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The Economic Resources Zone and the Southwest Pacific

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Although the Third U.N. Conference on the Law of the Sea has issues of major importance to resolve, especially in relation to deep seabed mining, there is increasing consensus on the regime that is to apply in the economic resources zone of a coastal state and the terms of access of other nations to a coastal state's economic zone. The relevant provisions are contained in the Draft Convention of the Law of the Sea promulgated after the ninth session of the conference[1] which is the end product of a series of earlier negotiating texts. It is the purpose of this article, having regard to the negotiating stand taken by the countries in the southwest Pacific at the conference, to analyze whether the provisions contained in the Draft Convention can be regarded as being in the economic and political interests of the region. Examination will be made of the policies of Australia, New Zealand, Tonga, Western Samoa, Fiji and other countries in the southwest Pacific. A common approach was taken on many issues by these countries, but, if there were differences, it was often Australia which took a different standpoint. These differences will be pinpointed.

The main areas of concern during the conference in regard to the economic zone have been the control and allocation of fisheries resources within the zone; the problem of migratory species; the extent to which the coastal state may take measures to control the marine environment and scientific research; the question whether small, uninhabitated islands should be able to claim economic zones of their own; and the relationship between the economic zone and the continental shelf. Although these matters overlap to some extent it is convenient to deal with them individually.

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[1] INT'L LEGAL MATERIALS Vol. 19, at 1129.

I. Fisheries

The fishing interests of the countries in the southwest Pacific from the point of establishing a negotiating position at the conference were much simpler than those of many other countries. For instance, Australia, the largest and, perhaps, the most economically advanced of these countries possesses no long-distance fishing fleets of any significance which harvest outside the 200-mile limit. Within the limit foreign fleets (mainly the Japanese) exploit blue-fin tuna, marlin and surf fish[2] to the southwest, and the Taiwanese and, to a lesser extent, the Indonesians exploit the demersal trawl fish to the north and west.[3] It is clear that Australian interests would be served by the introduction of an economic zone where the maximum control of fisheries resources is exercised by the coastal state, including the determination of the entry conditions for foreign ships to the zone. Such control would enable foreign fishing fleets to be excluded from fisheries exploited or likely to be exploited by Australian fishermen,[4] and, at the same time, foreign fishermen could be charged appropriate licensing fees for access or be allowed to enter into joint venture arrangements with Australian fishermen where it was thought appropriate.[5] The interests of the other nations in the southwest Pacific, which have even smaller fishing fleets and which (within their 200-mile limits) are subject to a degree of foreign fishing, would also be served by such a regime.

In accordance with these objectives, Australia and New Zealand submitted a working paper preparatory to the commencement of the Law of the Sea Conference which proposed that, if the local fishing industry had the capacity to fully exploit the stock within its zone, the coastal state could exclude all foreign fleets, allocating 100 percent of the catch to local industry.[6] It would only be in cases in which the local industry had no such capacity that there would be a duty to give access to other states, and on terms and conditions that the coastal state might determine. This proposal was in line with the attitudes of other nations in the south Pacific and,

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[2]AUSTRALIAN FISHERIES COUNCIL, THE 200 MILE AUSTRALIAN FISHING ZONE, (1977) at 16–17. The Japanese blue-fin tuna catch is estimated to be between 50,000 and 60,000 tons. The larger tuna may fetch $4,000 a ton on the Japanese raw meat market. (*See* Mr. Lionel Bowen in the House of Representatives Weekly Hansard May 11, 1978. No. 8, at 2296.)

[3]*Id.* at 17.

[4]The fisheries already developed by Australian fishermen are: in-shore scale fisheries (mullet and whiting); juvenile southern Blue-fin tuna; southern, western and tropical rock lobsters; south Australian, west Australian, northern and east coast prawns; Australian salmon; east coast trawl fisheries. *See* AUSTRALIAN FISHERIES COUNCIL, *supra* note 2, at 17–18.

[5]The demersal fish resources to the north and west are considered to be particularly suitable for joint ventures as the potential harvest is considered to be beyond the capacity of Australian fleets. *See* Liu, *The demersal fish stocks of the waters of north and south-west Australia*, ACTA. OCEAN. TAIWANIAN SCI. REPTS., NAT'L TAIWAN UNIVERSITY, at 128–134. Liu estimates the potential harvest to be over 1 million tons annually. The present harvest is 70–80,000 tons per year.

[6]U.N. Doc. A/Ac. 138 of Sc. 11/L. 11 (1972). This approach was apparent also from the Australian government's spokesman during the second reading of the Fisheries Amendment Bill, 1978, which established the Australian 200-mile fishing limit.

indeed, the developing coastal states in general. For example, the representative of Western Samoa advocated "an exclusive fisheries jurisdiction . . . because of the paramount importance of fisheries as the very livelihood of the people of his country," where "the coastal state *could* offer a percentage of the unutilized available catch to others on terms not unfavorable to it, and would have residual rights to control the fish stocks."[7] Similar sentiments were expressed by Tonga,[8] Indonesia[9] and Fiji.[10]

The views of the countries in the southwest Pacific were, on the other hand, in direct conflict with the views of landlocked and geographically disadvantaged states which envisaged that states in this category should share in the resources of a coastal state having no prior claim at all to the resources of the zone.[11] It was also at variance with those states possessing long-distance fishing fleets which argued that "states that have normally fished for a resource" should have prior claim to the resources of the zone over everybody except the coastal state.[12]

To what extent do the provisions of the Draft Convention reflect the attitudes of the southwest Pacific? There are provisions in the Draft Convention to allow for the participation of states other than the coastal state in the fisheries resources of the zone. Special attention is given to participation by landlocked countries or states with special geographical characteristics[13] in articles 69 and 70. The provisions of these articles give landlocked states and states with special geographical characteristics "a right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal states of the same subregion or region, taking into account the relevant economic and geographical circumstances of all states concerned."[14] The "terms and modalities" of such participation would be established by the states concerned through bilateral, subregional or regional arrangements. If the coastal state "approaches a point which would enable it to harvest the entire

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[7]THIRD U.N. CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS [hereafter cited as OFFICIAL RECORDS], Vol. II, at 189. *See also* the views of Tanzania, *supra*, at 183, for the general developing coastal state view.

[8]OFFICIAL RECORDS, *supra* note 7, Vol. II, at 190.

[9]OFFICIAL RECORDS, *supra* note 7, Vol. II, at 249.

[10]OFFICIAL RECORDS, *supra* note 7, Vol. I, at 113.

[11]*See* the proposal of Afghanistan, Austria, and Nepal, U.N. Doc. A/Conf. 62/C. 2 L. 39; Bolivia and Paraguay, U.N. Doc A/Conf. 62/C 2/L. 65; Zambia, U.N. Doc A/Conf. 62/C. 2/L. 95.

[12]*See* the American proposal, U.N. Doc. A/Conf. 62/C. 2/L. 49, article 13; and the position of the U.S.S.R., U.N. Doc. A/Conf. 62/C. 2/L. 38.

[13]States with special geographical characteristics are defined in art. 70(2) of the Draft Convention. The definition reads: "States with special geographical characteristics means coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive zones of other States in the sub-region or region for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own." *See generally* Phillips, *Exclusive Economic Zone as a concept in International Law*, 585 INT'L & COMP. L.Q. 607 (1977), at n.90.

[14]Articles 69(1) and 70(1) of the Draft Convention.

allowable catch" the coastal state shall cooperate for the participation of developing landlocked countries and countries with special geographical characteristics in the exploitation of the economic zones of states in the same region or subregion "as may be appropriate in the circumstances and on terms satisfactory to all parties."[15] Developed, landlocked states and states with special geographical characteristics can only participate in the economic zones of developed coastal states, and only then in any surplus fishing stocks.[16]

What is immediately clear from these provisions is that the right of participation is given in relation to the economic zones of coastal states in the same *region* or *subregion*. No definition of "region" or "subregion" is provided, but the regional approach means that the states of the southwest Pacific will be relatively unaffected by the provisions of these articles. Singapore, a geographically disadvantaged state, is the only state which might conceivably come within the "region." The regional approach to the problems of landlocked countries and countries with special geographical characteristics is open to criticism on the basis that the right of participation is dependent merely on geographical accident, and some of the most developed countries will face no claims for participation—the United States, for example, has no adjoining landlocked states, while Zaire has five. But it is a policy which undoubtedly favors the states of the southwest Pacific.

In any event, it is plain that the provisions relating to access for these countries would not undermine the right of the national government to refuse access to fishing resources that the coastal state can harvest or its discretion in allowing access to countries of its choosing. The right of access to landlocked countries or countries with special geographical characteristics is limited to participation in *surplus* resources before a coastal state's harvesting capacity is "approaching a point which would enable it to harvest the entire allowable catch." When this point has been reached no definite right of participation is given to the landlocked states or states with special geographical characteristics. It is true that it is stated that after such a time the coastal state "shall cooperate"[17] in the establishment of equitable arrangements for the participation of these groups in all the resources of its economic zone, but, in contrast to the provisions regarding surplus resources, the words "right to participate" are omitted and the access must be "on terms satisfactory to all parties." Even in relation to the participation of the landlocked countries and countries with special geographical characteristics in the surplus living resources of the zone, there is to be no *equal* right of participation but only "equitable" participation to be dependent on the terms of the agreement reached. In coming to any agreement for access the coastal state must also have regard to other matters, including the needs of those countries whose nationals have habitually fished the

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[15]Articles 69(3) and 70(4) of the Draft Convention.
[16]Articles 69(4) and 70(5) of the Draft Convention.
[17]Articles 69(3) and 70(4) of the Draft Convention.

area.[18] In sum, there is no obligation imposed by the Draft Convention on the coastal state to give access to one category of state rather than another, or to allow access to resources that the local industry can harvest.

Australia's legislation declaring a 200-mile fisheries zone reflects the view that there should be no restraint on the government's choice as to which states should have access. The Australian legislation assumes control over all fishing resources within the 200-mile economic zone and authorizes the minister responsible for the administration of the act to grant licenses on a wide variety of terms and conditions, including payment of fees.[19] This is in accordance with the Draft Convention which authorizes the coastal state to take such measures for the management of fishing resources in the zone.[20] Unlike the Draft Convention, no guidelines are given as to the criteria the minister should take into account in granting access or suggesting one category of countries should be favored rather than another. There is merely a general requirement that the minister should have regard to the objectives of optimum utilization of the living resources of the Australian fishing zone and of ensuring that the living resources of the Australian fishing zone are not endangered by over exploitation.[21]

New Zealand, Papua New Guinea, and Fiji have adopted similar legislation except that these legislatives have stipulated the criteria to be applied in granting access to foreign nationals. The thrust of these provisions is to emphasize that the major determining factor for granting access is the benefit that other nations have conferred upon the fisheries industries of those countries in terms of research, identification of fishing stocks, the conservation and management of fishing resources, and the enforcement of domestic law relating to such resources.[22] There is no mention of landlocked or geographically disadvantaged states, but that is because the participation of these countries is postulated on a regional basis. The legislation of all these countries does refer in the criteria for granting access to states that have habitually fished the area,[23] and it cannot be argued, therefore, that it conflicts with the provisions of the Draft Convention. Even the formula adopted by the Solomon Islands with a simple declaration that the "Solomon Islands has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources [of the economic

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[18]Articles 62(3) of the Draft Convention.

[19]Fisheries Amendment Act (1978) (C'wth) § 9, AUSTRL. C. ACTS, (1978); amending § 9 of the Fisheries Act, AUSTL. C. ACTS, (1952). The Australian government has entered into complex agreements with the Taiwanese and Japanese.

[20]Article 62(4) of the Draft Convention.

[21]§ 6, AUSTL. C. ACTS, (1978). *Cf.* Articles 62(1) and 61(2) of the Draft Convention.

[22]New Zealand: Territorial Sea and Exclusive Economic Zone Act § 13, (1977). Fiji: Marine Spaces Act § 11, (1977). Papua New Guinea: Fisheries (Declared Fisheries Zone) Act 1977 § 4, amending the Fisheries Act (1974).

[23]New Zealand: Territorial Sea and Exclusive Economic Zone Act § 13(2)(a) (1977). Fiji: Marine Spaces Act § 11(4)(a). Papua New Guinea: Fisheries (Declared Fisheries Zone) Act 1977, § 4.

zone]"[24] is not inconsistent with the Draft Convention's articles, given the discretion vested by the convention in the coastal state to grant access and to impose conditions on access.

II. Migratory Species

The nations of the southwest Pacific have a special interest in the provisions relating to migratory species since Japanese long-distance fishing fleets harvest southern blue-fin tuna within the various 200-mile zones. Australia and New Zealand jointly proposed a draft article on migratory species[25] at the early stages of the conference. It envisaged the formation of an international organization to regulate the harvesting of a particular species. The international institution was to allocate national quotas and in doing so take into account the coastal state's right of priority over other states to harvest the regulated species within its economic zone.[26] A fee fixed in relation to the amount of catch was to be paid to the coastal state by foreign fishermen within the economic zone.[27] This was a midway position aimed at achieving a compromise between regulation on a purely international basis, giving the coastal state no special rights when the species happened to be in that state's economic zone,[28] and total control by the coastal state when the migratory fish were within the economic zone of the coastal state.[29] Most of the other states in the southwest Pacific would have preferred the latter approach with its emphasis on coastal state control.[30] The Draft Convention adopts a general, and nebulous, proposal regarding migratory species in terms that "the coastal state and other states whose nationals fish in the region for [highly migratory species] shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone."[31] The provision does not envisage the setting up of an international organization, with the terms of reference and powers as advocated in the Australian/New Zealand proposal. The result is that the control of migratory species is governed by the general articles of the Draft Convention regarding the control of fisheries. Thus, as explained, access to fish for migratory species in a coastal state's economic zone will be determined by the coastal state on conditions laid down by that state. In one

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[24]Delimitation of Marine Waters Act § 5, (1978).

[25]OFFICIAL RECORDS, *supra* note 7, Vol. III, at 231.

[26]*Id.*, article 4(a).

[27]*Id.*, article 5(c).

[28]*See* the Working Paper submitted by the United States, *Special Considerations Regarding the management of anadromous and highly migratory ocean fishes,"* in III REPORT OF THE COMMITTEE ON THE PEACEFUL USES OF THE SEA-BED AND OCEAN FLOOR, Supp. No. 21, at 11.

[29]*See* the Canadian proposal, *id.*, at 82.

[30]*See* the views expressed at the conference, *supra* notes 7–10 (Western Samoa, Tonga, Indonesia, Fiji).

[31]Article 64 of the Draft Convention.

sense this is beneficial to all countries in the southwest area as it enables the responsible minister to impose any conditions on a license to fish for migratory species without reference to an outside body. But the deleterious effect is to reduce international control of the exploitation of this resource outside the 200-mile zone. This is significant as it has been estimated that the Japanese may be able to achieve present levels of harvesting without fishing within the various 200-mile zones in the area. In the southwest Pacific the large number of island states means that six million square miles of ocean will be brought under national control, and in order to provide some degree of regional cooperation, the South Pacific Regional Fisheries Agency has been established, one of the objects of which is to agree "on a common basis for negotiations with distant water fishing interests in relation to highly migratory species."[32] This will provide a degree of inter-governmental planning and international cooperation that was encouraged and suggested by the original Australian/New Zealand proposal.

III. Protection of the Marine Environment

A critical dispute at the Law of the Sea Conference was the extent to which the coastal state should have the power to take measures for the preservation of the marine environment in the economic zone and to enforce those provisions. The Draft Convention in Article 56(1)(b)(iii) gives the coastal state a general jurisdiction with regard "to the protection and preservation of the marine environment." The developed maritime nations have argued that the coastal state should only be able to adopt internationally agreed standards of pollution control on the basis that the imposition of varying unilateral standards, especially in relation to the design, manning and construction of vessels, will interfere with the freedom of navigation, with a consequent reduction in world trade.[33] At the other extreme the developing coastal states were of the view that they should be allowed to enact any type of national standards in the economic zone if, in their view, the existing international safeguards were inadequate.[34] It was considered that only then could those countries be sure that their economic interests in the zone were protected when international standards might be slow to change in response to newly discovered sources of ecological disturbance.

Many of the countries in the southwest Pacific adopted a position which approximated more closely the extreme position of the developing coastal states. New Zealand and Fiji, among other nations, tabled a proposal

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[32] *See* the resolution in 36 AUSTRALIAN FISHERIES (1977), at 4. The member states were Australia, Papua New Guinea, New Zealand, Nauru, Tonga, Western Samoa, Cook Islands, Niue, Gilbert Islands, Fiji, Solomon Islands, Tuvalu.

[33] *See, especially*, Sir Robert Jackling on behalf of the U.K. delegation, OFFICIAL RECORDS, *supra* note 7, Vol. II, at 200, ¶ 77; also U.S.S.R., at 320, ¶ 57; Greece, at 327, ¶ 51; and Italy, at 325, ¶ 31.

[34] *See* the Kenyan draft articles for the preservation and protection of the marine environment to be found in OFFICIAL RECORDS, *supra* note 7, vol. III, at 245, article 26.

which allowed for the unilateral introduction of design and construction requirements without approval by any independent authority, "where such stricter standards are rendered essential by exceptional hazards to navigation or the special vulnerability of the marine environment."[35] Australia, on the other hand, saw itself as adopting a compromise approach. After the fourth session of the conference the Australian delegation puts its position in these terms:

> Australia is seeking to achieve a regime for protecting the marine environment which will, on the one hand provide sufficient powers to protect the waters of an EEZ and territorial sea, and on the other hand will guarantee to the international community adequate freedoms and rights of navigation. Any rights that are acquired by Australia to control foreign ships in Australian offshore waters will also be acquired by about 120 other coastal States in respect of their offshore waters. It is important for Australia that these rights should not result in unreasonable interference with international shipping upon which Australian overseas trade depends.[36]

The implementation of this policy led the Australian delegation to support the introduction of unilateral measure by the coastal state with the qualification that "unilateral action must be reasonable in the circumstances and its reasonableness should be appealable to a disputes settlement machinery."[37] In Australia's view the protection of the Barrier Reef necessitated unilateral regulations governing traffic separation schemes, the discharge of pollutants, compulsory pilotage, and under keel clearances.[38]

The result of the Draft Convention is very much in line with the Australian position rather than the positions of the smaller countries in the region. Article 211(6) allows a coastal state in a special zone of ecological hazard to introduce domestic regulations (not accepted internationally) for the protection of the marine environment provided they do not relate to the design, construction, equipment requirements, and manning of foreign vessels. However, the international organization, within twelve months of notification by the coastal state, must determine that the area in which the unilateral requirements are to be imposed justifies the introduction of such special measures, and then approve those special measures themselves. This proposal has been declared "acceptable" to the Australian delegation although the ban on manning and design requirements might prevent the Australian government introducing rules regarding compulsory pilotage.

Apart from the question of the introduction of unilateral regulations, a second issue regarding the protection of the marine environment in the economic zone was the interrelationship of the enforcement powers of the

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[35]Canada, Fiji, Ghana, Guyana, Ireland, India, Iran, New Zealand, Philippines and Spain: draft articles on a general approach to the preservation of the marine environment appearing in OFFICIAL RECORDS, *supra* note 7, Vol. III, at 249, article 7(3)(iii).

[36]Fourth Australian Delegation Report, at 46–47.

[37]Statement in Third Committee on July 15, 1974, by the Australian representative, Mr. J. Petherbridge, appearing in Second Australian Delegation Report (Annex F).

[38]Fifth Australian Delegation Report, at 28.

coastal state, flag state, and port state. The Australian delegation, again adopting a midway position, supported the right of the port state to undertake investigations and legal proceedings against a vessel which happens to be in one of its ports for pollution offenses outside the waters of the port state and resisted attempts to exclude port-state enforcement except at the request of the flag state.[39] It also supported the right of the coastal state to bring proceedings against vessels for offenses in its economic zone but, in accordance with its "compromise" position, objected to suggested changes in earlier texts put before the conference allowing for detention and arrest of foreign vessels,[40] and giving the right of physical inspection of vessels where there have been no actual discharge of pollutants but merely a breach of applicable international rules resulting in threat of discharge.[41] New Zealand and the smaller island states of the region were, however, in favor of increasing the coastal states' powers in this way.[42]

The Draft Convention overrides the first of the Australian delegation's objections by incorporating in article 220(6) a right of detention where there has been a breach of applicable international rules which result in a discharge causing major damage or threat of major damage to the coastline or related interests of the state. As to the second, Australia's position is met to a degree in that article 220(5) only allows for physical inspection of a vessel navigating in the economic zone where there has been a "substantial discharge of pollutants." Yet the substantial discharge need not result in actual, significant pollution of the marine environment, but only in the threat of such pollution. The Draft Convention also incorporates a change made after the seventh session of the conference which allows a coastal state to take steps to protect its coastline and fishing interests when a maritime casualty which may "reasonably be expected to result in major harmful consequences has occurred."[43] This replaced an earlier requirement that the maritime casualty must result in a "grave and imminent danger from pollution or threat of pollution."[44]

These provisions go beyond Australia's preferred position.[45] Undoubtedly, the perceived danger is that the wider powers might have the effect of hampering freedom of navigation, especially in view of the large amount of seas which will be brought within the 200-mile zone in the Pacific area. Nevertheless Australia will accept all these provisions.[46] It is likely that

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[39]Fifth Australian Delegation Report, at 29.; Sixth Australian Delegation Report, at 60.

[40]Fourth Australian Delegation Report, at 45.

[41]Sixth Australian Delegation Report, at 61.

[42]*See* the views of Western Samoa, Tonga, Indonesia, and Fiji, *supra* notes 7–10; also New Zealand, OFFICIAL RECORDS, *supra* note 7, Vol. IX, at 164, ¶ 80.

[43]Article 221 of the Draft Convention.

[44]Article 222 of the Revised Single Negotiating Text, May 6, 1976, U.N. Doc. A/Conf. 62/WP.8/Rev. 1/Pt. 11.

[45]OFFICIAL RECORDS, *supra* note 7, Vol. IX, at 164, ¶ 73. Mr. McKeown, on behalf of the Australian delegation indicated that the changes eventually incorporated in the Draft Convention "went beyond his country's position," but "he would accept even these."

[46]*Id.*

New Zealand and the other Pacific island states will do the same, although New Zealand is on record at the close of the seventh session of the conference as welcoming further changes in the jurisdiction and enforcement powers of the coastal state.[47]

IV. Scientific Research

The critical issue with regard to scientific research has been whether it is necessary for countries or scientific bodies to seek the consent of the coastal state before undertaking research in that state's economic zone. The developed nations, led by the United States, adopted a view that it would be an unwarranted restriction of the high seas to impose any necessity for the coastal state to give its express consent.[48] The developing coastal states insisted vigorously on a consent requirement in order to protect themselves from the possibility of research being directed against the resources of the economic resources zone under the guise of purely scientific research.[49]

Of the countries in the southwest Pacific it was Australia who took the most active involvement in the issue of scientific research. Australia's position regarding scientific research was put by the Australian Delegation in these terms:

> Australia has two main concerns regarding marine scientific research which are somewhat competing. The first is that Australia supports the concept that marine scientific research should be vigorously encouraged and that it should be as free as possible from restrictions. The second is that Australia is concerned that the coastal State should have adequate powers to control and regulate activities within its EEZ with respect to resources and also to enable it to preserve and to protect its marine environment. These two concerns have led Australia to adopt a moderate position which has enabled the Delegation to assist in bringing together those delegations which hold extreme views.[50]

In line with this "moderate" approach Australia at the close of the fifth session of the conference submitted what it regarded as a compromise formula, taking the form of a new article 60 of the Revised Single Negotiating Text.

> 1. Marine scientific research activities in the economic zone or on the continental shelf shall be conducted with the consent of the coastal State in accordance with the provisions of this Convention, provided that coastal State shall not deny its consent to a marine scientific research project unless that project:
> (a) bears substantially upon the exploration and exploitation of the living or non-living resources;

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[47]Mr. MacKay, on behalf of New Zealand, OFFICIAL RECORDS, *supra* note 7, Vol. IX, at 164, ¶ 80.

[48]*See* the views of the American delegation, OFFICIAL RECORDS, *supra* note 7, Vol. II, at 341, ¶ 11-12. U.S.S.R., at 349, ¶ 15.

[49]As an example *see* Colombia, Draft Articles on Marine Scientific Research, U.N. Doc. A/Conf. 62/C. 3/L.13. *See* the views of Indonesia, OFFICIAL RECORDS, *supra* note 7, Vol. II, at 207, ¶ 68; also Venezuela, at 200, ¶ 46; Peru, at 345, ¶ 59; India, at 352, ¶ 63; Kenya, at 350, ¶ 29.

[50]Fourth Australian Delegation Report, at 50.

(b) involves drilling or the use of explosives on the continental shelf; or
(c) involves the construction, operation or use of such artificial islands, installations and structures as are referred to in Article 48 of Part II of this Convention.

2. Marine scientific research activities in the economic zone or on the continental shelf shall not unduly interfere with economic activities performed by the coastal States in accordance with its jurisdiction as provided for in this Convention.[51]

The difficulty with this submission was that it differed little from the wording of the previous article 60, and it attracted the same criticisms. The major objection of the coastal states was that the general principle of the "consent" regime established at the beginning of the first paragraph of the article was eroded by the qualifications expressed in the second part ((1)(a)(b)(c)), which delineated the only circumstances in which the coastal state can refuse consent and which make it plain that consent to a research project should be the general rule. In the words of the Peruvian delegation it "contained no positive element and therefore did not merit any comment."[52] In the southwest Pacific, New Zealand supported the Australian proposal, considering its interests "well protected"[53] under the formulation. The reaction of the smaller island states in the area is not recorded, but earlier statements at the conference would tend to indicate that they would be likely to oppose it, preferring the view of the developing coastal states.[54] Although the text put forward by the Australian delegation was only a submission aimed at achieving a consensus, it is apparent that it was also Australia's preferred position.[55] On this issue, Australia can be regarded as aligning itself with the major researching states.

The formula adopted in the Draft Convention is a rejection of the view of the researching states and is a negotiating victory for the developing coastal states. The only country disappointed with this outcome in the southwest Pacific would be Australia. Article 246 states the general principle that the consent of the coastal state is needed for research (article 246(3)), and then enumerates the circumstances for which the coastal state may refuse consent (e.g., that the project is of direct significance for the exploration or exploitation of natural resources),[56] but does not enumerate those circum-

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[51] Fifth Australian Delegation Report, Annex I.

[52] OFFICIAL RECORDS, *supra* note 7, Vol. VI, at 93, ¶ 30.

[53] OFFICIAL RECORDS, *supra* note 7, Vol. VI, at 99–100, ¶ 73. Note the support given to the Australian proposal by the United States, at 101; Italy, at 101; Ireland, at 101; Denmark, at 99; U.K., at 93.

[54] *See generally* the speeches cited in *supra* notes 7–10.

[55] *See* OFFICIAL RECORDS, *supra* note 7, Vol. IX, at 164, ¶ 164.

[56] The circumstances for which consent can be refused are that the research:

(a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;
(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
(c) involves the construction, operation of use of artificial islands, installations and structures referred to in articles 60 and 80;

stances exclusively. There is a requirement that research shall be "exclusively for peaceful purposes"—a term that is undefined and is presumably left to the interpretation of the coastal state—and there is no obligation on the coastal state to give written answers for its refusal. Most importantly, the question of whether consent should be refused is left entirely in the hands of the coastal state, with no objective basis (by a dispute settlement procedure or otherwise) for deciding whether the refusal is justified on the grounds that it is in some way of direct significance for the economic exploitation of the state's economic zone.[57]

V. Islands

The question regarding the economic zones of islands was one which had special importance for the Pacific. It was argued by a number of states that the question of whether a particular island should have an economic zone of its own should be dependent on such factors as population and geological structure and that, in any case, island dependencies should not be allowed to possess an economic zone of their own.[58] A joint submission by Fiji, New Zealand, Tonga, and Western Samoa vigorously rejected these propositions. According to this proposal any island which is a "naturally formed area of land, surrounded by water, which is above water at high tide"[59] should be able to establish an economic zone. If the island was one which had not attained full independence then the resources were to be vested "in the inhabitants of that territory"[60] rather than in the colonial power. Australia supported these proposals,[61] and they became incorporated in the Draft Convention with the qualification that "rocks which cannot sustain human habitation or economic life of their own"[62] shall have no economic zone. This definition will enable Australia to claim an economic zone around the Cocos and Christmas Islands to the northwest and Norfolk and Lord Howe Islands to the east. New Zealand may extend its economic resources zone to the southeast as a result of the geographical situation of Campbell Island, the Auckland Islands, and the Antipodes Islands. The articles will also mean that the other island states of the southwest Pacific including those (such as New Caledonia) which have not yet achieved inde-

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(d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organisation has outstanding obligations to the coastal State from a prior research project.

[57]There is a settlement procedure "with regard to marine scientific research" (Article 297(2)(a)), but excluded from its ambit is any dispute arising out of "the exercise by the coastal state of a right or discretion in accordance with Article 246" (Article 297(2)(a)(ii)) of the Draft Convention).

[58]*See, e.g.*, Madagascar, OFFICIAL RECORDS, *supra* note 7, Vol. II at 174, ¶ 51.

[59]*Draft Articles on Islands and on territories under foreign domination or control*, U.N. Doc. A/Conf. 62/C. 2/L. 30, Article 1.

[60]*Id.*, Part B.

[61]Sixth Australian Delegation Report, at 46.

[62]Article 121 (3) of the Draft Convention.

pendence, will also be able to claim economic zones with the resulting diminution of the area of the high seas and possible interferences to navigation.

VI. Continental Shelf

One of the problems facing the Law of the Sea Conference has been the relationship between the economic zone and the continental shelf. Australia, possessing a large continental margin, has the greatest interest in this issue. It has always supported the existing regime that applies to the continental shelf,[63] a view which is implemented in article 76 of the Draft Convention. A significant modification to the Australian proposal, however, lies in the adoption of a revenue sharing system in the resources of the continental margin in cases in which the margin happens to extend beyond the 200-mile limit.[64] It is envisaged that payments will be made through the Seabed Authority to be distributed "on an equitable sharing criteria," taking into account the interests and needs of the developing states, particularly the least developed and landlocked among them. Australia has always been an opponent of these provisions on the basis that "there is no reason in equity why a coastal state should be deprived of an area over which it has existing rights [under the Geneva Convention on the Continental Shelf] while the area under the jurisdiction of other states is being maintained or even extended."[65] The issue is an important one for Australia because of the large deposits of natural gas in the northwest shelf field and the important possible future sources of oil in the Exmouth plateau field off the coast of Port Headland.[66] Some of the resources in both these areas are located on the continental shelf but beyond the 200-mile limit. The incorporation of the resource-sharing provisions does represent a defeat for Australian interests, but it was a trend that was inevitable given the need to find a compromise between those nations with large continental margins and those countries, especially the coastal African states, who do not possess the same geographical advantages and who were arguing strongly that the continental shelf should no longer be a factor at all in determining state control over resources of the seabed.[67]

VII. Conclusion

In general, the provisions of the Draft Convention regarding the exclusive economic zone can be considered to be of significant benefit to the

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[63] *See* statement by Mr. Harry in the Second Committee. Second Australian Delegation Report, Annex D.

[64] Article 82 of the Draft Convention.

[65] Statement by Mr. Harry in the Second Committee. Second Australian Delegation Report, Annex D.

[66] *See* Joint Committee on Foreign Affairs and Defence, *Australia, Antarctica and the Law of the Sea*, PARLIAMENTARY PAPER 198/1978, at 51–52.

[67] *See* the views of Madagascar, OFFICIAL RECORDS, *supra* note 7, Vol. II at 174, ¶ 48; Zaire, at 176, ¶ 78; Liberia, at 184, ¶ 23.

nations of the southwest Pacific. The articles regarding fisheries give the coastal state wide discretion in granting access to other nations, a result that is in line with the negotiating stands of all these countries. The same can be said for the provisions regarding scientific research in regard to all these countries apart from Australia, which would have preferred a view akin to that of the major researching states. In relation to the protection of the marine environment, on the other hand, the final result is more in accordance with Australia's views, especially as to the unilateral introduction of special regulations. New Zealand and the smaller island states indicated that they would have favored a greater degree of latitude allowed to the coastal state in imposing their own regulations. Overall there is no doubt that the implementation of the 200-mile zone in the terms of the Draft Treaty will benefit the nations of the southwest Pacific to a greater extent than other nations. About thirty countries, including these nations, which represent less than one-third of the countries of the world will benefit considerably from its introduction. Another twenty-nine landlocked and geographically disadvantaged states, as well as another eighty coastal states, will gain comparatively little from the economic zone.