"AN EXAMINATION OF AUSTRALIAN SOVEREIGNTY OVER THE HEARD AND MCDONALD ISLANDS TERRITORY"

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In this article, the issue of Australian sovereignty to the Heard and McDonald Islands, in the Indian Ocean, will be examined. Australian claims to the islands and surrounding rocks, the territorial sea of the islands, the declaration of a 200 nautical mile fishing zone and possible economic exclusion zone (EEZ), and a possible claim to the continental shelf surrounding the islands will be examined. The proximity of the island to the Antarctic also raises questions as to the extent of a possible claim to the continental shelf, and international recognition of Australian sovereignty generally. Each of these issues shall be considered individually, commencing with the islands themselves, and 'working outward' finally considering the continental shelf.

Firstly, considering Australia's sovereignty to Heard Island itself, the island is currently uninhabited. Therefore it will be necessary to examine the history of the island, to determine if Australia has good title to it. By virtue of a transfer of ownership of the claim to the island by Britain to Australia, in 1947, Australia has acquired all rights Britain had to the island. The discovery of Heard is actually in dispute, although all 3 claims of discovery are British (1). As a basis for sovereignty, mere discovery is not sufficient (2). in the Island of Palmas Case, Huber J. held that discovery without some substantial action at a time after would not confer sovereignty (3).

The island was, by 1855, infested with sealers, largely of American nationality. The island was more or less continuously occupied until the turn of the century. In 1910, the British Government paid sealers to build a survival hut on the island.

1. R.A. Swan, Australia in the Antarctic, Melbourne, 1961, p.243
   H. Fletcher, Antarctic Days with Mawson, London, 1984, p.89
2. D.W. Bowett, The Legal Regime of Islands in International Law, New York, 1979, p.46
3. Island of Palmas Case, 2 U.N.R.I.A.A. 829 at 845

and the British flag was officially raised over the island for the first time (1). In the later years of the nineteenth century, the British government also granted licences to sealers for the exploitation of Heard (2). By the outbreak of the First World War the island was deserted. The only recorded ship visits occurred in 1926 and 1930 (3).

In 1947, Australia established a weather and research station on Heard Island. The station was continuously manned until 1955, and was visited by H.M.A.Ships *Labuan*, *Wyatt Earp* and the cruiser H.M.A.S. *Australia* (4). Government for the Heard and McDonald Islands was provided for in 1953 (5), giving them the laws of the A.C.T., and the status of an Australian external territory. The station on Heard was abandoned in 1955, but the island is periodically visited by ANARE personnel (6), the last major occupation being a large expedition in 1983. A survival hut is maintained for castaways by ANARE.

The question is whether these acts will amount to Australian sovereignty of Heard Island at international law. Firstly, aside from Great Britain, no state other than Australia has ever laid claim to the island. Therefore Australia has only to show sufficient title for sovereignty; not better title. The best assertion of sovereignty is occupation (7). In the Island of Palmas Case, it was held that

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1. Swan, op.cit., p.244: Fletcher, op.cit., p.90
2. Ibid.
3. Swan, op.cit., p.244-5; Fletcher, op.cit., passim - both British ships
4. Swan, op.cit., passim
5. Heard and McDonald Islands Act, 1953 (Cth)
6. K. Jones, "Australian Sovereignty over Heard Island", 10 Aust.Y.I.L. 261 at 262
   ANARE - acronym for Australian National Antarctic Research Expeditions
7. Bowett, op.cit., p.46

since the inhabitants of Palmas island was subject to Dutch administration, the Netherlands had the better title, by way of occupation (1). Australian occupation only lasted for a period of 7 years, and whilst certainly providing sufficient title for that period, the claim is certainly weaker by the fact the island has been abandoned for over 30 years.

The Palmas Case also raised the point that what acts are required to give sovereignty for a particular territory will vary on the circumstances of that territory (2). If an island is small, uninhabited and remote on the high seas, that will require acts of a lesser degree than a larger or inhabitted island, or an island close to another state. In the Clipperton Island Case (3) a brief landing, granting of guano licences, a brief statement in a Hawaiian newspaper and occasional surveillance were enough to give France sovereignty. This was despite the raising of a Mexican flag, and a claim under the 1493 Papal Bull by Mexico. It was held that the actions of the French were sufficient to establish initial title in 1858, due to the nature of the island, and that title was never relinquished. Similar arguments can be found the Eastern Greenland Case (4), where it was held that assertion of legal jurisdiction, and occasional scientific visits were enough to give Denmark sovereignty.

Australia has, in the past, occupied Heard. No other nation has laid claim to the island. The island is visited by Australian scientific expeditions, and Australian law is specifically applied to the island. Britain granted licences to the island last century. Bowett points out that if the sovereignty of an island

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1. 2 U.N.R.I.A.A. 829 at 855
2. 2 U.N.R.I.A.A. 829 at 840
3. 26 A.L.I.J. 390; 2 U.N.R.I.A.A. 1108
4. Legal Status of Eastern Greenland P.C.I.J., Ser.A/B, No.53

must go to arbitration, it is extremely unlikely that it will be found that the island is *terra nullius* (1). Australia has done far more than any other nation, and is the only potential claimant. On all these bases, it would seem the Australian claim to Heard Island is sustainable. In addition, the claim is recognized specifically by Great Britain (2), and by virtue of 1982 Australia/France Maritime Delimitation Agreement (3), impliedly recognized by France. The ratification of the Antarctic Marine Living Resources Convention in 1982 also gave implied acknowledgement to Australian sovereignty over the Heard and McDonald Islands by some 15 countries, including the USA, the Soviet Union, Argentina, Chile and South Africa (4).

Along similar lines, Australian sovereignty to the McDonald Islands can be demonstrated. They were discovered in 1854 by a British ship (5). The islands are rocky and desolate, and have been landed on (deliberately) only twice, both times by Australian expeditions. They lie some 33 kilometres due west of Heard Island.

Using the principle that the acts required to obtain sovereignty vary in the circumstances, the acts for the McDonalds need be the bare minimum indeed. The islands are remote, except for Heard Island, and no representatives of any other nation have ever landed upon them. They are certainly uninhabitable. Australia asserts legal jurisdiction over them (6), in the same instrument as it does for

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1. Bowett, op.cit., p.50
2. Jones, op.cit., p.261
3. Australian Treaty Series, 1983
4. J.R.V. Prescott. The Maritime Political Boundaries of the World, London, 1985. pp.146-7: - this covers all other possible claimants, and the superpowers
5. Swan, op.cit., p.244
6. Heard and McDonald Islands Act, 1953 (Cth)

Heard Island. In Minquiers and Ecrehos Case, Britain was able to demonstrate title on the basis of an Eleventh Century claim, and the assertion of British state functions, notably the application of criminal jurisdiction (1). Whilst the Australian claim to the McDonalds is not so ancient, the assertion of Australian law over them, discovery (rights of which passed to Australia in 1947) and the Australian landings would seem to combine to give Australia sufficient title to the islands. The Ecrehos Case (2) is reasonable authority for this.

The next question is the potential territorial sea of the islands. To be able to generate a territorial sea, the territory in question must comply with the definition of an island at international law. That definition has been the subject of continual debate throughout the Twentieth Century. Symmons (3) notes that from this debate some seven criteria of an island can be deduced:

(a) area of land

(b) natural formation

(c) sufficient size

(d) surrounded by water

(e) above water at high tide

(f) capacity for human habitation

(g) economic viability or defence value (4)

On these bases, Heard Island itself qualifies on all counts, although it may be difficult to demonstrate the island is economically viable today, though it was for seal oil and pelts last century. The McDonald Islands, and Sail Rock (a collection

1. I.C.J. Reports 1953, p.47

2. Ibid.

3. C.R. Symmons. The Maritime Zones or Islands in International Law. The Hague, 1979

4. Id., p.20

or barren outcrops about three miles to the north of Heard Island) are a different matter. While they are natural formations, always clear of the ocean, they are small, not capable of human habitation and certainly of no economic value. If these outcrops are not 'islands' in the international sense, what territorial sea, if any, do they generate?

One solution was suggested by Hodgeson (1) was a grading as to size. Rocks, islets, isles and islands were all classified in terms of their land area at high tide, and given full or partial effect to claims of territorial sea around them (2). Under Hodgeson's system Heard would generate a full territorial sea, the McDonalds would generate a territorial sea of half effect, and depending on its area at high tide, Sail Rock may not generate a territorial sea at all. However, Hodgeson's scheme has not received support in the international community.

The more internationally accepted view of an island which generates a territorial sea is found in Article 10 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958. That article provides that:

> *1. An island is a naturally-formed area of land, surrounded by water, which is above the water at high tide.* (3)

Article 3 provides that the territorial sea is measured from the low water-mark of the territory in question (4). The Law of the Sea Convention, 1982 also preserves

1. R.D. Hodgeson, Islands: Special and Normal Circumstances, Reaserch Study Bureau of Intelligence and Research, 1973. Cited in Bowett, op.cit., pp.38-44 and Prescott, op.cit., p.73 & p.93
2. Bowett, op.cit., p.43-44; Prescott, op.cit., p.93
3. Article 10, Geneva Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205
4. Article 3, Convention on the Territorial Sea, 516 U.N.T.S. 205

the territorial sea rule laid down in Article 10 (1). On this basis, it would seem that Heard Island, McDonald Island, and any other adjacent rocks Australia can lay legitimate territorial claim to, that satisfy this definition, would generate a territorial sea. Australia currently claims a territorial sea of 3 nautical miles (2), although a claim of 12 nautical miles is possible under the Law of the Sea Convention (3).

Beyond the territorial sea, it is possible for a nation to claim a contiguous zone. This is a zone adjacent to the territorial sea, where a state may act to protect its territorial sea (4). Its basis is in Article 24 of the Vienna Convention on the Territorial Sea and Contiguous Zone, 1958, and Article 33 of the Law of the Sea Convention, 1982. The latter allows a contiguous zone of 24 nautical miles. The Law of the Sea Convention makes it apparent that if an island generates a territorial sea (5), then it also generates a contiguous zone (6). Therefore it would seem that if outcrops around Heard Island generate a territorial sea, then they also have the right to a contiguous zone.

Another question to be considered is that of archipelagic waters. Under the Law of the Sea Convention, an archipelago is defined as a group of islands which are so closely interrelated that they *'form an intrinsic geographical, economic and political entity, or which have been historically have been regarded as such'* (7).

1. Article 121, Convention on the Law of the Sea, 1982, p.48
2. 10 Aust.Y.I.L. 374
3. Article 3, Convention on the Law of the Sea, 1982, p.3
4. Prescott, op.cit., p.38; Symmons, op.cit., pp.103-4
5. Article 121, Convention on the Law of the Sea, 1982, p.13
6. Symmons, op.cit., p.104
7. Article 46, Convention on the Law of the Sea, 1982, p.18

In addition, archipelagos which generate baselines, within which archipelagic waters are delimited, are restricted. Article 47 of the Law of the Sea requires the ratio of land to water must be between 1 to 1 and 1 to 9 in the archipelago (2) and shall have a maximum length of 125 nautical miles (3). (With the Heard and McDonald Islands, there is no possibility of any baseline beyond 40 nautical miles, so the baseline distance limitations are not in issue.) The water to land ratio would fall within the parameters set by the Convention.

There are obvious difficulties is attempting to label Heard and McDonald Islands are part of an archipelago. While the islands are politically linked, and are geographically related, it is hard to see any economic relationship between uninhabited islands. Even during the 19th Century, there was no sealing on McDonald Island. In addition, there is a school of thought which suggests that continental states cannot draw baselines around offshore archipelagos (4). Australia has ignored this with regard to the Houtman Abrolhos Group of islands off the coast of Western Australia (5). The Houtman group is however inhabitted, and is the basis of thriving crayfishing concerns. Thus Australia could perhaps claim that this group did fall under the scope of Articles 46 and 47 of the Law of the Sea Convention. But the Heard and McDonald Islands are too difficult to justify under the Convention, and so it would seem Australia cannot claim archipelagic waters around the islands.

The two remaining issues are far more clouded. The declaration of an Australian

1. Article 46, Convention on the Law of the Sea, 1982, p.18
2. Article 47(1), Convention on the Law of the Sea, 1982, p.18
3. Article 47(2), Convention on the Law of the Sea, 1982, p.18
4. Prescott, op.cit., p.183
5. Ibid.; Commonwealth of Australia, Gazette, No. S26, 9th February, 1983

200 nautical mile fishing zone, and potential 200 nautical mile economic exclusion raises two problems. Firstly, Heard Island is reasonably proximate to the Antarctic, and is within the field of the Antarctic Marine Natural Resources Convention (1). This will be considered later, as it equally affects Australia's claim to the continental shelf of the islands. The second issue is that the French Kerguelen Islands are within 400 nautical miles of Heard. Hence French and Australian 200 mile limits overlap. The difficulties that this creates will be considered next.

The concept of the 200 nautical mile economic exclusion zone has its international embodiment in the Law of the Sea Convention (2), although its origins lie in the extravagent claims of various Latin American states in the 1950's and 1960's (3). Article 121 of the Law of the Sea Convention provides that an island generates an econoomic exclusion zone, as a piece of continental territory would, with one notable exception (4). Article 121(3) states:

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.(5)

This bears directly upon the Heard and McDonald Islands.

While Heard, having been the site of permanent habitation is within the scope of Article 121(3), the various rocks in the McDonald Islands have rarely been landed on, let alone being able to sustain habitation or economic life. Australia, in

1. Convention on the Conservation of Antarctic Marine Living Resources, Aust.T.S. 1982, No.9
2. Articles 55-75, Convention on the Law of the Sea, 1982, pp.22-33
3. C.C. Joyner, "The Exclusive Economic Zone and Antarctica", (1981) 21 Vir.J.I.L. 691
4. Article 121, Convention on the Law of the Sea, 1982, p.48
5. Article 121(3), Convention on the Law of the Sea, 1982, p.48

1979, claimed a 200 mile fishing zone (FZ) around the continent itself, and its external territories (1) (although this was withdrawn after one day in the case of the Australian Antarctic Territory)(2). The Heard and McDonald Islands Territory is defined by the Commonwealth as *comprising all the rocks and islands* lying within a large rectangle (3).

It is clear under the 1982 Convention, the FZ around the McDonalds is hard to justify. Neither Denmark nor Ireland would concede such a 200 mile zone around the outcrop of Rockall, despite Great Britain building a navigation light upon it, and regularly servicing the light (4). Britain was 'compelled' to land a man on the rock for some months in an attempt to substantiate the claim to an EEZ and continental shelf. The McDonalds are far too barren and inhospitable to support anyone, even in the face of such action, however determined. If challenged, the Australian 200 mile fishing zone around the McDonald Islands would be extremely difficult to substantiate.

Potential international dissatisfaction with the Australian declaration (at least so far as the Heard and McDonald Islands are concerned) has been largely overcome. The McDonald Islands and Sail Rock are to the west, and north of Heard Island respectively. This means any 200 nautical mile zone based on them will overlap with the zone of the French Kerguelen Islands. France declared a 200 mile zone about them in 1977, together with other French external territories (5). In 1983, Australia and France concluded a Maritime Delimitation Agreement, to

1. s.3. Fisheries Amendment Act, 1978 (Cth)
2. 10 Aust.Y.I.L. 357-8
3. Schedule, Heard and McDonald Islands Act, 1953 (Cth)
4. Symmons, op.cit., pp.162-4 and pp.184-7; Prescott, op.cit., pp.328-9
5. Id., p.260

establish, amongst other things, where the boundary between the Australian and French zone should be (1). That agreement, whilst not specifying any methodology as to its calculation, is based on 8 points, and appears to take account of all Australian (and French) uninhabited islets (2). Further, the rocks appear to be given full effect, contrasting the half effect solution of the Court of Arbitration in the Channel Islands Arbitration (3).

As to the remainder of the zone, it is bounded by the High Seas. Further, virtually all of its claimed edge is as a result of Heard Island itself. The islets' effect is almost completely limited to the line now between the Australian and French interests. It seems unlikely that the rest of the zone created as a result of the islets, small as it is, would be the subject of international protest. Since Heard is capable of supporting human habitation, and has done so in the past, the zone created based around it is certainly justifiable. Joyner, for one, believes that the island certainly generates an EEZ (4). International protest is also unlikely, in that the seas are amongst the roughest, and poorest in the world. Being south of the Antarctic Convergence, fish are rare, the region has no krill, or whales, and the bottom is as yet unexplored, but any mining would be difficult in the extreme. All of these combine to make any protest by another power of little purpose, or likelihood.

The final question to be considered is the continental shelf that Heard

1. Agreement on Maritime Delimitation between the Government of Australia and the Government of France, Aust.T.S. 1983 No.3
2. C. Cook, "Filling the Gap - Delimiting the Australia-Indonesia Maritime Boundary", 10 Aust.Y.I.L. p.161 and author's observations
3. (1979) 18 I.L.M. 397
4. Joyner, op.cit., pp.716-7

Island could generate. This is a particularly difficult question. Firstly, the Maritime Delimitation agreement with France specifically states that it in no way delimits any boundary of continental shelf claims (1). Secondly, while a 200 nautical mile EEZ does not extend to the 60 degree South parallel, where the Antarctic Treaty has operation, a continental shelf claim would. This raises the question as to whether the Antarctic Treaty would suspend Australia's claim to a continental shelf generated by Heard south of the 60th parallel. Further, the exact extent of the continental shelf to the south of the island is by no means clear. This coupled with differing methods of determining shelf boundaries makes the question of Heard's continental shelf by no means simple.

Australia asserts jurisdiction over its continental shelf (2) under the auspices of the 1958 Geneva Convention on the Continental Shelf (3). This includes all Australian Territories (4), including both Heard and McDonald Islands Territory and Australian Antarctic Territory. The Shelf Convention provides that the seabed, to a depth of 200 metres or deeper if exploitable, around both continental land masses and islands. The definition of islands under the Shelf Convention would presumably be the same as under the Territorial Sea Convention (5), thus claiming shelves for the McDonald islands.

However, under the Law of the Sea Convention, Article 121 limits islands that

1. Article 3(2), Agreement on Maritime Delimitation between the Government of Australia and the Government of France, Aust.T.S. 1983 No.3
2. Continental Shelf (Living Natural Resources) Act, 1968 (Cth)
3. 499 U.N.T.S. 311
4. s.5, Continental Shelf (Living Natural Resources) Act, 1968 (Cth)
5. Article 10, Geneva Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205

generate continental shelves as for EEZs (1). There is no practical difference as Heard Island rests on the same shelf, so would generate the same shelf area. The only situation where the various islets could become relevant is with regard to a delimitation between Heard and Kerguelen by Australia and France. This situation will be considered later.

Firstly, examining the shelf, as it extends southward. Heard Island is a volcanic outcrop that stands on a mid-ocean ridge. The ridge (known as the Kerguelen-Gaussberg Ridge) runs roughly north-south, from Kerguelen, through Heard and south to about 62 degrees South. There is then a slight trough before Antarctica is encountered. The Law of the Sea Convention defines the continental shelf as:

> *1. The continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.*(2)

This is wider than the 1958 Convention definition under which Australia's claim is based. The Australian shelf ends at the 200 metre isobath (1) which is less than 50 nautical miles south of the island. A continental shelf proclaimed under the Law of the Sea would extend much further south. The 1982 Convention sets two methods to determine the edge of the continental shelf. The boundary is to be determined by

1. Article 121, Convention on the Law of the Sea, 1982, p.48
2. Article 76(1), Convention on the Law of the Sea, 1982, p.33
3. It is not yet possible to exploit the seabed below this depth, in the Southern Ocean. The weather is too extreme, and icebergs too numerous.

one of two equations, or set at the 200 nautical mile limit as within the EEZ. It has been held that both have equal effect (1). As to the equations, the first involves the thickness of sedimentary rock at points on the shelf being at east one percent of the shortest distance from that point to the foot of the continental slope (2). The second is a line which is not more than 60 nautical miles from the foot of the slope (3). In most cases, the second method is used, as it is rare that the first method produces the larger shelf area. South of Heard Island is such a rare exception (4). Therefore, the delimitation of the southern edge of Heard's continental boundary would be an extremely difficult task.

Article 76(5) of the Law of the Sea Convention does limit the shelf to 350 nautical miles (5). Applying Article 76(4) even with the 350 nautical mile limit would still extend Heard Island's southern shelf into the realm of the Antarctic treaty, that is, below 60 degrees South. This create a problem not elsewhere encountered in international law, except perhaps in the delimitation of the shelf of the Falkland Islands (6).

The Antarctiic Treaty states it applies to the area south of 60 degrees South (7), and that whilst the Treaty is in force, no new claim to territorial sovereignty is to be asserted (8). The question to be considered is whether this

1. Guinea/Guinea-Bissau Case, 1985, Maritime Boundary Award, para. 115
2. Article 76(4)(a)(i), Convention on the Law of the Sea, 1982, p.33
3. Article 76(4)(a)(ii), Convention on the Law of the Sea, 1982, p.33
4. Prescott, op.cit., p.77
5. Article 76(5), Convention on the Law of the Sea, 1982, p.33
6. Prescott, op.cit., p.101
7. Article 6, Antarctic Treaty, (1959) 402 U.N.T.S. 71
8. Article 4(2), Antarctic Treaty, (1959) 402 U.N.T.S. 71

freeze on new claims, also holds claims on the continental shelf from outside the Treaty area in abeyance. This is a question little considered by authors, as it is not of great international importance, and Australia has made no such claim as yet. However, Harry (1), Joyner (2) and, to a lesser extent, Prescott (3) tend towards the continental shelf generated being permissible. In addition, it is easy to distinguish Article 4(2) of the Antarctic Treaty to claims of territory above the water surface. Further, claims for continental shelves in 1959 were not of a magnitude to possibly extend into the Treaty area. It is a circumstance which would not have been considered in the drafting of the Treaty (4). This would not seem to be extreme enough to constitute a fundamental change of circumstances, but might be persuasive if the matter might ever be arbitrated. Considering the Antarctic Treaty will soon require revision, the question may be addressed in the course of that revision.

Finally, considering where a continental shelf boundary between Kerguelen and Heard would run, a number of factors have to be considered. The Maritime Delimitation Agreement between Australia and France is of no value, as it specifically states that it in no way indicates where the shelf boundary should be (5).

The Law of the Sea Convention merely provides that opposite states should

1. R.L. Harry, "The Antarctic Regime and the Law of the Sea Convention: An Australian View", (1981) 21 Vir.J.I.L. 727 at 732 and passim
2. Joyner, op.cit., pp.716-7
3. Prescott, op.cit., p.101
4. Specifically Article 6
5. Article 3(2), Agreement on Maritime Delimitation between the Government of Australia and the Government of France, Aust T.S. 1983 No.3

delimit their continental shelves by "agreement on the basis of international law", and failing that, use the International Court of Justice to obtain an "equitable solution" (1). This means earlier continental shelf cases may be considered in determining international law. The International Court of Justice, in the North Sea Continental Shelf Cases said that there was no single method of determing exactly where the boundary should be (2). In the English Channel and South-Western Approaches Arbitration, the Court of Arbitration held such relevant factors were the size and importance of islands (3), the limits of territorial seas (4) and fisheries (5), the political status of the islands (6) and their geographic location (7). De facto maritime limits were held as highly relevant in the Tunisia/Libya Case (8). The principle of equidistance, deriving from the 1958 Shelf Convention is also a relevant factor, one which has been the primary basis for large numbers of delimitations (9). The geomorphology of the sea-bottom is also a factor (10).

The underlying theme in all the continental shelf delimitations is the need for an equitable solution. In an arbitration between Australia and France over the Heard/Kerguelen boundary the following would be relevant:

1. Article 83, Convention on the Law of the Sea, 1982, p.36
2. I.C.J. Reports 1969, para.85
3. 18 I.L.M. 397 (1979), para.57
4. Ibid.
5. Ibid.
6. Id., para.190
7. Id., para.183
8. I.C.J. Reports 1982, para.117-121
9. Bowett, op.cit., pp.170-189
10. Attard, op.cit., pp.236-7; Cook, op.cit., passim

(a) the delimitation of the EEZs between the two islands

(b) the various rocks and islets claimed by both countries

(c) the habitation on Kerguelen and lack of it on Heard.

(d) the lines of equidistance produced with and without regard to the rocks and islets, including any 'warping' of the lines by geographic features

(e) the geomorphology of the sea-bed

(f) the distribution of any resources discovered below the sea-floor

In actuality, a consideration of all these factors may be unnecessary. The rights to the continental shelf are encapsulated in the rights pertaining to the EEZ. The ridge peters out within 100 nautical miles to the east and west of Heard. This means that the boundary would be 200 nautical miles, or the same as the EEZ. It would seem likely that the delimitation of the EEZ would also be used as the delimitation of the continental shelf. The express reservation in the Delimitation Agreement was probably included as the Agreement also delimits boundaries in the Pacific, where there is still continental shelf, outside the delimited EEZs, which has not been claimed authoritatively by Australia and France (1). Were the continental shelves and EEZs to overlap, this would create a problem that has yet to receive a definitive answer. Cook (1) believes that states are tending to favour primacy of the EEZ in such situations.

1. Prescott, op.cit., see map pp.192-3

2. Cook, op.cit., p.165

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