarding, inspection and enforcement. Each agreement acknowledges New Zealand's sovereign rights in the zone and the cooperation achieved under the agreement is essential in the enforcement of these rights since, if New Zealand's jurisdiction over the zone amounted to total sovereign ty, her rights of enforcement would be paramount and the foreign vessel would have to accept such jurisdiction, and submit to the local judicial process; the right of the foreign state to intervene on behalf of the vessel would be limited to situations where the treatment accorded did not conform to the minimum international standard "in accordance with ordinary standards of civilisation"(100) and where there had been a denial, ineffectiveness or insufficiency of municipal law.

The agreements detract from the exercise of total sovereignity in that New Zealand agrees to promptly notify, through diplomatic channels, the foreign government in the event of a fishing vessel being seized and to promptly release the vessel and crew on compliance with the New Zealand requirements relating to bonds and other security. "Enforcement procedures" are envisaged by Art. 62(4)(k) of the Negotiating Text in regard to the zone and Art. 73 provides that while a state may take such measures as may be necessary to ensure compliance with its laws and regulations, the vessel and crew must be promptly released and such penalties as are implemented may not include imprisonment or "any other form of corporal punishment."

The cooperative nature of the agreements may be further seen in the obligation placed upon the foreign flag states to ensure that their nationals

and vessels comply with the New Zealand laws and regulations relating to licensing, fishing, inspection and enforcement. The agreements signed under the present Act differ from that signed by Japan in July 1967 in relation to the 12 mile zone then in force (101). That agreement gave Japan "primary" authority to deal with any of its nationals who infringed New Zealand's regulations in the zone, in contrast to the present agreement which obliges the government of Japan to:

> "take measures, in accordance with the relevant rules of Japan (102) (to ensure) that all fishing vessels of Japan comply at all times with instructions given by competent New Zealand officials for the purpose of regulation of fishing, including inspection and enforcement." (103)

Therefore the primary jurisdiction is now provided by the 1977 Act and the bilateral agreement secures the compliance by Japanese nationals with its enforcement to be ordered and supervised by the Japanese government.

There have been several instances of foreign vessels being caught in breach of licensing regulations in the zone and one case has gone on appeal to the Supreme Court (104) (as it was then), where it was held that, where an unlicensed vessel is found fishing for tuna within the 200 mile EEZ, it is no defence for the appellant (the master of the vessel) to claim that he thought the type of fishing conducted by him was, in fact, permitted, as S19 of the Act created a strict liability offence. Speight J. in coming to that decision, reasoned that the Act dealt with the protection of public welfare and, in particular, the economic resources of New Zealand, whereas "unlike cases such as Lim Chin Aik v R (105) the creation of strict liability would assist in enforcement, for there were ample precautions available for a person engaged in the trade to ensure that he does not offend against the fishing zones of the various nations" and "it is further noticeable that S28(e) spe-

cifically creates a limited form of defence and no other."(106)

A further point was dealt with (obiter) by his Honour, who stated that Tuna, (although counsel had argued that it was a "highly migratory species" travelling over great distances of ocean in the course of its life,) was still within the definition of "fish" under S2 of the Act since "by the Act's definition, 'fish' means every description of fish and shellfish ... Even wider is the definition of 'fishing' which includes not only taking fish, but any other activity relating to the taking of fish and will include, in my view, attempting to take fish..."(107)

The penalty imposed by the Court below was also reviewed: the fine of $10,000 imposed on the appellant with costs of $52,000 and forfeiture of the vessel was found not to be excessive. (108)

The bilateral agreements also include provision for compensation to be paid for damage caused by foreign fishing vessels while fishing within the zone: the Soviet agreement, for example, provides that the Soviet government:

> "shall ensure that all necessary measures are taken to ensure prompt and adequate compensation to the New Zealand government or New Zealand citizens for any loss or damage for which (licensed) USSR fishing vessels have been responsible..."(109)

The agreement with Japan is, however, worded differently on this point in relation to the Korean and Soviet agreements as the constitutional situation of that country does not enable compensation payments to be enforced by the government in the manner provided for in the other two agreements. The obligation embodied in Art. VI is, therefore, to ensure that all licensed Japanese vessels operating within the zone carry adequate insurance to compensate any damage they may cause. A residual responsibility for pay-

ment is conferred on the Japanese government under Art. VI(3) where provision is made for consultations with the New Zealand government "for the purpose of contributing to the satisfactory settlement of such claims."

(4) Rights of Foreign States in the Zone

(i) International Convention

Art. 62(2) of the Negotiating Text provides that after the Total Allowable Catch has been determinted, the coastal state: "shall, through agreements and other arrangements ... give other states access" to that part of the catch surplus to its own requirements. The word "shall" is mandatory and an obligation is placed on the coastal state to earmark its surplus resources for foreign exploitation.

However, no real guidelines are given for the determination of which states should be allowed access to the surplus. Art. 62(3) lists "the significance of the living resources of the area to the coastal state concern ed, and its other national interests, the requirements of developing states in the sub-region or region ... and the need to minimise economic dislocation in states whose nationals have habitually fished in the zone or have made substantial efforts in research and identification of stocks. The list is, however, not exclusive and does not fix priorities; neither is it very specific since most of the criteria listed are capable of differing interpretations. For example, what degree of economic dislocation is envisaged? What is meant by the term "habitual", can a state claim habitual rights after a presence of only one season in the zone or must the presence be longer? Is it possible to fix any criteria for assessing the significance of the fishing industrial to a coastal state, especially if it is combined with "national interest"? The article affords a significant latitude to the coastal state in determining the terms of access by foreign vessels in the zone.

By contrast, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas recognised the rights of all states "for their nationals to engage in fishing in the High Seas" (110) subject to:

(a) their treaty obligations;

(b) the interests and rights of coastal states provided for in the convention;

(c) the conservation measures embodied in the Convention.

The interests and rights of coastal states as provided for in the convention, recognised that a coastal state had a special interest in its offshore living resources, even if not engaged in fishing there, it can enter into agreements with other nations so engaged in order to prescribe conservation measures (111); only if agreement has not been reached between the states may a coastal state adopt unilateral measures of conservation and only then if:

(a) there is an urgent need for such measures, as shown by existing scientific knowledge;

(b) that the measures adopted are based on appropriate scientific findings;

(c) that such measures do not discriminate in form or in fact against foreign fishermen (112).

A nation engaged in fishing on the high seas adjacent to the Territorial Sea of a coastal state may adopt conservation measures, provided they are not opposable to those adopted by the coastal state.

Clearly then, although the coastal state does have recognised interests in its adjacent seas, they are limited and are not paramount over the rights of foreign vessels; the instances where a state may adopt unilateral action of a type approximating to that envisaged by the Negotiating Text are few

and operate only in certain well defined circumstances.

(ii) State Practice: National Legislation

Few examples of state legislation may be found which impose a duty on the coastal state to allocate any portion of its Total Allowable Catch to foreign fishing vessels and most of the laws are silent on issues of access to surplus, beyond the establishment of licensing systems. Yet national legislation by its very nature is more concerned with relations between the state and individuals and with relations among individuals rather than with interstate relations. A state would also be understandably reluctant to use language which unnecessarily acknowledges obligations of the state under international law; however the absence of any reference in national legislation to such responsibilities may not mean that such responsibilities do not exist or are not accepted by the coastal state. An example of this may be found in the Australian legislation, no express mention is made of the rights of access to surplus for foreign states; but the Act does stipulate that the minister should have regard to the objective of "optimum utilisation of the living resources of the Australian fishing zone" in the administration of the act; it was stated, on presentation of the Bill to the House of Representatives, that in practice, adherence to this aim would mean that Australia would be obliged to grant fishing access to the surplus to foreign vessels (113).

The New Zealand and Fijian legislation (114) contains strong provisions: requiring the minister concerned to determine the T.A.C. for any fishery in the zone and the portion that local vessels have the capacity to harvest, with the remaining portion then being expressly set aside as "the allowable catch for that fishery for foreign craft". The legislation of Cuba and Mexico (115) is not so detailed but an obligation to allow access to the surplus for foreign vessels is acknowledged.

However, although the surplus of the T.A.C.is earmarked for foreign vessels in mandatory terms, the New Zealand Act and Fijian (116) legislation do not require this to actually be apportioned or specifically allocated to the foreign states. By contrast, the US Fishery Conservation and Management Act of 1976 does "require" the secretary of state to determine the allocation of the surplus among foreign nationals.

(iii) State Practice: The New Zealand Legislation

The Act gives the minister a discretion as to when he determines the Total Allowable Catch under S12(1) and a similar discretion as to when he determines the allowable catch for foreign fishing craft under S13(1), there is no obligation for such calculation and apportionment to be made at regular intervals; thus enabling fishing intensity in relation to certain stocks to be immediately adjusted should they be in danger of over exploitation or over population. A second but by no means unimportant consideration is that this enables political freedom of movement: even if New Zealand's fishery objectives with another state were regulated by an agreement (such as that with the USSR) which limited th government's right to alter the quotas in unforeseen circumstances to "unforeseen circumstances relating only to the fish stocks", political and diplomatic measures would still not be totally ruled out, since the determination of the total allowable yield of fish stock is within the discretion of the minister. While such diplomatic bargaining is a fact of life and few people would find fault with such an attempt to make the best possible use of our primary resources, the long term question must still be one of "do the ends justify the means?", since injudicious use of such a power could have irreversible effects on the fish stocks and productivity of our coastal waters.

The minister has a discretion as to whether or not he allocates any of the

surplus to foreign states (117) and, if so, he has a further discretion as to which states are allowed access (118). In exercising the latter discretion the minister is given a list of criteria which he may take in to account (119), these include:

- whether the state has habitually engaged in fishing in the zone;
- whether or not it has cooperated in research and conservation measures undertaken by the New Zealand government in New Zealand fisheries waters;
- the terms of any relevant international agreement;
- such "other matters as the minister, after consultation with the minister of foreign affairs determines to be relevant".

The use of the word "habitual" is of interest and is seemingly capable of various interpretations. It is used in the Negotiating Text (120) as well and is there coupled with the recognition of the need to minimise economic dislocation in states where nationals have habitually fished in the zone. Although the criteria in S13(2) (a-e) are by no means all inclusive, the omission of "economic dislocation" may be significant. Although Japan did argue that denial of access to the zone would injure her economy, such damage may well be a question of degree and the fact remains that the two states which could claim "habitual" rights in the New Zealand zone are the two largest fishing nations in the world and may not suffer the same amount of economic loss that a smaller state, dependent on the New Zealand zone, would. There is still the question of the length of time involved - does a state become an habitual presence in the zone on the basis of a season or two or is the test to be adopted the same as that for "traditional rights" mentioned in the judgement of the Icelandic Fisheries Jurisdiction Cases (121) where it was emphasised that for a traditional or historic interest to be claimed in a fishery, that fishery must have been exploited over a lengthy period of time (decades, rather than years).

Of the three fisheries agreements concluded, only the Japanese agreement refers to the fact that its nationals "have been engaged (in fishing of the New Zealand coast) for a considerable period of time" - Japanese boats first appeared offshore in 1957 (122). The other two agreements are silent on the matter; the USSR began fishing offshore in 1971 while the Republic of Korea only became a major presence in New Zealand waters in 1977. It may be that only a presence of more than ten or even twenty years could be defined as "habitual", but if a fixed time were to be adopted, it would go against the flexibility of the requirement since a state could well claim preference because of a longer presence in the zone than another state which contributed far more to research and conservation in the area.

> "New Zealand, in establishing an EEZ, has taken on an obligation to the international community to carry out proper conservation and management measures to protect the zone's living resources from over exploitation. It also has an obligation under the Law of the Sea to allow other countries to take the surplus resources over and above its own harvesting capacity, but has the right to determine itself the allowable catch and to impose conditions and regulations on other countries' vessels to take the surplus resources." (123)

The "obligation" undertaken by New Zealand is that of "optimum utilisation" of the living resources of the zone it "shall ensure through proper conservation and management measures the maintenance of the living resources in the Exclusive Economic Zone is not endangered by over exploitation." (124)

At the heart of the management programme envisaged by the Negotiating Text is the calculation of a figure representing the Total Allowable Catch - i.e. the "maximum sustainable yield from a fishery as qualified by relevant environmental and economic factors, including the economic needs of coastal

fishing communities, and the special requirements of developing states, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional or global minimum standards." (125) The New Zealand legislation follows this definition with the exception of the reference to the special needs of coastal fishing communities and developing states; this would appear to show a reluctance to assume any duty not expressed in binding terms in the Negotiating Text and which would detract from New Zealand's interest in maintaining full control over the resources of the zone. However, it could be argued that the needs of such states could be included as "any relevant economic or environmental factors". A further, more persuasive argument could be advanced based on the wording of the Negotiating Text where, under Arts. 69 and 70, there is provision for land-locked and geographically disadvantaged states to participate in the exploitation of the zone through bilateral, subregional or regional agreements. It may therefore be argued that the obligation only refers to such states in the region of New Zealand - of course the concept of a "region" is always extremely fluid and differs according to the criteria used, whether they be political, geographical, management based (i.e. where there is a well-defined management problem capable of being handled as a distinct issue, for example, the annual range of migratory species), or operation based (where the region is defined by , for example, the operation of a Treaty or the limits of competence of a fisheries commission). It is possible that the proposed South Pacific Forum Fisheries Agency would be viewed by the government as encompassing a region for the purposes of New Zealand's compliance with the Negotiating Text. The organisation is at present limited to members of the South Pacific Forum only, although consideration is being given to the inclusion of distant water fishing countries and others in order to form a more broadly based organisation (126). The New Zealand Act operates in such a way that preference is given to the New Zealand industry and the rights of foreign vessels are subordinate to the needs of the domestic

situation: S11 of the Act requires the calculation of the Total Allowable Catch for each fishery within the zone and the portion of this that New Zealand craft have the capacity to havest is then calculated under S12(1), it is only the remaining portion of the T.A.C. which will be allocated to foreign vessels. Therefore, it follows that the more the domestic industry expands and is able to harvest larger proportions of the T.A.C., the less will be allocated to foreign vessels. This situation is envisaged by the Negotiating Text which provides for equitable regional and subregional arrangements to be entered into with geographically disadvantaged and landlocked states when the coastal state's harvesting capacity nears total utilisation of the T.A.C. (127) Thus the disadvantaged state may be given access to other zones in the region on an equitable basis and according to the nutritional needs of the participating states, the need to avoid any coastal state within the region being burdened with too long a degree of foreign exploitation and the avoidance of any detrimental effects to coastal fishing communities (128).

The New Zealand Act does not go into any detail on the method to be employed in the calculation of the T.A.C. and indeed little was known of the extent of the living resources of the area when the Act was passed in 1977:

> "This caused a massive increase in the amount of information required for the sound management of the fish stocks being exploited in the EEZ." (129)

In late 1977 T.A.C.'s were "created" by Fisheries Research Division scientists (130) to allow foreign quotas to be allocated for the 1978 season and these figures are now being refined in the light of more recent catch statistics. The method of calculation used is known as an "Expanded Area Method" which involves the extrapolation of catch rates of various species over a wide area reached by multiplying standard catch rates by several

factors - such as a figure based on the area of sea bottom swept by a trawl, this area being a percentage of a larger, arbitrarily defined area.

At present, this has to be based on several assumptions i.e.:

(1) The actual, effective width of the bottom trawl fishing on the seabed.

(2) What proportion of fish in the path of the net are actually being caught.

(3) The validity of crude estimates of actual mortality of the stocks of species.

(4) The validity of extrapolating catch rates over a large area, given that catch rates must vary over distance and time.

(5) The biological similarity or otherwise of a local area, i.e. the fluctuations in food supplies over a large zone.

(6) The level of exploitation or actual harvesting at the time of the survey.

It is recognised that this method is not totally satisfactory (131), and the need for an institutionalisation of information regarding (a) mapping of the area, (b) its monitoring over time of variables such as catch, effort, size or age of the catch, (c) management directives and (d) predictive models of fish resource systems, is regarded as essential for proper management of the zone.

State Practice: Bilateral Agreements

Consistent with the emphasis on negotiation and agreement between states before resort to international procedures, found both in the 1958 Convention and the United Nations Charter, the Negotiating Text provides for agreements to be entered into by the coastal state with other states governing terms

of access to the EEZ (132). It is these agreements which may serve to clarify the degree of acceptance of the provisions of the Negotiating Text as international law and the manner in which they are implemented: a state could well adopt procedures in the agreements which would not be found in its national legislation and which could serve to indicate the way in which some of the discretionary provisions of the Act could be applied in practice.

New Zealand has concluded bilateral agreements with the Republic of Korea, USSR and Japan: each of these countries recognises, in the first instance, New Zealand's sovereign rights for the purpose of conserving and managing the zone's resources and take into account the work of the Third Law of the Sea conference relating to the Exclusive Economic Zone; although each agreement makes the reservation that nothing in the agreements should be construed as prejudicing any stance the parties may take at the conference. The agreements cannot therefore be used as evidence of the party's acceptance in international law of any of the provisions of the New Zealand legislation and will not cause them to be estopped from any other stance. For example, Japan has been opposed to any encroachment on the freedom of the High Seas, and while forced to adopt a 200 mile zone in 1978 in order to protect her fisheries from Soviet encroachment, did so as a provisional measure only.

The preambles to the agreements state that:

> "In accordance with relevant principles of international law, the Government of New Zealand has established a zone of 200 nautical miles, within which it exercises sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of that zone."

The zone is not referred to as an "Exclusive Economic Zone" and although "sovereign rights" are exercised by the coastal state, these rights do not include any "economic" rights other than those relating to the "conservation, exploration, exploitation and management of the living resources. Article II of the agreements allow fishing to take place "within New Zealand Fisheries jurisdiction (hereinafter referred to as the Exclusive Economic Zone)". This echoes S10 of the Act which provides that the waters within the EEZ are to be under New Zealand fisheries jurisdiction. The extension of fisheries jurisdiction in that section is couched in mandatory language while in contrast, S9 merely describes the limits of the EEZ, and lacks the positive extension of jurisdiction embodied in S10. This positive assertion of fisheries jurisdiction in contrast to the more descriptive language employed in relation to the EEZ means that New Zealand effectively extended jurisdiction over a fisheries zone only thus avoiding any possibility that the EEZ concept could be subjected to municipal judicial review and found to be contrary to international law since the EEZ concept has not as yet became firmly established in international law. New Zealand has reserved the right to claim a full EEZ in SS 27 and 30 of the Act, yet no such regulations have as yet been made, and it is likely that any such move would be postponed until there is agreement on a Convention at the Third Law of the Sea Conference.

In relation to the calculation of the T.A.C. and the allocation of the surplus to foreign vessels, the agreements repeat the phraseology of Art. 12, embodying the concepts expressed in Art. 62 of the Negotiating Text. The suspension of the foreign states quota due to "unforeseen circumstances" is provided for and an obligation is placed on the foreign states to make available to the New Zealand government such statistical and biological information as may be required for conservation and management of the zone

(133). The agreements also include provision for cooperation in research outside the zone, this is not envisaged in the New Zealand Act and non cooperation in this regard would probably not result in any reduction in the allocation as it might do if such non cooperation related to areas within the zone (134). However Art. 61 (s) of the Negotiating Text calls for all states to cooperate in the exchange of information on a regular basis "through relevant regional, subregional and global organisations" and this includes areas outside the EEZ.

There are two small areas of High Seas enclosed by the New Zealand zone and it was argued by New Zealand that if foreign vessels fished there they could subvert the management of the zone in that the fish caught there would not be under New Zealand fisheries jurisdiction and lack of information and control could lead to problems in formulating management plans. Consequently, all three countries agreed that their vessels, when fishing in these enclaves, would comply with New Zealand licensing conditions and zone laws as if they were applicable in those areas, catches made in those areas being included in their overall quotas for the zone. Once again it was provided that this concession would not prejudice any stance the countries take at the Law of the Sea Conference.

(iv) The Interpretation of the Act in Relation to International Law

An aspect of the Act which has not yet arisen for judicial interpretation is that of its relationship (as municipal law) to international law, and consequently whether the courts may turn to customary international law as a means of interpreting it.

The determination of which person or organ has the power to conclude treaties

is a matter essentially left to the constitutional law of the state itself. In British and New Zealand practice, this power is and has been consistently maintained by the Executive, in this area, New Zealand is governed by the provisions of the External Affairs Act of 1943, yet these somewhat narrow powers are extended by constitutional convention to include an extra-territorial function and enable New Zealand diplomats as well as "the Executive" to conclude international agreements. In most cases a treaty will be signed by the Minister of Foreign Affairs, but often another minister will undertake the duty if, for example, he is overseas on an official tour or is authorised by statute to do so.

The principle emerging from the Canadian Labour Conventions Case (135) is that the making of a treaty is an executive act, while its enforcement if such enforcement involves a change in the domestic law, is a legislative act and within the competence of parliament. This principle is subject to some qualification in that treaties providing for the cession of territory; expressly requiring legislative approval or of such importance that the government feels obliged to allow debate on the subject or otherwise discern the legislature's intention are usually subject to parliamentary approval.

Although the approval function of parliament is theoretically separate from its power to implement treaty provisions, the two are often merged, certainly where implementing legislation is required to give effect to treaty obligations, parliament does have some control over actions of the executive in relation to the conclusion of international agreements.

It is a fundamental concept of constitutional law that parliament has total sovereign ty and may make or unmake any law it so desires, consequently a municipal law takes precedence over a conflicting rule of international law in a

domestic court:

> "if its meaning is clear, we must give effect to it, even if it is different from that of the convention ... the crown has a sovereign right, which the court cannot question, to change its policy." (136)

But there is also a presumption that the Crown did not intend to break a rule of international law, and if there is any ambiguity between the Act and international law it should be resolved so as to accord with international law (137) since "no state can plead a deficiency in its municipal law against complaint of a breach of treaty obligations or a rule of Customary International Law" (138).

It was held in R v Kent Justices ex parte lye (139) that the extension of sovereign ty over territorial waters was:

> "peculiarly a matter for the crown from time to time under the prerogative to determine:

and:

> "no doubt any declaration of sovereign ty will in general, if not always, be made when the international law current at the time though if the crown did exercise sovereign ty over a greater area, these courts would have to enforce it."

In that case, it was argued that, the United Kingdom, having extended sovereignity over Territorial waters by virtue of an Act of 1875 (140), could not validly extend the Territorial Sea to three miles by order in council in 1964 (promulgated to give effect to the Geneva Convention on the Territorial Sea and Contiguous Zone 1958). The argument was rejected, and the judgement approved in the Court of Appeal (142) where Diplock, L.J. stated that:

> "For such extensions the authority of parliament is not required.

> The Queen's Court upon being informed by order in council of the Crown's claim to sovereign ty or jurisdiction over any place must give effect to it and are bound by it."

It is submitted that the courts of New Zealand, when faced with a situation where the Territorial Sea and Exclusive Economic Zone Act 1977 appeared to be in conflict with international law (for example, if the Act were found to be contrary to customary international law or the Negotiating Text in its codified form) would give similar precedence to the Act and any regulations made under it (142). The Act itself is the document that must be construed; if the wording is ambiguous it will be construed as far as possible to accord with international law, but if the meaning is clear and differs from international law, then effect will be given to it. Similarly any regulations made by the Governor General under the Act which purport to extend New Zealand jurisdiction will be enforced without need for legislation. This is a situation which could conceivably occur if the Governor General exercised his power under S9(3) of the Act, to implement an EEZ in the Ross Dependency. This may be construed as a further claim to sovereign ty and therefore contrary to the provisions of the Antartic Treaty yet if any question of its validity in domestic law arose the courts, if finding the words unambiguous, would not look beyond them to international law.

The result would perhaps differ if the Act expressly referred to or scheduled an international treaty or agreement, where the court would construe the act in the light of such international undertaking:

> "Furthermore the express mention in the Act of its intention to implement the Convention demonstrates ... that the language of the Act is intended to adopt and reflect its purposes." (143)

CONCLUSION

The main feature of the Act is its inclusion of wide powers of discretion; vested in both the Governor General and the Minister of Agriculture and Fisheries and it is the content of regulations made in pursuit of such powers that will determine the status and operation of the Act in the fields of International Law, Conservation and Management, and politics - both domestic and international.

It may be seen that although the long title of the Act states that its purpose is "to establish" an EEZ and S9 marks out the boundaries of such a zone, as yet no assertion of sovereign rights of this area has been made except in relation to fisheries where S10 of the Act extends New Zealand fisheries jurisdiction to encompass the 200 mile zone. Further powers are given to the Governor General to regulate other economic and scientific uses of the zone (which are consistent with those uses enumerated in the Negotiating Text) but as yet no such provision has been made and the major portion of the Act itself relates to the conduct of fishing within the zone.

The question naturally arises as to why legislation for an EEZ if it is not going to be utilised. It is probable that the answer lies in the field of international law, where the Law of the Sea has undergone considerable change in the twenty two years since the four Geneva Conventions were signed. Claims to 200 mile jurisdiction have escalated in the last decade, with the call for and implementation of a third United Nations Conference on the Law of the Sea adding impetus to the trend as states seek to create a type of "instant customary law" which may sway the future convention towards recognition of larger zones of jurisdiction. Yet although the trend of the conference is to favour extended jurisdiction, it cannot be said that the Economic Zone

concept (as distinct from other extended claims such as Territorial Seas or Fisheries Zones) has gained the overwhelming support of the international community and any extension of jurisdiction before a Convention is promulgated must still be in accordance with current customary international law.

Viewed in this light, the New Zealand Act can best be seen as a compromise between claiming the full rights proposed by the draft Convention and rights allowable under the present law. A strict interpretation of the dicta of the Icelandic Fisheries Jurisdiction case can result in support for the argument that a 200 mile Exclusive Fisheries Zone may be valid in international law, and it is probable that full economic jurisdiction will not be extended until such a zone receives the assent of the overwhelming majority of states either by Convention or custom. New Zealand's position in international law has been further safeguarded by the recognition of the 200 mile zone claim by the USSR, South Korea and Japan through the bilateral fisheries agreements: it may be argued that these agreements are without prejudice to the contracting parties' stances at the Law of the Sea Conference, but the adoption of 200 mile claims by those parties to their own offshore resources would in all likelihood stop them from challenging New Zealand's jurisdiction.

It is worrying that the Act lends itself so readily to political manipulation; While it cannot be disputed that the allocation of resources is rapidly becoming the largest international political issue, it must be recognised that only by responsible management in the first place can marine resources remain capable of sustaining political and economic demands. Global conservation of marine stocks can only be effectively achieved if national and regional measures are responsibly carried out. While it is pleasing to see that the standard of optimum utilisation of the resources has been adopted by the New Zealand Act as opposed to emphasising the economic efficiency of

the fishing operation, the actual calculation of the Total Allowable Catch is open to absue, either as a result of political intervention or by the inadequacy of information available to New Zealand fisheries researchers: such a situation could concievably damage stocks in the zone. It may certainly be said that the conservation measures adopted under the Act (e.g. limitations on fish size, limited quotas, restricted areas and seasons, restricted fishing effort, gear limitations, and the ban on the taking of marine mammals) are responsible and, with the increased data available from foreign vessels, should prove a more than adequate measure of conservation, yet the fact still remains that the Act does not safeguard these measures from political pressures, both international and domestic.

The Act has not gained the universal acceptance of the New Zealand fishing industry; with most protest coming from smaller operations in competition with larger joint venture vessels. The Negotiating Text envisions the expansion of the domestic industry to the point where it is able to harvest all the resources of the zone and the New Zealand Act is administered in conformity with such an aim; local vessels being given priority in allocation of quotas and grounds. If the local industry is to expand, the Act must not be seen as a protectionist measure, shielding local vessels from competition, but rather as a "development" package which, in conjunction with development schemes outside the Act, (such as loan and boat building assistance) works towards creating a viable and competitive New Zealand fishing industry.

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UN Doc No A/Conf 19/L 12 1960

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53. The Mining Act 1971 S8(i)

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55. SS 10-26

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65.

66. Speech of the USSR delegate to the 2nd Committee 3rd United Nations Conference on the Law of the Sea. Official Records vol II p 221

67. Moore (1980) 11 Journal of Maritime Law and Commerce 2. The states referred to are Fiji and New Zealand.

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69. Smith and Hodgson in Gamble and Miles ed. "Law of the Sea: Conference outcomes and problems of Implementation"

70. i.e. "An Act to make provision with respect to the Territorial Sea of New Zealand, and to establish an exclusive economic zone ... and in the exercise of the sovereign rights of New Zealand..."

71. Supra Art 61 (2)

72. ibid Art. 62 (1)

73. ibid Art 62 (3)

74. ibid Art 61 (3)

75. Convention on the Territorial Sea and Contiguous Zone 1958, Art 2

76. ibid Art 7(2) (a) (b) (c)

77. Fishery Limits Act 1976

78. Fishing Zones of Canada (zones 4 and 5) Order 1977 under the Territorial Sea and Fishing Zone Act 1964-5.

79. e.g the UK and Canada

80. Bahamas - Fishery Resources (jurisdiction and conservation) 1977 S2

81. Fiji - Marine Spaces Act 1972 S2

82. USA - Fishery Conservation and Management Act of 1976

83. Decree Amending Act 37 of the Federal Tax on Fisheries Management 10 Feb, 1976

84. Supra

85. Supra Art 69,70,71

86. ibid Art 62 (4) (my emphasis) The Proviso that the technology be related to the fishing industry would presumably preclude any transfer of military equipment.

87. Supra Arts 3,4,6

88. Supra Art 76

89. The Act; as defined in S2

90. S15 (3) (r)

91. Exclusive Economic Zone (licence fees for foreign fishing craft) Regulations Amendment 4 SR1980/65 April 1980

92. The Act S10

93. B Cunningham, Director Fisheries Management Division - quoted in "Commercial Fishing" March 1980

94. "Commercial Fishing" April 1980

95. S2

96. "Commercial Fishing" February 1980

97. NZ Foreign Affairs Review Jan-March 1980

98. Catch June 1978

99. NZ Foreign Affairs Review July-December 1978

100. Opinions of the US-Mexican Claims Commission - Roberts Case at p 105

101. The Territorial Sea and Fishing Zone Act 1965

102. Art IV (i) Japan-New Zealand Agreement on Fisheries 1978

103. ibid Art IV (1) (d)

104. Kim v Ministry of Agriculture and Fisheries 1292/79 Auckland Supreme Court

105. (1963) AC 160

106. The defence applies if the defendant proves that such activity related only to fish taken beyond the outer limit of the zone.

107. Supra p 5

108. The costs related to, inter alia, fuel consumed by the frigate Otago in undertaking the arrest of the vessel.

109. Agreement on Fisheries between the USSR and New Zealand 4/4/78 Art V

110. Supra Art I

111. ibid Art 7 (i)

112. ibid Art 7 (2)

113. Fisheries Amendment Act 1978 S6. In Australia: House of Representatives Debates 13 April 1978 1517

114. Fiji Marine Spaces Act, supra. The New Zealand Act S12

115. Cuba: Act of 24 Feb 1977. United Mexican State Decree of 10 Feb 1976

116. Supra

117. The Act S13 (1)

118. ibid S13 (2)

119. ibid S13 (2) (a)-(e)

120. Supra Art 62(3)

121. Bradstock, supra

122. ibid

123. The Hon Mr Talbot, Chairman of the Foreign Affairs Committee. Debate on the Territorial Sea and Exclusive Economic Zone Bill 23/8/77 New Zealand Parliamentary Debates p2401

124. Negotiating Text Art 61(3)

125. ibid

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127. Supra Arts 69(3), 70(4)

128. ibid Arts 69(2), 70(3)

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130. ibid p83

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132. Supra Art 62(4)

133. Art VIII, all agreements

134. The Act, S13 (1) (b)

135. Attorney General For Canada v Attorney General for Ontario (1937) AC 326

136. Post Office v Estuary Radio Ltd CA 1967 (1968) 2QB740 at p757

137. ibid. Diplock LJ referred to Salomon v Commissioners of Customs and Excise (1967) 2QB116

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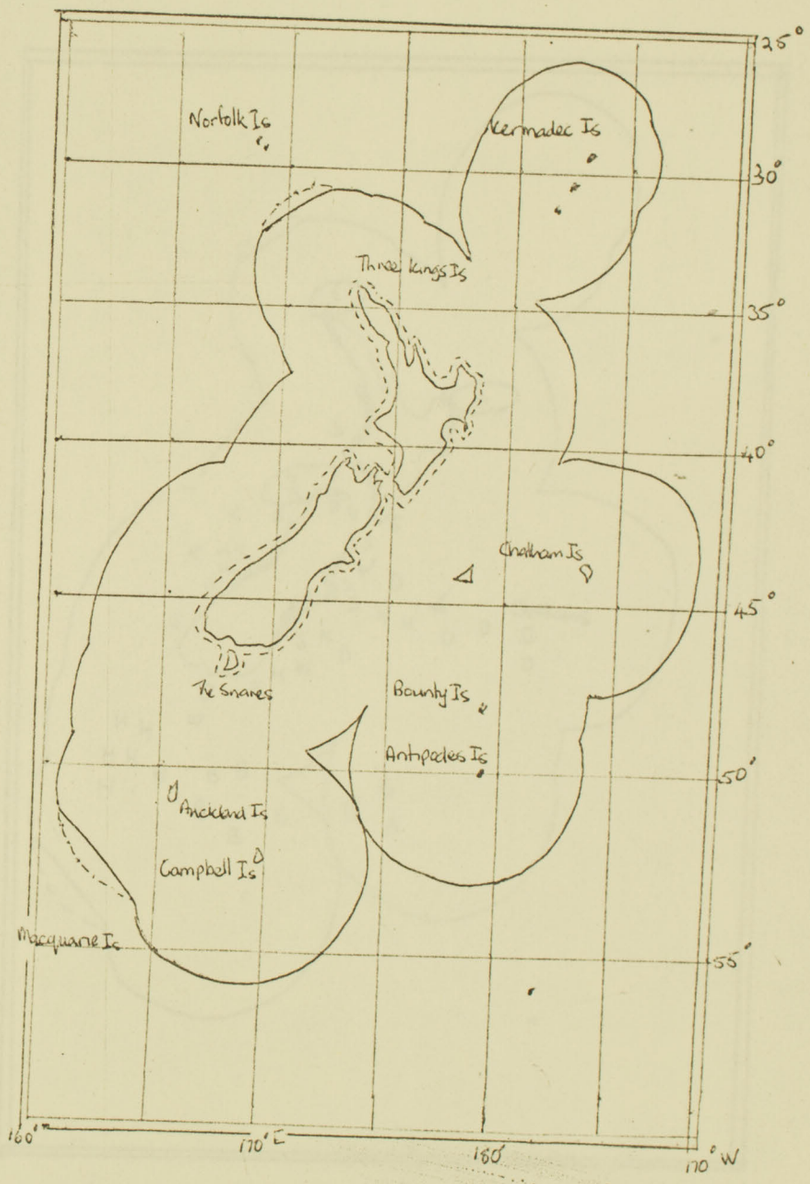
142. It should be noted that in New Zealand, the situation involving use of the prerogative would not arise, but the result would not in all likelihood differ.

143. King-Ansell v Police (1979) 2NZLR 563 pr Woodhouse.J.

New Zealand Exclusive Economic Zone



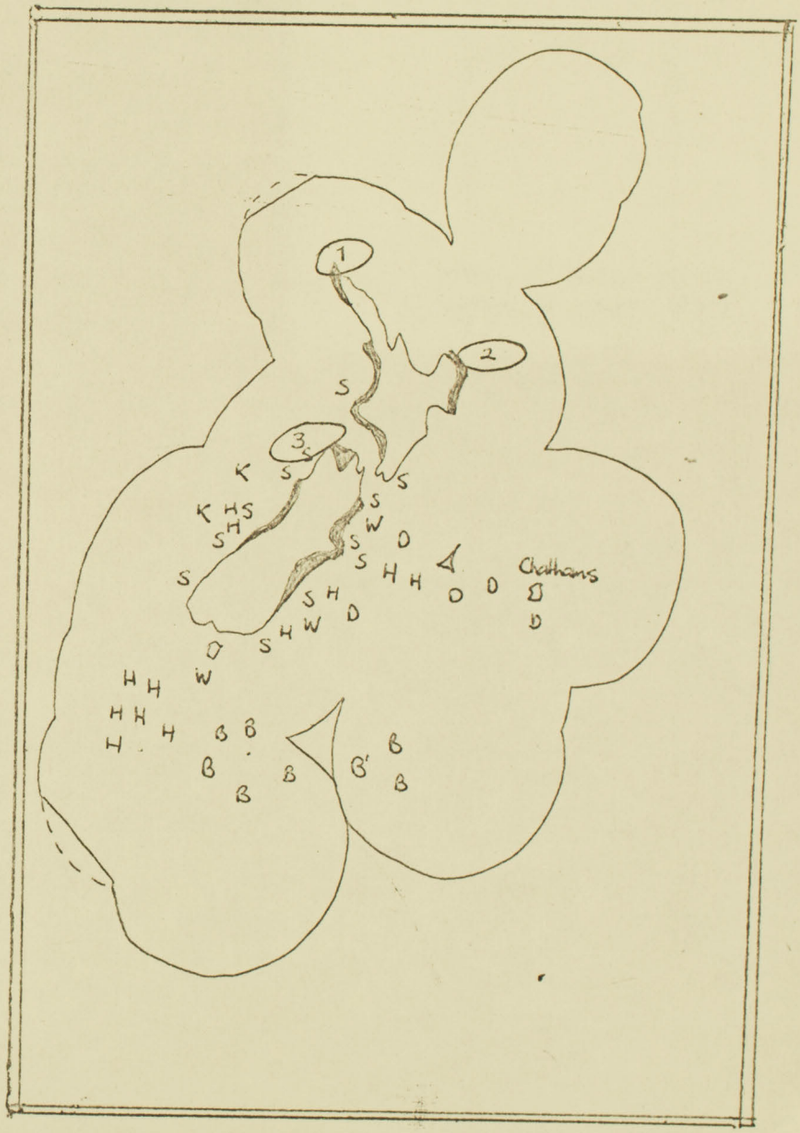
--- Territorial Sea

——— Exclusive Economic Zone Boundary

—·—·— " " Area of Overlap

The Exclusive Economic Zone

Fishing Grounds



Areas Closed to foreign trawling

Areas of upwelling (ie nutrient rich fishing grounds)
Three Kings
East Cape
Mernoo Gap

Fish Stocks

K – Hake
S – Squid
H – Hoki
W – Hakehau
O – Oreo Dory
B – Southern Blue Whiting