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The Kermadecs Conundrum

marine protected areas and democratic process

Introduction

Marine protected areas (MPAs) are on the increase. Their creation is heralded as a significant response to severe marine degradation caused by fishing, mining, pollution and climate change. However, MPAs are highly controversial as they can override other competing interests, and their creation has become fraught. Sometimes this is about historic or ongoing disenfranchisement; often it has to do with a lack of transparency in the development processes (Warne, 2016).

New Zealand's recent move to establish a large marine protected area in the Kermadec region exemplifies these problems. The Kermadec Ocean Sanctuary Bill, if passed, will establish an MPA in New Zealand's exclusive economic zone around the Kermadec Islands (Ministry for the Environment, 2016a, p.3). It would be one of the world's largest and most significant fully protected ocean areas (New Zealand Government, 2016a). However, it will also potentially extinguish property rights of the fishing industry and Māori. Compensation to affected parties is expressly extinguished in the bill, and it was developed in the absence of consultation; both of these factors have resulted in strong opposition to the bill.

This article considers the conundrum of the bill. It first outlines the Kermadec region and its history, and the intended effect of the bill. It then examines the main issues raised by interested parties, considers the Treaty of Waitangi impli-

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cations of the bill, and notes some particular observations not considered explicitly in the current dialogue. Overall, the sanctuary proposal demonstrates the importance of transparency in the establishment of MPAs and the need for standardised processes. It also demonstrates the inherent conflicts in plural societies with differences in world views. Ad hoc approaches to MPA establishment undermine their effectiveness and result in unnecessary conflict.

The Kermadec Ocean Sanctuary

The Kermadecs lie within New Zealand's exclusive economic zone, located 1000 km north-east of the North Island. Globally, the region is important because of its rich biodiversity and geology. It is home to over six million seabirds of 39 different species, includes the second deepest ocean trench in the world, and up to 35 species of dolphin and whales migrate through the area. Many of the species that live in and migrate through the region exist only there, or are critically endangered elsewhere in the world. With these characteristics, and as a migration route and safe haven for far-ranging species, the region plays a crucial role in ocean ecosystems. The region is valuable scientifically because of its potential to enhance understanding of marine ecosystems. Culturally, the region is significant to a number of iwi. Ngāti Kuri and Te Aupōuri have statutory acknowledgements relating to Te Rangitāhua/Kermadec Islands and are recognised as mana whenua (Ministry for the Environment, 2016c, pp.6-9).

The Kermadec Islands Marine Reserve was created in 1990, establishing a no-take marine reserve from the shoreline out to the 12-nautical-mile territorial sea boundary, which means that no extractive activity is allowed. The exclusive economic zone surrounding the islands has a benthic protected area (BPA) that prohibits certain fishing activities in the territorial sea and surrounding seabed out to 200 nautical miles. New Zealand's marine environment is divided into ten fisheries management areas (FMAs) under the quota management system: the proposed sanctuary covers most of FMA10 (Ministry for the Environment, 2016c, pp.15-17).

New Zealand has voluntarily undertaken international obligations to protect the marine environment and meet the requirements of international maritime law. Under the United Nations Convention on the Law of the Sea, New Zealand's sovereign right to exploit natural resources must be exercised in accordance with its duty to protect and preserve the marine environment.[2] In addition, under the Convention on Biological Diversity New Zealand has obligations regarding the establishment of protected areas for the conservation and sustainable use of biological diversity (Ministry for the Environment, 2016c, p.54).[3] New Zealand subscribes to this convention's Aichi target 11, which sets the global goal of '10 per cent of coastal and marine areas to be conserved by 2020', and emphasises areas of particular importance for biodiversity and ecosystem services (ibid.). Less than 1% of New Zealand's marine area is currently protected. This would jump to 15% if the sanctuary is created (ibid., p.55). Scientific research demonstrates that at least 30% of the world's marine area should be protected for the sake of conservation of marine biodiversity (B. Golder, personal communication, 2 September 2016).

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The bill is the (intended) outcome of an eight-year campaign that began in 2008 and was led by the Pew Charitable Trusts, the World Wide Fund For Nature (WWF) and Forest and Bird. Mana whenua, scientists, artists, business leaders, international ocean ambassadors, politicians, the Royal New Zealand Navy and non-governmental organisations were involved in that campaign. The core of the campaign focused on the scientific value of the region and was delivered through a range of media (ibid.).

The bill was announced at the United Nations in September 2015. Subsequently introduced into Parliament in March 2016, it is still awaiting its second reading. The government originally aimed to have the sanctuary in place by 1 November (Ministry for the Environment, 2016b, p.3); however, it is now being delayed in an attempt to resolve the ongoing conflict.

The purpose of the legislation is to preserve the region in its natural state (clause 3) by establishing this new MPA (Ministry for the Environment, 2016b, p.3). The resultant sanctuary will comprise the waters, and underlying seabed and subsoil, extending from the boundary of the current Kermadec Islands Marine Reserve to the 200-nautical-mile limit of the exclusive economic zone (ibid.). Fishing, mining and seismic surveying for non-scientific purposes will be prohibited (clause 9).

Issues

During the select committee process, submissions for and against the creation of the sanctuary came from three main interest groups: conservation groups, iwi and fisheries companies. Among these groups three main issues were identified. These were: whether the proposal extinguished property rights; whether the proposal was a sustainability measure; and the inability to claim compensation.

Property rights

Submitters to the local government and environment select committee raised

concerns about the potential loss of property rights. There are two types of rights at issue here: commercial fishing rights allocated under New Zealand's quota management system, which include commercial fishing rights granted to Māori under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and Māori customary fishing rights guaranteed by the Treaty of Waitangi and the 1992 settlement (Te Ohu Kai Moana Trustee Limited, 2016, p.36).

Commercial fishing rights

Quota held under the quota management system are a form of transferable property right. Iwi and the fishing industry claim that the bill's proposed no-take zone will extinguish their commercial property rights because they can no longer fish in FMA10 (Te Ohu Kai Moana Trustee Limited, 2016, p.4; New Zealand Fishing Industry Association, 2016, p.3). Although it appears that removing the right to fish in FMA10 effectively extinguishes property rights, a further consideration of the evidence suggests that that may not be the complete answer.

Forest and Bird, the Pew Charitable Trusts and WWF claim that no rights would be extinguished by the sanctuary. The reason for this is that all of the quota management species currently caught in the proposed sanctuary area are highly migratory species. The quota management area of these stocks is the entire exclusive economic zone. As the total allowable catch for highly migratory species has not been reduced by this bill, quota holders can continue to harvest their quota elsewhere in the zone. Further, over 97% of relevant quota is taken outside FMA10. Thus, access to the Kermadec region is not critical to the harvesting of the species concerned and does not remove the right to fish these species elsewhere in the exclusive economic zone (Forest and Bird, Pew Charitable Trusts and WWF, 2016, p.6).

The select committee did not explicitly decide whether the bill would extinguish commercial fishing rights. However, its overall discussion seems to suggest that it accepted that no such rights would be extinguished. This can be seen in its emphasis on the evidence that suggests minimal impact, such as the absence of stocks caught in FMA10, as well as it noting that highly migratory species can be caught elsewhere in New Zealand (Local Government and Environment Select Committee, 2016, p.7). Further, despite expressing sympathy with those who had expressed concern about the loss of rights because the sanctuary would, in effect, prevent the utilisation of quota within the area of the sanctuary, it considered that the inability to claim compensation should remain (ibid., p.8).

Māori customary fishing rights

The bill's no-take zone effectively removes Māori customary rights and is thereby claimed to be inconsistent with the Treaty of Waitangi, as well as the 1992 settlement (Te Ohu Kai Moana Trustee Limited, 2016, p.4). The issue is less than clear cut and the government itself has identified the need to determine whether the bill does in fact extinguish Māori customary rights (Cabinet, 2015, p.9). However, WWF contends that the sanctuary is consistent with the 1992 settlement act because only commercial quota settlement assets are affected by the creation of the sanctuary (Forest and Bird, Pew Charitable Trusts and WWF, 2016, p.6). This is because there are no recognised customary fishing rights being exercised within the sanctuary area to extinguish.

Although attractive, this argument is inherently flawed. First, it requires us to accept that not using a right means there is no right (to extinguish). Second, it is not consistent with tikanga. Rights according to tikanga are not absolute. Rights are relational and are determined according to whakapapa (ancestral lineage) and other relationships. Use of a right may cease but the connection to a place can never be severed. Thus rights, sourced in whakapapa, are inalienable. Importantly, this means that rights of use can always be reasserted (Jackson, 2010). To assess Māori customary rights so narrowly is inconsistent with the principles of the treaty and the Māori world view.

The committee did emphasise that customary rights or interests in the Kermadec area would not be extinguished by the bill (Local Government and Environment Select Committee, 2016, p.8). However, it is not clear what evidence the committee was relying on to conclude in this way, and they did not explain this point further. Overall, whether the bill extinguishes commercial or customary fishing rights is still a live issue, and hopefully subsequent assessment will conclude the matter before the bill is enacted.

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Compensation and sustainability measures

The bill extinguishes the right to compensation (schedule 1). It is generally accepted that legislation should not take a person's property without good justification and that compensation should be paid (Legislative Advisory Committee, 2014, schedule 1, clause 1). The bill's approach is considered consistent with the creation of no-take reserves and justified because the sanctuary is a sustainability measure. The policy justification is that the government, in principle, should not have to compensate for sustainability measures taken to protect the marine environment (Local Government and Environment Select Committee, 2016, p.11).

There are two main issues here: whether the sanctuary is a sustainability measure, and whether quota allocated to Māori under the 1992 settlement was always subject to the Crown's right to create reserves without compensation. In support of the latter point, it is argued by some that settlement quota held by Māori is not distinguished from other quota under the Fisheries Act 1996 (Forest and Bird, Pew Charitable Trusts and World WWF, 2016, p.6). All commercial quota is subject to the management measures provided for under that act, including the adoption of sustainability measures such as no-take areas, and thus includes Māori settlement quota (part 3). Some committee members did not accept this argument. If this were so, then the Crown would not need to legislate away quota holders' ability to claim compensation through the courts (Local Government and Environment Select Committee, 2016, p.9). While this may be technically correct from a purely doctrinal point of view, such a justification sits uncomfortably in the context of treaty settlements. It raises the question of what 'full and final' means in the light of parliamentary supremacy, a matter that extends beyond the scope of this article.

The second issue concerns whether this is even a sustainability measure such that removing the right to compensation is justified. Industry stakeholders claim that this is not a sustainability measure for a number of reasons. First, they claim that the area is adequately protected because of the presence of a benthic protected area and a mineral reservation in FMA10. Second, the commercial total allowable catch for FMA10 is low and the stocks are caught using methods that pose no threat to fragile benthos. Further, there is no evidence that this level of fishing poses a threat to marine biodiversity in the Kermadec exclusive economic zone (Paua Industry Council and New Zealand Rock Lobster Industry Council, 2016, p.11). However, the industry's claims may be overstated. Benthic protected areas (BPA) only protect the seabed and the water column up to 100 metres above the seabed (Ministry for Primary Industries, 2009). Further, BPAs are recognised as having limited conservation value and the government does not consider them to meet the definition of marine protected areas in New Zealand policy or legislation because they do not meet sufficient biodiversity conservation values (WWF, 2016, p.5). In addition, the mineral reservation in place does not exclude petroleum (New Zealand Petroleum and Minerals, 2016). These factors suggest that the sanctuary is indeed justifiable as a sustainability measure.

The issues raised at select committee concerning property rights, compensation and sustainability measures demonstrate the inherent complexity of the creation of the sanctuary. However, the complexity may reflect the procedural failings. As highlighted by the WWF, the concerns expressed and the misinformation generated demonstrate a need for more systematic, transparent and efficient processes for developing marine reserves in other parts of the exclusive economic zone (WWF, 2016, p.7).

The government's engagement with iwi did not meet the standard of consultation required by Treaty principles or consultation generally.

Duty to consult with Māori

One of the key issues surrounding creation of the sanctuary has been the lack of consultation with Māori on the proposed bill. The Treaty of Waitangi obliges the Crown to consult with Māori on any matter that a responsible treaty partner would consult on.[4] The treaty principle of partnership is at the heart of consultation, and the good faith owed to each party to the treaty 'must extend to consultation on truly major issues'.[5] In *Ngai Tahu Maori Trust Board v Director-General of Conservation* the granting of whale-watching permits was so linked to taonga and fisheries that a reasonable treaty partner would recognise that treaty principles were relevant.[6] Consultation was required in that instance. As the bill directly concerns commercial, and potential customary, fishing rights, it is likely that consultation would have been triggered in this case. Further, given the significance of the 1992 settlement, a responsible treaty party should have realised – and the Crown did in fact realise – that such a situation required proper engagement with Māori (Cabinet, 2015, p.9).

However, there was in fact no consultation with industry stakeholders or iwi on the proposal to establish the sanctuary (Fisheries Inshore New Zealand, 2016, p.26). The government only engaged with iwi after Cabinet had made the decision. Te Ohu Kaimoana, who manage Māori fishing quotas, were advised by telephone the evening before the government's announcement of the intention to establish the sanctuary (Te Ohu Kaimoana Trustee Limited, 2016, p.16).[7] Attempts to engage with government following the announcement were unsuccessful. A letter sent to the prime minister seeking the opportunity to work towards a marine protection initiative that would meet the needs of government, iwi and the seafood industry was declined by the minister for the environment (Fisheries Inshore New Zealand, 2016, p.30).

The government's engagement with iwi did not meet the standard of consultation required by Treaty principles or consultation generally.[8] Further, the government's approach is inconsistent with section 12 of the Fisheries Act. That section requires consultation with interested parties where sustainability measures are to be introduced (s12(1)). Sustainability measures include setting the total allowable catch to zero (ss11, 13-15). Section 12 does not directly apply to the present matter; however, it specifies situations that require consultation when implementing measures that have the

same effect as the establishment of the sanctuary under the bill (Fisheries Inshore New Zealand, 2016, p.29).

Lack of consultation with Māori is also inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples, which includes the right to consultation.[9] Interestingly, the Crown has used consistency with international obligations as an argument in support of the sanctuary (Cabinet, 2015, p.5). However, in the process it has neglected other relevant international law. Although the Declaration on the Rights of Indigenous Peoples is non-binding, there is still domestic authority for looking towards international documents New Zealand has signed as a guide to interpretation of domestic legislation.[10] Overall it appears that the government has simply proceeded to follow a chosen policy irrespective of opposition.

Observations

Motive

The Kermadecs discourse shows that beneath the rhetoric of sustainability, it appears the government's key motive is for New Zealand to be lauded as a pioneer in marine conservation. This is evident in the many statements made during the bill's first reading. Almost every member referred to the importance of this sanctuary to New Zealand's pioneer status as a 'world leader' in marine conservation, while the sanctuary was repeatedly referred to as the 'gold standard' (New Zealand Government, 2016b). However, research demonstrates that protection and sustainability goals can be achieved through a range of different protection regimes, which can accommodate other social interests. The International Union for the Conservation of Nature (IUCN) top level of protection (category Ia) contemplates some extractive activity (IUCN, n.d.b). The Kermadec Cabinet paper categorises the Kermadec sanctuary as an IUCN Ia category marine protected area (Cabinet, 2015, p.5.). Allowing for Māori customary fishing rights would mean the sanctuary would not be the gold standard; however, it would still meet the criteria to be an IUCN category Ia. Thus, it appears that pioneer status has unduly influenced the government in its pursuit of gold.

Reform

The government has identified the need to reform the current approach to the creation of marine protected areas. In particular, the government highlights the inadequate consultation processes in the current regime, which provide few mechanisms for Māori participation in decision making (Ministry for the Environment, 2016a, p.12). However, these issues are not new. Two bills introduced and subsequently dropped sought to address inadequacies of the current regime, as well as provide for consultation (Marine Reserves Bill, 2002; Marine Reserves (Consultation) Bill, 2006). Further, marine protected areas already have comprehensive policies in place that include a number of implementation principles that guide their establishment (Department of Conservation and Ministry of Fisheries, 2005, 2008). Three principles of note are: the special relationship between the Crown and Māori will be provided for, including kaitiakitanga and customary use; MPA establishment will be undertaken in a transparent and participatory manner; and adverse impacts on existing users of the marine environment should be minimised in establishing MPAs (Department of Conservation and Ministry of Fisheries, 2005, pp.18, 19). Although the bill is not subject to this policy, the calls for a consistent approach to MPA establishment suggest that such a document is particularly relevant. Further, the principles contained in the document reflect those in the MPA reform consultation document, as well as the IUCN MPA programme (IUCN n.d.a).

Conclusion

The Kermadec Ocean Sanctuary Bill provides an illuminating case study. It demonstrates the importance of transparency in government processes and the subsequent risks where this is absent. It also illustrates the inherent problems within pluralistic societies where we have opposing world views, such that one – often Maori's world view – is subordinated to the other. If the government wishes to eliminate unnecessary conflict it could reassess the processes it follows, or simply follow the ones that are ostensibly already in place.

1 The title must be credited to Kennedy Warne, *NZ National Geographic* writer: see Warne, 2016.
2 United Nations Convention on the Law of the Sea, 1833 UNTS 3 / [1994] ATS 31/21 ILM 1261 (1982) arts 192–3.
3 Convention on Biological Diversity, 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993).
4 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).
5 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 513 (CA) (Forestry Asset case) at 152.
6 At 558.
7 Announced at the United Nations General Assembly, 29 September 2015.
8 *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA).
9 United Nations Declaration on the Rights of Indigenous Peoples, A/Res/61/295 (adopted 13 September 2007), article 32(2). Resolution of and adopted by the United Nations General Assembly in 2007, endorsed by New Zealand in 2010.
10 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266.

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