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The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011

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Introduction

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (the Bill) was introduced to Parliament on 24 August 2011 and is scheduled to come into effect on 1 July 2012 (Hon Nick Smith MP "Environmental protection laws for oceans introduced" press release, 24 August 2011). The Bill will set up an environmental management regime for New Zealand's Exclusive Economic Zone (the EEZ) and Continental Shelf (the CS). It aims to fill the gaps in New Zealand's existing environmental management regime and to give effect to New Zealand's obligations under the United Nations Law of the Sea Convention 1982 (the LOSC) to manage and protect natural resources of the EEZ (explanatory note to the Bill).

This article looks at the Bill in light of New Zealand's rights and obligations under the LOSC. We then address three key areas of concern including: (a) the purpose of the Bill; (b) the test for granting marine consents under cl 61(2); and (c) the precautionary approach. We consider that the Bill largely succeeds, in a drafting sense, in what it sets out to do (ie provide an effects-based statutory regime for balancing environmental protection with economic development). However, we consider that the Bill fails to provide an adequate degree of clarity in respect of our three areas of concern. Lack of clarity in turn contributes to an overall failure to achieve a desirable level of integration with the Resource Management Act 1991 (the RMA). This leads to our central concern, which is that "failure to achieve integrated management will

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result in unnecessary complexity and costs for the Crown, applicants, submitters (whether supporters, opponents or neutral), and decision-makers" (Robert Makgill and Alastair Logan, "The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill" (2012) LawTalk 789 at 15).

Rights and obligations under the LOSC

It is important, when considering the Bill, to appreciate that the EEZ and CS are not part of New Zealand's sovereign territory. Rather, New Zealand exercises "sovereign rights" over the EEZ and CS pursuant to the LOSC. Those sovereign rights are subject to a number of obligations set out under the LOSC, various international agreements and customary international law.

The EEZ extends from the outer limit of the territorial sea (12 nautical miles) to 200 nautical miles from the territorial sea baseline (LOSC, arts 55 and 57). The CS comprises the seabed and subsoil which is "the natural prolongation" of a coastal State's land territory and may extend beyond the EEZ (art 76(1)). New Zealand has the fifth largest EEZ, approximately 430 million ha, in the world (Ministry for the Environment *Improving regulation of environmental effects in New Zealand's Exclusive Economic Zone*, discussion paper, August 2007 at 1). Furthermore, our CS does extend beyond the EEZ in certain locations. The combined area of the EEZ and CS is approximately 20 times New Zealand's land area. Its vast size is conversely matched by the limited amount of scientific information we have concerning its ecosystem values and natural resource potential (Ministry for the Environment *Regulatory Impact Statement: Exclusive Economic Zone and Extended Continental Shelf Environmental Effects Legislation*, April 2011 at 1).

New Zealand has "sovereign rights" within the EEZ for "exploring and exploiting, conserving and managing" the living and non-living natural resources of the waters, seabed and subsoil (LOSC, art 56(1)(a)). The EEZ provisions under the LOSC also establish jurisdiction over artificial islands, installations and structures, marine scientific research, and obligations to protect and preserve the marine environment (art 56(1)(b) and (c)). New Zealand's rights and jurisdiction are subject to freedoms enjoyed by other States including; navigation, overflight and the laying of submarine cables and pipelines (art 58), as well as the general obligations under the LOSC (eg Parts XII and XIII) and those set out under other international agreements and customary international law.

New Zealand's rights are narrower in respect of the CS where it extends beyond the EEZ. These comprise exclusive "sovereign rights" to explore and exploit natural resources within the CS (ie mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species (LOSC, art 77). There are no special rights in respect of the water column or airspace (art 78). Exclusive rights are exercised over artificial islands, installations and structures (art 80), and for the authorisation and regulation of drilling (art 81). These rights are subject, however, to the freedom of foreign States to lay submarine cables and pipelines (art 79(1)), and the requirement to pay royalties to the International Seabed Authority for resources exploited from the CS.

It is important to note that cl 11 of the Bill provides that it "must be interpreted, and all persons performing functions and duties under it must act, consistently with New Zealand's obligations under the [LOSC]". This not only requires decisions made under the Bill to be consistent with Parts V, VI and XII of the LOSC (ie those providing for the EEZ, CS and protection and preservation of the marine environment), it also requires decisions to be consistent with the full body of customary international law that is used to interpret the implementation of those Parts of the LOSC (see Elana Geddis "The Law in International Waters" (2011) 174 NZLawyer 18).

However, the law of the sea is no longer confined to the LOSC. New Zealand is subject to international obligations under a number of international and regional instruments with respect to its EEZ and activities taking place therein. The most important of these instruments is the Convention on Biological Diversity 1992. Clause 11 fails to recognise the complete framework of international obligations that New Zealand needs to take into account when providing for protection and development within its EEZ and CS. In that sense it might be helpful to amend cl 11 by removing the words "under the convention" (New Zealand Law Society *Submission on Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill*, 27 January 2012 at 4). It is relevant to note here that specific reference to the LOSC under cl 11 does not negate the existence of, nor excuse non-compliance by New Zealand with, international obligations of other origin (based on contributions made by Associate Professor Karen Scott, Professor Timo Koivurova and Ana Paula Linhares, during preparation of the Law Society's *Submission*).

In short, while New Zealand has jurisdiction to enact legislation over the EEZ and CS, such legislation must be consistent with our rights and obligations under the LOSC, other international agreements to which New Zealand is a party and customary international law.

Purpose of the Bill

Clause 10 is the central purpose provision in the Bill. Subclause (1) provides that the Bill "seeks to achieve a balance between the protection of the environment and economic development in relation to activities in the [EEZ] and on the [CS]". A balancing approach to development and protection under the Bill is appropriate in light of New Zealand's rights and obligations under the LOSC. This is because the right to develop resources within the EEZ and on the CS, conferred under the LOSC and customary international law, is subject to obligations to protect and preserve the marine environment (LOSC, preamble and art 193). In this part of the article we discuss the balancing approach of the Bill in light of international law, the existing domestic framework and integrated management.

International law: sustainable development

The preamble to the LOSC states that its objectives include establishing a legal order for the seas and oceans which promotes "the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment". The LOSC thus attempted for the first time to provide a global framework for the rational exploitation and conservation of the sea's resources and the protection of the environment (Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed, Oxford University Press, New York, 2002) at 348).

The LOSC provision for development and protection is consistent with the concept of sustainable development recognised by the World Commission on Sustainable Development in its report *Our Common Future* (Oxford University Press, Oxford, 1987). The report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (at 43). Many definitions of sustainable development, if not most, include explicit or implied reference to "future generations" (although it is worth noting that there are a variety of different ways in which the term has been implemented in practice).

The LOSC does not expressly endorse sustainable development except in relation to EEZ fisheries (LOSC, art 61(3)) and the conservation of the living resources of the high seas (art 119(1)(a)). Nevertheless, there is no doubt that the development rights and environmental obligations under the LOSC can be used to give effect to sustainable development. Support for this can be found in decisions of the International Tribunal for Law of the Sea, and the United Nations General Assembly resolutions and reports of the consultative process on oceans and law of the sea (*Oceans and the law of the sea: Report of the Secretary-General* topic of focus of the twelfth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, UN General Assembly, Document A/66/70/Add.1, 11 April 2011).

Irrespective of whether one accepts that the LOSC endorses sustainable development, it is important to recognise that the balancing approach under cl 10 of the Bill is interpreted under international law as sustainable development. For example, the International Court of Justice (the ICJ) found in the *Gabčíkovo-Nagymaros* case that "this need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development" (*Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* Merits, Judgment, ICJ Reports 1997, at 77–78, [140]). Likewise, the ICJ observed in the *Pulp Mills* case that it is "the balance between economic development and environmental protection that is the essence of sustainable development" (*Pulp Mills on the River Uruguay (Argentina v Uruguay)* Merits, Judgment, ICJ Reports 2010, at 54, [177]).

The existing domestic framework

The proposed balancing approach under cl 10 of the Bill has many similarities to the "sustainable management" purpose of the RMA and the "utilisation"/"sustainability" purpose of the Fisheries Act 1996. Both pieces of legislation form part of the marine management regime under cl 7 of the Bill, and include decision-making provisions that will interface with decision-making under the Bill. The key departure under the Bill's purpose from the aforementioned legislation is the omission of any requirement to consider the needs of future generations. This is also a departure from sustainable development as defined under international law (*Our Common Future*). It is important to acknowledge that natural resources are finite. However, the lack of reference to future generations under the Bill narrows the ability of decision-makers to consider

whether resources might be better exploited at a future point in time (eg as technology improves the efficiency of exploitation methods).

Perhaps of greater concern to the immediate implementation of the Bill once enacted, however, is the lack of a clear definition of its purpose. Failure to define the balancing approach under the Bill introduces an unnecessary level of uncertainty that is likely to complicate integrated management of the EEZ, CS and territorial sea. "Integrated management" between different sectoral and jurisdictional boundaries is the cornerstone of sound environmental legislation. There is an extensive body of international literature extolling the administrative virtues of providing for integrated management within legislation governing the marine and coastal environment. It is relevant within this context that the RMA is generally extolled amongst that body of literature as a legislative model for the implementation of "integrated management" (eg Robert Makgill and Hamish Rennie "A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand's Resource Management Act 1991" (2012) 27 IJMCL at 135–165).

Implementation of integrated management of the EEZ, CS and territorial sea, in the case where there is more than one legislative regime, requires that policy considerations, decision-making processes and administrative entities are harmonised and made consistent (Robert Makgill and Hamish Rennie, at 140). Consistent definitions of the respective balancing approaches adopted under the RMA and the Bill are a prerequisite to achieving an appropriate level of integration and compatibility between the existing and proposed legislative regime for marine management in New Zealand.

Risks of failing to define balancing approach

The balancing test under cl 10(1) has not previously been interpreted by the New Zealand courts. Failure to adopt the term "sustainable" under the Bill's purpose means that administrators and applicants will find less comfort from existing precedent and practices developed in light of New Zealand's existing domestic legislative framework. It is therefore possible that, despite inclusion of a balancing approach, the purpose of the Bill may be interpreted differently to that of the RMA. For example, the Bill might be interpreted as offering less protection than Part 2 of the RMA (Barry Barton "Offshore Petroleum and Minerals" (2011) NZLJ 211 at 212). This is especially so in light of cl 61(2), which enables the Environmental Protection Authority (EPA) to grant consent if an activity's contribution to economic development outweighs an activity's adverse effects on the environment.

The intense level of commercial and political interest in both development and protection of the EEZ and CS means that interpretation of the proposed balancing approach is likely to be contentious. Any differences between the Bill and the RMA are likely to be subject to time-consuming and costly litigation. Lack of domestic precedent may be exacerbated, notwithstanding cl 11 of the Bill (which requires that the Bill be interpreted consistently with the LOSC), by judicial reluctance to look to customary international law for assistance in interpreting cl 10(1).

The Bill (cls 93–98) anticipates cross-boundary applications where a proposal will need to be considered under both the Bill and the RMA. In light of the present uncertainty concerning the interpretation of the Bill's balancing approach, there is a risk that two different statutory balancing approaches will need to be assessed in the case of cross-boundary applications and effects. This would be difficult to administer and impose additional costs on applicants, likely requiring consideration of both tests in respect of the respective jurisdictional area (ie territorial sea and EEZ/CS). It is also possible that cross-boundary applications would be decided differently either side of the boundary.

Improving the purpose clause

In our view the Bill should be worded as simply as possible in order to avert any unnecessary uncertainty as to where the balance needs to be drawn in terms of decision-making. We consider it would, therefore, be preferable for the purpose of the Bill to clearly define the balancing approach with reference to the definition of sustainable management under the RMA. Such an approach would be more certain, easier to administer and ultimately less costly for decision-makers and applicants.

We consider that the term "sustainable management" is preferable over the terms "sustainable development" or "sustainable use". This is because sustainable management is the test that will be applied under the RMA to those parts of a cross-boundary application located in the territorial sea. Consequently, adoption of a sustainable management approach would promote integrated management of the marine environment. Furthermore, use of the term sustainable management will mean decision-makers are able to draw on an extensive pool of case law built up over the last two decades of resource

management decision-making in New Zealand.

The authors think that it is likely to have been a deliberate policy decision on the part of the Government to distinguish the purpose of the Bill from the purpose of the RMA. However, we do not consider that defining the balancing approach under the Bill as sustainable management is likely to deliver decisions any more or less favourable to either economic development or marine protection than those presently made under the RMA. This is because a sustainable management approach allows for comparative weighting of development values against other environmental values, and it is not uncommon for the benefits of development to outweigh adverse effects in decision-making under the RMA (eg *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC)).

Test for granting marine consents under clause 61(2)

Clause 61(2) authorises the EPA to grant a marine consent "if the activity's contribution to New Zealand's economic development outweighs the activity's adverse effects on the environment". Conversely, the EPA may refuse an application "if the adverse effects of the activity on the environment outweigh the activity's contribution to New Zealand's economic development" (Law Society's *Submission*, at 6).

In its present form, cl 61(2) is inconsistent with the purpose of the Bill. Clause 61(2) enables a consent to be granted if economic development outweighs environmental effects. Perceived economic benefit trumps environmental effect. This not only creates an internal inconsistency with the balancing approach under cl 10 of the Bill, it is also inconsistent with New Zealand's rights and obligations under the LOSC.

Clause 61(2) also creates a significant difference between the marine consent decision-making process under the Bill and the resource consent decision-making process under the RMA. The clause sets thresholds for both granting and refusing applications for marine consent, based on weighing the activity's contribution to New Zealand's economic development against the activity's adverse effects on the environment. That evaluation in itself will be complex and problematic, particularly as there is no guidance within the legislation as to how an activity's "contribution to New Zealand's economic development" is to be assessed. In addition, it is not clear whether the weighing exercise results in a threshold (ie once the evaluation has been completed, whether there is still a discretion to grant or refuse based on all relevant considerations), or whether the evaluation is the final and deciding factor in the decision-making process (based on contributions made by Margot Perpick, during preparation of the Law Society's *Submission*).

Different tests under the RMA and the Bill will contribute to the complexity of processing cross-boundary applications and create the possibility that cross-boundary applications are decided differently. This is not satisfactory for decision-makers, applicants or other stakeholders. To resolve these concerns, cl 61(2) should be simplified to remove reference to the weighting of environmental effects and national economic benefit. We consider that it would be simpler to include national economic contribution under a new clause providing for matters of national importance to be recognised and provided for when exercising functions, powers or duties under the Bill. Some direction might be taken from ss 6 and 7 of the RMA. In particular, the Bill could list those forms of economic development and environmental values that are of national importance. Matters of national importance would in turn be accorded more weight in decision-making than those that are not nationally important.

The precautionary approach

The precautionary approach obligation derives from international law. The starting point for any discussion of the precautionary approach is Principle 15 of the Rio Declaration, which provides:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The precautionary approach does not mean doing nothing until perfect scientific information is available. Rather, the approach recognises "that it may be better to act first and then set about ascertaining the facts more closely" and "that intervention is required prior to the occurrence of damage in relation to known risks" (Caroline Foster *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, New York, 2011) at 18).

It is helpful to note that the terms "precautionary principle" and "precautionary approach" are both used when referring to the precautionary obligation. There has been some suggestion in the past that the term precautionary principle is somehow more restrictive than the term precautionary approach.

This is incorrect. There is no substantive distinction between the precautionary principle and the precautionary approach under international law. Rather, the content of the obligation and the way it is enforced is defined by the context within which it is implemented (Arie Trouwborst *Precautionary Rights and Duties of States* (Martinus Nijhoff Publishers, Leiden, 2006) at 11; Simon Marr *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law* (Martinus Nijhoff Publishers, Leiden, 2003) at 17).

International law: the precautionary approach

Provision for the precautionary approach through relevant international and regional agreements (and subsidiary regulations) means that it should be used in the interpretation of New Zealand's rights and obligations within the EEZ and CS. This is supported by the fact that there is increasingly strong support from the international judiciary for recognition of the precautionary approach as part of customary international law. For example, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (the Chamber) observed in its recent *Advisory Opinion* on deep seabed mining "that the precautionary approach has been incorporated into a growing number of international treaties and instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration". In the Chamber's view, "this has initiated *a trend towards making this approach part of customary international law*" (Seabed Disputes Chamber of the International Tribunal for the Law of the Sea *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: Advisory Opinion* (1 February 2011) at [135] (emphasis added)).

The Chamber cited the LOSC regulations and the ICJ's invocation of the precautionary approach in the *Pulp Mills* case as support for its applicability in respect of deep seabed mining (*Advisory Opinion* at [135]). The LOSC regulations expressly require States to apply precautionary approach, and "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (*Advisory Opinion* at [161], quoting from Principle 15 of the Rio Declaration).

The Chamber concluded that States must apply a precautionary approach as an integral part of their due diligence obligations "in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks" (*Advisory Opinion* at [131]). Disregarding such risks would constitute a failure to comply with the precautionary approach, and accordingly a failure to meet the State's due diligence obligation (Donald Anton, Robert Makgill and Cymie Payne "Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No 17): Environmental Law in the Seabed Disputes Chamber" (2011) 41(2) EPL 60 at 63).

Cautious approach and adaptive management

The Bill seeks to give effect to the precautionary approach through the adoption of a "cautious approach" under cl 10(1)(b), the use of "favouring caution" under cl 13, and adaptive management as defined under cl 4(1). Clause 10(1)(b) seeks to achieve the balancing approach of the Bill by inter alia:

> requiring [decision-makers] to take a cautious approach in decision-making if information available is uncertain or inadequate ...

The incorporation of the cautious approach into the balancing exercise to be undertaken pursuant to cl 10 would appear to be intended to reinforce the importance of caution and adaptive management in decision-making as provided for elsewhere under the Bill. However, the way in which the Bill is drafted means that, contrary to the precautionary approach, "cost-effective measures to prevent environmental degradation" might not be adopted, on the grounds that they are outweighed by the contribution of economic development to that Nation's economy. For example, it is conceivable that under cl 61(2) there will be instances where the precautionary approach is not applied because it is judged not to be in the interests of economic development.

On the positive side of the ledger, the Bill's information principles under cl 13 encapsulate the requirement under the precautionary approach that decisions in the absence of certain or adequate scientific information require the decision-maker to "favour caution and environmental protection" (cl 13(2)). Furthermore, if caution and environmental protection means that an activity is likely to be refused, the decision-maker "must first consider whether taking an adaptive management approach" would be appropriate (cl 13(3)). The term "adaptive management approach" is defined under cl 4(1) of the Bill to include:

a) allowing an activity to commence on a small scale or for a short period so that its effects can be

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for the active management of Te Waihora and its catchment, implementing one of the stated goals of the CWMS. Investigating an improved lake opening regime which effectively balances fish migration and recruitment with lake-edge and catchment land use will also be a key tenet of the restoration programme. Two generations of work are anticipated as part of the cultural and ecological restoration plan, with the clean-up process planned to commence in carefully considered niche areas. This will require considerable effort by all parties involved. It is about building successful partnerships and giving effect to the concept of collaborative governance.

These measures signal a fresh start for the management of a key natural resource in the Canterbury region and the further realisation of the original recommendations of the Waitangi Tribunal made over 20 years ago. That can only happen if there is genuine commitment to the sustainable management and enhancement of the freshwater resource — mō tātou, ā, mō kā uri ā muri ake nei — for us and our children after us.

The authors appeared on behalf of Ngāi Tahu at the Te Waihora WCO hearing.

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monitored;

b) allowing an activity to be undertaken on the basis that consent can be revoked if the effects are more than minor;

c) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued on the basis of those effects.

We are of the view that cls 4(1), 13(2) and 13(3) are reasonable expressions of the precautionary-approach obligation as set out under international law. However, the effectiveness of the precautionary approach under the Bill is potentially undermined by the lack of a clear definition tying it to the interpretations set out under customary international law, and the chance that its implementation could be subjugated in favour of activities that contribute to national economic development.

In our view, the precautionary approach under the Bill, described as the "cautious approach", should be defined to ensure that its application and implementation is consistent with New Zealand's obligations under the LOSC and other international law. Furthermore, the Bill should be amended to clarify that contributions to national economic development cannot be used as a reason for failing to take a precautionary approach to decision-making under cl 10(1)(b) or cl 13. We consider (as in the case of our comments on cl 10 and cl 61(2)) that clarifying the meaning of the precautionary (or cautious) approach under the Bill will assist with integrated decision-making in respect of the RMA and remove unnecessary complexity and costs for all stakeholders involved.

Conclusion

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill brings about a welcome legislative change to the management of New Zealand's EEZ and CS. It is not the comprehensive answer to ocean governance that a number of different sectors were looking for, but it does plug a regulatory and environmental management hole that was quite simply an embarrassment when viewed in the context of regulatory advances made by other States. This was particularly the case given increasing commercial and political interest in the protection and development of New Zealand's EEZ and CS. While filling many of the gaps in the existing regime, concern remains regarding the consistency of the Bill with key principles of international law and existing domestic legislation. We have raised concerns in relation to: (a) the purpose of the Bill and its failure to incorporate a definition of sustainable development (or management); (b) the potential for cl 61(2) to lead to decision-making that is not sustainable; and (c) the Bill's lack of clarity concerning the application of the precautionary approach.

We remain hopeful that the Bill will enhance the environmental protection of New Zealand's oceans while enabling appropriate forms of investment in natural resource development. If this is achieved, New Zealand will continue to hold its place in the international community as a successful innovator when it comes to environmental management. This in turn will enable New Zealand to continue to trade on a well-earned reputation.

Robert Makgill, a law of the sea expert, was a principal drafter of the New Zealand Law Society's written submission on the Bill. He also presented the Law Society's submission to the Local Government and Environment Select Committee in mid-February of this year.