# MINISTERIAL INQUIRY – FCVS

MARITIME NEW ZEALAND

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| DATE OF REPORT | 10 October 2011 |
| SUBJECT | **Maritime New Zealand Submission: Ministerial Inquiry into Foreign Chartered Fishing Vessels** |

1. The purpose of this submission is to complement the information that Maritime New Zealand ("MNZ") has already provided to the Ministerial Inquiry Panel, provide further clarification of some of those matters, and also to provide a high level MNZ operational perspective on the maritime safety regulation of foreign chartered fishing vessels ("FCVs").

2. In summary, MNZ's submission is that all vessels undertaking fishing operations in the same operational area should be subject to the same legal regime with respect to vessel safety and the protection of the marine environment, because those activities have an impact on New Zealand as the coastal State.

## Introduction

3. FCVs operate within New Zealand's domestic economy, and yet they constitute something of a legal anomaly in the New Zealand maritime safety context. This has caused difficulties for operators, Safe Ship Management ("SSM") companies, and MNZ.

4. MNZ's primary submission is that FCVs, which historically have fished within the New Zealand Exclusive Economic Zone ("EEZ"), should be fully subject to the same safety regulatory regime as New Zealand fishing vessels that operate in the same area.

5. In the absence of change in the international legal framework concerning fishing vessels and their crew, MNZ considers that there is a strong argument in favour of reform of the relevant New Zealand law in order to address maritime safety issues. Having said that, MNZ is fully aware that the Ministerial Inquiry Panel must consider the regulation of FCVs from a variety of perspectives, including the costs of regulation.

6. This submission addresses:

   - The difficulties inherent in seeking to address issues associated with FCVs as one class of vessels;
   - The issues arising from New Zealand's exercise of jurisdiction over those vessels for safety purposes;
   - Other issues arising from the operation of FCVs in the New Zealand EEZ, including health and safety; and
   - Mechanisms identified by MNZ to deliver or provide one set of safety standards for all fishing vessels operating in the New Zealand EEZ.

7. When discussing legal standards, this submission is limited to issues of maritime safety.

## Scope of Maritime Safety

8. The concept of "maritime safety" encompasses:

- vessel and equipment safety;
- marine protection and the avoidance of pollution;
- vessel manning and seafarer certification;
- operational procedures;
- search and rescue; and
- health and safety issues (including living conditions and food preparation).

## International Law Context: Port State and Flag State Powers

9. While the United Nations Convention on the Law of the Sea ("UNCLOS") creates a dichotomy between the powers of coastal States and foreign States to make laws, it also seeks to balance the interests of the different States.

10. Under UNCLOS, the sea is divided into a range of different areas: from the territorial sea to the high seas. Coastal States have full sovereign rights in their territorial sea. Within the EEZ, coastal State's rights are more limited, and they have what is referred to as sovereign rights (in contrast to full sovereignty). UNCLOS provides for the scope of those sovereign rights, which relate to exploring and exploiting, and conserving and managing, natural resources (whether living or non-living).

11. As the present issue only relates to fishing operations, and as FCVs historically have fished in New Zealand's EEZ, this paper focuses on maritime safety issues regarding fishing operations in the New Zealand EEZ.

12. Although New Zealand has taken the view that its sovereign rights in the EEZ extend to the power for New Zealand to regulate vessel safety for foreign flagged vessels, MNZ observes that some FCV operators have occasionally taken a different view.

13. UNCLOS is the more general (or umbrella) convention over which the International Maritime Organization ("IMO") conventions operate. The IMO Conventions include matters of maritime safety and marine protection.

14. One example is the International Convention for the Safety of Life at Sea ("SOLAS"), which the primary instrument of international law with respect to vessel and equipment safety. Under SOLAS, coastal States' powers with respect to foreign-flagged vessels visiting its ports are generally limited to the operation of "port state control". This involves the coastal State ensuring that vessels carry appropriate documentation issued by their flag States. There are also circumscribed powers provided to the coastal State if the vessel is deemed to be unsafe.

15. Another example is the IMO convention on the Standards of Training, Certification and Watchkeeping (STCW). Professional mariners who have designated safety or pollution prevention duties must be trained to certain standards. STCW provides the international standard for the training of those professional mariners.

## Domestic Law Context

16. The rights of New Zealand (as a coastal State) in its EEZ can be contrasted with New Zealand's full sovereign rights regarding the "domestic regulation" of New Zealand registered ships. New Zealand ships are required by law to comply with the safety standards prescribed in the Maritime Transport Act 1994 (MTA), Maritime Rules (which are made under that Act) and the Health and Safety in Employment Act 1992 (HSEA).

17. Compliance with those provisions is then monitored both by SSM companies, which are authorised by the provisions of Maritime Rule Part 21 to act as a form of "delegated regulator", and by MNZ.

## FCV Legal Context

18. Many of the IMO conventions do not apply to fishing ships. For example, fishing ships and fishing crew are expressly excluded from the application of SOLAS and STCW. As a result, much of the international law relating to maritime safety does not apply to fishing operations.

19. The two international instruments specific to fishing, the Torremolinos Protocol and STCW-F, are yet to come into force. However, STCW-F will enter into force within 12 months. New Zealand is not party to either of those conventions. The coming into force of these instruments would provide international standards for fishing vessels and their crew, which in turn would provide for international consistency.

20. As a matter of law, New Zealand does not recognise a class of vessels known as FCVs. In fact, FCVs do not constitute a homogenous class of vessels. Rather, legally, they are a loose collection of ships, distinguishable by their country of origin, their flag status, and the nature of the charterparty agreement under which they are operating. Often, the crew members of one FCV will originate from several different countries.

## Scope of current maritime safety regulation

21. All of the aspects of maritime safety listed above are addressed in New Zealand primary legislation (including the MTA and the HSEA) and the Maritime Rules. The issue is the application of this suite of regulatory provisions to FCVs.

22. As a result of the general flag State/coastal State paradigm under UNCLOS, FCVs are subject to a variety of legal regimes while operating in the New Zealand EEZ.

23. For example, FCVs fish in the New Zealand EEZ subject to vessel safety requirements imposed by their flag State, as well as those imposed by New Zealand. As has been explained elsewhere, once an FCV operates within New Zealand for two years, the Safe Ship Management ("SSM") regime applies.[1]

24. Regardless of SSM applying to FCVs, some maritime rules do not apply because those rules apply only to "New Zealand ships" or "New Zealand fishing vessels".[2] For example:

- Maritime Rule Part 31C (Crewing and Watchkeeping Fishing Vessels) applies to any New Zealand fishing vessel.
- Maritime Rule Part 42B (Safety Equipment – Fire Appliances Performance Standards) applies to fire appliances that are installed or intended to be installed on any New Zealand ship (rule 42B.3).

25. As a result of this lack of homogeneity, MNZ's experience is that issues of FCV vessel safety can at times have an unhelpful complexity associated with them.

26. MNZ considers that there would be merit in the consideration of a safety regime that is constructed in such a way as to capture all FCVs, irrespective of the flag State, charterparty agreement or the length of time they have operated within New Zealand waters.

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[1] Found at Tab 6 of the Information Pack.

[2] There are a number of other maritime rules that do apply to FCVs. See again Tab 6 of the Information Pack.

# Legal Issues

27. As mentioned above, New Zealand considers that there is a legal basis for exercising international jurisdiction to make laws for safety purposes covering foreign-flagged FCVs operating within its EEZ. However, operators in the maritime industry have, from time to time, questioned New Zealand's international jurisdiction for doing so.

28. MNZ considers that there are sound operational policy grounds for New Zealand exercising responsibility for safety standards for these vessels. From an MNZ perspective, FCVs impact on New Zealand as a coastal State in the following ways:

- Vessel and equipment safety;
- Marine protection; and
- Search and Rescue.

29. Certainly, while operating under a charterparty agreement, FCVs are more closely connected geographically with New Zealand than with their flag States. New Zealand bears the environmental and reputational risk associated with that. Likewise, operation from New Zealand ports means that the search and rescue (SAR) burden in relation to these vessels falls on New Zealand.

30. An example is the Korean-flagged *Oyang 70*, which sank while fishing in the New Zealand EEZ in August 2010. Following a SAR operation managed by the Rescue Coordination Centre of New Zealand, the rescued sailors were brought back to New Zealand. The accident was investigated by the New Zealand Transport Accident Investigation Commission, and will be the subject of a New Zealand Coroner's inquiry to be held later this year.

**The MTA**

31. The Minister's power to make Maritime Rules is found in sections 34 (for rule maritime relating to maritime documents) and 36 (for rules relating to other matters) of the MTA. However, section 34 only authorises rule-making in respect of New Zealand ships, and foreign ships operating within New Zealand waters (defined as extending to the outer edge of the territorial sea). Accordingly, there may be an issue regarding to the Minister's power to make certain rules covering FCVs operating in the New Zealand EEZ.

**The Maritime Rules**

32. The Maritime Rules distinguish between "New Zealand ships" and foreign ships. The former class is defined, throughout the maritime legislation and regulations, as being a ship that is registered in New Zealand or is required, or entitled, to be registered in New Zealand.

33. The Maritime Rules govern FCVs. The rules prescribe the basis on which FCVs are regulated before they are required enter the New Zealand SSM system, and once they enter SSM (after the FCV that has operated in New Zealand waters for two years).

34. However, even after FCVs are required to enter SSM, some Maritime Rules only provide standards in respect of "New Zealand ships" (as noted above). Additionally, there are some Maritime Rules that FCVs should comply with once they have entered SSM, but currently most FCVs do not. For example:

- Part 40D (Design, Construction and Equipment-Fishing ships) applies to every foreign ship under SSM (rule 40D.3(1)(d)), however FCVs are designed and constructed to their flag State's standards, not New Zealand's.[3]

[3] MNZ does not necessarily see this as a safety issue, as ships can be designed and constructed to differing standards, and yet still be safe. However, it is an example of how FCVs do not easily fit within the domestic New Zealand safety regulatory regime. Another aspect to this issue is that there is no international standard for the design and construction of fishing vessels, as the SOLAS convention does not apply to fishing. As

35. Essentially, this creates a legal regime in which different legal standards apply, depending on whether the vessel is:

- a New Zealand ship;
- an FCV that has recently commenced operations in New Zealand waters; or
- an FCV after the expiration of the two year SSM entry requirement.

36. MNZ's view is that this distinction is inappropriate and unlikely to improve safety standards on an ongoing basis. MNZ considers that all FCVs should, if legally permissible under international law, be required to operate under the same legal framework as New Zealand ships fishing in the same operational area.

**Health and safety issues**

37. Under the international law applicable to FCVs, the flag State retains responsibility for issues of crew health and safety. This covers a broad range of matters, including the avoidance of injury, the minimisation of hazards, crew accommodation and living conditions.

38. Originally, provisions as to crew health and safety were included in the MTA as enacted in 1994. The provisions of Part II of the MTA imposed duties in respect of health and safety on New Zealand ships.

39. In 2003, the HSEA was amended to apply to ships. MNZ was designated as the agency with statutory responsibility for the administration of the HSEA for work on board ships and ships as places of work. One of the consequences of the legislative amendment was the repeal of Part II of the MTA.

40. The HSEA does not apply to foreign crew on FCVs. They are crewed subject to foreign employment agreements.

41. The SSM regime (under the Maritime Rules) does include provisions relating to vessel safety, including the avoidance of injury and the minimisation of hazards. It does not provide for the "health" aspects of health and safety, for example crew accommodation and/or living conditions.

42. MNZ considers that there is scope for New Zealand to assert control over crew health and safety issues in respect of FCVs operating in the EEZ. As presently drafted, the HSEA applies to persons engaged under contracts or agreements governed by New Zealand law:

- on board a New Zealand ship; or
- on board a foreign-flagged ship carrying coastal cargo on demise charter to a New Zealand operator.

43. There may be merit in consideration being given to further amendment to the HSEA to cover FCVs. On the basis of the present formulation of section 3B of the HSEA, the crew would need to be subject to New Zealand employment law. MNZ's information is that most crewing agreements are governed, at the moment, by foreign employment law. This would also need to be addressed.

44. MNZ observes that there is a legal regime that applies to foreign flagged vessels that undertake coastal cargo in New Zealand's territorial sea. Foreign ships may only carry coastal cargo within the limitations imposed by section 198 of the MTA, unless otherwise authorised by the minister of Transport. This is found in section 198 of the MTA. These vessels are subject to the HSEA, if the employees are employed under an agreement subject to New Zealand law. So the question may be asked, why not simply have a similar regime for FCVs that are fishing within New Zealand's EEZ? There are some differences.

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noted elsewhere, the 1993 Torremolinos Protocol would provide for an international standard for the design and construction of fishing vessels.

- First, foreign vessels are undertaking operations in the territorial sea (as opposed to the EEZ). So, New Zealand has, at international law, full sovereignty with regard to those vessels.
- Second, these vessels are subject to international standards, which are set out in the applicable IMO conventions (for example SOLAS and STCW). FCVs are not subject to any international standards.

## Policy Issues

45. MNZ's view is that the regulatory policy of providing FCVs with a two-year window of operation before being required to enter the SSM system has not been successful in terms of ensuring adequate safety standards have been met.

46. In the last five years, FCVs have been a focus for activity by MNZ. In that time, MNZ has introduced a series of measures, each adopted with the purpose of improving vessel safety on FCVs. This can be seen in the Director's letter of 7 December 2006, in which she set out the revised MNZ policy for FCVs.[4]

47. Further capacity for increased oversight was delivered in 2008 when the power to issue maritime documents related to the SSM system was removed from SSM companies. This ensured that these certificates were issued by the Director.

48. In the past six months, MNZ has increased the scope of its inspection regime by its Maritime Safety Inspectors. This has placed FCVs under more intense scrutiny as to vessel and equipment safety.

## Compliance Issues

49. There have been issues as to some FCVs' compliance with the Maritime Rules.

50. Section 41 of the MTA provides for the Director to recognise foreign certificates on the basis of a finding that the flag State's standards are similar to those of New Zealand. (You may recall this is before FCVs have been operating in New Zealand waters for two years.) In this regard, MNZ exercises port State control and is not required to look behind the documents to ensure compliance with the foreign standards. With the benefit of hindsight, it is apparent that there may be issues as to whether individual vessels have indeed met the foreign standards to which they have been certified.

51. Likewise, it is apparent to MNZ that New Zealand SSM companies, upon an application to join their SSM systems, have adopted a similar approach. Faced with foreign survey certificates, the SSM companies have accepted those certificates as evidence of compliance with New Zealand safety standards without substantial verification.

52. MNZ recognises that, as the regulator with ultimate responsibility for maritime safety, it has a role in ensuring that vessels operating subject to New Zealand laws are safe to do so. MNZ is conscious that its monitoring of this area of maritime safety could have been more rigorous.

## How MOSS will affect FCVs

53. The most significant development for FCVs under the proposed Maritime Operator Safety System ("MOSS") will be the requirement that they enter the MOSS system prior to operation in New Zealand. The two year window will no longer be available to FCVs.

54. The proposed arrangements under the MOSS system are expected to deliver a simplified system and strengthen MNZ's regulatory control over FCVs operating in New Zealand.

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[4] Found at Tab 17 of the Information Pack.

This is consistent with the history of improvements in the regulation of FCVs discussed above.

55. It needs to be recognised that the MOSS system will not address all existing issues as to FCVs. A requirement that FCVs enter the MOSS system prior to operation will not provide for the application of Maritime Rules limited in their application to "New Zealand ships".

## Options for how these issues might be addressed

56. MNZ's fundamental position is that it considers that there should not be a distinction at law between various FCVs, or between FCVs and New Zealand ships. MNZ's preference, form an operational safety perspective, would be for all fishing vessels operating within the New Zealand EEZ to be subject to the same maritime safety standards.

57. Putting international initiatives to one side, two avenues suggest themselves as a means of delivering this outcome:

- Amendment of the relevant suite of legislation (including the Maritime Rules); and
- Requiring all FCVs to be registered in New Zealand as a condition of operation in the New Zealand EEZ.

58. It is too early for MNZ to express a conclusive view as to which of these mechanisms would have the greater efficacy. The former would require amendment to, among other enactments, the MTA, the Maritime Rules and the HSEA. It is conceivable that amendment to the Ship Registration Act 1992 might also be required.

59. MNZ's view is that the latter course might have some merit. This would appear to be a comparatively simple means of ensuring the application of New Zealand standards to FCVs. This approach has the attraction of being more consistent with the coastal State/flag State paradigm discussed earlier in this submission than including FCVs.

60. MNZ is conscious that requiring FCVs to be New Zealand-registered will not necessarily provide a simple and complete answer to any and all safety issues associated with FCVs. For example, there may still be issue with the application of Maritime Rule Part (discussed above). Many FCVs simply would not be able to meet the standards contained in Part 40D because they were originally constructed to different standards.

## Conclusions

61. From an MNZ perspective, FCVs impact on New Zealand as a coastal State in the following ways:

- Vessel and equipment safety;
- Marine protection; and
- Search and Rescue.

62. MNZ's view is that the MOSS system will represent a significant opportunity for improvement in the safety of commercial fishing generally. It is expected that this will be reflected in the FCV fleet.

63. MNZ's view is that a clear and consistent regulatory regime, with one standard applicable to all fishing ships operating in New Zealand waters, would assist MNZ to ensure that vessels operating in the EEZ do so safely.

64. In the absence of international initiatives coming into force in the short term, MNZ considers that the two mechanisms identified above should be considered further and it would welcome a recommendation from the Panel to that effect.

# Recommendations

65. In keeping with the Ministerial Inquiry Panel's desire to be able to make robust recommendations to the New Zealand government, MNZ would welcome recommendations in relation to the following issues.

**Information sharing**

66. From time to time, it has been apparent to MNZ that individuals within other government departments and entities have held concerns as to vessel safety but have not considered it appropriate to raise those concerns with MNZ.

67. In circumstances in which vessels are being operated in a fashion which might be unsafe while fishing in the EEZ, it has been MNZ's experience that this information sometimes does not come to light until some time after the fact.

**Amendments to legislation and regulations**

68. As will be clear from the discussion above, a regulatory regime that requires all fishing ships to meet the same safety standards will require amendment to legislation (including the Maritime Rules).

**International initiatives**

69. MNZ considers that the Torremolinos Protocol and STCW-F (a crewing and watchkeeping convention specific to fishing vessels) would provide additional clarity as to New Zealand's legal authority to regulate FCVs. MNZ would welcome additional efforts for New Zealand to adopt and implement these instruments.