MANAGEMENT REGIMES FOR ANTARCTIC MARINE LIVING RESOURCES — AN AUSTRALIAN PERSPECTIVE

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[*The author examines the measures which have been taken to regulate the exploitation of the living resources of the Antarctic region. Initially, this involves a discussion of the legal framework in relation to the Antarctic, namely the Antarctic Treaty of 1959. Then follows an analysis of the conservation measures adopted and the Australian response thereto, with respect to whaling, the fauna and flora of the area and sealing. A brief history of the negotiations leading up to the Convention for the Conservation of Antarctic Marine Living Resources introduces a critical examination of the regime established by the Convention, in particular its structure, the area and scope of the Convention, its objectives and its enforcement and operation. In this way the author presents a comprehensive and instructive account of the legal measures which have been implemented through time to regulate the marine living resources of the Antarctic.*]

1. INTRODUCTION

Increasing interest has been apparent in the last few years in the resource potential of the Antarctic.[1]

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1 There are three potentially valuable resources in the Antarctic, namely minerals, marine living resources and icebergs. For information in relation to minerals, see Wright and Williams, *Mineral Resources in Antarctica*, 1974 U.S. Geological Survey Circular 705; Elliott, *A Framework for Assessing Environmental Impacts of Possible Antarctic Mineral Development* (1976) Institute of Polar Studies, Ohio State University; EAMREA (The Scientific Committee on Antarctic Research, Group of Specialists on the Environmental Impact Assessment of Mineral Exploration/Exploitation in Antarctica), (1977) *A Preliminary Assessment of the Environmental Impact of Mineral Exploration/Exploitation in Antarctica; Mineral Resources of Antarctica*, (1974) U.S. Dept. of the Interior, Geological Survey Circular No. 705, 15; Wade, "Antarctica: an Unprospected Unexploited Continent — Summary" Circum-Pacific Energy and Mineral Resources Conference, American Association of Petroleum Geologists Memoir No. 25, 74; Fridtjof Nansen Foundation, *Antarctic Resources*, report from the informal meeting of experts 1973; Auburn 'Off-shore Oil and Gas in Antarctica (1977) 20 *German Yearbook of Int. L.* 139. For information in relation to Icebergs, see *Iceberg Utilization*: proceedings of the 1st International Conference (1978), Iowa, Husseing, A., (ed.); Mougin, G., *Communication to the Scientific Committee on Icebergs for the Future*, Key Biscayne; Florida (1978); Hunt, J. L. and Ostrander, M.C., *Antarctic Icebergs as a Global Fresh Water*

To date exploitation of these resources has not occurred on any scale, but this can only be a shortlived situation.[2]

The aim of this paper is to examine the measures which have been taken to regulate the exploitation of the living resources of this region, commencing with the regulation of whaling and culminating with the Convention for the Conservation of Antarctic Marine Living Resources in Canberra in 1980. These measures must be viewed against the background of the Antarctic Treaty of 1959. With the exception of whaling, the management of which commenced before the Treaty, all the conservation measures in relation to living resources in the Antarctic have been initiated by the Consultative Parties to this Treaty.[3] This is a result of the special responsibility which the Treaty Parties see themselves as possessing with regard to Antarctic matters generally. The form and content of the conservation measures is therefore a direct reflection of the national and international interests of the Treaty States. Whether or not this method of resource management is the ideal solution in the Antarctic region remains to be seen. There is pressure from the Third World to inter-

Source prepared for the U.S. National Science Foundation by the Rand Corporation, Santa Monica, California (1973); Weeks and Campbell, 'Icebergs as a Fresh Water Source: An appraisal' (1973) 12 *Journal of Glaciology* 207; Weeks, 'Iceberg Water: An Assessment' (1980) 11 *Annals of Glaciology*; Lundquist, T. R., 'The Iceberg Cometh?: International Law Relating to Antarctic Iceberg Exploitation' (1977) 17 *National Resources Journal* 1; Proceedings of the Conference on the use of Icebergs: Scientific and Practical Feasibility, Cambridge 1980, (1980) 1 *Annals of Glaciology* 136. In relation to resources generally, see Rose, "Antarctic Condominium: Building a New Legal Order for Commercial Interests" (1976) 19 *Marine Technology Society Journal* 19; Potter, *Natural Resource Potential of the Antarctic* American Geographical Society Occasional Publication No. 4 Vermont 1969; Crommelin, M., *Legal Aspects of Resource Development in Antarctica* paper presented at the second Circum-Pacific Energy and Minerals Conference, Honolulu, 1978; Law, *Possibilities for Exploitation of Antarctic Resources* paper presented at International Symposium on Antarctic Development, Punta Arenas, Chile, 1977; 'Antarctica and the Question of the Exploitation of its Resources' (1977) 12 *Australian Foreign Affairs Record* 48; Burton, S. J., 'New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources' (1979) *Virginia Law Review* 421.

2 In relation to krill, potentially the most valuable living resource of the area, Everson in "The Living Resources of the Southern Ocean" (1977) (UNDP/FAO Southern Ocean Fisheries Survey Programme, Doc. No. GLO/0/77/1), states at 60:

'Any of the nations currently involved in fishing for krill (U.S.S.R., Japan, Federal Republic of Germany, Poland, Chile) could either on their own or with outside help solve the processing and marketing problems and vastly increase their present catch so that a total catch of a million tons or more is a distinct possibility in the immediate future. Even allowing for the fact that this is a small figure in comparison to the estimated krill production, once fisheries of this size are established they tend rapidly to expand to their fullest capacity. Therefore even though it is not certain that the krill fishery will expand it is necessary to formulate a management plan now to enable the needs of conservation and capital investment to be fulfilled. There is clearly a need therefore for:

(a) Sound scientific information on the state of krill stocks.
(b) Advice on the effect of exploitation on the stocks of krill and its consumers and prediction of anticipated changes as a result of different fishing strategies.
(c) International agreement on management plans resulting from a and b.
(d) Implementation of management plans.'

The report of the meeting of experts at the Fridtof Nansen Foundation at Polhgda, 1973, stated 'that unless the Treaty governments decide soon that exploration and exploitation of mineral resources on the Antarctic Continent should be completely prohibited there is an urgency to begin as soon as possible to establish regulatory measures under which exploration of the Antarctic Continental Shelf can be administered, conceding that it will inevitably take several years for such machinery to be set up.'

3 *infra* n. 5 p. 281 as to the significance of the status of Consulatative Party.

nationalize Antarctica and its resources,[4] and it cannot be assumed that those States with territorial claims in the area will allow them to remain in abeyance permanently.

Before examining the details of the management regimes relating to the living resources of the Antarctic a brief analysis of the present legal regime applicable to the Antarctic is therefore necessary.

2. *THE ANTARCTIC TREATY 1959*[5]

The Antarctic Treaty has its origins in the successful International Geophysical Year of 1958. The seven States having territorial claims to Antarctica — the United Kingdom, Australia, Chile, Argentina, France, Norway and New Zealand — were joined by the U.S.S.R., the U.S.A., Japan, South Africa and Belgium in a very extensive program of scientific research in the Antarctic.

At the conclusion of this undertaking the United States proposed an international conference to draw up an understanding between those parties who participated in the I.G.Y. to prevent Antarctica becoming an object of political conflict. There were sixty secret preparatory meetings in Washington. The Treaty was concluded in 1959[6] and came into force on 23 June 1961, after ratification by all signatory States. Since this date, Poland, the Federal Republic of Germany, India and Brazil[7] have acquired full Consultative Party status, and Bulgaria, Czechoslovakia, Romania, Denmark, Italy, Netherlands, Papua New Guinea, Peru, Uruguay, the German Democratic Republic, China, Spain, Cuba, Finland, Sweden and Hungary have acceded to the Treaty.[8]. Only those States with Consultative Party status may participate in

[4] As early as 1956 India had proposed that the question of Antarctica be discussed in the United Nations. It repeated the attempt in 1958 but was blocked by the Treaty Parties. However, in 1983 Malaysia, Antigua and Barbuda succeeded in a move to have the question of Antarctica placed on the Agenda of the General Assembly of the United Nations. The matter is again on the Agenda of the 40th Session of the General Assembly. See also the statement of the Vice Chairman of the Sri Lankan delegation to the United Nations Conference on the Law of the Sea that 'the resources of Antarctica should be made subject to a regime of international management and utilisation to secure optimum benefits for mankind as a whole and in particular for the developing countries'. Increasing interest in the resources of the Southern Ocean has been shown by the Third World at meetings of the Committee on Fisheries of the Food and Agricultural Organization of the United Nations. For a discussion of the internationalization of Antarctica, see Pinto, M. C. W., 'The International Community and Antarctica' (1978) 33 *University of Miami Law Review* 475.

[5] For a full discussion of the background to the Antarctic Treaty, see Hayton, R. D., 'The Antarctic Settlement of 1959' (1960) 54 *American Journal of International Law* 348. For further information on the Treaty itself and its operation, see Taubenfield, H. J., 'A Treaty for Antarctica' (1961) 531 *International Conciliation* 246; Dater, 'The Antarctic Treaty in Action 1961-71' 6 *Antarctic Journal of United States* 67; Hanessian, J. 'The Antarctic Treaty 1959' (1960) 9 *International Comparative Law Quarterly* 436; Guyer, R. E., 'The Antarctic System' (1973) 139 *Recueil des Cours* (Academie de Droit International) 149; Hambro, E., 'Some Notes on the Future of the Antarctic Treaty Collaboration' (1974) 68 *American Journal of International Law* 217.

[6] The main provisions of the Treaty relate to demilitarization (Art. I); freedom and co-operation in scientific investigation (Art. II); 'freezing' of territorial claims (Art. IV); ban on nuclear explosions and disposal of radioactive waste (Art. V); area of application of treaty (Art. VI); observer system (Art. VII).

[7] Poland (1977); Federal Republic of Germany (1980); India (1983); Brazil (1983).

[8] Czechoslovakia (1962); Denmark (1965); Netherlands (1967); Romania (1971); German Democratic Republic (1974); Bulgaria (1978); Uruguay (1980); Italy (1981); China (1983); Spain (1983); Cuba (1984); Finland (1984); Sweden (1984); Hungary (1984); Peru (1981) and Papua New Guinea (1981).

the meetings provided for by Article IX of the Treaty.[9] To obtain Consultative Party status by Article IX, paragraph 2, a Party must demonstrate its interest in Antarctica by conducting substantial scientific research activity. The only States to satisfy this criteria to date are Poland, the Federal Republic of Germany, India and Brazil.

To date there have been twelve Antarctic Treaty Consultative Party Meetings under Article IX.[10] The object of the meetings is to formulate measures to further the principles and objectives of the Treaty. For the present discussion the most important of these stated objectives is Article IX, paragraph 1, relating to measures for the '(f) preservation and conservation of living resources in Antarctica.'[11]

It is on the basis of this Article that the Treaty Parties have initiated the conservation measures discussed later in this paper.

By far the most difficult and contentious issue to be dealt with by the Antarctic Treaty was the issue of the status of territorial claims to the Antarctic. This unresolved issue has caused and will continue to cause problems. This is well illustrated by the long debates over the issue in relation to the recently concluded Convention for the Conservation of Antarctic Marine Living Resources. The aim of this paper is not to review the status of these claims. This question has been covered in detail by other writers.[12]

9 At the Twelfth Antarctic Treaty Consultative Meeting in Canberra in 1983 for the first time observers from acceding parties to the Treaty were permitted to attend. The topic of observers was included on the Agenda of this Meeting and the Consultative Parties endorsed the attendance of acceding parties at the Thirteenth Consultative Meeting in Belgium in 1985.

10 The first Antarctic Treaty Consultative Meeting was held in Canberra in 1959 and the most recent in Canberra in 1983.

11 Although minerals are not covered by this Article and any regime relating to minerals will have to be outside the framework of the Treaty, much consideration has already been given to the problem by the Treaty Parties. The question of mineral exploration was first placed on the agenda of the Seventh Consultative Meeting in Wellington in 1972. At the Eighth Consultative Meeting, the recommendation was made that the subject, "Antarctic Resources — The Question of Mineral Exploration and Exploitation" be the subject of a special preparatory meeting in 1976 to report to the Ninth Consultative Meeting. The special preparatory meeting submitted a statement of principles in relation to mineral resources which was accepted by the Ninth Consultative Meeting. This meeting recommended the establishment of a Group of Experts whose report, 'The Report of the Group of Ecological Technological and other Related Experts on Mineral Exploration and Exploitation in Antarctica' was accepted by the Tenth Consultative Meeting. At the Twelfth Consultative Meeting the recommendation was made that a minerals regime be concluded as a matter of urgency and a Special Consultative Meeting should be convened in order to elaborate such a regime. This Special Consultative Meeting reported to the Twelfth Consultative Meeting in 1983 where negotiations were continued. A further Special Consultative Meeting on the topic of minerals was held in Rio de Janiero in 1985.

12 Beeby, C., *The Antarctic Treaty* (1972) (pamphlet published by the New Zealand Institute of International Affairs); Greig, D. W., 'Territorial Sovereignty and the Status of Antarctica' *Australian Outlook* (1978) 32, 117; Johnson, F. W., 'Quick Before it Melts: Toward a Resolution of the Jurisdictional Morass in Antarctica' (1976) 10 *Cornell International Law Journal* 173; Jessup, P. C., 'Sovereignty in Antarctica' (1947) 41 *American Journal of International Law* 117; Toma, P. A., 'Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic' (1956) 50 *American Journal of International Law*; Swan, R. A., *Australia in the Antarctic, Interest Activity and Endeavour* (1961) M.U.P.; Bernhardt, J. P. A., 'Sovereignty in Antarctica' (1975) 5 *California Western International Law Journal* 297; Triggs, G., 'Australian Sovereignty in Antarctica' Part I (1981) 13 M.U.L.R. 123; Part II (1982) 13 M.U.L.R. 302; Carl, B. M., 'International Law — Claims to Sovereignty — Antarctica' (1954) 28 *Southern California Law Review* 386; Alexander F. C., 'Legal Aspects: Exploitation of Antarctic Resources' (1978) 33 *University of Miami Law Review* 371, 381-98.

It is sufficient for the present purpose to outline the solution adopted by the Treaty itself to these claims contained in Article IV[13] of the Treaty, which reads:

ARTICLE IV

1. Nothing contained in the present Treaty shall be interpreted as:
(a) a renunciation by any Contracting Party of previously asserted rights or of claims to territorial sovereignty in Antarctica;

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica or, otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

From the standpoint of devising management regimes for marine living resources, a further difficulty has arisen from the provisions of the Treaty itself, namely the uncertainty as to the scope of the Treaty. Article VI of the Treaty states that:

> The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

It has been suggested that the correct interpretation of this Article is that the Treaty does not apply to the high seas at all.[14] It is submitted that this is putting it too strongly. Although the matter is not free from doubt, the correct interpretation of this clause is that there is room for the application of the Treaty in the high seas as long as it does not interfere with the rights of any State in the high seas under international law.

Therefore any conservation measures made under the Treaty must not interfere with or affect these rights.[15] Support for this proposition can be found in conventions which relate wholly to the high seas and contain the same reservation as to high seas rights. If these reservations are construed otherwise than

13 For an analysis of Article IV, see Wyndham, *The Development of International Co-operation in the Antarctic* (1979) paper presented at the Agenda for the Eighties Seminar, Dept. of International Relations, Research School of Pacific Studies Australian National University at p. 13.

14 Pallone, F., 'Resource Exploitation: The Threat to the Legal Regime of Antarctica' (1977) 8 *Manitoba Law Journal* 597, 600; Marcoux, 'The Antarctic Continental Margin' (1970-71) 11-12 *Virginia Journal of International Law* 374, 378, n.28. It was stated quite categorically in 16 *Polar Record* (1972-73) at p.435 that the draft Convention for the Regulation of Antarctic Pelagic Sealing was to be considered outside the framework of the Treaty because, *inter alia*, the latter did not apply to the high seas; and see Final Report of the Sixth Antarctic Treaty Consultative Meeting (1970) 3, where it is stated that the conservation of seals in the sea does not fall within the scope of the Treaty.

15 In fact all conservation measures in marine areas have been in the form of International Conventions.

as suggested above, the conventions would be rendered totally inoperative.[16] It remains to ascertain what these rights are. Until the United Nations Convention on the Law of the Sea 1982 comes into force,[17] high seas rights are governed at international law by the 1958 Geneva Conventions on the High Seas and on Fishing and Conservation of the Living Resources of the High Seas. Article 2 of the High Seas Convention contains the following provision:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal states:
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.

However these freedoms are stated to be subject to other rules of international law. In this case the Convention on Fishing and Conservation of the Living Resources of the High Seas is particularly relevant. By Article 2 of this Convention:

> All States have the duty to adopt, or to co-operate with other states in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

This restriction on the freedom of fishing in the high seas does not require States to comply with measures taken by a body of other States whose membership bears no relation to their fishing activities in the zone. Restricting the participation in the drawing up of conservation measures in the area to the Antarctic Treaty Consultative Parties would prevent such measures being binding on other States and any attempt to implement them in the high seas would amount to an interference with high seas rights.

To add to the difficulties in relation to the interpretation of Article VI, the Treaty Parties themselves have always been ambivalent in their interpretation of Article VI. It is possible to cite many instances where it is clear that the Parties considered that there was room for the application of the Treaty in high seas areas.[18]

[16] *e.g.* International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969) and International Convention for the Northwest Atlantic Fisheries (1949).

[17] The United Nations Convention on the Law of the Sea in relation to high seas rights and conservation of marine living resources is in all relevant respects in the same terms as the Geneva Convention on the High Seas and Conservation of Living Resources of the High Seas. See Articles 116-119 of the Convention on the Law of the Sea.

[18] See Recommendation V-3, which states: 'Considering that the Southern Ocean is an integral part of the Antarctic Environment and that the Consultative Governments have made substantial contributions towards knowledge of this ocean in the Treaty area'. Recommendation VIII-10 contained a request to the Representatives to recommend to their Governments that 'they encourage studies which could lead to the development of effective measures for the conservation of Antarctic Marine Living Resources in the Treaty area'. In addition, the legislation of the various States relating to Antarctica reflects this ambivalence. For example, the Agreed Measures for the Conservation of Antarctic Fauna and Flora by their terms apply to the same area as the Antarctic Treaty and contain the same reservations as to high seas rights as the Treaty. In implementing these Measures, different interpretations of the 'area' provisions have been made. See Antarctica Amendment Act 1970 (N.Z.) which by s. 2 provides for the regulations for the conservation of Antarctic Fauna and Flora to be extended to and apply to the high seas within Antarctica. By way of contrast s. 1 of the Antarctic Treaty Act 1967 (U.K.) limits the conservation measures to the land mass of Antarctica and the ice shelves.

Irrespective of the correct interpretation of Article VI, it appears the Treaty Parties have chosen to utilize international conventions as the vehicle for management regimes in off-shore areas for two other reasons. First, the Treaty fails to define what are high seas within the Treaty area. The view of claimant States would be that the high seas commence outside their territorial sea or 200-mile economic zones. The non-claimant States would regard all the seas off Antarctica as high seas. Rather than become involved in territorial disputes, it was far preferable to have an international convention covering all the seas south of 60° South latitude, without the reservation as to high seas rights, and thus avoiding the necessity to decide in what area these high seas rights operated. Secondly, the Consultative Parties recognized that regulation of renewable resources in Antarctica would only be effective if formulated and adopted by a wider community of States than the Consultative Parties. It is suggested that this latter factor is illusory, as although the conventions relating to living resources have been negotiated outside the Antarctic Treaty the only negotiators were the Antarctic Treaty Consultative Parties.

What room there is for the application of the Treaty in off-shore areas in relation to other measures remains an open question.[19]

3. *MANAGEMENT REGIMES FOR ANTARCTIC LIVING RESOURCES*

A. *Whales*[20]

Whales have been exploited in Antarctic waters for over 150 years. The result of virtually uncontrolled exploitation led to the collapse of the whaling industry and the fall of whale populations, in some cases almost to the point of extinction. In fact whaling and the attempts to regulate it could be cited as an example of how not to manage resources. The exploitation of whales is now governed at an international level by the Convention for the Regulation of Whaling 1946.[21] The relevant national legislation is the Whale Protection Act 1980. The Convention for the Regulation of Whaling 1946 set up the International Whaling Commission, which has regulated international whaling since 1948. All members of the Antarctic Treaty, with the exception of Belgium, Poland and the German Democratic Republic are members of the Commission. The only Consultative Parties actively involved in whaling are Brazil, Chile, Japan, Norway and Russia.

[19] The Antarctic Treaty by Article V(1) forbids 'Any nuclear explosions in Antarctica and the disposal there of radioactive waste material . . .' Surely 'Antarctica' in this context includes the high seas south of 60° South Latitude?

[20] For a full account of Australia's policies on whales and whaling, see *Report of the Frost Inquiry into Whales and Whaling*, A.G.P.S., Canberra, (1978).

[21] The blue and humpback whale is also protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which entered into force on 2 June 1975.

In March 1978 an Inquiry into Whales and Whaling was appointed by the Australian Government. The Report of the Inquiry was presented in December 1978. One of its terms of reference was to examine 'the implications of Australia's policies on 200 nautical-mile fishing and economic zones in Australian waters, including those adjacent to the Australian Antarctic Territory'.[22] Accepting that at international law coastal States have the right to establish 200-mile fishing zones what should Australia's position be in respect of these waters? The recommendation was that whaling should be prohibited within Australia's 200-mile fishing zone.[23] If waters in the Australian Antarctic Territory were included in that zone the prohibition should apply also in those waters, although it recognized 'that broader international considerations may affect its immediate implementation.'[24] An initial point considered by the Inquiry was whether a coastal State which is a member of the International Whaling Commission could prohibit whaling by foreigners in its 200-mile economic zone. After various opinions were obtained,[25] the conclusion was reached that there was nothing in the International Whaling Conventions that would prevent Australia from prohibiting whaling in its 200-mile fishing zone.

On 1 November 1979 the provisions of the Fisheries Amendment Act 1978 (Cth), declaring an exclusive 200-mile fishing zone off Australia came into operation.

However the Australian Government was well aware that a declaration of a 200-mile exclusive fishing zone around its Antarctic Territory could jeopardize the delicate negotiations then in progress relating to the establishment of the Convention for the Conservation of Antarctic Marine Living Resources. Therefore to overcome the problem of the Antarctic Territory, although the proclamations made under the Act covered this Territory, the power contained in s. 7A of the Act was utilized to allow the Governor-General to declare by proclamation that the waters of the Australian Antarctic Territory are excepted from the provisions of the Act.[26]

The Minister for Primary Industry, Mr Sinclair, in discussing this action of the Government stated:

> 'Against the background of the Antarctic Treaty and Australia's current involvement with other Antarctic Treaty countries in negotiations for the conclusion of a convention for the conservation of Antarctic marine living resources, the Government proposes to recommend to the Governor-General that, in all the circumstances, the appropriate course at this time is to take the further step of excepting Australian Antarctic Territory waters from the AFZ.'[27]

The Whale Protection Act was passed in 1980 and prohibits whaling except in certain restricted circumstances. Prima facie this prohibition applies to the waters in the Australian Antarctic Territory as by s.6(1) the Act extends to every external Territory. However, insofar as the Act purports to apply to

22 Reference 3 (f).
23 *Whales and Whaling*, A.G.P.S., Canberra (1978) 206.
24 *Ibid.* 207.
25 *Ibid.* 60, 61.
26 The proclamation was published on 2 November 1979.
27 *Commonwealth Parliamentary Debates*, House of Representatives, 25 September 1979, 1465.

waters beyond the Australian fishing zone its provisions only apply to Australian citizens. The Australian fishing zone by s.3 is as defined in the Fisheries Act 1952, which definition excludes Antarctic waters. Therefore the provisions of the Whale Protection Act relating to the Preservation Conservation and Protection of Whales, Part II ss 9-19, only apply to whaling in Antarctic waters by Australian citizens domiciled in Australia, and not to foreign personnel, aircraft or vessels.

In the discussions relating to the Convention on Antarctic Marine Living Resources[28] the relationship between the Convention and the International Whaling Commission had to be clarified. In the Comparative Table of Texts presented to the Special Consultative Meeting of March 1978, Argentina and Australia suggested that the following clause should be inserted:

> 'In adopting measures the commission shall bear in mind the provisions of the 1946 Whaling Convention and the Convention for Conservation of Antarctic Seals and shall ensure there is no inconsistency between obligations of the contracting Parties and such provisions.'

The final result, Article VI of the Convention, is not so specific and obligations are imposed on each contracting party to abide by its other Convention obligations, viz:

> 'Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.'

As stated earlier, the conservation measures in relation to whales were negotiated outside the framework of the Antarctic Treaty. The other measures relating to Antarctic Living Resources have all been initiated by the Treaty Parties.

B. *Conservation of Fauna and Flora*

As stated previously, under Article IX para. 1(f), one of the obligations on the Antarctic Treaty Parties is to formulate measures regarding the preservation and conservation of living resources in Antarctica. At the first Antarctic Treaty Consultative Meeting at Canberra in 1961, the representatives, realizing the need for measures to conserve the living resources of the Treaty area and to protect them from uncontrolled destruction or interference by man, recommended that until internationally agreed measures for the preservation and conservation of living resources of the Antarctic could be established, as an interim measure, the 'General Rules of Conduct for preservation and conservation of living resources in Antarctica', contained in their report should be adhered to.[29]

At the Third Antarctic Treaty Consultative Meeting at Brussels in 1964, the Agreed Measures for the Conservation of Antarctic Fauna and Flora were agreed upon and recommended to the governments of the Treaty Parties for

[28] *Supra* p. 290.
[29] Recommendation I-VIII.

implementation.[30] Until such time as the measures become effective it was recommended that they be used as guidelines in this interim period.[31] The measures have apparently been very successful in operation. Brian Roberts of the Scott Polar Research Institute at Cambridge has stated:[32]

> The 'Agreed Measures for the Conservation of Antarctic Fauna and Flora', first formally recommended to governments in 1964, have subsequently been the subject of substantial improvements in the light of experience. These arrangements have been widely acclaimed as one of the most comprehensive and successful international instruments for wildlife conservation on land that has yet been negotiated.

By Article 1 the Agreed Measures apply in the same area as the Antarctic Treaty[33] and have the same provision relating to non-interference with high seas rights at international law.[34]

In 1980 the Commonwealth Government passed the Antarctic Treaty (Environment Protection) Act to give effect to these Measures. One of the difficulties for claimant States when enacting legislation to give effect to their treaty obligations is whether to confine the application of the legislation to its own nationals, or to apply the legislation on a territorial basis, in other words to foreign persons within the claimed territory. Australia has not been consistent in its practice in this matter. However, as regards the Antarctic Treaty (Environment Protection) Act 1980, by s. 4 the Act applies in the Australian Antarctic Territory to foreign persons as well as Australian nationals and outside Australia to Australian citizens.[35]

The Act by s. 8 provides for the proclamation of specially protected areas, including an area of sea within the Antarctic, defined by s. 3 as the area south of 60° South Latitude, including all ice shelves in the area. Section 19 sets out the offences relating to the environment prohibited by the Act. Section 9 provides for the granting of permits to carry out, under certain conditions, activities prohibited by s. 19. This permission does not cover the following: (i) to land or drive an aircraft; (ii) to drive a vehicle in a specially protected area (s. 19(1)(e)); (iii) to do anything in a site of special scientific interest otherwise than as authorized by the plan of management relating to the site (s. 19(1)(g); (iv) to cause or permit a dog to run free (s. 19(2)(f)); and (v) nor to cause or permit to escape from control, an animal, plant, virus, bacterium, yeast or fungus that is not indigenous to the Antarctic and has been brought into the Antarctic by virtue of a permit or to be used as food (s. 19(2)(g)).

The Agreed Measures for the Conservation of Antarctic Fauna and Flora are the only measures in relation to living resources that are within the framework of the Antarctic Treaty. The other measures discussed below have been instigated by the Treaty Parties but are in the form of international conven-

30 Recommendation III-VIII.

31 None of the Agreed Measures are in force, as by Article XIII, all Consultative Parties must notify their approval before they become effective and this has not occurred.

32 Roberts, B., 'International Co-operation for Antarctic Development: The Test for the Antarctic Treaty' (1978) 19 *Polar Record* 107, 109.

33 *Supra* p.283.

34 *Supra* p.283.

35 *Cf.* Antarctic Marine Living Resources Conservation Act 1981 (Cth) s. 5(2), *infra*, n.65,

tions. Although the form is different the negotiations have in all cases been carried out by the Treaty Parties in secret and only a handful of other interested States have been grudgingly accorded observer status. This aspect of the politics of Antarctic negotiations is discussed at a later stage.[36]

C. *Convention for the Conservation of Antarctic Seals 1972*[37]

Seals were exploited sporadically from as early as the beginning of the nineteenth century and the southern fur seal was almost exterminated by uncontrolled exploitation. At present there is no commercial sealing at all in the Antarctic.

At the Third Antarctic Treaty Consultative Meeting held at Brussels in June 1964, Recommendation III-XI dealt with pelagic sealing and the taking of fauna on pack ice. The thrust of the recommendation was that the Parties recommend to their governments that they voluntarily regulate these activities by their nationals to ensure that the species is not endangered and "that the natural ecological system is not seriously disturbed".

Recommendation IV-21 of the Fourth Antarctic Treaty Consultative Meeting at Santiago in Nov. 1966 contained the Interim Guidelines for Voluntary Regulation of Sealing. At the fifth Antarctic Treaty Consultative Meeting held in Paris in Nov. 1968, Recommendation V-7 indicated that the Parties were aware of problems relating to the control of activities in the high seas within the framework of the Treaty and recognized that an international convention to regulate Antarctic sealing may be necessary. At this meeting a draft Convention for the regulation of Antarctic Pelagic Sealing was submitted by the working party for consideration at the Sixth Antarctic Treaty Consultative Meeting. The Argentine representative placed on record the following statement:

> The Argentine Delegation wishes to state that its approval of the Recommendations concerning Pelagic Sealing and of Recommendation IV-21 and IV-23 which also bear on the question, must not be considered as a precedent affecting in any way whatsoever the application of the provisions of Article VI (non-interference with high seas rights) of the Antarctic Treaty.

As a result of the difficulties of interpreting this article and the interest of other countries who were not members of the Antarctic Treaty, at the Sixth Antarctic Treaty Consultative Meeting, the Parties decided to consider the conservation of seals outside the framework of the Antarctic Treaty. The Antarctic Treaty Parties met separately in London in 1972 and adopted the Convention for the Conservation of Antarctic Seals.

By Article I the Convention covers the seas south of 60° South Latitude. All Contracting Parties are held to have agreed to the provisions of Article IV, the Sovereignty Article, of the Antarctic Treaty in respect of that area.[38] Accession by Article 12 is open to any State invited to accede with the consent of all

36 *Infra*, p.305.

37 This Convention came into force on 11 March 1978.

38 The insistence of the Antarctic Treaty Parties that non-Treaty parties be obliged to adhere to provisions of a treaty of which they are not a member is criticized *infra*, p.304.

the Contracting Parties.

The relationship between this Convention and the Convention for the Conservation of Antarctic Marine Living Resources has already been adverted to.[39]

The difficulties which have arisen for claimant States in the application of the Agreed Measures for Fauna and Flora[40] and the Antarctic Marine Living Resources Convention[41] are avoided by the Convention for Antarctic Seals. Article 2 para. 2 of the Sealing Convention limits the obligations of a Contracting party to adopting laws for its own nationals and vessels under its flag. Therefore a system of national rather than territorial jurisdiction is adopted by the Convention.

D. *Convention for the Conservation of Antarctic Marine Living Resources*[42]

The most ambitious undertaking by the Antarctic Treaty Parties to date has been the successful conclusion of the Convention on Antarctic Marine Living Resources. For some time the Treaty Parties had been under pressure from *inter alia*, third world countries in relation to the living resources of Antarctica.[43] In fact, South Korea, Taiwan, Japan, U.S.S.R., Poland, Chile, the Federal Republic of Germany and the German Democratic Republic were already exploiting these resources.[44] The United Nations Food and Agriculture Organization had also expressed its interest[45] and produced three comprehensive reports.[46]

39 *Supra*, p.287.

40 *Supra*, p.288.

41 *Infra*, p.308.

42 For a comprehensive study of the issues raised by Antarctic marine living resources and the factors to be considered in the implementation of any management regime, see *Final Environmental Impact Statement on the Negotiation of a Regime for Conservation of Antarctic Living Marine Resources* (1978) U.S. Dept. of State; see also El-Sayed, *Biological Investigations of Marine Antarctic Systems and Stocks (BIOMASS)* 1977.

43 For a description of the living resources of the area and their economic importance, see Scully, R., 'The Marine Living Resources of the Southern Ocean', (1978) 33 *University of Miami Law Review* 341, 345; for an outline of the species in the Antarctic marine ecosystem and a history of commercial harvesting, see *Final Environmental Impact Statement for a Possible Regime for Conservation of Antarctic Living Marine Resources* (1978) U.S. Dept. of State, 24, 34.

44 The actual total catch of krill in 1979 was 129,403 tons (F.A.O. figures).

45 In the report of the eleventh session of the Committee of Fisheries (Rome) 1977, paras, 39-49, the use of the resources of the Southern Ocean and the role of the F.A.O. were discussed. The Committee stressed the important role of the F.A.O. with regard to the living resources of the southern ocean as their future exploitation might represent an element in meeting world food needs. They also stressed the need for close co-operative working relations with the Antarctic Treaty parties in relation to the Treaty area. The report of the twelfth session of the Committee of Fisheries (Rome) 1978, paras, 43-52, discussed and welcomed the initiative of the Antarctic Treaty Consultative Parties in drawing up a Convention of Antarctic Marine Living Resources and expressed the desire that special provisions be included in the Convention providing for co-operation and a special relationship with F.A.O.

46 Everson, I., *The Living Resources of the Southern Ocean*, (1977) (UNDP/FAO Southern Ocean Fisheries Survey Programme, Doc. No. GLO/50/77/1); Eddie, G. O., *The Harvesting of Krill*, (1977) (UNDP/FAO Southern Ocean Fisheries Programme, Doc. No. GLO/50/77/2); Grantham, G. J., *The Utilization of Krill*, (1977) (UNDP/FAO Southern Ocean Fisheries Survey Programme, Doc. No. GLO/50/77/3).

The most potentially important resource is krill.[47] Its economic importance is as yet not established[48] but fisheries biologists have estimated annual sustainable catch levels of 50-60 million tons, about the same size as the entire world fish catch at present. One of the major problems with exploiting krill is that it is the basis of a food chain on which many other species depend at every level of the ecosystem.[49] By way of illustration, krill is the staple food for the diminished stocks of baleen whale, two species of seals, several species of penguins, many types of fish and probably deep sea squid. Sperm whale feed on fish, so the interdependence of the food chain is clear and before exploitation occurs careful consideration would have to be given to prevent disturbing the balance of the fragile ecosystem.[50]

It became evident that unless the Antarctic Treaty Parties took the initiative in dealing with the controversial issues of both living and non-living resources their prime position in matters relating to the Antarctic held by the Treaty Parties would be lost. Along with this would come a threat to the whole regime itself and the territorial claims in the area. The feeling was that to a large extent the ability of the Treaty Parties to reach agreement successfully on the conservation of these resources would affect the viability of the regime itself. This explains the rather unique aspect of the Antarctic Marine Living Resources Convention in that it has tackled the problem of conservation before over-exploitation has occurred.

Marine living resources was on the Agenda of the Eighth Antarctic Treaty Consultative Meeting at Oslo in 1975. Recommendation VIII-10 urged, *inter alia*, the development of effective measures for the conservation of Antarctic marine living resources in the Treaty area and placed the matter on the agenda of the Ninth Consultative Meeting.

In recognition of the need for a sound scientific basis for conservation measures the Parties recommended that the Scientific Committee on Antarctic Research (SCAR), report on a programme for the study and conservation of Antarctic marine living resources. At the subsequent meeting in 1976, SCAR recommended a ten year research programme to assess resource levels and their relationship to the development of resource management strategies.

[47] For a history of Antarctic krill fishing see, Eddie, G. O., *The Harvesting of Krill* (1977) (UNDP/FAO Southern Ocean Fisheries Survey Programme Doc. No. GLO/50/77/2) 5.

[48] For a study of the uses of krill, see Grantham, C. J., *The Utilization of Krill*, (1977) (UNDP/FAO Southern Ocean Fisheries Survey Programme Doc. No. GLO/50/77/3), 33. For the potential of krill as a commercial catch, see *Report of the International Institute for Environment and Development* 1980, 60, and *The Antarctic Krill Resource: prospects for Commercial Exploration*, Report by Tetra Tech. Inc. to the U.S. Dept. of State (1978).

[49] For a discussion of the Antarctic food chain, see Llano, G., 'Ecology of the Southern Ocean Region' (1978) 33 *University of Miami Law Review* 351; *Final Environmental Impact Statement for a Possible Regime for Conservation of Antarctic Living Marine Resources* (1978) U.S. Dept. of State, 33; Green, *Role of Krill in the Antarctic Marine Ecosystem* (1977) Report to the U.S. Dept. of State, Division of Ocean Affairs.

[50] For this reason the Convention on Antarctic Marine Living Resources is ecosystem rather than single species oriented, see *infra*, p.305. However, the implementation of the ecosystem approach has not been without problems, see *infra*, p.310.

The Working Group on Marine Living Resources met preparatory to the Ninth Antarctic Treaty Consultative Meeting. One important result of its deliberations was that the word 'conservation' as used in their recommendation to the Treaty Parties included rational use.[51] The Working Group supplied a report and draft recommendation to the plenary of the Ninth Antarctic Treaty Consultative Meeting. Recommendation IX-2 of their Report[52] contained the version of this recommendation adopted by the plenary meeting in the form of Interim Guidelines for the Conservation of Antarctic Marine Living Resources to be observed until the negotiation of a definitive regime.[53]

The Meeting also recommended[54] the conclusion of a definitive regime for living resources by the end of 1978. A Special Consultative Meeting was to be convened to determine whether an international convention was necessary, if other States than the Consultative Parties who were actively engaged in research and exploration of the resources should participate, and also if international organizations should be invited to participate on an observer basis.

Certain matters were to be taken into account in drafting a new regime. First, the prime responsibility of the Consultative Parties in relation to the protection and conservation of the environment in the Antarctic Treaty area and the importance of the measures recommended by the Consultative Parties to this end was to be recognized. This matter is dealt with in the preamble to the Convention, where it is stated:

51 There was by no means unanimity between the Treaty parties on this point, see *infra*, p.301.

52 The preamble to Recommendation IX-2 reads:

ANTARCTIC MARINE LIVING RESOURCES

The Representatives,

Recalling the special responsibilities conferred upon the Consultative parties in respect of the preservation and conservation of living resources in the Antarctic by virtue of Article IX paragraph 1(f) of the Antarctic Treaty;

Recalling further the history of action taken by Consultative Parties concerning conservation and protection of the Antarctic ecosystem including, in particular, Recommendations III-8, VIII-10, VIII-13 and IX-5;

Noting that concentrations of marine living resources are found in the Antarctic Treaty area and adjacent waters;

Aware of the need to compile more information with a view to developing a good scientific foundation for appropriate conservation measures and rational management policies for all Antarctic marine living resources.

Recognising the urgency of ensuring that these resources are protected by the establishment of sound conservation measures which will prevent overfishing and protect the integrity of the Antarctic ecosystem;

Concerned that interim guidelines for the protection and conservation of Antarctic marine living resources are desirable until such time as a definitive regime enters into force;

Convinced that provision for effective measures to conserve Antarctic marine living resources as well as for collection and analysis of the data necessary to develop such measures will require the early conclusion of a definitive conservation regime;

53 INTERIM GUIDELINES FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES

1. They observe the following interim guidelines pending entry into force of the definitive regime for Antarctic Marine Living Resources:
   (a) they co-operate as broadly and comprehensively as possible in the mutual exchange of statistics relating to catch of Antarctic Marine Living Resources;
   (b) they should show the greatest possible concern and care in the harvesting of Antarctic marine living resources so that it does not result in the depletion of stocks of Antarctic marine species or jeopardizing the Antarctic marine ecosystem as a whole;
   (c) they urge those Governments which are not parties to the Antarctic Treaty and which engage in activities involving the use of the marine living resources of Antarctica to take account of these guidelines;
2. They review these interim guidelines as and when necessary and in any event following the conclusion of the definitive regime with a view to their future elaboration in the light of the provisions of the definitive regime.

54 Recommendation IX-2.

RECOGNISING the prime responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the Antarctic environment and, in particular, their responsibilities under Article IX, paragraph 1(f) of the Antarctic Treaty in respect of the preservation and conservation of living resources in Antarctica;

RECALLING the action already taken by the Antarctic Treaty Consultative Parties including in particular the Agreed Measures for the Conservation of Antarctic Fauna and Flora, as well as the provisions of the Convention for the Conservation of Antarctic Seals;

Secondly, the provisions of Article IV of the Antarctic Treaty, the Sovereignty Article, should not be affected by the new regime and the principle should apply in the marine areas south of 60° South latitude. This aim was achieved and is discussed in detail later.[55]

Finally, the regime should provide for effective conservation of the marine living resources of the Antarctic ecosystems as a whole, and to do so should extend north of 60° South latitude, that is outside the Antarctic Treaty area where necessary to achieve this objective. All these requirements are incorporated in the Convention and are discussed in detail later.[56]

The first Session of the Special Antarctic Treaty Consultative Meeting was held in Canberra in 1978. Eight draft Conventions were tabled and a single negotiating text was produced as a basis for further negotiations.[57] Substantial progress was made on many issues at this meeting. However, certain matters remained unresolved, in particular the method to use in the Convention to deal with the issue of sovereignty in marine areas. The talks were continued at the Second Session of the Special Antarctic Treaty Consultative Meeting in Buenos Aires in 1978. However, the sovereignty issue and other issues remained unresolved.

At the informal talks in Washington in 1978 the key articles in the Convention were settled on the basis of a 'gentleman's agreement'.[58] The basis of the agreement was that the agreed articles all together constituted a 'package' and any further negotiation about any one of them could disrupt the fragile compromise achieved.[59]

The two remaining issues still causing difficulties were, first, the insistence by the French that their sovereign rights around Kerguelen and Crozet islands should not be interfered with, and secondly, the participation of the European Economic Community (referred to hereafter as the EEC) in the Convention.[60] Further informal talks on these issues took place at Berne in 1979 and at Washington in 1980, at which point sufficient agreement had been reached for the third and final Session of the Special Antarctic Treaty Consultative Meeting in Canberra in 1980, followed by a Diplomatic Conference to conclude the Convention. The Conference concluded in Canberra on 20 May 1980 with the

55 *Infra*, p.298.

56 *Infra*, p.305.

57 Australia relied in its first draft on several features of the North-West Atlantic Fisheries Convention 1949, the Convention for High Seas fisheries of the North Pacific Ocean 1952, and the North and East Atlantic Fisheries Convention 1959.

58 For the details of these key Articles *infra*, n.71.

59 Some of the Articles were in fact altered to allow for the possibility of accession by the EEC.

60 For a discussion of the solution to these problems, *infra*, p.300; p.306.

signature of the Final Act. By Article XXVI, para. 1, the Convention was open for signature at Canberra from 1 August to 31 December by the States partici pating in the Conference. By the 31 December 1980 all these States had signed the Convention. By Article XXXIII the Convention entered into force on the 7th April 1982 following the date of deposit of the eighth instrument of ratification. To date fifteen nations, including Australia,[61] and the European Economic Community have ratified the Convention.[62]

One distinctive feature of the Convention is the relative speed of the negotiations leading to its conclusion and the prompt ratification of the Convention by many States. The original deadline for the conclusion of the Convention was the end of 1978 and the conclusion in May 1980 of the Convention was not far outside this initial estimate. Comparisons can be drawn with other Treaty deliberations. For example, there were 61 preparatory meetings before the Antarctic Treaty was signed in 1959. The Convention for the Conservation of Antarctic Seals was six years in negotiation and there was another six years of the ratification process before it came into force in March 1978. The explanation for this speed may well lie in the fears of the Treaty Parties that unless they demonstrated their ability to handle such issues they may lose credibility in the world forum.

Another distinctive feature of the Convention is that during the negotiations two factors strongly influenced the attitude of the participants as to the desirable form and content of the Convention, namely whether they were claimant or non-claimant States, and whether they were fishing or non-fishing States. The only State which was both a claimant and a fishing State was Chile. However, Chile put its territorial interests first during the negotiations, as these are of far more potential value at this stage than its fishing interests.

The claimant and non-fishing States wanted a strong conservation agreement. In addition, the claimant States were primarily concerned with preventing any possible adverse reflection on their territorial claims. The fishing States, on the other hand, were determined to prevent any enlargement of existing territorial claims and to obtain a regime providing for the exploitation of living resources in the Antarctic. With such divergent interests it is not surprising that agreement was difficult to reach in relation to some of the issues which arose in the course of the negotiations. The end result of these differences although probably inevitable is none the less unfortunate in that with potentially valuable economic resources and territorial interests at stake the

61 6 May 1981. The other States which have ratified the Convention are Argentina, France, Belgium, Norway, Poland, Japan, U.S.S.R., Chile, United Kingdom, United States of America, South Africa, Federal Republic of Germany, German Democratic Republic and New Zealand.

62 This allowed for the first meeting of the Commission and the Scientific Committee in Hobart in May 1982, as under Article XIII such a meeting must be held within three months of the entry into force of the Convention, provided that among the Contracting Parties there are at least two States conducting harvesting activities within the area of the Convention. This latter requirement was satisfied by the ratification of the Soviet Union and Japan, both of whom are engaged in fishing in the Convention area. For a discussion of the work of the Commission and the Scientific Committee since the Convention came into force *infra*, p.309

provisions of the Convention in relation to a number of important issues are not as effective as they could have been.

Structure of the Convention

The internal structure of the Convention is similar to most international fisheries organizations. The central element is the Commission,[63] established by Article VII. The Commission is constituted by one representative from each of the original signatory Parties, acceding States whilst they are engaged in research and harvesting activities, and acceding regional economic organizations whilst their member States are members of the Commission.

The functions of the Commission are contained in Article IX and are to give effect to the objective of the Convention to conserve Antarctic marine living resources and to carry out the principles of conservation in Article II. Article IX, para. 2, sets out some of the conservation measures which may be formulated and adopted by the Commission under Article IX, para. 1 (f). Included in these measures are the '(a) designation of the quantity of any species which may be harvested in the area to which the Convention applies'. Noticeably absent is any catch allocation provisions. It had been stated by the Working Group on Antarctic Marine Living Resources in its report to the Ninth Antarctic Treaty that 'the regime would exclude catch allocation and other economic regulation of harvesting'. However, the issue was raised on several occasions during negotiations. Some of the claimant States wanted to receive some benefit in return for refraining from proclaiming and enforcing their jurisdiction in marine areas. On the other hand, the fishing nations took the attitude that in return for agreeing to conservation measures they would be entitled to treat the seas south of 60° South latitude as high seas and have full access to fish in those waters. To have incorporated the concept of catch allocation in the Convention would have changed the nature of the Convention from being primarily a conservation regime to a more overtly fisheries regime. Such a change in emphasis could well have given rise to problems with Third World Countries. Apart from this consideration, catch quotas raised once again the issue of sovereignty. The non-claimant and fishing States would not have been prepared to grant quotas to claimant non-fishing States as this would inevitably have given rise to an implied recognition of their sovereignty.[64]

Under Article XII decisions of the Commission on matters of substance are by consensus and on other matters by a simple majority of the members present and voting.[65] The method of decision making was a source of much

[63] For a discussion of the operation of the Commission since its establishment, *infra*, p.309.

[64] The claimant States will not be so willing to give up benefits under a minerals regime. see 'Antarctica — A Continent of international harmony?' *AFAR* Feb. 1980, 11.

[65] *Cf.* the Convention for the Conservation of Antarctic Seals. Conservation measures, by Art. 6, para. 1 (a), require concurring votes of all States present, and in addition ⅔ of Contracting Parties; and see the International Whaling Convention, by Art. III, decisions of the Commission are taken by a simple majority, with the exception of alteration of the provisions of the schedule, under Art. V. which requires a ¾ majority. The schedule sets out conservation measures.

dissension between the participants in the negotiations. The Chairman's Draft, presented to the First Session of the Special Consultative Meeting in Canberra 1978, established a different system. Voting was to be by consensus if possible. If this were not possible, on a matter of substance a two-thirds majority of the members of the Commission should suffice as long as the two-thirds majority included two-thirds of the Antarctic Treaty Consultative Parties.

The inclusion of the latter requirement was an attempt on the part of some States to establish a link with the Antarctic Treaty, by giving the Consultative Parties what in fact amounted to the power of veto over decisions of the Commission. However, this idea was abandoned. If the Convention was designed to encourage access by fishing nations, unequal voting power on the Commission would discourage this. In addition, the area of the Convention covered a wider area than the Antarctic Treaty and in view of that fact there seemed little justification for the preferred position of the Consultative Parties. The fishing States were insistent on consensus voting on the ground that as the majority of the Commission would be initially made up of non-fishing States, this would prevent the fishing States from being adversely affected in their fishing operations without their consent. On the other hand, the conservation minded States feared that the consensus voting would prevent the implementation of any effective conservation measures.[66]

It was suggested that the consensus method of voting had the advantage that it could tend to minimize the use of the objection procedure contained in Article IX, paras. 6(c) and (d) of the Convention in relation to conservation measures. In common with most other international fisheries organizations, the Commission does not have the power to make decisions binding on member States, and is limited to recommendations only. However, in accordance with a similar practice first followed by the International Whaling Commission, recommendations automatically become binding within one hundred and eighty days of notification being received by Member States, unless the Member State notifies the Commission that it is unable to accept the conservation measure.[67] Consensus voting coupled with objection procedures is unusual in fishing conventions. The former should negate the need for the latter. However, the argument against this proposition is that measures taken by the representatives of the Commission must be acceptable to their governments.

To assist the Commission in carrying out its functions as set out in Article IX, the Scientific Committee[68] is established by Article XIV. The Scientific Committee, a consultative body to the Commission, is made up of representatives appointed by each member of the Commission.

66 In relation to, *inter alia*, consensus voting in the Antarctic Treaty, Hayton, 'The Antarctic Settlement of 1959' (1960) 54 *American Journal of International Law* 349, 364 states: 'In short, the crucial procedures of disputes — settlement and decision-making provided by the treaty are very weak, permissive and add little, if anything, to the present opportunities and obligations of the nationals involved.'

67 For a discussion of conservation measures adopted by the Commission, *infra*, p.311.

68 For a discussion of operation of the Scientific Committee since its establishment, *supra*, p.309.

The budget of the Commission and the Scientific Committee, by Article XIX, para. 3, is to be contributed equally by each member of the Commission until the expiration of five years after the entry into force of the Convention. Thereafter the contribution is determined by two criteria: the amount harvested and an equal sharing among all members of the Commission. The Commission determines the proportion in which these two criteria apply. The original Canberra Draft Text of the Convention left the decision as to the amount of contribution by each member State to be determined by a consensus decision of the Commission. The final result is a combination of two formulae used in other fisheries Conventions.[69] This compromise is probably a result of the unusual composition of the members of the Convention. The five-year delay before the amount harvested becomes a factor in determining contribution was seen as necessary to allow time for the total catch to reach a realistic level.

A system of inspection and observation is provided by Article XXIV of the Convention.[70] In the original Chairman's Draft of the Convention the system was set out in detail, rather than, as in the Final Act, to be left to the Commission to elaborate on the basis of certain principles. The first draft also provided for observation and inspection of vessels under the flag of other Contracting Parties in addition to their own.

The final Article XXIV, as one of the principles on which the system is to be based, requires the designation of inspectors by members of the Commission. These inspectors are subject to the jurisdiction of the Contracting Party of which they are nationals, and report to this Party who in turn reports to the Commission. The Commission brings the report to the notice of the Contracting Party under Article X, para. 2.

The system of inspection and observation established by the Convention does not appear to be potentially as strong and effective as it could be. It is submitted that a more effective model could have been that of the Antarctic Treaty itself. Article XII, para. 2 of the Treaty establishes a system of rights of unilateral inspection granted to all parties, the only international agreement to provide such rights. It must be conceded that the exercise of these rights of inspection is beset with difficulties from a political point of view. In fact the inspections which have occurred under Article II, para. 2 of the Treaty have always been formalities.[71] However, the deterrent effect of such rights of inspection should not be overlooked.

The Antarctic Marine Living Resources Conservation Act 1981 (Cth), (not yet proclaimed), by s. 13 provides for the appointment by the Minister of in-

[69] The equal amounts formulae is to be found in the Salmon Commission, the Halibut Commission and the North Pacific Commission. The proportion of harvest formula is to be found in the Pacific Tuna Commission.

[70] The system of inspection and observation has been raised in the Commission, *infra*, p.311.

[71] For example, in 1980-1981 the U.S. conducted a series of inspections of the bases in the peninsula area of the Antarctic. The time and place of these inspections was communicated to all States involved and a written report was presented to the Eleventh Consultative Meeting in Buenos Aires in 1981.

spectors and of special inspectors upon the nomination of the Commission for the Conservation of Antarctic Marine Living Resources. The powers of these inspectors are set out in s. 16 and include the power to stop or detain and search a vessel if it is believed on reasonable grounds that an offence may have been committed by that vessel.

Having discussed the basic structure of the Convention, certain issues which gave rise to particular difficulties during the negotiations warrant more detailed examination, namely the issue of sovereignty, the objectives of the Convention, the area and scope of the Convention, and the relationship of the Convention with the Antarctic Treaty and other agreements and organizations.

(a) *Sovereignty issue*

Under recommendation IX-2 adopted at the Ninth Antarctic Treaty Consultative Meeting, one of the objectives of the First Special Consultative Meeting was to apply the principle contained in Article IV of the Antarctic Treaty, the Sovereignty Article, to the marine areas south of 60° South Latitude. Article IV was designed to deal with territorial sovereignty not with jurisdiction over marine areas as a consequence of this territorial sovereignty. The claimant States wanted to protect their rights to declare coastal state jurisdiction over 200 mile fishing zones, a right recognized at customary international law through the Law of the Sea Conference. The non-claimant States, on the other hand, considered that any declaration of fisheries (or economic) zones off Antarctica was contrary to Article IV (2) of the Treaty. Such a declaration in their opinion would amount to 'an enlargement of an existing claim to territorial sovereignty'.[72]

A further difficulty encountered in the negotiations on this point was that the area of the Convention was to extend north of 60° to the Antarctic Convergence.[73] This would take in certain French islands, namely Kerguelen and Crozet, and would limit the exercise of coastal state jurisdiction in areas under French sovereignty, north of 60° South Latitude, which were not in dispute. If the French insisted on full coastal state rights around these islands, the Convention area could not be treated under a single conservation regime. It was felt that this was necessary for reasons discussed *infra*.[74] The final version of the working text of the Chairman's draft on this Article stated that all Contracting Parties, whether or not they are Parties to the Antarctic Treaty, were to be bound by Articles IV and VI of the Antarctic Treaty in their relations with each other. Nothing in the Convention was to be interpreted as a renunciation by any Contracting Party of any right of or claim to or basis of claim to

72 Argentina had already declared an exclusive economic zone off its claimed territory, and see 'Antarctica — A continent of international harmony?' *AFAR* Feb. 1980, 10.

73 See discussion of area and scope of the convention *infra*, p.303

74 See discussion of area and scope of the convention *infra*, p.303.

coastal state jurisdiction in the marine areas of the Convention or as prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any such right or claim or basis of claim.

The claimant States were of the opinion that this formulation allowed them to interpret Article IV(2) as applying to waters both north and south of 60° South. Non-claimant States, on the other hand, could interpret Article IV2) as only applying to waters around islands north of 60° South where there was no dispute over sovereignty or coastal state jurisdiction (known as the bifocal approach). Article IV(1) incorporated Articles IV and VI of the Antarctic Treaty, and therefore these provisions applied to the marine areas both north and south of 60° South and safeguarded the legal position of both claimant and non-claimant States. However, at the second session of the Special Antarctic Treaty Consultative Meeting at Buenos Aires, in July 1978 the issue of sovereignty remained unresolved. The major stumbling block was the refusal of the fishing States, who were also non-claimant States, to concede to the claimant States the right to preserve their claims to jurisdiction in the marine areas south of 60° South. They insisted that such a preservation, even balanced by statements as to their own position, amounted to an enlargement of an existing claim to territorial sovereignty and was contrary to the Antarctic Treaty. The basic issue related to the economic benefits resulting from the exploitation of the resources. The claimant States felt they should obtain some economic benefit from refraining from declaring 200-mile fishing (or economic) zones. The fishing States, however, considered all the seas south of 60° South latitude as high seas and were not prepared to offer any economic benefit to the claimant States with regard to these waters.

The working Group's final 'disagreed text' read as follows:

> Nothing in this convention including acts or activities carried out in accordance with or implemented pursuant to the provisions thereof, shall be interpreted as:
>
> (a) a basis for asserting, supporting or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area;
> (b) as a renunciation by a contracting party of, or as prejudicing, the rights or claim to exercise coastal state jurisdiction or high seas rights under international law in marine areas in which this convention applies;
> (c) as prejudicing the position of any contracting party as regards its recognition of any such right, claim or basis of claim;
>
> In this connection contracting parties confirm that no new claim or enlargement of an existing claim to territorial sovereignty in the Antarctic Treaty area shall be asserted.

Although this is referred to as the 'disagreed text', in fact the Washington text on the sovereignty question, which resulted from informal consultations amongst the representatives in Washington in September 1978 and was to be the final form of the text accepted at Canberra in 1980, was in all but one material respect identical to this disagreed text. The difference is in Article IV, para. 2(b), where 'or high seas rights' has been deleted from the Washington text. The right to coastal state jurisdiction is retained. The rationale behind this compromise appears to be that the non-claimant and fishing States must have been persuaded that their high seas rights were protected by Article IV, para. 1, of the Convention, which binds all the Contracting Parties to the Convention to Article VI of the Antarctic Treaty in their relations with each other.

Article VI of the Antarctic Treaty, as it will be recalled, specifically protects the exercise of all high seas rights at international law in the Treaty area, that is south of 60° South latitude. However, it was reasonable that the claimant States would still wish to protect their rights to claim or exercise coastal state jurisdiction as these were not dealt with by the provisions of the Antarctic Treaty and had to be specifically covered by the Convention.

The Washington text was presented to the parties' governments for approval and contained a statement from the Chairman to the effect that the Consultative Parties regarded certain articles including Article IV, the sovereignty article, as of special importance.[75] Apparently certain of the Consultative Parties had indicated that they were not prepared to alter the sovereignty clause or the other clauses included in the statement and would not participate in any further discussion in relation to them.[76]

The talks at Washington were continued at Berne in 1979 and further informal consultations took place in Washington prior to the Tenth Antarctic Treaty Consultative Meeting. A possible solution to the problem of the French islands was arrived at during these latter consultations in Washington.

The French Government agreed to attend the final conference in Canberra on the condition that a statement regarding the application of the Convention on the Conservation of Antarctic Marine Living Resources to the waters adjacent to Kerguelen and Crozet was annexed to the Draft Convention, was accepted by all Parties and was recorded in the Final Act. The Chairman of the informal consultations in Washington conveyed these conditions to the representatives of Australia, the hosts to the Special Consultative Meeting and the Diplomatic Conference. He confirmed that the Statement was fully consistent with the Draft Convention on the Conservation of Antarctic Marine Living Resources. These conditions were set out in the invitation issued by the Australian Government to the Consultative Parties for the Diplomatic Conference to conclude the Convention and the statement was included in the Final Act.[77]

[75] The other Articles referred to in the statement of the Chairman as of special importance to the Consultative Parties were Articles I, II, III, V, VI, VII, VIII, X, XVII, XIX, XXI, XXII, and XXVII.

[76] In fact some of the clauses were amended to accommodate the European Community *infra*, pp.306-7.

[77] *Statement regarding the application of the Convention on the Conservation of Antarctic Marine Living Resources to the waters adjacent to Kerguelen and Crozet over which France has jurisdiction and to the waters adjacent to other islands within the Convention area over which the existence of state sovereignty is recognized by all Contracting Parties.*

Measures for the conservation of Antarctic marine living resources of the waters adjacent to Kerguelen and Crozet, over which France has jurisdiction, adopted by France prior to the entry into force of the Convention, would remain in force after the entry into force of the Convention until modified by France acting within the framework of the Commission or otherwise.

After the Convention has come into force, each time the Commission should undertake examination of the conservation needs of the marine living resources of the general area in which the waters adjacent to Kerguelen and Crozet are to be found, it would be open to France either to agree that the waters in question should be included in the area of application of any specific conservation measure under consideration or to indicate that they should be excluded. In the latter event, the Commission would not proceed to the adoption of the specific conservation measure in a form applicable to the waters in question unless France removed its objection to it. France could also adopt such national measures as it might deem appropriate for the waters in question.

Accordingly, when specific conservation measures are considered within the framework of the Commission and with the participation of France, then:

It is not putting it too strongly to say that the success of the negotiations depended primarily on the resolution of the sovereignty issue. This factor probably explains why the eventual compromise on this issue is so unsatisfactory. In fact the bifocal approach it is submitted, is a convenient and plausible method of not facing the issue at all. While the status quo in the Antarctic continues, the provisions of Article IV will prevent dissension among the Parties to the Convention. However, if for example large scale exploitation of living resources occurs in the Convention area, problems of coastal state jurisdiction will become acute and it appears inevitable that the bifocal approach will prove unworkable.

(b) *Objectives of the Convention*[78]

As with the sovereignty issue the fishing and non-fishing States had different views on the objectives of the Convention. The fishing States wanted a Convention based on utilization and limited conservation measures, to ensure that resources were harvested in the most efficient manner. They basically wanted a Convention modelled on a normal fisheries Convention. On the other hand, the non-fishing States were more concerned with protecting and preserving the marine environment as a whole.

The Convention, by Article II, para. 1, states that the objective of the Convention 'is the conservation of Antarctic marine living resources'. In deference to the fishing States, Article II, para. 2, defines 'conservation' as including rational use.

A further difficulty associated with the different aims of the participants to the negotiations centred around the conservation standard. The non-fishing States wanted the conservation standard to be set out in the Convention rather than to be decided from time to time by the Commission. The fishing States, on the other hand, were more interested in concepts such as maximum sustainable yield, in other words maximum utilization rather than a firm conservation standard. The end result is contained in Article II para. 3, which requires harvesting and associated activities in the area to be conducted in accordance with the following principles of conservation:

(a) France would be bound by any conservation measure adopted by consensus with its participation for the duration of those measures. This would not prevent France from promulgating national measures that were more strict than the Commission's measures or which dealt with other matters;
(b) In the absence of consensus, France could promulgate any national measures which it might deem appropriate.

Conservation measures, whether national measures or measures adopted by the Commission in respect of the waters adjacent to Kerguelen and Crozet, would be enforced by France. The system of observation and inspection foreseen by the Convention would not be implemented in the waters adjacent to Kerguelen and Crozet except as agreed by France in the manner so agreed.

The understandings, set forth in paragraphs 1-4 above, regarding the application of the Convention to waters adjacent to the islands of Kerguelen and Crozet, also apply to waters adjacent to the islands within the Convention area over which the existence of state sovereignty is recognized by all Contracting Parties.

78 For a discussion of the work of the Commission and the Scientific Committee in relation to the conservation objectives of the Convention *supra*, p.310.

(a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment;

(b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in sub-paragraph (a) above;

and

(c) prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.

This conservation standard has been criticized.[79] The thrust of the criticism is that Article 11, para. 3(a), which sets as the criterion for the protection of species, that they not be harvested below the level which ensures the greatest net annual increment, is suitable for those predatory species at the top of the food chain. However, it is not suitable for prey species.

The harvest of prey species to this level could result in a serious reduction of predator species which are dependent on them. Edwards and Heap,[80] in their comment on the Convention, contend that this difficulty is overcome if Article 11 is read as a whole. Article 11, para. 3(b), requires that the ecological relationship between harvested, dependent and related populations be maintained, and therefore that any level of exploitation set under Article 11, para. 3(a), must consider the requirement of para. 3(b). However even if it is conceded that the requirements of para. 3 have the potential to operate satisfactorily,[81] a stronger less equivocal statement of the conservation standard is desirable to prevent any misapprehension as to its intent. The inadequacy of the conservation standard flows from the necessity to find a compromise between the divergent interests of the fishing and non-fishing States.

[79] The International Union for Conservation of Nature and Natural Resources (IUCN) submitted proposed amendments to the Washington Draft of the Convention. The conservation standard they suggested reads: (their additions to the text are *underlined*).

(a) Prevention of decrease in the [size] *abundance* of any harvested population *which is not subject to significant natural predation* to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment; *for any other harvested population, prevention of decrease in the size of the population, either as specified above or to a level below which the stable recruitment of species dependent upon it cannot be ensured, whichever is the higher level;*

[80] Edwards and Heap, 'Convention on the Conservation of Antarctic Marine Living Resources: A Commentary' (1981) 20 *Polar Record* 353, 355. See also *Report of the Australian Delegation to the Third Session of the Special Antarctic Treaty Consultative Meeting and the Conference on the Conservation of Antarctic Marine Living Resources*, A.G.P.S., Canberra, 1981, 16.

[81] In fact the members of the Scientific Committee have agreed that Article II of the Convention needs to be considered in its entirety. *Supra*, p.310.

(c) *Area and Scope of the Convention*

The Convention, unlike the Antarctic Treaty,[82] does not place the emphasis on an area to define the ambit of the Convention but on the resources within an area. This is the result of the insistence of non-fishing States that a proper conservation Convention must proceed on an ecosystem as opposed to a single species approach.[83] This represents a novel method of managing the living resources of the ocean and recognizes the interdependence of the various species within the ecosystem. Article 1 states that the Convention:

> applies to the Antarctic marine living resources of the area south of 60° south latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem.
>
> Antarctic marine living resources are:
>
> the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence.

The Antarctic marine ecosystem 'means the complex of relationships of Antarctic marine living resources with each other and their physical environment'. The Antarctic Convergence is defined in Article 1 para. 4, in accordance with F.A.O. statistical lines. Despite the use of this geographic definition, the Antarctic Convergence is a scientific rather than a geographic concept. The Convergence is where the cold waters of the Antarctic converge with warmer waters of the north. It is not a static zone but a seasonable movable zone. A problem arising from this relates to migratory or straddling stock. If the whole Antarctic ecosystem was to be encompassed within the Convention how were these stock to be treated? The solution is to be found in Article XI, which requires the Commission to co-operate with Contracting Parties exercising jurisdiction in marine areas adjacent to the Convention area in order to conserve any stock or stocks of associated species which occur both within those areas and the Convention area and to attempt to harmonize the conservation measures in relation to such stocks.

The adjacent marine areas to the Convention are either high seas or are under the jurisdiction of Antarctic Treaty Consultative Parties who are Contracting Parties to the Convention.

[82] See Article VI of the Antarctic Treaty.

[83] The Commentary by the Australian Delegation on the draft Convention for the Conservation of Antarctic Marine Living Resources prepared by Australia and submitted to the First Special Consultative Meeting in Canberra 1978 stated:

> Whilst the problems arising from the utilisation of these resources [those resources which it is feasible to harvest] are the most pressing and require immediate attention, it is important to bear in mind that the need for conservation extends also to living organisms whose significance is not immediately to be seen primarily in resource terms. The Antarctic Treaty Parties have in the past demonstrated their concern with the conservation of the fauna and flora which are components of the Antarctic terrestrial ecosystem. It seems appropriate that this wider concern should now find some place within the framework of a Convention dealing with the marine ecosystem.

The scope of this approach is reflected in the present draft in at least three ways:

(i) it covers all the seas south of 60° South latitude, including those within national jurisdiction as well as the high seas;

(ii) it also covers all the organisms constituting part of the ecosystem of the area, even beyond the geographic area of the Convention;

(iii) it is open to participation by all States which conduct research on or harvest the living organisms of the area.

(d) *Relationship between the Convention and the Antarctic Treaty and other agreements and organizations*

The provisions of the Convention which provide links between the Antarctic Treaty and measures taken thereunder, and the Convention, could well attract criticism on the basis that they strengthen the notion of the Convention being for the benefit of the 'Antarctic Club', and weaken the international aspect of the Convention, making it less acceptable to other States. These criticisms, though not without merit, overlook the practicalities of the situation. It is the Antarctic Treaty parties who have initiated all conservation measures in the area and it would be practically and politically difficult for a Convention to operate efficiently in primarily the same area in which the Antarctic Treaty operates without strong co-operation between that regime and the Treaty. In fact, it was made clear during the negotiations leading up to the Convention that some claimant States were not prepared to negotiate on any other basis.

By Article III of the Convention, the Contracting Parties agree not to engage in any activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty, and that in their relations with each other they are bound by the obligations contained in Articles I and V of the Antarctic Treaty.

Article I provides that Antarctica shall be used for peaceful purposes, and Article V prohibits nuclear explosions and the disposal of radioactive waste therein.

Article IV, para. 1, of the Convention requires, with respect to the Antarctic Treaty Area, that all Contracting Parties, whether or not they are Parties to the Antarctic Treaty, be bound by Article IV (Sovereignty Article) and VI (protection of high seas rights) of the Antarctic Treaty in their relations with each other. The aim of this provision is to protect the position of claimant States in relation to their coastal zones. If the claimant States under the new Convention allowed Contracting Parties who were not members of the Antarctic Treaty and therefore not bound by these provisions to fish in what the claimant States regard as their coastal waters, this could be interpreted as a renunciation or diminution of its claims to territorial sovereignty. As compelling as this argument may be from the claimant States' point of view, it is submitted that the provision is unlikely to appeal to States contemplating accession to the Convention. Such States could argue with compelling force that it is not their role in acceding to what purports to be a fishing convention, to bolster the position of States making territorial claims in the Convention area.

With regard to the Agreed Measures for the Conservation of Antarctic Fauna and Flora, by Article V of the Convention, the Contracting Parties who are Parties to the Antarctic Treaty agree that in their activities in the Antarctic Treaty Area they will observe the Agreed Measures and such other measures as have been recommended by the Antarctic Treaty Consultative Parties. This provision does not apply to future Recommendations, as it was felt inappropriate at international law to bind parties to the Convention to Recommendations emanating from a different body in which they took no part in the decision making.

The method of attempting to avoid inconsistency in relation to such future measures, insofar as the Antarctic Treaty Parties are concerned, is to be found in Article IX, para. 5, of the Convention, which requires the Commission to take into account measures established or recommended by the Antarctic Treaty Meetings. The necessity for the Parties to the Convention to be bound by these Agreed Measures is, according to Edwards and Heap,[84] to cover a gap in the existing conservation arrangements for living resources in Antarctica.

Article VI of the Convention deals with the relationship between the Convention and the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals. It states that nothing in the Convention shall derogate from the rights and obligations of Contracting Parties under those Conventions.

Finally, Article XXIII of the Convention requires the Commission and the Scientific Committee to co-operate with the Antarctic Treaty Consultative Parties on matters falling within the competence of the latter.

With regard to the relationship between the Commission and other organizations, by Article IX, para. 5, the Commission must take full account of measures of existing fisheries commissions responsible for species which may enter the area to which the Convention applies to avoid any inconsistency.

Article XXIII requires the Commission and Scientific Committee to co-operate with the Food and Agriculture Organization of the United Nations and other specialized agencies, the Scientific Committee on Antarctic Resources, the Scientific Committee on Oceanic Research and the International Whaling Commission. The Commission may enter into agreements with these organizations and other organizations as may be appropriate.

(e) Participation

As stated earlier, Recommendation IX-2 of the Ninth Antarctic Treaty Consultative Meeting suggested that consideration should be given to inviting the participation of States actively engaged in research and exploitation of the resources of the area at the Special Meeting to elaborate a draft Convention, and to the participation, on an observer basis of other international organizations.

It has already been stated that only those states with full Consultative Party status[85] attend Antarctic Treaty Consultative Meetings and any Special Consultative Meetings. The basis of interest of many of these parties is their territorial claims rather than their interests in research and exploitation of the resources of the area. It would seem reasonable therefore that at least the six (at that date) acceding States to the Treaty should have been invited to participate in the discussions. In fact the negotiations proceeded with only the participation of the thirteen Consultative Parties. None of the acceding States to

[84] Edwards and Heap, 'Convention on the Conservation of Antarctic Marine Living Resources: A Commentary' (1981) 20 *Polar Record* 353, 361.

[85] *Supra* n.5, p.281.

the Treaty was invited to attend. Such limited participation does little to advance international acceptance of the Convention.

However, as a result of an understanding reached at the informal consultations at Washington in 1978, the Federal Republic of Germany and the German Democratic Republic were invited to participate in the Final Conference at Canberra in 1980 and are among the original Contracting Parties to the Convention. Certain international organizations were invited to participate as observers at the Canberra meeting in 1980, namely the Commission of the European Communities, the Food and Agriculture Organization of the United Nations, the Inter-Governmental Oceangraphic Commission, the International Union for the Conservation of Marine and Natural Resources, the International Whaling Commission, the Scientific Committee on Antarctic Research and the Scientific Committee on Oceanic Research.

As stated previously, difficulties in relation to the participation of the European Economic Community had arisen early in the negotiations and remained unresolved until the Washington informal consultations in 1980.

At the first Special Antarctic Treaty Consultative Meeting at Canberra in 1978 the attention of the Parties was drawn to the problem of France, Belgium and the United Kingdom in relation to their obligations as members of the EEC. It was pointed out that the EEC member States have a common fishing policy which operates both at an internal and external level. That is, as between member States fishing and conservation activities under their respective jurisdictions are governed by common regulations. On the other hand, as between member States and other States in relation to exploitation of marine living resources, the Community itself binds its members vis a vis other States.

The problem was how to overcome the fact that France, Belgium and the United Kingdom who wished to be signatories to the Convention could not enter into such an undertaking alone. In order for those States to be validly bound in relation to other Parties to the Convention the EEC itself would have to become a party to the Convention. In addition these member States of the EEC would have to be signatories in their own right as a consequence of their specific powers as Consultative Parties to the Antarctic Treaty and as States having claims to jurisdiction over marine areas not subject to Community Law.

The possible solutions put forward by the French were participation by the Community in the negotiations to enable the EEC to become an original signatory party, or to allow in the Convention for the possibility of accession by the EEC.

The eventual solution was to allow for the possibility of the EEC to accede to the Convention,[86] and it was accorded only observer status at the final Con-

[86] At the first meeting of the Commission there was some disagreement as to whether the EEC had fulfilled the conditions of accession in Article XXIX of the Convention. The depositary Government, Australia, was of the opinion that it had and after some consideration the meeting agreed that the EEC had met the requirements of accession to the Convention and Membership of the Commission.

ference at Canberra in 1980.

To accommodate the right of accession of the EEC and to resolve a number of problems which could result therefrom, a number of alterations to the draft Convention had to be made. Article XXIX was amended to provide the right to accede to the Convention, after consultation among members of the Commission, of regional economic integration organizations, whose members include one or more State Members of the Commission and to which the State Members of the organization have transferred in whole or in part competence with regard to matters covered by this Convention.[87]

Concern was expressed by some States that a regional economic integration organization could be a Member of the Commission after its Member States had ceased to be. Article VII, para. 2(c), was inserted to overcome this problem. A regional economic integration organization is only entitled to be a member of the Commission during such time as its State Members are so entitled.

A further difficulty which required resolution was the participation of such an organization in decision making in the Commission. There was strong objection from some States as to the possibility of 'duplicate voting'. Article XII, para. 3, deals with this situation. With respect to consideration in the Commission of any item requiring a decision, the regional organization must indicate whether it is participating and if any of its Member States are also to participate. The number of such Parties participating must not exceed the number of Member States of the regional economic organization which are Members of the Commission. In other words if the regional organization is to participate and vote, one of its Member States, who is also a member of the Commission, must withdraw.

The criterion for participation in the drafting of the Convention, set out above, lends itself to criticism. One of the major problems which must almost inevitably arise in respect of the Convention is the attitude of the Third World and other nations to the implementation of the provisions of the Convention. The original signatory States to the Convention, unlike other fishing conventions, are not made up of fishing nations or nations interested in the conservation and regulation of particular areas or species. At international law it is up to the exploiting nations to draw up management regimes in the high seas.[88]

Therefore the fact that the negotiation of the Convention was initiated by and restricted to those States holding Consultative Party Status under the Antarctic Treaty, may not exactly encourage other nations to accede to the Convention or adhere to its terms. In addition, the original Contracting Parties to the Convention are with two exceptions[89] the full Consultative Parties (at that date) to the Antarctic Treaty. The preferred position of the Antarctic

87 For an outline of the matters so transferred, *supra*, p.306.

88 Arts. 3 and 4 of the Convention on Fishing and Conservation of the Living Resources of the High Seas. See also Art. 118 of the ICNT which requires States whose nationals exploit resources in the same area to enter into negotiations with a view to conserving these living resources.

89 German Democratic Republic and the Federal Republic of Germany.

Treaty parties is further exacerbated by the provisions relating to membership of the Commission.

Accession to the Convention is, by Article XXIV, open to any State interested in research and harvesting activities in the Convention area. However, membership of the Commission is restricted, by Article VII, to those acceding States during such time as they are engaged in research and harvesting activities in the Convention Area.[90] Such a restriction does not apply to the Antarctic Treaty Consultative Parties. Contracting Parties to the Convention, by Article VII, para. 2(A), are automatically permanent Members of the Commission and, incidentally, the Scientific Committee, regardless of whether they are interested in or engaging in research or harvesting activities.

The obvious justification for the preferred position of the Antarctic Treaty Parties is based on the territorial claims of some of the Parties in the area and the history of scientific research and co-operation in the Antarctic by all the Parties. Whether this is sufficient to justify the exclusion of other interested States from participating equally in what is in essence a high seas fishing convention in relation to potentially highly valuable resources is a matter of conjecture.

(f) Enforcement of the Convention

Under Article XXI of the Convention, each Contracting Party is required to take appropriate measures to ensure compliance with the provisions of the Convention and with the conservation measures adopted by the Commission. It is therefore left open to the Contracting Parties whether to take measures only in relation to their own nationals, or in the case of claimant States to apply their legislation to foreigners in their claimed territories. Either approach would not prejudice the position of a claimant State or non-claimant State, as Article IV of the Convention protects both their positions. By the operation of this Article, if a claimant State only applies the legislation to its nationals, it is protected by the statement that no acts taking place while the present Convention is in force shall be interpreted as a renunciation or diminution of any claim to coastal state jurisdiction in the Convention area. On the other hand an attempt by a claimant State to apply its legislation to foreigners in the claimed territory, cannot constitute a basis for asserting or supporting a claim to sovereignty in the Antarctic Treaty Area. The real difficulty of course would lie in the enforcement of conservation measures under national legislation against foreigners in claimed territorial waters.

The Australian Government has decided on a national approach at this stage.[91] The Antarctic Marine Living Resources Conservation Act 1981 (Cth)

[90] For a discussion of the expanding role for observers in relation to the Commission, *supra* p.309.

[91] *Cf.* s. 4 of the Antarctic Treaty (Environment Protection) Act 1980 (Cth.) and Art. 2.2 of the Convention on Antarctic Seals.

(not yet proclaimed), by s. 5(2), applies to all persons, including foreign persons, within the Australian fishing zone and to nationals outside the outer limits. By s. 3 of the Fisheries Amendment Act 1978, 'Australian Fishing Zone' is defined so as to include a 200 mile zone of waters adjacent to each external Territorial but not to include excepted waters. The waters adjacent to the Australian Antarctic Territory are excepted waters.[92] Therefore, the Antarctic Marine Living Resources Conservation Act 1981 only applies to Australian nationals in the waters of the Australian Antarctic Territory.

This Act by s. 9 sets up a system of permits. Permits are granted by the Minister in his discretion and authorize the harvesting of marine organisms as specified, or research with respect to specified marine organisms. In granting the permits the Minister is by s. 9(3) required to have due regard to the objectives and principles of the Marine Living Resources Convention.

(g) *The Convention in Operation*

The Convention came into force on 7th April 1982. By Article XIII the headquarters of the Commission established under the Convention is at Hobart in Tasmania. In accordance with this Article the first meetings of the Commission and the Scientific Committee were held in Hobart in 1982 and regular annual meetings of these bodies have been held in Hobart since that date.

One of the first problems tackled by the Commission was the scope for participation by observers in the meetings of the Commission. Once that issue was resolved it soon became clear however, that the real work of the Commission and the Scientific Committee would be in relation to devising a workable management regime in light of the conservation objectives set out in Article II of the Convention.

In relation to observers, this matter must be viewed in its context. As has been stated previously,[93] in recent years the Antarctic Treaty Regime as a whole has been the subject of increased criticism at an international level. One method the Treaty Parties have used to meet this criticism has been to lift to a limited extent the veil of secrecy over their deliberations. At the Twelfth Annual Antarctic Consultative Meeting, observers from non-Consultative Parties to the Treaty were permitted to attend. The operation of the Antarctic Treaty system, the public availability of documents of Consultative Meetings and the Appointment of Observers were on the Agenda of this meeting and it is clear that the Treaty Parties are well aware of the importance of public relations in the light of current international interest in Antarctica. The non-Consultative Parties are to be invited to the Thirteenth Consultative Meeting at Belgium in 1985 as well as to its Preparatory Meeting. In addition, the possibility of

[92] Proclamation 2 November 1979.
[93] *Supra* n.4, p.281.

limited participation as observers by international organizations was canvassed and agreed to in principle.[94]

The Convention, by way of contrast, specifically provides by Article XXIII for appropriate organizations to be invited to send observers to meetings of the Commission and the Scientific Committee. However, the attendance of observers from acceding States is not dealt with in the Convention. At the First Meeting of the Commission in May 1982 the question of such observers and the nature of their participation in the meetings of the Commission was the subject of much discussion and some dissension. The principle of the attendance of acceding States to the Convention as observers at meetings of the Commission was endorsed and provided for in the Rules of Procedure adopted by the Commission.[95] However, certain restrictions were imposed in relation to observers namely, that any Member of the Commission could at any time request that observers be excluded in relation to the discussion of any particular agenda item.[96] In addition, any Member of the Commission could object to an observer addressing the Commission. Some delegations expressed their disappointment at these provisions as they were of the opinion that once invited to a Meeting, observers should be able to attend all sessions. The end result reflects once again an uneasy compromise between the protection of the entrenched positions of various Members of the Commission and the need perceived by others to be seen as sensitive to changing international attitudes.

In relation to the attainment of the objectives of the Convention, as stated earlier,[97] these objectives were the subject of controversy during the negotiation of the Convention. The compromise reflected in the conservation principles in Article II had the potential to operate unsatisfactory. By leaving the principles of conservation to be determined by the Commission from time to time the difficulties in reconciling the opposing interests of the Members of the Commission in relation to this topic were only delayed.[98] These opposing interests are reflected in the various management options considered at the Third Meeting of the Scientific Committee namely:

(a) to prohibit all harvesting and related activities in the Convention Area with the aim of restoring the Antarctic marine ecosystem to a condition perceived to be similar to that which existed prior to human intervention;
(b) to reduce the abundance of certain krill predators if they are found to be competing with depleted stocks of krill-eating whales, with the aim of facilitating the restoration of depleted whale stocks; or
(c) to allow rational utilization of resources that have not been overexploited, within levels which will ensure that any potential detrimental effects are reversible over two or three decades.

94 Final Report of the Twelth Antarctic Treaty Consultative Meeting, para. 42.
95 Rules of Procedure of the Commission for the Conservation of Antarctic Marine Living Resources, Rule 30(b).
96 *Ibid.* Rule 32.
97 *Supra* n.48*ff*, p.301.
98 In fact, in its Third Report the Scientific Committee stated that it was necessary to consider Article II in its entirety.

It was inevitable given the attitude of the fishing States that option (c) was considered to be the most appropriate.

In addition, various criteria for selecting management approaches were considered and these appeared to represent once again marked differences in approach of the various Members of the Committee.[99]

Nevertheless, some progress in relation to conservation has been made. The first Conservation Measures recommended by the Scientific Committee in accordance with Article IX (1)(f) were adopted by the Commission at its Third Meeting at Hobart in September 1984.[1] In addition, the Commission also made a number of requests to parties to the Convention in relation to certain fish stock and minimum fish size.[2] In addition, the Committee recognized that further widespread conservation measures are urgently required.[3] However, the Commission is dependent on the advice of the Scientific Committee in this area and progress will depend on how rapidly the Committee can overcome the problems referred to above and arrive at a co-ordinated approach to conservation.

Hand in hand with conservation measures goes the need for an effective system of observation and inspection. This was another area of potential conflict which became apparent during the negotiations preceding the Convention and was left to the Commission to elaborate on the basis of certain principles.[4] The topic was discussed at the Third Meeting of the Commission and the distinction was drawn between the system of inspection designed to ensure the observance of the provisions of the Convention and the system of observation which would relate to the promotion of the objectives of the Convention. It is clear that the latter will be easier to implement than the former.

It is early days in relation to the effectiveness of the Convention in the area of the conservation and management of the resources within its scope. It is hardly surprising given the lack of available data, the inexperience of the Committee in relation to the ecosystem approach of the Convention and the diverse interests reflected in the memberships of the Commission that progress may not be as swift as could be desired. Hopefully, it will be sufficient to prevent irreversable damage to this unique and fragile area.

4. CONCLUSION

The Antarctic Treaty has been an outstanding example of international co-operation for the last twenty one years. However, the change of emphasis from scientific research to the exploitation of resources could place this co-operation

99 The criteria considered were: practicabilities of achievement, risks to the stability and diversity of the system, economic feasibility and benefits to mankind.

1 Conservation Measure I/III, Closure of Water Adjacent to South Georgia, and Conservation Measure 2/III, Mesh Size, *Report of the Third Meeting of the Commission*, Hobart, Australia 1984, paras. 48, 49.

2 *Report of the Third Meeting of the Commission*, Hobart, Australia 1984, paras. 38, 43.

3 *Ibid*, paras. 37, 44.

4 See Article XXIV.

under strain, or even bring an end to the Treaty regime. Until the resource issue arose, States had nothing concrete to gain by pushing their positions, either as claimant or non-claimant States. In addition, it is only relatively recently that the Third World has turned its attention to this area. The discussions which have taken place in the Treaty forum in relation to resources have highlighted the difficult legal and political problems which will have to be faced and dealt with at some stage.

The successful conclusion of the Antarctic Marine Living Resources Convention indicates that the Treaty Parties are aware that any indecision or prevarication on their part may threaten their position in the world forum. The Third World has made clear its interests in the resources of the Southern Ocean, and it seems likely their attitude will be that these resources should not be subjected to claims by developed countries, but be vested in an international authority as part of the common heritage of mankind.

Obviously many compromises were made by the negotiating States to enable them to reach agreement, in particular in relation to the issue of the economic zones of coastal claimant States.

The minerals issue, however, will be dealing with on-shore areas, where the issue of territorial sovereignty cannot be dealt with by a freezing of the status quo.[5] Australia has made it clear that it expects tangible benefits from allowing the exploitation of what it considers to be its resources.

[5] For a discussion of how the solutions in the living resources regime may influence the mineral regime negotiations, see Colsun, 'The Antarctic Treaty System: The Mineral Issue', (1980) 12 *Law and Policy in International Business*, 841.