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Commentary on the Draft Convention for the Conservation
of Antarctic Marine Living Resources

(Paper submitted by the Delegation of Australia)

1. The present draft Convention for the Conservation of Antarctic Marine Living Resources has been prepared by the Australian Delegation in response to a suggestion made at the Extended Preparatory Meeting of the Antarctic Consultative Parties held in London towards the end of July 1977. While the shortness of the period since that meeting has excluded the possibility of consultations between the Australian Delegation and other Consultative Parties, the present draft attempts to accommodate the various attitudes towards the subject so far as they are known to the Australian Delegation. At the same time, even from the Australian point of view, the text has not been perfected. Consequently, the Australian Delegation is obliged to describe the present draft as no more than a working text placed before the Consultative Meeting without commitment to its provisions.
2. The present importance of an attempt to deal with the conservation of Antarctic living marine organisms hardly needs statement. The waters south of 60° South latitude support living resources of considerable size which form a significant reserve of protein. The activities of a number of States have demonstrated that it is now feasible to harvest these resources from a number of trophic levels of the ecosystem. It is evident that these resources should be utilised in a manner which not only maintains and protects them from overexploitation but also recognises their role in the ecosystem.

3. Whilst the problems arising from the utilisation of these resources 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.

4. 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.

These elements necessarily suggest the advantage of tackling the problem of conservation by way of a specific Convention.

Title The draft Convention is entitled: "Convention for the Conservation of Antarctic Marine Living Resources". In fact, this title is narrower than the scope of the Convention as contemplated in its first operative paragraph, which refers to living organisms forming part of the ecosystem in the Antarctic seas. However, it seems important to emphasise that, even though the Convention is concerned with the conservation of all living organisms within the Antarctic marine ecosystem, in practice the primary activity under the Convention will necessarily be conservation of commercially exploitable living resources.

Preamble

1. The Preamble presents in summary form the background and objectives of the Convention: the importance of the Antarctic marine ecosystem; the requirement of greater knowledge of it; the risk of over-exploitation of the system; the need for conservation and co-operation. The fifth paragraph recalls the language of the first preambular paragraph of the Antarctic Treaty, while the sixth and seventh paragraphs identify earlier steps taken by the Parties to the Antarctic Treaty to promote conservation in the Antarctic area.

2. The eighth paragraph notes the relevance of recent developments in the law of the sea - especially in relation to the conservation and management of the living resources of the exclusive economic zones and of the high seas. It lends emphasis to the fact that this Convention is concerned with conservation and management, as contemplated in Article 61 of the Informal Composite Negotiating Text (ICNT) of the Law of the Sea Conference, and not with utilisation, as contemplated in Article 62 of that Text.

Article 1

1. In stating the area of application of the Convention to be the seas south of 60° South latitude, the draft follows the approach of Article VI of the Antarctic Treaty. However, this northern limit does not coincide with either the Antarctic convergence or with the range of movement of living organisms which exist in the ecosystem of the Antarctic seas. Nevertheless, the difficulty of establishing some precise geographical limit other than the line of 60° South latitude has confirmed the view that the northern geographic limit should coincide with that of the Antarctic Treaty. The actual implementation of the Convention depends, of course, upon the use which the Commission (established under Article 2) makes of its powers. These are limited in Article 4(4) in order to avoid the problem of overlap between this Convention and any other agreements which may specifically affect species in the area.
2. No distinction is drawn in the text between seas which are high seas and those which may form part of the territorial seas or economic zones of territories lying south of the limit. The belief is that there is advantage in the adoption of a single unified conservation system throughout the area - especially when, as is the case at present, the principal element in an effective conservation scheme is the collection and assessment of information. The position of all States which are or believe themselves entitled to economic zones in the area is safeguarded by the terms of Article 8 (see below), as is the position of any States which do not accept the validity or extent of any particular economic zone.

3. While the main thrust of this Convention is towards the conservation of fish and other edible ocean protein, the expressions "living organisms of the seas" and "living organisms which form part of the ecosystem of those seas" are intended to cover not only fish or other wholly marine species, but all species dependent on the sea, including birds.

Article 2

1. The Commission established by this Article is the body which gives the Convention life. Without activity by the Commission, the Convention is inoperative. Hence the requirements that the Commission shall meet annually (Article 2(4)), that it should have a Secretariat (Article 2(7)) and that the Commission should be able to establish committees to advise on matters requiring special examination (Article 3).
2. Although conventions such as the Northwest Atlantic Fisheries Convention 1949, the Convention for the High Seas Fisheries of the North Pacific Ocean 1952 and the North-East Atlantic Fisheries Convention 1959 are not identical in function with the present Convention and cannot, therefore, serve as comprehensive precedents for it, the provisions of this Article reflect in simplified form the institutional features which are common to the Commissions established under those Conventions.
3. The draft does not deal with at least one important problem which may engage the attention of Delegations. This is whether the membership of the Commission should be co-extensive with participation in the Convention.

Delegations will recognise that if the text of paragraph 2 of this Article is adopted in its present form, and notwithstanding the terms of Article 14, the possibility will arise that binding decisions may be taken by a two-thirds majority of the Commission which could be contrary to the preferences of a third of the membership comprising, possibly those Parties who are most active or otherwise most interested in the area.

4. One way of meeting this difficulty might be to permit Parties to enter objections to the whole or part of particular measures. Provisions of comparable effect are contained in a number of fishery conventions. But the Australian Delegation has felt it preferable at the present stage of discussion to omit such provisions, principally because the precedents in which these procedures are used relate to the exercise of economic rights rather than to conservation; and they may therefore be deemed inappropriate in the present context.

Article 3

1. Paragraph 1. In describing the functions of the committee as one of advice, the Australian Delegation has assumed that the Commission as a whole would be able in its meetings, whether annual or special, to deal with all relevant problems, and that therefore there would be no need to make provisions for the delegation by the Commission of any functions to any subordinate organ. It is for consideration, however, whether the Commission should have the power to delegate any of its functions to its Chairman or Vice-Chairman for exercise between meetings.

2. Paragraph 2. While there is obviously room for debate as to the precise role of the Scientific Advisory Committee and its relationship to the Commission, there may well be convenience in postponing the detailed examination of that problem until the Commission is set up and has an opportunity to discuss the terms of reference of the Scientific Advisory Committee. So far as the present draft is concerned, the intention is only to indicate to the Commission the importance which the Parties attach to ensuring that all decisions of the Commission are taken on the basis of sound and objective technical advice.

Article 4

1. This Article is the centre of the operation of the Convention. It prescribes the duties of the Commission and, in so doing, indicates its functions and powers as well - by implication - as the more detailed purposes and objectives of the Convention.
2. The principal emphasis is on the collection of information and statistics with a view to the assessment of the nature and extent of the populations of living organisms in the Area of the Convention. At the present time, although a certain amount is known in general terms about the stocks of fish in the waters of the Antarctic region, there is relatively little detailed knowledge of the species available, their location, quantities etc. A necessary first step, therefore, towards the adoption of specific conservation measures is the collection of appropriate information.

3. The use of the phrase "in accordance with such priorities as it may determine", which appears in the chapeau of paragraph 1, is intended to enable the Commission to proceed about its business in an orderly manner, having regard to the more immediate need for the conservation of some living organisms than for the conservation of others.
4. Paragraph 1(c) of the Article requires the Commission to adopt conservation measures. Paragraph 2 identifies a number of matters with which these measures may deal, but the list is not exhaustive. As regards items (i) and (v) the assumption underlying the proposed wording is that the Commission will do no more than fix overall limits in respect of quantities of any species to be caught and for restrictions on catch-effort, which will apply either to the whole or any designated part of the seas within the scope of the Convention. The manner in which total allowable catch and total catch-effort would be distributed amongst interested Parties would be a matter for further agreement between them, consonant with the rights of relevant coastal States. The same distinction between conservation measures and arrangements for utilisation also forms the basis of paragraph 5 of this Article.
5. Item (viii), which refers to the possibility of the establishment of an effective system of inspection, should be read together with Article 6(1).

6. Apart from the specific direction to the Commission in paragraph 4 to take into consideration and avoid conflict with the Conventions which deal with the conservation of whales and seals in the seas covered by this Convention, the Commission will no doubt as a matter of practice bear in mind the relevance to its activities of such other international instruments as the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973.
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Article 6

1. This Article contains a statement of three specific obligations which the Convention places upon the Parties. Paragraph 1 places the basic responsibility for ensuring compliance with conservation measures upon the State whose nationals and vessels are engaged in activities in the Convention area. Experience will show whether this is sufficient to secure adequate fulfilment of conservation requirements. If it is not, then the Commission will no doubt wish to consider whether the development of a system of inspection under Article 4(2)(viii) meets the needs of the situation or whether it is instead desirable to propose some amendment of the Convention under Article
2. In addition, paragraph 2 places upon coastal States within whose territorial sea or exclusive economic zone any conservation measures are applicable the obligation to make those measures part of the law of the coastal State.

3. Paragraph 3 is based upon the distinction recognised in the emergent Law of the Sea Convention (ICNT) between conservation and utilisation. While accepting the right of the Parties to conclude arrangements relating to the utilisation of stock (subject, of course, to the rights of coastal States) it provides expressly that such utilisation agreements shall be consistent with conservation measures adopted pursuant to the Convention.

Article 7

This Article contains a further, but separate, obligation of the Parties - to provide information regarding operations by their nationals and vessels under their jurisdiction as well as about the steps taken to implement conservation measures adopted by the Commission. The generality of the obligation is qualified by the requirement that the information shall be provided only in such form and at such intervals as the Commission may prescribe.

Article 8

1. The differences of opinion regarding the extent of rights in Antarctica which for the specific purposes of the Antarctic Treaty were adequately dealt with by Article IV of that Treaty still remain basically unresolved. This lack of resolution has some bearing upon the present draft, for although the Convention does not affect activity on land, it does deal with activities in seas part of which, on one approach to the question of rights in Antarctica, fall within the territorial seas and exclusive economic zone (or lie over the continental shelves) appurtenant to the Antarctic coasts; and rights in those seas and shelves are dependent upon rights over the adjacent coasts.

2. However, the Australian Delegation considers that nothing will be gained by seeking to resolve these difficulties, one way or the other, in the present draft Convention. For purposes of conservation this issue need not be specifically tackled, any more than it was in the Antarctic Treaty. But the avoidance of the problem must be without disadvantage to either side in the controversy; and if the coastal States should be prepared to forego in the present context an express acknowledgement of their rights, so equally it would be expected that those who do not accept coastal State claims or rights, would not insist on the latter being treated as non-existent.
3. Approaching the matter in the way just suggested, the draft replaces the notion of "previously asserted rights of or claims to territorial sovereignty in Antarctica", which appears in Article IV(1)(a) of the Antarctic Treaty, with the concept of "sovereignty, sovereign rights or other rights in any part of the seas to which this Convention applies", which now appears in Article 8(1)(a) of the present draft. The words "sovereignty, sovereign rights or other rights" are intended to refer to the totality of the rights of a coastal State in the adjacent territorial sea, exclusive economic zone and continental shelf. Comparable substitutions appear in subparagraphs (b) and (c).
4. It has not been thought necessary to repeat the reservation of position regarding sovereignty over the adjacent Antarctic land territory because such a reservation is achieved on a continuing basis between the parties to the Antarctic Treaty by Article IV(1) of that agreement.

5. On turning to paragraph 2 of Article 8 of the present draft, it is not appropriate to attempt to follow the precedent set by Article IV(2) of the Antarctic Treaty. The latter provision was necessary because otherwise it would in theory have been possible for States active in Antarctica after entry into force of the Treaty to have gained territorial rights by virtue of such conduct. But this is not the case in the situation to which the present draft relates. Since territorial sea, economic zone and continental shelf rights exist in favour of a State by reason only of its possession of the adjacent coast, there is no possibility of a State, which merely fishes in an area of sea without possessing sovereignty over the adjacent territory, thereby establishing a claim or basis of claim to the territorial sea or economic zone. The most that it could do would be to generate an interest of a kind which would, in accordance with Article 62(3) of the ICNT, need to be taken into consideration by the coastal State when ultimately disposing of any surplus of the annual yield. Conversely, looking at the matter in terms of the prospective conduct of a coastal State, there is no basis on which it could be said that its acts or activities taking place while the Convention is in force could strengthen or weaken its rights in territorial seas, economic zones or continental shelves since these are a legal, rather than a factual, consequence of sovereignty over relevant areas of adjacent territory.

6. Accordingly, all that is called for is a provision which excludes the attribution of legal consequences to the one kind of activity in territorial seas or economic zones which could have such consequences; and that - as

indicated in paragraph 1 above - is (in the language of ICNT, Article 62(3)) habitual fishing or substantial effort in research and identification of stocks. Article 8(2) of the present draft is intended to serve that purpose.

7. Generally in this connection Delegations may wish to bear in mind that a reference to territorial seas, economic zone and Continental shelves in the sea area covered by the present draft does not necessarily refer exclusively to such seas, zones or shelves lying adjacent to the disputed party of the Antarctic mainland. Apart from the high seas which also lie within the seas south of 60° South latitude, there are the territorial seas, exclusive economic zones and continental shelves of a number of islands sovereignty over which is not, or may not be, exposed to the same kind of reservations as attach to existing rights or assertions of rights in Antarctica. Thus, south of 60° South latitude it is possible to identify, for example, part of the Contin

ental shelf of Heard Island and part of the economic zone of the South Sandwich Islands, as well as the territorial sea, economic zones and continental shelves of the Balleny Islands, Scott Island, Peter I Island, the South Shetland Islands and the South Orkney Islands. Accordingly, any acknowledgment that there may be territorial seas, economic zones or continental shelves south of 60° South latitude does not imply acceptance that they necessarily attach to Antarctic territory stricto sensu. They may equally attach to non-Antarctic territory south of that latitude.

Article 9

This Article reproduces the substance of Article 10 of the Antarctic Treaty, with the replacement of the word "Antarctica" by "the seas to which the present Convention applies". Since Article 6(1) imposes upon Parties an obligation to ensure compliance by their nationals and vessels with measures adopted by the Commission, it is understood that the main function of Article 9 is to require Parties to encourage compliance with the principles and purposes of the Convention by nationals and vessels of States not Parties to the Convention. This encouragement may best be achieved by strongly urging the non-Parties whose nationals and vessels become interested in the area to accede to the Convention pursuant to Article 14.

Article 10

1. This Article contains provision for the obligatory settlement of disputes. It takes its lead from the approach to this question adopted in the Law of the Sea Conference and reflected in the Informal Composite Negotiating Text of 15 July 1977. The ICNT provides for a choice of settlement by the International Court of Justice, a new tribunal to be established under the name of the Law of the Sea Tribunal, arbitration or special arbitral procedure. Because the Law of the Sea Tribunal has not yet been established, it seems sufficient to use here a simpler approach and provide for a system which, though obligatory, enables the defendant to choose between settlement by the ICJ and settlement by arbitration. However, if and when the Law of the Sea Tribunal is established under

an operative Law of the Sea Convention, recourse to the Law of the Sea Tribunal will be allowed as a further alternative. (Article 288(2) of the ICNT clearly contemplates the possibility that treaties relating to activities in the sea, such as the present Convention, may prescribe the Law of the Sea Convention procedure for the settlement of disputes.)

2. Where there is recourse to arbitration, the process will be governed by the arbitration annex of ICNT until such time as a Law of the Sea Convention with comparable provisions enters into force. Thereafter the latter provisions will be controlling.
3. Paragraph 3 provides that where the Commission is a party to a dispute, the dispute may be referred only to arbitration. It appears necessary to refer expressly to the Commission because most of the activity under the Convention will be initiated by the Commission rather than by individual Parties. As only States may be parties to disputes before the International Court, it follows that disputes in which the Commission is a party must be settled by arbitration. After the Law of the Sea Tribunal is established, the Commission will be able to appear as a party in proceedings there.

Articles 11-18

1. These Articles contain the final clauses. They are (with one exception) identical in content with the final clauses of the Convention for the Protection of Antarctic Seals.
2. The one exception is in Article 14 (Accession) which permits accession by any State "which is engaged in research or harvesting activities in relation to the living marine organisms to which the Convention applies." This limitation upon accession has been thought desirable because otherwise the Convention would be open to unconditional participation by any State; and in view of the system of majority voting applicable to the adoption of measures by the Commission, the possibility of voting in the Commission without any real basis of involvement in the Convention appears unsatisfactory.

