Marine Protected Areas in the Exclusive Economic Zone: UNCLOS or the TPPA’s Looming Presence?

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Introduction

In January 2016, the Minister for the Environment released a proposal for new marine protected areas legislation.1 If enacted, this proposed legislation would repeal the existing Marine Reserves Act 1971, and replace it with an Act providing for four different types of marine protected areas to be set aside following a Board of Inquiry or collaborative process.2 However, these protected areas would all have to be within New Zealand’s territorial waters3 and so, in this respect, the new legislation would represent no change from the existing position: the Marine Reserves Act 1971 already authorises the establishment of marine reserves within the territorial sea, but not in the exclusive economic zone (EEZ) which lies between 12 and 200 nautical miles offshore.4 The Minister has tried to support the Government’s decision to exclude the EEZ from the proposal by referring to New Zealand’s obligations under the United Nations Convention on the Law of the Sea (UNCLOS),5 but his argument is difficult to sustain, and a more plausible explanation...

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3 At 6 and 16.
4 Section 3(1) authorises the establishment as reserves of:

… areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest

and s 2 defines “area” as:

… any part of … the seabed vertically below an area of the surface of … the territorial sea of New Zealand; or … the internal waters of New Zealand as defined by section 4 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977; … the foreshore of the coast of New Zealand; … and includes any water at any material time upon or vertically above it.

for the decision appears to be the proposed Trans–Pacific Partnership Agreement (TPPA).

The Marine Protected Areas Act Proposal
Currently, marine reserves are established by the Minister of Conservation with the concurrence of the Ministers of Primary Industries and Transport, following a process that is initiated by an application (from the Director–General of Conservation, a university, the administering body for a seaside reserve administered under the Reserves Act 1977, an organisation engaged in the scientific study of marine life or natural history, or the Tangata Whenua), is led by the Minister and Director–General of Conservation, and includes an opportunity for anyone to make objections on proposed reserves. The presumption is that reserves are no take, nil use areas, although exceptions to this for fishing and mining can be made.

Under the proposed new legislation, marine protected areas will not all be presumed to be nil use, no take areas. This legislation would provide for four types of protected areas: marine reserves (which would be the same as under the existing Act: nil use, no take areas), species–specific sanctuaries (where particular activities could be regulated, in order to protect (a) particular species but otherwise allow for sustainable use of the area), seabed reserves (here seabed mining, bottom trawl fishing, and dredging would be prohibited, but sustainable use of the area would otherwise be allowed) and recreational fishing parks (in which commercial fishing would be banned in order to “enhance the enjoyment and value of recreational fishing in high-demand areas”).

The Ministers of Conservation and Primary Industries would make an initial joint decision with the Minister for the Environment on which marine protected area proposals will be considered, and a further joint decision on whether accepted proposals will be considered using a collaborative, or a Board of Inquiry, process. Boards would be appointed by the Ministers, and chaired by an Environment Court Judge. Public consultation would be required, whichever process is chosen by the Ministers. The final decision on making a protected area would be made by the “relevant Ministers”. The Government’s Consultation Document does not mention that the Minister’s (or Ministers’) decision will be subject to any rights of appeal.

Personally, I can see a lot of good in the Government’s proposal, but I also see a lot that is disappointing from the marine environment’s

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6 Marine Reserves Act 1977, s 5(9).
7 Sections 5(1) and (3).
8 Sections 3(2), 3(4), 4(5) and (6), 5(9).
9 Notably, these activities would not include fishing; the proposal says that these would continue to be managed using “established tools” under the Fisheries Act 1996: Ministry for the Environment, above n 1, at 17.
10 At 17.
11 At 21–24.
perspective. From an environmental point of view, particular concerns with the existing process for making marine reserves under the Marine Reserves Act 1971 are the apparent preference given to objections to proposals for marine reserves,\textsuperscript{12} and the final requirement for concurrence by the Minister of Primary Industries with the Minister of Conservation’s decision to establish a marine reserve.\textsuperscript{13} While the decision in \textit{Akaroa Marine Protection Society Incorporated v Minister of Conservation}\textsuperscript{14} helped address the first of these concerns (Whata J held that objections to proposals for marine reserves must be considered against the potential benefits of those proposals and not in isolation, before the Minister decides to accept an objection and reject the proposal),\textsuperscript{15} the ability of the Minister of Primary Industries to effectively veto a proposal at the last step remains\textsuperscript{16} and is a clear disincentive to the establishment of marine reserves under the 1971 Act. The proposed legislation will involve the Minister of Primary Industries from the get–go, so there should be no question of any expensive, end of process, vetos. I think this is good, but only because it may avoid unnecessary expense on the part of the Department of Conservation, and not because it will result in more marine reserves being made (it clearly will not).

\textsuperscript{12} Section 5(6) states that the Minister must consider any objections before considering the application (which sets out the anticipated benefits of the proposal), and shall uphold any objection if satisfied that the proposed reserve would interfere unduly with: any estate or interest in land in or adjoining the proposed reserve, any existing right of navigation, commercial fishing, any existing usage of the area for recreational purposes or, would otherwise be contrary to the public interest.

\textsuperscript{13} Section 5(9).


\textsuperscript{15} At [79].

\textsuperscript{16} CRA3 Industry Association Incorporated v Minister of Fisheries [2001] 2 NZLR 345. Significantly, in this case the Court of Appeal (at [29] per Ellis and Doogue JJ) held that “concurrence” means that the Minister of Fisheries:

\begin{quote}
... must make his own decision and have regard not only to the particular expertise available to him from his ministry and his statutory functions under the legislation, but also to the wider picture. This wider picture includes the assessment by the Minister of Conservation of the desirability of creating the new reserve.
\end{quote}

In delivering his own concurring judgment, Thomas J (at [2]) emphasised that: “While entitled to place reliance on the views of the Minister of Conservation, [the Minister of Fisheries] cannot accept them without bringing his own judgment to bear on his decision.” He added (at [6]):

\begin{quote}
While a cooperative and harmonious relationship between the Department of Conservation and Ministry of Fisheries is to be encouraged, the Minister of Fisheries cannot shed this independent function which he is to exercise pursuant to the statute. It is part of the statutory safeguard provided in the Act for commercial fishers.
\end{quote}
“Joint” decision-making between the Ministers of Conservation and Primary Industries and the Minister for the Environment features at least twice in the procedure proposed for making marine protected areas under the new legislation: when the initial decision to progress an application (or not) is made, and when the subsequent decision about whether to apply a collaborative or a Board of Inquiry process is made.17 “Joint” decision-making between the three Ministers could also be the method envisaged for the final decision on whether to establish a new marine protected area, but the Government’s Consultation Document is, to my mind at least, unclear on this point. Heidi Baillie argues persuasively that “joint” decision-making fudges decision-making in a way that is likely to hinder the effectiveness of judicial review: 18

Applicants challenging joint ministerial decisions face additional barriers on judicial review, compared to those challenging decisions of a single minister. The major barrier is that the courts are likely to adopt a [strict standard to test the reasonableness of decisions] because the involvement of additional ministers appears to be a signal from Parliament that such decisions involve weighing and balancing of competing policies. … Another hurdle for applicants is that ministers may prefer not to give reasons, in order to conceal areas of disagreement and negotiation. Ministers might rely on [Talleys Fisheries Ltd v Cullen HC Wellington CP287/00, 31 January 2002 (HC)] to argue that there is no duty to provide reasons … [and] it seems likely that ministers will [be able to] rely on s 9 of the [Official Information Act 1982, which authorises the withholding of official information where this is necessary to protect the free and frank expression of opinions between ministers], so applicants cannot rely on that route as an alternative. … Identifying reviewable decisions may [also] be problematic. … Although this problem is not unique to joint ministerial decisions, it seems more likely to occur in that context, because of the drawn-out discussions and negotiations leading up to joint decisions.

Judicial review is currently the only means of challenging the Ministers’ decisions under the Marine Reserves Act, and it seems that it will continue to be the only available means of legal control over the Ministers’ decisions about marine protected areas under the proposed legislation.19

But the biggest disappointment (and initially most confusing aspect) of the Government’s marine protected areas proposal is the decision that the new legislation (if it ever in fact eventuates) will not apply to the EEZ, despite earlier assurances by the Minister that it would.

Marine Protected Areas, the EEZ and UNCLOS
Explaining its decision not to extend the reach of the new legislation out to 200 nautical miles offshore, the Government said that marine protected areas in the EEZ would not be ruled out, and may in the future

17 Ministry for the Environment, above n 1, at 22–23.
19 The Consultation Document (Ministry for the Environment, above n 1) is silent on appeals.
be established by special Acts of Parliament, as in the current proposal
to establish the Kermadec Ocean Sanctuary by enacting the Kermadec
Ocean Sanctuary Bill.20

But existing legislation already provides for the making of Executive
Orders or regulations establishing marine areas in the EEZ where fishing
can be restricted to protect the marine environment or marine mammals
and wildlife21 (and the Government’s proposal expressly indicates its
intention that many of these tools will continue to be used even if the
proposed Act is made),22 and for areas in the EEZ where mining activities
can be excluded.23 The Minister for the Environment’s response to this
question has been to say that making at least some kinds of marine
protected areas – that is, marine reserves of the blanket no take, nil use
kind – in the EEZ by Executive order would put New Zealand in breach
of its international obligations, and he has suggested, more specifically,
that such action would breach UNCLOS.24

However, establishing no take, nil use marine reserves in the EEZ
does not breach UNCLOS,25 provided New Zealand does not exercise
its “sovereign rights” to (inter alia) conserve and manage the natural
resources of the EEZ without having “due regard” to the rights and

20 Kermadec Ocean Sanctuary Bill 2016 (120–1). If enacted, this Bill would
establish a marine reserve extending from 12 nautical miles offshore of
each of the islands in the Kermadec group, out to the 200 nautical mile
limit of the EEZ. (The territorial sea is already a protected marine reserve.)

21 Fisheries Act 1996, ss 11, 15, 297 and 298.

22 Ministry for the Environment, above n 1, at 17. Note that this does not
mean that more coordination and integration between these various tools
would not be a good idea, as the Government is well aware, with the
Ministry for the Environment’s consultation document noting (at 11):

New Zealand has other legislative tools available that offer
marine protection in specific circumstances, ... These statutes do
not provide for a range of marine protection and use measures
to be implemented as a package, so some key initiatives over the
past two decades have been put in place using special Acts of
Parliament, such as in Fiordland, Kaikoura and the Subantarctic
Islands.

23 Exclusive Economic Zone and Continental Shelf (Environmental Effects)

24 Interview with Nick Smith, above n 5.

25 Graeme Kelleher (ed) Guidelines for Marine Protected Areas (IUCN,
Gland, Switzerland, 1999) at 3; Alison Reiser ‘The Papahānaumokuākea
Precedent: Ecosystem-scale Marine Protected Areas in the EEZ’ (2012) 13
APLPJ 210. It is worth noting that in the one UNCLOS case to feature a
marine protected area, the focus of the Permanent Court of Arbitration
was squarely on sovereignty over the disputed islands, and the Court
appears to have had no issue with the marine protected area itself: Chagos
Marine Protected Area Arbitration (Mauritius v United Kingdom) (2015) PCA
(Case Number 2011-03).
duties of other states.26 This was certainly the position taken the last time a new marine reserves Act was proposed in 2002.27

The art 56 reference to “sovereign rights” is well understood to mean something less than the “sovereignty” that coastal states enjoy over their territorial seas,28 but expressly includes ensuring, through the use of “conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.”29 This conservation and management must be done taking into account the best scientific evidence available30 and consistently with the rest of UNCLOS, particularly pt V on the EEZ.31

The explicit rights of other states, set out in UNCLOS, that must be given “due regard” by New Zealand are rights to enjoy freedom of navigation and freedom of overflight, and rights to lay submarine cables and pipelines. But there is nothing to stop these rights being accommodated in specific marine protected areas. Thus, the Kermadec Ocean Sanctuary Bill would expressly allow some activities in the proposed sanctuary precisely in order to accommodate New Zealand’s international obligations.32 Provided such accommodations are made, there would be no breach of UNCLOS’s duty on New Zealand to pay due regard to these rights of other states.

One possible counter-argument is that UNCLOS requires states to manage all the living resources in their EEZs exclusively for optimum utilisation purposes. This argument emphasises arts 61 (which requires states to set catch limits for the living resources in their EEZs, from which it is implied that the living resources are all there to be caught) and 62 (which requires states to promote the objective of optimum utilisation of the living resources of the EEZ, from which it is implied that everything must be exploited). Then there are the points that

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26 According to arts 56(2) and 58(3). Thus, for example, in discussing the Kermadec Ocean Sanctuary, Cabinet acknowledges the need to be aware of the limitations to coastal states’ rights in their EEZs (Cabinet Paper “Establishment of a Kermadec Ocean Sanctuary” (10 September 2015) at [28]).


28 Art 2.

29 Art 61(2).

30 Art 61(2).

31 Department of Conservation Marine Reserves Bill: Summary of the Key Issues, above n 27, at 5.

32 Office of the Minister for the Environment, Establishment of a Kermadec Ocean Sanctuary, Prepared for the Cabinet Economic Growth and Infrastructure Committee (September 2015) at [39], and Kermadec Ocean Sanctuary Bill 2016 (120–1), cls 7 and 10.
indeterminate preservation of (any of) the living resources of the EEZ potentially conflicts with the rights of other states to enjoy access to “surplus” fisheries in the EEZ, and that UNCLOS only directly considers (and so is confined to) preservation and environmental protection in the context of pollution and not preservation and protection of the marine environment in any wider context or in response to other threats (in particular, fishing).

But optimum utilisation does not necessarily exclude no take marine reserves, and total allowable catches can be zero: nothing in UNCLOS says otherwise. To the contrary, UNCLOS clearly envisages that states will legitimately restrict where fishing activities can take place.

No take marine reserves are a well-recognised component of fisheries conservation and management. The very existence of the Kermadec Ocean Sanctuary Bill shows that the New Zealand Government sees no issue in proposing a bill to create a very large no take, nil use marine protected area in New Zealand’s EEZ. It matters not to UNCLOS whether New Zealand, or any other state, establishes no take, nil use marine protected areas in its EEZ by Act of Parliament or by Executive order, so this part of the Minister’s suggestion of a breach of UNCLOS is a red herring. The practice of other states support this: as at 2010, there were 15 known marine protected areas in EEZs around the world, at least some of which are no take, nil use areas. Much of the Coral Sea Commonwealth Marine Reserve, for example, is zoned as a ‘marine national park’ where mining and all types of fishing are prohibited. What is more, this marine reserve was established within Australia’s EEZ by proclamation of the Governor–General of Australia, under the authority of the Environment Protection and Biodiversity Conservation Act 1999 (Ch), s 344. In the United Kingdom, the Marine and Coastal Access Act 2009, ss 116 and 123 mandate the creation of a network of marine conservation zones, including within that state’s EEZ. These zones can be established by relevant Executive authorities (Welsh Ministers, Scottish Ministers, the Secretary of State), depending on location. The entire EEZ of the Pitcairn Islands has been designated a no take, nil use reserve.

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33 Art 62(2).
34 The argument is that the words “as provided for in the relevant provisions of this Convention” in art 56(1)(b) limit the scope of art 56(1)(b)(iii) (“the protection and preservation of the marine environment”) to the matters in pt XII.
35 Art 62(4).
36 Ministry for the Environment Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary (February 2016) at [84].
37 Once again, no problem with the idea of New Zealand making no take, nil use reserves by way of Executive Order was identified when the Marine Reserves Bill 2002 (224–1) was being considered.
38 Graeme Kelleher, above n 25, at 8.
use marine reserve by order of the Governor of the Islands. These are but a few examples of the inaccuracy of the Minister’s claim of a breach of UNCLOS by extending the proposed marine protected areas Act to include the EEZ. If UNCLOS is not the problem, what is?

The TTPA: The Real Concern?

The Government appears open to making a no take, nil use marine reserve in the EEZ by way of an Act of Parliament, following a select committee process, but not to authorising the making of other no take, nil use marine reserves in the EEZ by way of Executive orders, following a collaborative or a Board of Inquiry process. Why? The Executive orders in question here (those establishing marine protected areas in the EEZ) would be made by Ministers, following a Board of Inquiry or governance board recommendation. Acts are made by Parliament, which the Government can pretty much control via the party political system. New Zealand has an EEZ covering four million square kilometres, one of the largest EEZs in the world. It is no secret that the current Government has been encouraging the exploration of the resources of the EEZ, and that some giant international corporations have shown interest in petroleum resources, in particular, in the EEZ.

Adding all of this up, I have wondered whether the Government is concerned about keeping control over marine reserves that might limit commercial activities (seabed mining, for example) in the EEZ and that, rather than being concerned about the impact of the marine protected areas proposal on UNCLOS, the Government is more concerned about the potential impact of something much closer to the themes of this Symposium on trade and international dispute resolution: the Investor State Dispute Settlement provisions of the TPPA. After all, the TPPA aims to create a “seamless regulatory environment for cross-border movement of goods, capital, data, and elite personnel and their related commercial activities” and would therefore allow international investors to challenge New Zealand laws or government policies using the international state dispute settlement procedures if they believed that those law or policies diminished their future profits through unfair or unequal treatment or indirect expropriation.

41 Ministry for the Environment, above n 1, at 24.
42 Bill Mansfield “Law of the Sea – The Benefits for New Zealand” (12 June 2006) Te Ara – The Encyclopedia of New Zealand <teara.govt.nz> at 3. Statoil, Anadarko and Shell Oil, for example. The activities that have been applied for and allowed in the EEZ are all described on the website of the Environmental Protection Authority <epa.govt.nz>.
take, nil use marine reserves could be seen as affecting investor interests, and be subject to these provisions. The Government probably wants to have control over these measures. This makes me think of Jane Kelsey, who has been an out-spoken opponent of the TPPA and has observed that: 46

The most egregious threat to the environment [in the TPPA] is the investment chapter, in particular the prior consent by all countries except Australia to investor-state dispute settlement (ISDS). The vast majority of investment arbitrations under similar agreements involve natural resources, especially mining, and have resulted in billions of dollars of damages against governments for measures designed to protect the environment from harm caused by foreign corporations.

But there are flaws in this argument too: the Ministers would have plenty of control over the establishment of marine reserves if the new legislation were to extend to the EEZ – at least as much, if not more, control than if special Acts were used to create offshore marine reserves. Also, just as with UNCLOS, it is unlikely that it will matter to the TPPA whether marine reserves are established in the EEZ by Executive order or Act of Parliament. The draft text of the agreement released in January 2016 speaks simply of “measures” taken by Parties. Measures can be “law[s], regulation[s], procedure[s], requirement[s] or practice[s].” 47

Conclusion

Maybe international law is not involved at all in the Government’s decision not to extend the proposed marine protected areas legislation to the EEZ. Executive orders are reviewable in domestic courts, Acts of Parliament are not, so perhaps the decision is all about limiting challenges to marine reserves in domestic courts? Thus, legal challenges to the Kermadec Ocean Sanctuary Bill have been stayed because of the comity principle, which arises precisely because Parliament is involved in making Acts. 48 Of course, involving Parliament can also mean involving politicians of different political persuasions and it is politics which seems to have stalled the creation of the Kermadec Ocean Sanctuary, at least for now.

48 Te Ohu Kai Moana Trustee Ltd v Attorney-General [2016] NZHC 1798.