NOTE: PAPUA NEW GUINEA'S NATIONAL SEAS LEGISLATION, 1977.

With the passage of the *Interpretation (Application of Laws) Act* 1977,1 the *Continental Shelf (Living Natural Resources) (National Seas) Act* 1977,2 the *Fisheries (Declared Fishing Zone) Act* 1977, 3 the *National Seas Act* 1977,4 the *Petroleum (Submerged Lands) (National Seas) Act* 1977,5 and the *Tuna Resources Management (National Seas) Act* 1977,6 known collectively as the National Seas legislation, Papua New Guinea joins the majority of nations that have acted in recent years to greatly expand their maritime jurisdiction.

Prior to the passage of these Acts, (and until such time as the Acts are brought into force by notification in the Government Gazette) Papua New Guinea's maritime jurisdiction was determined under three pre-Independence Acts and international customary law. In addition to the then-standard territorial sea of three nautical miles, the *Fisheries Act* 1974,7 created a further nine-mile fishing zone, which reserved fisheries for Papua New Guinean vessels and foreign licensees. The *Continental Shelf (Living Natural Resources) Act* 1974,8 and the *Petroleum (Submerged Lands) Act* 1975,9 extended jurisdiction over the living and non-living resources of a portion of the continental shelf.9A

The *National Seas Act* 1977 allows for the declaration of a twelve mile territorial sea, drawn from the appropriate baselines,10 and an area of "offshore seas", extending an additional 188 nautical

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1. No. 3 of 1977.

2. No. 5 of 1977.

3. No. 6 of 1977.

4. No. 7 of 1977.

5. No. 8 of 1977.

6. No. 9 of 1977.

7. No. 31 of 1974.

8. No. 29 of 1974.

9. No. 9 of 1975, as amended by No. 57 of 1975.

9A. Pending delimitation of the full continental shelf by Papua New Guinea and her neighbours.

10. Section 3(2).

miles from the outer limits of the territorial sea.11 In the expanded territorial sea, the customary rules of international law shall continue to apply;12 the nature of Papua New Guinea's jurisdiction over the offshore seas area is not specified in the Act, and will undoubtedly be the subject of future legislation. It is anticipated, however, that Papua New Guinea will view its offshore seas as an economic resource zone, with the government having jurisdiction over living and non-living resources, and with foreign exploitation of those resources restricted to licensees and subject to regulation.13

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11. Section 6. The 200-mile zone will come into effect on 31 March, 1978. Australia has likewise announced its intention to declare a 200-mile zone, but the required legislation has yet to come before Parliament. See "Australia supports 200 mile zone in Pacific", Papua New Guinea *Post-Courier*, 19 October, 1976, at p.7.

12. Papua New Guinea is not a party to the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone [(1964) 516 UNTS 205; for Australian ratification see (1964) 516 UNTS 279.], having expressly denied succession to the treaty, which, prior to Independence, Australia had made applicable to the Territory of Papua and New Guinea. Such express denial of state succession is made possible under the provisions of s.273 of the Constitution.

13. The 200 mile exclusive economic zone (EEZ) has won general acceptance at the United Nations Law of the Sea Conference, which has been meeting in sessions since 1974. In the Conference's "Informal Composite Negotiating Text" (ICNT) (U.N. Document No. A/CONF.62/WP.10, 15 July 1977), which supercedes the previous "Revised Single Negotiating Text" (RSNT) (U.N. Document No. A/CONF.62/WP.8) as the working draft for the Convention, subject to further negotiations, the EEZ is provided for (Article 55), and given a breadth of 200 nautical miles. (Article 57). Under the proposed regime, coastal states would have sovereign rights over the living and non-living resources of the sea-bed, subsoil and superjacent waters. (Article 56.)

    Each coastal state would determine, based on scientific evidence, the maximum sustainable yield of living or renewable resources in its EEZ, ensuring proper conservation and management. (Article 61). The objective of "optimum utilisation" of living resources would, however, require coastal states to make arrangements with other states to harvest that portion of the allowable catch which the coastal states are unable to harvest themselves. The licensees would be subject to coastal state regulation with respect to fees, equipment and technology, seasons, catch quotas, conservation and pollution, safety matters, observers and trainees, co-operative arrangements, reporting scientific data, etc. Coastal states would also be allowed, under this regime, to require that all or any part of the catch of foreign vessels be landed in the coastal state. (Article 62.)

Another major step taken by the Act is the institution of the concept of archipelagic waters"; that is, constructing baselines connecting the various island groups and associated features that comprise Papua New Guinea, with all waters inside the baselines having the character of "archipelagic inland waters".14 Schedule 2

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14. Archipelagic proposals have been tabled at international law conferences, without success, since 1924. See D. McLoughlin, "The Approach by Fiji - A Mid-Ocean Archipelago - to the Conference on the Law of the Sea", *Melanesian Law Journal* Vol. 1, No. 3, (1972), 37, 40-43. The first States to unilaterally proclaim archipelagic regimes were the Philippines, in 1955, and Indonesia, in 1957. See Holder and Brennan, *The International Legal System*, pp. 371 372. An attempt to add an article dealing with archipelagoes to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone failed. The main proponents of the archipelago theory at the Law of the Sea Conferences have been Indonesia, Mauritius, the Philippines, Fiji, the Bahamas, and Papua New Guinea. See, e.g. the joint submissions of Fiji, Indonesia, Mauritius and the Philippines, A/AC.138/SC.II/L.15 of 14 March 1973, and A/AC.138/SC.II/L.48 of 6 August 1973. Representatives from Micronesia (the United States Trust Territory of Pacific Islands), attending the Conferences as members of the United States delegation, have also lobbied hard for acceptance of archipelagic principles.

Despite the small number of states pressing archipelagic claims, the relative weakness of those states, the vast areas of ocean - much of it formerly high seas - that would come under the national jurisdiction of archipelagic states, and the economic and strategic problems that might ensue for the major maritime powers, the Law of the Sea Conference appears to be quite favourably disposed towards the acceptance of at least some archipelagic claims. The ICNT defines "archipelago" as:

> a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features from an intrinsic geographical, economic and political entity, or which historically have been regarded as such. (Article 46.)

Under the proposed ICNT regime, archipelagic states would be permitted to draw straight baselines joining the outermost points of the outermost islands and drying reefs, provided that the ratio of the area of the water enclosed by the baselines to the area of land is between one to one and nine to one, and that the length of baselines not exceed 100 miles, except that up to three per cent of the baselines drawn may be up to 125 miles in length. (Article 47.)

The waters enclosed within the baselines would be under the sovereignty of the archipelagic state, and would have a status similar to the internal waters of a coastal state, except that innocent passage rights would be accorded foreign vessels (Article 52), and, as a

of the Act provides for an interim delimitation of archipelagic waters,15 creating the "principal archipelago", consisting of the main island of New Guinea and all the fringing islands, including those of the Admiralty group, the Bismarcks, the North Solomons, the Trobriands, the Louisiades, and the D'Entrecasteaux; and the Tauu and Nukumanu Islands archipelagoes, which are located northeast of Bougainville and consist of small clusters of coral reef ("low") islands.

Again, no specific regime for the archipelagic waters is set out in the Act, but it is likely that prevailing international opinion will be respected, and that while archipelagic waters will be under the sovereignty of Papua New Guinea, foreign vessels would be allowed transit through those waters which would otherwise be considered high seas.

Current practice in Papua New Guinea is to measure the territorial sea from a coastal baseline. The new legislation leaves open the possibility of measuring the territorial sea and the offshore seas from the archipelagic baseline, which would expand PNG's maritime jurisdiction even further. It is not likely that such a step would be taken, however, without prior negotiations with neighbouring states, or a Law of the Sea Convention which would authorise it.

The remaining acts in the National Seas package make few major changes in existing legislation other than to amend principal acts in accordance with the new regimes of maritime jurisdiction set out in the National Seas Act. The *Interpretation (Application of Laws) Act* ensures that references to "archipelagic waters", "internal waters", "offshore seas", and "territorial sea" in legislation will be interpreted consistent with the definitions employed in the National Seas Act. The Interpretation Act also establishes the presumption that, unless a contrary intention is expressly stated, the laws of Papua New Guinea are intended to operate throughout the land territory, inland waters, territorial sea and superjacent airspace of those areas, and on board ships and aircraft, wherever located, which have Papua New Guinea nationality. At such time as the archipelagic baselines are designated as the inner baselines for delimiting the territorial sea, archipelagic waters would be considered internal waters for the purposes of the presumption of applicability of laws.

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14. continued:

    concession to the major maritime powers, the archipelagic state would be *obliged* to designate sea lanes and air routes suitable for "the safe, continuous and expeditious passage" of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea. (Article 53.)

    The archipelagic state would be permitted to use its baselines as the starting points from which the breadth of the territorial sea and the exclusive economic zone would be measured. (Article 48.)

15. Subject to a subsequent declaration of archipelagic waters by the Head of State, acting on advice from the National Executive Council. Section 7(3).

The *Fisheries (Declared Fishing Zone) Act* changes the territorial application of the old fisheries regime from the nine mile fishing zone to "the declared fishing zone", which will correspond to the 200 mile offshore seas.16 This Act also specifies, for the first time, matters to be taken into account by the Minister for Foreign Affairs and Trade in determining which foreign fishing vessels shall be permitted to operate in Papua New Guinea's waters, to wit, whether the foreign state involved has (1) made substantial contributions to the development of Papua New Guinea's fishing industry and research; (2) granted reciprocal rights to Papua New Guinea nationals; (3) cooperated in enforcement, conservation and management; and (4) traditionally engaged in fishing in what have now become Papua New Guinea's offshore seas.17 The Act also requires the Minister to take into account the principle that fish stocks should be managed so as to ensure production from those stocks of the optimum sustainable yield,18 and any other rule of international law relating to jurisdiction over fishing zones.

The *Continental Shelf (Living Natural Resources) (National Seas) Act*, and the *Petroleum (Submerged Lands)(National Seas)Act* amend the respective principal acts by redefining continental shelf jurisdiction in terms of the offshore seas concept embodied in the National Seas Act. Consequently, irrespective of the actual dimensions of the continental shelf, exploitation of the living and non-living resources of the seabed and subsoil is under national jurisdiction for those areas of seabed of subsoil which underlie internal waters, the territorial sea, and the offshore seas "to a depth not exceeding 200 meters, or beyond that limit, to a depth where the superjacent waters admit of the exploitation of the natural resources of that area".19 The *Continental Shelf* Act also specifies the powers of the Minister to control the taking of sedentary species.20

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16. Section 2, which amends s.3 of the principal act.

17. Section 4, which adds s.6A to the principal act.

18. Section 8, which adds s.12A to the principal act, bringing Papua New Guinea into line with the ICNT on this matter. See fn. 13, para. 2, *supra*.

19. Section 1 of the *Continental Shelf Act* amends s.2 of its principal act; Section 1 of the *Petroleum* Act amends s.1 of its principal act. The 200 mile isobath limit and the exploitability test are drawn from the 1958 Geneva Convention on the Continental Shelf [(1964) 499 UNTS 311; Article 1], which, while it did not gain a large number of signatories, basically reflects current international custom.

20. Section 4, which amends s.7 of the principal act. "Sedentary species" are defined as "marine organisms which, at the harvestable stage, are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil". Section 1(d).

The *Tuna Resources Management (National Seas) Act* likewise uses the "offshore seas" concept in determining the area which the Tuna Resources Management Advisory Committee is concerned,21 replacing the intentionally vague phrase "waters adjacent to Papua New Guinea" employed in the principal act.

Thus, the philosophy behind the National Seas legislation is to make the 200 nautical mile zone, or offshore seas, the key determinant in all questions of maritime jurisdiction, adding certainty to an area of international law clouded by competing claims and conflicting interests, and obviating the need for separate delimitation schemes with respect to rights over living and non-living seabed and subsoil resources, fisheries, and migratory species.

While the establishment of a 200 mile zone reflects the trend in international law, and is not controversial in itself, controversy has erupted over what effect the new regime will have with respect to Papua New Guinea's international maritime boundaries. The western border with Indonesia will be extended out farther into the ocean, but no major delimitation problems are expected A full 200 mile zone for Papua New Guinea would, however, overlap with the territorial waters and/or EEZ's of Australia to the south, Micronesia22 to the north, and the Solomon Islands to the east.23

Negotiations with Micronesia and the Solomon Islands should be relatively uncomplicated,24 but problems with respect to the

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21. Section 2, which amends s.9 of the principal act.

22. Officially known as the United States Trust Territory of Pacific Islands. The Congress of Micronesia recently proclaimed a 200 mile fishery zone, with at least the tacit support of the United States. See Trust Territory *Highlights*, 1.11.77. pp. 1-2. The Congress' passage of Public Law 7-71 adds a new Title 52 to the Trust Territory Code, which establishes the fishery zone and provides for the regulation of living resources in the zone.

23. The Solomon Islands have also declared a 200 mile zone.

24. Papua New Guinea is one of the nations supporting the "special circumstances" (or "fairness and equity") theory of delimitation at the Law of the Sea Conference, as opposed to the "median line" (or "equidistance") theory. The ICNT, in an effort to overcome the deadlock between supporters of the two theories, offers a compromise solution (Article 74):

> The delimitation of the exclusive economic zone between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances.

"Preliminary discussions" between Papua New Guinea and the Solomon Islands have already begun. See "Talks on Border", Papua New Guinea *Post-Courier*, 27.4.1977, p.3.

Torres Strait area between Australia and Papua New Guinea have already aroused much emotion. Despite the basic agreement in principle reached by the two governments in June 1976,25 which would have allowed Australia to retain sovereignty over all of the islands of the Torres Strait, but which would have shifted the present boundary south,26 little progress has been made towards finalising an agreement. In fact, internal political pressures have reduced the flexibility which the Australian government once enjoyed in carrying out the negotiations.27

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25. See "PNG Agrees to Double Border Settlement", Papua New Guinea *Post-Courier*, 7.6.1976, p.1.

26. Such a shift would place the boundary north of all inhabited Australian islands with the exception of Boigu, Dauan and Saibai islands, which fringe the Papuan coast. The agreement also called for a "protective zone" transcending national boundaries, to preserve the traditional way of life of the inhabitants of the area. Fundamental to the dispute is whether a "present boundary" even exists - see, e.g., *The Torres Strait Boundary: Report by the Sub Committee on Territorial Boundaries of the Joint Committee on Foreign Affairs and Defence* (1977), p. 87, for the Australian position that a border was demarcated in 1879 by the *Queensland Coast Islands Act*, which corresponds to the "traditional border" established by the indigenous inhabitants of the region. See, e.g. Jackson, "Torres Border Must Suit Us, Says Sir Maori", Papua New Guinea *Post-Courier*, 16.6.76, p.4, for the Papua New Guinea position summed up by the former Minister for Foreign Affairs and Trade, Sir Maori Kiki:

> [T]he line that is shown on some maps as indicating sovereignty over Australian islands is not a sea or seabed boundary. The true position is that no sea or seabed boundary exists in Torres Strait. It is therefore wrong to talk about moving or relocating the boundary. A line fixed by agreement between the two countries will be the first real boundary and the only boundary.

27. See, e.g., "Border Talks Bog Down on Demands", Papua New Guinea *Post-Courier*, 1.2.1977, p.1; and "Aust-PNG Border Talks Deadlocked", The Sydney *Morning-Herald*, 1.2.1977, p.4.

At the time of the adoption of the National Seas legislation, the Foreign Minister, Sir Maori Kiki stated that:

> Papua New Guinea [must]take steps to protect its interests. One of the steps is to introduce the National Seas Act *which will establish the border from our point of view.* As a matter of international law there is no border in existence;28

and Australian parliamentarians variously described the new legislation as "a gross act of discourtesy to Mr. Fraser and the Australian people;"29 "political grandstanding and an ungracious act toward the Australian Government and people, which provide 42.5 per cent of the PNG budget";30 and "a piece of impertinence".31

With the bilateral discussions regarding the Torres Strait at a standstill, however, and while talks with her other neighbours are only at a preliminary stage, Papua New Guinea's declaration of 200 mile offshore seas will, of necessity, include a unilateral declaration of interim maritime boundaries. Such boundaries would have effect until subsequent negotiations resulted in permanent borders. In the case of the Torres Strait, the interim boundary will likely be a "moderate" one, asserting Papua New Guinea's belief that the present arrangement is inequitable, but generally reflecting the 1976 agreement in principle.

DAVID WEISBROT.

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28. "Act Will Establish the Border - Kiki", Papua New Guinea *Post-Courier*, 3.2.1977. p.1.

29. "Liberal Angered By'Somare's Insult'" the *Australian*, 9.2.77, p.2.

30. *Ibid.*

31. "PNG"'A Threat to Torres' : MP," Papua New Guinea *Post-Courier*, 10.2.77, p.5.