AUSTRALIA AND THE THIRD UNITED NATIONS
CONFERENCE ON THE LAW OF THE SEA

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This thesis is my own original work.

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Abstract

The Third United Nations conference on the Law of the Sea (UNCLOS 111) that took place between 1973-1982 was the most comprehensive political and legislative work ever undertaken by the United Nations. Arguably the 1982 Convention on the Law of the Sea that resulted from the conference in terms of the range of interests involved is the most important multilateral treaty Australia has ever signed after the UN Charter itself.

Australia was an influential player at the negotiations in which almost every state in the world participated. The Australian position on most issues at the conference was accepted in the 1982 Convention on the Law of the Sea.

This thesis provides a history of Australian law of the sea diplomacy at UNCLOS 111. The study seeks to analyse Australian policy objectives at the conference in terms of Australian negotiating strategies and tactics. It is argued that at UNCLOS 111 Australia moved away from its traditional position on law of the sea issues which was to support the maritime powers. Instead Australia moved at the conference to align itself with coastal state positions. The study seeks to identify Australia’s overall role in the negotiations and analyse the reasons why Australian negotiators were remarkably successful in promoting Australia’s interests.

The study draws certain lessons from Australia’s UNCLOS 111 experience that may be relevant for Australian participation in future exercises in conference diplomacy. The study concludes with a consideration of whether Australia should ratify the 1982 Convention and discusses Australia’s implementation of the Convention. Conclusions are drawn on the relevance of Australia’s law of the sea diplomacy for the future direction of Australian foreign policy.
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INTRODUCTION

Australia has significant national interests in the oceans. It has a coastline of 24,000 km, the second largest continental margin in the world, and more than 90% of its oil production, which amounts to two-thirds of total consumption is located offshore. Australia is a major trading nation dependent upon the sea for almost all its imports and exports. Its geographical position means that its maritime routes extend in all directions across the Pacific and Indian oceans. Australia’s population is heavily concentrated along the seaboard; over 90 percent live within 50 kilometres of the coastline and most of Australia’s economic activity takes place in the coastal zone. Australia’s coastal facilities, including one of the world’s natural wonders—the Great Barrier Reef—give Australia a significant interest in the marine environment. Australia’s defence is strongly oriented towards the sea.

Because of these interests Australia was a major participant during the Third United Nations conference on the Law of the Sea (UNCLOS 111) when between 1973-1982 the international community negotiated a new oceans regime. After nearly ten years of negotiations the conference produced the United Nations Convention on the Law of the Sea, one of the major achievements of international diplomacy, consisting of 320 articles and nine annexes. The Law of the Sea Convention (LOSC) attempts to provide what some have called a new ‘constitution for the oceans’: the Convention acts as a signpost for state action in almost all aspects of human interaction with the seas.

The treaty is a major contribution toward the establishment of the rule of law over more than two-thirds of the earth’s surface. The treaty determines jurisdiction over nearly all the world’s oil and gas resources, establishes the conditions under which exploitation of polymetallic nodules on the seabed will be carried out, affects the mobility of merchant and military shipping, establishes a comprehensive system to protect the marine environment, regulates the conduct of marine scientific research and should make an effective contribution to the management of world fisheries.

One third of the globe’s surface has been declared beyond the limits of national jurisdiction, and the control of its seabed and resources has been given to a new international body yet to be created, the International Seabed Authority. The majority of states, including Australia, have signed the Convention. The treaty, however, will come into force only for those states ratifying it one year following the receipt of the sixtieth ratification. As at August 1990 43 states have ratified.
In the twenty year period following World War II, Australia became party to some 300 treaties, almost twice as many as the period between the wars, and between 1979 and 1984 alone it became party to 146 treaties. Arguably, the 1982 Law of the Sea Convention in terms of the range of Australian interests involved, is the most important multilateral treaty Australia has ever signed after the UN Charter itself.

The Law of the Sea negotiations were certainly the most comprehensive political and legislative work undertaken by the United Nations. At UNCLOS 111 Australian negotiators were extremely successful in promoting Australian interests at what was the largest, longest, most complex multilateral negotiations ever undertaken by the United Nations. Australia was an influential player at the negotiations in which almost every state in the world participated. The Australian position on most issues at the conference was accepted in the 1982 LOS Convention. Although in recent years Australia has played a significant role in such areas as the GATT and on disarmament issues it is possible to argue that Australia’s most important contribution to multilateral international relations in the last twenty five years was its role at UNCLOS 111.

Internationally the world has moved from the four 1958 Geneva Conventions on the Law of the Sea to that (apart from deep seabed mining) embodied in the LOSC as the best evidence of customary international law of the sea. The negotiations at UNCLOS 111 which led to the LOSC certainly dominated international policy concerning the legal regime of the oceans from the early 1970’s to the present. This study attempts to provide a detailed history of Australian law of the sea policy as it was developed throughout the UNCLOS 111 negotiations. Despite the importance of the negotiations to Australia, despite the influential and successful role played by Australian negotiators, and despite the considerable diplomatic investment in the negotiations by Canberra over a period of 14 years (if one includes the preparatory period), law of the sea diplomacy has received virtually no attention by political scientists and writing on Australian law of the sea policy has almost been entirely left to academic lawyers. This scholarly lack of attention contrasts with the situation elsewhere and probably reflects a more general lack of interest in marine policy issues by Australian social scientists.

This work then seeks to fill a significant gap in the literature on the political aspects of Australia’s relationship to the oceans. It also seeks to provide a detailed history of an important but neglected aspect of recent Australian foreign policy in the field of multilateral diplomacy. It provides the most complete treatment of Australian participation in a global conference, an aspect of Australia’s international relations that has received virtually no attention in the literature. While the thesis is a case study in Australian
diplomacy, and unusually in Australian multilateral diplomacy it is not, except to the extent required in Chapters 8 to 10, a study in foreign policy making. That is, it does not give an ongoing commentary or analysis of the domestic political, including bureaucratic, process of policy making. There are two reasons for this. First, because the purpose of this thesis is diplomatic history, not foreign policy analysis and second the sources for such a foreign policy making study are not available. The formulation of Australian policy, examining the role of key individuals and groups will have to await the release of archival documents under the 30 year rule.

This means that the thesis concentrates on Australia chiefly as a ‘unitary actor’ responding to pressures and opportunities in its external political environment. It takes as its point of departure an agreed policy stance put forward by Australia in the UNCLOS negotiations, and then explores the process of Australia co-operating and contending with other states similarly acting as sovereign states. When the question of change in policy arises, the sources of this change, both domestic and external is discussed.

The study concentrates on the period of UNCLOS 111, 1973-1982 but in order to provide some depth and historical perspective, Australian law of the sea diplomacy policy at the First and Second United Nations conferences on the Law of the Sea (1958 and 1960) is considered, along with the setting of Australia’s law of the sea positions in the period between 1968-1973 at the United Nations Seabed Committee. It is argued that at UNCLOS 1 and 11 Australia’s approach was essentially to support the maritime powers and Australia down-played its coastal interests. During the preparatory negotiations in the work of the Seabed Committee, Australia essentially outlined its positions on most of the law of the sea issues that were to be negotiated at UNCLOS 111. It is argued that those positions were largely determined by Australia’s coastal interests and marine attributes and mirrored attempts at the domestic level by Australia to expand its jurisdiction over offshore resources and activities in the mid 1960s through to 1973.

The main focus of the study, however, is to analyse Australia’s participation and role at UNCLOS 111. The unique structure of the negotiations is outlined along with Australia’s key law of the sea objectives. Those objectives essentially revolved around Canberra’s wish to exercise greater control over offshore resources and activities. It is argued that international negotiations offered Australia the best opportunity to achieve those objectives. The study seeks to analyse Australian policy objectives at UNCLOS 11 in terms of Australian negotiating strategies and tactics. How did Australia manage to forward its law of the sea goals during the negotiations and how successful was Australia in securing those preferred goals? It is argued that Australian negotiations were remarkably successful in promoting Australian policies without seriously compromising
Canberra's goals in the negotiations. Australian diplomatic activity is elaborated in Chapters 4–7. The approach adopted is to look at the development of Australian policy over successive sessions rather than issue-areas. This approach is adopted partly because of the complexity of the issues and partly because of the linkages of issues within sessions. The study seeks to identify Australia's overall role in the negotiations and analyses the reasons why Australian negotiators were remarkably successful in promoting Australia's interests. The study draws certain lessons from Australia's UNCLOS experience that may be relevant for future Australian participation in conference diplomacy. The study concludes with a consideration of whether Australia should ratify the LOS Convention and considers Australia's implementation of the Convention. Finally some thoughts are offered on the relevance of Australia's UNCLOS diplomacy for the future direction of Australian foreign policy.

An important theme that arises from this study concerns the making of the UNCLOS regime. In the analysis of Australian diplomacy, it is inevitable that broader questions arise with respect to the ways that states interacted to produce this international agreement, how and why state interests conflicted and were compromised and how the values of states in creating a new order for the oceans converged and diverged over time. In short, questions about how this most significant new Convention came about, and the nature of the politics of this most ambitious law-making venture emerge as a context for Australian diplomacy at UNCLOS.

These questions are not addressed directly in the major part of this thesis because of its concentration on Australia's role but they are treated in the analytical chapters 8-10 to the extent they bear on Australia's actions. However, it is useful here to set such questions about the creation of a new international regime for the law of the sea in the context of some broad theoretical preoccupations in international relations and international law.

Realist theory in international relations is clearly one relevant context here, since much of the politics of UNCLOS concerns states acting explicitly in pursuit of competing national interests, in a situation where wider interstate conflicts (such as North-South splits) powerfully affected outcomes. Further, the hierarchy of powers, most clearly demonstrated by the late refusal of the United States to sign the Convention, is clearly an important factor in the diplomacy of states on this issue. Yet what the UNCLOS story shows along with this, is the formation of coalitions of states, on a basis quite other than that of alliances or hierarchy, in cooperative and conflictual endeavours to create different sets of balances of forces – coastal states, maritime states, landlocked and geographically
disadvantaged states – which cross-cut the structure of international relations (understood from a traditional realist perspective) and which prevailed to create a new oceans order.

This points to the relevance of a different theoretical perspective in international relations —that of interdependence broadly conceived and regime theory in particular. This literature finds some of its concerns raised in Keohane and Nye’s work *Power and Interdependence: World Politics in Transition* and in the ensuing debates on the question of regimes in the late 1970s and 1980s. While the law of the sea is arguably a paradigm case of an international regime, given the standard definition of international regime, international relations scholars with a general interest in regime theory have by and large ignored the oceans area.

Regime building at UNCLOS 111 consisted not only of the revision of the traditional regimes of the high seas, territorial sea and contiguous zone but also the re-design of the regime for international straits and the continental shelf. Three new regimes were also created—archipelagic states, the exclusive economic zone and the international area beyond the limits of national jurisdiction. The recent work of Keohane is interesting in this context. Keohane focuses on the definition of regimes as a convergence of norms and on the conditions that seem necessary for the creation of new regimes in the international system. In an important sense, this is a return to earlier preoccupations with the development of international institutions, how they came about, change and decline. The dynamics of regime creation, in the sense of developing norms of generalised commitment is given some attention in chapters 4-7 which documents Australia’s UNCLOS diplomacy.

Also of broader theoretical significance is the question of change in international law. Under what circumstances do states pursue large scale codification and progressive development of international law? The codification and progressive development of international law is a process of authoritative decision making in the international system, and states do not undertake lightly a decision to trigger this process. It is possible to argue, as does Professor Johnston, that UNCLOS 111 marked the breakthrough from the 'neo-classical' to the current 'romantic' period of international legal development. That is, the remaking of the law of the sea took place in a period where legal development has been largely taken over by the diplomatic arena and where classical virtues such as symmetry, clarity, consistency and universality tend to yield to 'romantic' sentiments in favour of diversity rather than uniformity, justice rather than order, imagination rather than logic, and where participation and spontaneity are felt to be virtues in themselves. It is a time when, says Johnston, the process may be judged to be more important than the 'product'. The 1982 Law of the Sea Convention is probably the best example of a
product of the romantic approach to law making and raises questions as to whether
UNCLOS represents the most productive model for legal development.

These broader theoretical and analytical questions cannot be treated in any depth in this
thesis, since its central preoccupation is an empirical one to provide a political history of
Australia’s law of the sea diplomacy at UNCLOS 111. To treat these questions properly
would require a thesis of different purpose and immersion in different literatures.
Nevertheless, Australia’s law of the sea diplomacy raises these broader questions and an
attempt will be made at various points in the thesis to not only relate Australia’s policies
and actions to the main game of ocean politics at UNCLOS 111, but where relevant, to
comment on these wider theoretical issues.

Before turning to the substantive issues of the thesis a short introduction to the classical
law of the sea is necessary in order to provide the broad legal and political background of
the UNCLOS 111 negotiations. The traditional regime of the oceans is known as
‘freedom of the seas’. That regime is associated with the Dutch legal theorist, Hugo de
Groat or Grotius. Grotius’s argument on the right of neutral vessels to use the sea freely
became the basis of subsequent doctrine on the freedom of the seas, and was embodied in
the Treaty of Paris of 1856.16 Beyond a narrow territorial sea everybody could freely
navigate and fish. Most states claimed a territorial sea of three nautical miles, where the
coastal state exercised its sovereignty with foreign vessels having a right of ‘innocent
passage’. Grotius doctrine had prevailed over the contending idea of dividing the seas
into national jurisdiction, a system advocated by the British scholar John Selden in Mare
Clausum (1635), and supported by the Portugese and Spanish governments. The Dutch
along with the British developed commercial interests throughout the world and freedom
of the seas was perceived to be in the interests of the Dutch. The British later came to be
the dominant maritime power and with some exceptions during wars vigorously defended
the principle of freedom of the seas.17

In the twentieth century the tension between pressures to enclose marine space and for
maritime freedom continued. Expanding ocean use early this century led to an interest in
reaching agreement on the width of the territorial sea and of a special purpose contiguous
zone. Under the auspices of the League of Nations, a conference for the Codification of
International Law was convened in The Hague in 1930. At the Hague conference
discussion revolved around a territorial sea of three or four miles with a small contiguous
zone beyond but there was neither agreement on the territorial sea nor on the nature and
breadth of the contiguous zone.18
Since the Second World War a gradual erosion of the traditional ocean regime has occurred. A key development here was the Truman Proclamations in 1945 in which the US claimed ownership of the resources of the seabed adjacent to the American coast, and established a new fishery conservation zone outside the US 3 mile limit and recognized other states’ rights to fishery jurisdiction up to 12 miles from their coasts. These proclamations were followed by similar claims on the part of many other Arab, Caribbean and Latin American states.

These claims varied in their nature, with some claiming jurisdiction and control over the resources of the shelf, while others claimed sovereignty over the shelf as such. Other claims made by a number of Latin American States extended not only to the shelf but also to the superadjacent waters and in some cases to the airspace above those waters. Chile claimed a 200 mile maritime zone in 1947, with whaling the main offshore interest. Peru followed shortly afterwards, claiming a national zone of 200 miles, with tuna and anchoveta resources being the most important. Ecuador became the third Latin American State to claim 200 miles in 1951. The extensions all claimed the Truman Proclamation as a precedent with the 200 mile limit purely arbitrary. Australia proclaimed its rights to its continental shelf on 11 September 1953 and for the first time attempted to establish a specific relationship between the shelf and sedentary species. In 1951 Ecuador, Romania, and Bulgaria established 12 mile territorial seas. By 1958 sixteen countries had made territorial sea or fishing jurisdiction claims or a combination of both extending to 12 miles. By September 1977, as many as sixty two states had claimed 12 mile territorial seas including 13 countries claiming 200 mile territorial seas. There were only 33 countries with territorial sea claims of less than 12 miles, including twenty six countries (Australia was one) with 3 mile territorial seas. As many as forty six states had established 200 mile economic or fishery zones. Thus the position has seen a remarkable transformation in the traditional ocean regime. The factors behind national enclosure are noted below.

In these circumstances of change the notion that there should be some codification of the international law of the sea led to the first two United Nations conferences on the Law of the Sea in Geneva in 1958 and 1960. Both dealt primarily with the nature and extent of coastal state jurisdiction in offshore areas and is discussed in Chapter One. In 1958 and 1960 UNCLOS 1 and 11 failed by a narrow margin to agree on a six mile territorial sea and an additional six mile contiguous zone for fiscal, sanitation, and customs enforcement. The first Geneva conference did, however, agree to four Conventions, including a Convention on the Continental Shelf, which codified the Truman Proclamations by granting to the coastal state ‘sovereign rights’ to seabed resources out
to depths of 200 metres or beyond that point to water depths at which exploitation was possible. The demand for marine resources had been the main driving force for extensions of coastal state jurisdiction and from that viewpoint the concept of ‘exploitability’ made sense. However this Convention was probably not helpful from the viewpoint of preventing ‘creeping jurisdiction’ as it was possible to argue that technological progress could legitimate national claims to deeper parts of the shelf.

Ocean policy issues were put back on the international agenda in 1967 when Malta’s Ambassador to the United Nations, Arvid Pardo made a speech where he talked about the new pressures on ocean resources and the wealth of the manganese nodules on the deep ocean floor. The world at that time was concerned about the physical limits of production and the prospect of the seabed nodules providing a secure source of supply for thousands of years created an enormous degree of excitement. Many developing countries that had not participated at UNCLOS 1 and 11 now wished to enter the game of global ocean politics to ensure that they would help shape a new ocean regime.

Pardo’s speech resulted in the General Assembly setting up an ad hoc committee, which in 1968 became a permanent committee, the Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction, the so-called Seabed-Committee. The Committee was enlarged in 1970 and from that time until 1973 it worked as a preparatory committee for UNCLOS 111. The preparatory work of the seabed committee was uneven and UNCLOS 111 was handicapped by inadequate preparation and an enormous agenda of over 25 items (and over 100 sub-items). UNCLOS 111 saw the number of participants that attended UNCLOS 1 and 11 jump from just under 90 to 158. The UNCLOS 111 conference met for eleven sessions between 1973 and 1982. On the final day of the spring 1982 session, UNCLOS 111 adopted the new Convention on the Law of the Sea. There were 130 countries voting in favour, 4 against and 17 abstaining. The United States voted against the treaty, as did Israel, Turkey and Venezuela. Among the countries that abstained were the Soviet Union and her East European allies, FRG, Italy, the Benelux countries and the UK. Most developing countries voted in favour as did Australia, New Zealand, Canada, France, Japan and the Scandanavian countries. Australia was one of the 113 states that signed the Convention in December 1982 at a final session in Montego Bay, Jamaica.

A number of factors are necessary to explain why states have preferred national enclosure rather than international management to replace the traditional freedom of the seas. The chief underlying cause has been the demand for marine resources. Acquisitive impulses to exploit fishery resources, offshore petroleum and natural gas and later mineral deposits on the deep seabed have been given impetus by technological developments in ocean
resource exploitation. Offshore technology has advanced rapidly permitting the exploitation of marine resources that previously would have been either unexploited or under-exploited. Coastal states have also responded to increased dangers to the marine environment from human activities on land or at sea by national enclosure. Particularly important here was the danger of ship sourced oil pollution with the growth of supertankers.

A further factor supporting pressure for national enclosure was the call strongly made in the 1970s by the developing countries for a New International Economic Order. The demand by the developing countries for a redistribution of the world’s wealth and power away from the western developed countries found an avenue of expression in the debate on ocean issues. Developing countries argued that the traditional order of the seas had been imposed by the developed world and that a new ocean regime was necessary to reduce inequities in the development and exploitation of marine resources. National enclosure was seen as a significant way in which to gain greater access to marine resources. The fact that both the US and the USSR opposed the concept of the 200 mile zone based on fears of the implications of national enclosure on military activities simply served to strengthen the demands of the developing countries for a new ocean regime. Thus a number of factors are necessary to explain why national enclosure has replaced the traditional ocean regime.

UNCLOS 111 has extended the process whereby coastal states have appropriated ocean space. The Convention includes 12 mile territorial seas, 200 mile economic zones, coastal state rights to areas of the continental margin beyond 200 miles, and a new archipelago concept which allows groups of islands to enclose the waters between the islands with strait baselines. Only in the area of the development of deep seabed mining has the Convention adopted international management, although whether that system will work successfully will have to await the development of seabed mining which is not expected to occur until at least the next century.

Research for this thesis is drawn from primary and secondary sources. The first of the two categories of primary sources consisted of United Nations official material as well as statements and papers of Australian delegates and archival material (for Chapter One). Of particular importance here were the official records of UNCLOS 111, the 18 volume collection of documents of the conference collected by R. Platzöder and the Australian delegation sessional reports. The secondary primary source of research were interviews with key members of the Australian delegation. As is well known UNCLOS 111 largely proceeded by informal means and official records were of necessity kept to a minimum.
Thus in order to gain a full understanding of Australian policies and practices it was necessary to speak to Australian officials concerning Australia's law of the sea diplomacy. While it is important to be able to cite sources in all academic work, all delegates interviewed asked for confidentiality to be maintained. In a small number of cases where interview material important to the argument was not able to be sourced from the public record I have simply designated the source as interview. A list of all delegates interviewed appears in the bibliography. The secondary sources used pertain for the most part directly to the UNCLOS negotiations. These provide a background to the negotiations as well as the policies of the other states. Other readings relate to Australian foreign policy in general. It should be noted that apart from the original research on Australia and UNCLOS 111 this thesis is the first attempt to document Australia's policies at UNCLOS 1 and 11 and at the UN Seabed Committee. For that reason and because it is extremely unlikely that others will undertake the necessary research I have included (unusually) extensive documentation in the notes for Chapters One and Two.

Australia's policy on the oceans has evolved in the context of the three main international negotiations to reach agreement on the law of the sea. At the same time Australian policy, like that of most other states, has been to a large degree reflected in the outcome of those negotiations. The most important of those negotiations was UNCLOS 111. Before turning to analyse Australia's diplomacy within that forum it is necessary to examine Australia's role at UNCLOS 1 and 11 in order to understand the changes in Australian law of the sea policy. It is to an examination of Australian policy in Geneva in 1958 and 1960 that we now turn.
CHAPTER ONE

AUSTRALIA AND THE FIRST AND SECOND UNITED NATIONS CONFERENCES ON THE LAW OF THE SEA

Introduction

Australia's policy on ocean issues evolved in significantly different ways from the early period at the international level to the later period of UNCLOS 11. This chapter then examines Australia's position at the First and Second United Nations Law of the Sea conferences held in 1958 and 1960 (UNCLOS 1 and UNCLOS 11). It argues that Australia's position at these conferences was basically to resist wide territorial sea claims by developing coastal states, thus aligning itself with the maritime powers. Australia, however, showed an accommodating attitude to wider coastal state limits once it became clear the narrow territorial limits would not be acceptable to the majority of states at the conferences. It joined with other traditional maritime powers of the West on most of the contentious issues at the conferences where the major political cleavage was between East and West. It exhibited in the early years a basic satisfaction with the status quo of traditional law of the sea and its cornerstone, freedom of the seas, in contrast to a number of newer developing states who wished to revise traditional maritime law and who saw that law as something developed by their former colonial masters.

This chapter also briefly considers the factors which undermined UNCLOS 1 and 11 and led to the shifts in Australia's stance a decade later. Australia's views and alignments on ocean issues were to be modified by the time that the law of the sea was to be considered at the next treaty making effort at UNCLOS 111. While the next chapter considers Australian policy in the lead-up to UNCLOS 111 in order to understand the shifts in Australian law of the sea policy it is necessary to consider those factors that served to undermine the four Geneva Conventions produced at UNCLOS 1. It is argued in this chapter that a number of legal, political and technological developments during the period 1961-67 served to propel ocean law issues back on the international agenda by the late 1960s, and helped modify Australia's law of the sea goals by the time of UNCLOS 111.
UNCLOS 1

The First United Nation conference on the Law of the Sea met in Geneva from 24 February to 20 April 1958. Eighty six states participated in the 1958 session. The conference considered all aspects of the law of the sea and produced four Conventions:

1. a Convention on the Territorial Sea and Contiguous Zone;
2. a Convention on the High Seas;
3. a Convention on Fishing and Conservation of the Living Resources of the High Seas; and
4. a Convention on the Continental Shelf.

Because the conference failed to reach agreement on the breadth of the territorial sea, it was decided that a second conference would be convened. The Second United Nations conference met in Geneva from 17 March to 26 April 1960, but again there was no agreement on the question of the breadth of the territorial sea and the related fishing zone.1

UNCLOS 1 was attended by approximately 700 delegates from 86 countries and seven specialized agencies and nine intergovernmental organisations as observers.3 The composition of the group of states at UNCLOS 1 is worthy of note: 29 were Western states, 10 belonged to the Soviet group, 20 were from Latin America, 9 were Arab, 16 were Asian, and only 2 were African. In terms of developed and developing states they represented totals of 38 (the Western and Soviet groups minus Turkey) and 48. The Cold War clash meant that the predominant cleavage at UNCLOS 1 (and 11) was based on East-West divisions. The East-West division was reflected in the fact that China, East Germany, North Korea and North Vietnam were not present while Taiwan, West Germany, South Korea and South Vietnam were.4 The conference was also divided by maritime versus coastal state alignments with coastal state interests mainly identified with the Soviet Union and a group of developing countries and maritime interests mainly identified with Western States. Thus support for wide versus narrow limits got tangled up with cold war divisions making it extremely difficult for compromise to be reached.

Apart from the cold war divisions and maritime versus coastal state alignments there were also the ‘beginnings of a North-South fissure...in the anticolonial resentment evident among the new nations who wished to revise the traditional maritime law to serve their needs’.5 This theme is developed by Friedheim6 who contrasts the views of the ‘dissatisfied’ states with that of the ‘satisfied’ states. The first group of countries were mainly ‘have not’ states associated with African, Arab, and Latin American caucusing groups at the UN and constituted 54 of the 86 states represented at UNCLOS 1.7
They argued that the traditional law of the sea had been created by the great maritime powers, that it was just a cloak to dominate their own interests and that law created before their own states had come into existence was not binding. There was a feeling that newer states could help create new laws for new conditions. The ‘satisfied’ states by contrast argued that international law exists, that it is fundamentally just and provided hope for the adjustment of interests. They clearly agreed with the broad principles of the law of the sea, especially the freedom of the seas doctrine. The core of this group was composed of Western European, Benelux, European Community, Scandinavian caucusing groups, and the NATO common interest group. Usually voting with these groups were the ‘White Commonwealth’ states, including Australia, five European states not represented in the General Assembly and Israel. In addition the votes of five US cold war allies—Japan, Pakistan, and the Republics of China, Korea, and Vietnam—could frequently be counted on. Although heavily outnumbered the states in the ‘satisfied’ category can be said statistically to have dominated both UNCLOS 1 and 11.

The most contentious issue at the conference was the breadth of the territorial sea and fishing rights beyond the territorial sea. Australia’s position at UNCLOS 1 was to basically support the US and UK against what were seen as expansionist claims by the Communist bloc members and developing coastal states, led by Latin American states whose main concern was to protect their coastal fisheries from distant-water fishing and to see their offshore claims recognized in international law. Australia’s overriding goal in the negotiations had already been flagged by Sir Percy Spender in the Sixth Committee of the General Assembly on 7 December 1956 in the debate on the ILC’s draft articles. Spender pointed out that all of Australia’s ocean interests did not run in the same direction. While Australia had a long coastline and fisheries both sedentary and pelagic which were ‘largely of the coastal type’ Australia was ‘very largely dependent for economic stability as well as for safety in a dangerous world on overseas communications’. While noting that ‘in some respects’ Australia was ‘very conscious of the special needs’ of coastal states ‘in other respects Australia has always felt as vital the importance of preserving the historic freedoms of the sea. On balance, my Government’s position is determined by what is, as we see it, the basic element in our national situation, namely, our dependence on overseas communications’ (author emphasis).

Thus Australia sought international agreement on narrow offshore limits and a fishing zone, although along with other traditional maritime partners, it was willing to be somewhat flexible. On the most contentious issue at the conference, the territorial sea question, Australia behaved more as a maritime power than a coastal state. As the leader of the Australian delegation pointed out, Canberra judged that its ‘own essential interest
was in making the least possible extension of the territorial sea’. Australia was also concerned here to defend the interests of its major allies who wanted maximum freedom of the seas for naval deployment.

As noted above the major political cleavage at the conference was between East and West. Australia inevitably sided with the western powers. As the leader of Australia’s delegation later wrote Australia had at stake the interests of ‘the great states with which she is associated’ which he identified as being ‘particularly the United Kingdom, the other countries of the Commonwealth and the United States’.

Australia also fell into the ‘satisfied’ group of states. It did not regard the traditional law of the sea as unjust or a cloak for the interests of dominant states and that therefore old laws should be swept away. Rather, Australia defended the traditional freedom of the seas as also of benefit to developing states.

Committee One—Territorial Sea and Contiguous Zone

The territorial sea provided for a zone of full coastal state sovereignty including the airspace and seabed subject to a right of innocent passage by other states. The contiguous zone was intended to permit coastal states to control specific functions or activities beyond the territorial sea e.g. customs, fiscal, and immigration regulations. Not surprisingly given the military and economic implications of the territorial sea and contiguous zone these issues proved the most contentious at UNCLOS 1. The breadth of the territorial sea had been examined at the conference for the Codification of International Law at the Hague in 1930, under the auspices of the League of Nations. It was agreed that the territorial sea formed part of the territory of the coastal state and that other waters were ‘free’ but the conference could not agree on the width of the territorial sea or on the nature and breadth of the contiguous zone. Australia’s position at the Hague conference was to support a 3 mile limit.

At Geneva the maritime states, US, Great Britain, Holland, Belgium, Greece, France, West Germany and Japan wanted to preserve the three mile limit. Australia also wished to preserve narrow limits, largely for strategic reasons. As noted in the introduction state practice was changing concerning the breadth of the territorial sea by UNCLOS 1. As of 1958 territorial sea claims were almost evenly divided between those for and those against three miles with some 38 states supporting the traditional 3 mile limit while 34 others favoured 4 miles or more.
Australia made clear that it too wished to preserve the traditional 3 mile limit both for strategic reasons (closure of straits in South East Asia) and because of Australia's dependence on seaborne commerce.  

Thirteen proposals were presented to Committee One on the limits of the territorial sea and all were linked to a contiguous fishing zone. Some of these were withdrawn in favour of other proposals or compromises and later reintroduced. None of these proposals succeeded in committee or in plenary in commanding the necessary majority. So the conference failed to reach agreement on the principal issue in relation to the territorial sea—its width. Space prohibits a full examination of the debate in Committee One. The critical point as far as Australian diplomacy was concerned was that the delegation were only prepared to concede a six mile territorial sea and a six mile fishing zone and even this concession was largely one imposed on the delegation after both the US and the UK moved to support such limits. Conference diplomacy and politics meant that there was little choice but to accept wider limits.

A range of other issues also arose in Committee One that were of concern to Australia. They ranged from the question of archipelagos, delimitation relating to irregular coasts and closing lines of bays, the issue of straits and prior authorisation of warship passage in the territorial sea. On virtually all these issues Australia sided with the maritime states. Commercial and strategic interests in freedom of navigation and a desire to maintain freedom of the seas for Australia's allied navies were the driving factors here. Australia's interest in freedom of navigation thus overrode any interests Australia may have had in preserving fisheries in Australian waters for the Australian fishing industry. Apart from pearling, Australia's isolation from foreign fishing at this time meant that broad security interests were dominant in Australia's thinking in Committee One.

Committee II—High Seas

The second committee considered issues relating to the definition of the high seas, the scope of high seas freedom, nationality of ships, safety and rights of navigation, prevention of pollution, visit and hot pursuit, piracy and slavery. For the most part these issues were not as controversial as in Committee One but political factors were not entirely absent. On those issues that did arouse some controversy, Australia sided with the major maritime and western developed industrialized states. These issues related to naval training on the high seas, testing of nuclear weapons, restricting military activities generally and the issue of the immunity of warships. Australia sided with the western
bloc on all these questions although without appearing to be in the limelight of any of the Committee Two questions.23

Committee Three—Fishing and Conservation of High Seas Living Resources

The Third Committee considered the ILC’s draft articles concerning fishing and conservation of high seas living resources. The main struggle was between those states, mainly distant water fishing nations arguing that the ILC had gone too far in recognizing the interests of coastal states and those coastal fishing states, arguing that the draft articles did not go far enough.24 Australia generally took a middle ground view although overall it sided with coastal state views.

Australia did not adopt a high profile in Committee Three. Its overall position was to occupy the middle ground. It rejected the position of distant water fishing nations, particularly Japan25 that put up stiff opposition to attempts to restrict freedom of high seas fishing on grounds of resource conservation.26 On the other hand it did not agree with the proponents of coastal state rights for unilateral control over offshore fisheries without the need for negotiations, but did support more moderate coastal state positions.27

Committee Four—The Continental Shelf

The fourth Committee considered the legal regime for the continental shelf.28 The Committee agreed to a mixed definition of the delimitation of the shelf that included both a geomorphological description and a depth element related to exploitability. This was a favourable result as far as broad shelf countries such as Australia, that supported the approach, were concerned but it soon became apparent that the mixed definition required refinement and it was to become one of the most difficult issues for Australia at UNCLOS 111.29

Australia took the lead on the question of defining the natural resources to which their rights would apply. The extreme positions were to restrict rights to minerals only and on the other hand to include not only minerals but also sedentary species and bottom fish.30 The middle position was to include minerals and sedentary species but not bottom fish. For Australia the issue was of some importance for as noted earlier Australia’s shelf proclamation for the first time established a specific relationship between the shelf and sedentary species.31 Australian policy at Geneva on this issue also had to be considered in the context of Australia’s dispute with Japan on the issue.32 The Japanese government
protested against the Australian parliament’s action in bringing foreign nations within the regulatory provisions of the *Pearl Fisheries Act 1952*. The Japanese government protested against this measure claiming that it could not (without contravening international law), be applied to Japanese nationals taking mother-of-pearl shell from the oyster beds on the shelf off the northern coasts of Australia. The Australian government accepted a suggestion of the Japanese government that the legal issue should be submitted for judicidal decision and expressed itself as willing to submit the matter to the International Court of Justice by special agreement, provided that an acceptable *modus vivendi* was agreed in the meantime. Such a *modus vivendi* was reached in May 1954 and registered with the United Nations.\(^3\) By the time of the Geneva conference agreement had not been reached between the two governments as to the terms in which the issue was to be submitted for decision by the court.\(^4\)

Thus Australia’s interest at Geneva was to secure a definition of natural resources that would give international recognition to Australia’s legislation that covered the pearl-shell oyster (as well as the trochus, the sea slug, and the green snail).\(^3\) Such a definition it was felt would serve to strengthen Australia’s case in the contemplated suit before the International Court of Justice.\(^4\) Australian negotiators were successful in having achieved a definition of natural resources which made clear that pearl-shell oysters were included as sedentary species\(^3\) but in the longer term this was to prove a much less important or controversial issue than the definition of the continental shelf.

For Australia the results of Committee Four were very satisfactory.\(^3\) The conference had confirmed the shelf doctrine and coastal states had been given sovereign rights to resources and a legal right to exploit them as far out as they were able. In particular it had upheld Australia’s position in relation to claiming the right to control oyster beds and pearl fisheries.\(^3\)

The two months negotiations at Geneva produced four Conventions:\(^8\) (1) Convention on the Territorial Sea and Contiguous Zone; (2) Convention on the High Seas; (3) Convention on Fishing and Conservation of the Living Resources of the High Seas and (4) Convention on the Continental Shelf. The conference also adopted an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes\(^9\) and nine resolutions.\(^9\) The four Conventions entered into force in the 1960s after obtaining the 22 ratifications as provided in their concluding articles. All were ratified by Australia on 14 May 1963.\(^9\) Australia also acceded to the Optional Protocol concerning the compulsory settlement of disputes\(^9\) which provided that all disputes arising from the interpretation or application of the Conventions should be referred to the International
Court of Justice, unless the parties agreed within a reasonable time upon some other means of peaceful settlement.46

UNCLOS 11

The second UN conference was brief lasting from 17 March to 26 April 1960. Eighty seven states attended in 1960. (Afghanistan and Nepal attended in 1958 but not in 1960 and Cameroon and Guinea attended in 1960 but not in 1958).47 The 1960 conference took up the issue of the breadth of the territorial sea and coastal state jurisdiction over fisheries which had failed to be settled in 1958. It was unable to find consensus on these issues with the main discussion of UNCLOS 1 between support for a territorial sea of 12 miles on the one hand and support for 6 mile territorial sea plus a fishing zone on the other again being evident. No Convention was produced.48 The details of the negotiations and Australia's role cannot be fully discussed here. What is important to note is that the six-week conference saw no change in Australia's position from UNCLOS 1. The same concerns to limit the territorial sea and press only for minimum coastal state fishing rights was evident. Interests in commercial and military navigation, both surface and air, were noted in Australia's position at UNCLOS 11. The fact that Australia was isolated from foreign fishing again meant that the delegation did not see any great need to push for wide fishing limits. Australia supported a six-plus six formula on the territorial sea and fishing zone proposed by the US and Canada but it failed by a single vote to gain the necessary majority.49

At the first two law of the sea conferences Australia defended the virtues of a narrow territorial sea and saw wider boundaries as a threat to navigation rights. In that respect Australia aligned itself with the major maritime powers.

There was little interest at the time by Australia to expand its jurisdiction in an offshore fisheries zone, either to conserve the fisheries in Australian waters for the Australian industry or to protect the area from foreign fishing. At that stage foreign fishing states had shown little interest in Australian waters (apart from Japanese pearlers). On the other hand it did not entirely ignore its coastal interests: in its policy on the continental shelf issue with its support for the exploitability criteria in the ILC definition Australia behaved like a coastal state. Maritime interests were heavily identified with the Western States and their dependencies and allies at UNCLOS 1 and 11. Australia along with most of the states supporting the six-plus-six formula supported the traditional 3 mile limit and promoted the proposal as a compromise between themselves and the large group of six and twelve mile states. Australia like the UK and US was prepared to consider
functional jurisdiction to the coastal state for fishing out to 12 miles and the idea of a contiguous zone for customs, fiscal, immigration and sanitary regulation.

In so far as the 12 mile states represented coastal rather than maritime interests Australia aligned itself with the maritime powers who were primarily concerned to preserve the maximum freedom of the seas for their naval deployment. Australia also showed itself to be one of the 'satisfied' states. It showed clear agreement with the broad background of ocean law doctrine and its cornerstone, the freedom of the seas against those predominantly developing states who felt that traditional law was really a cloak, a set of ideas used to camouflage the self interest of powerful states and who demanded 'progressive' changes to traditional law.50

By the late 1960s when ocean law issues were back on the international agenda Australia was to behave much more like a coastal state in seeking wider limits and types of coastal state controls over resources and activities off its coast. It was to also exhibit a much greater degree of flexibility in choosing its allies on law of the sea issues based on realizing its interests as a coastal state and to be much more enthusiastic on the need for change in traditional law of the sea. The development of Australia's international policy on law of the sea issues to a more coastal oriented position is considered in the next chapter. It is necessary to consider briefly, however, those developments that served to undermine the Geneva Conventions as a stable basis for the law of the sea, in order to place the development of Australian policy prior to UNCLOS 111 in some historical context.

Ocean Politics 1961-1967

Buzan identifies four developments in the period 1961-1967 that served to undermine the Geneva Conventions.51 First, the Conventions were slow to come into force and did not attract the ratifications of a majority of states in the international system.52 Second was the influx of dozens of new states into the international system as a result of the last round of decolonization. Twenty-two states required for ratification was now a small fraction of the international community53 and with the momentum of decolonization those states, mainly African, that had not participated at UNCLOS 1 and 11 were not necessarily inclined to support conference outcomes at which they had not participated. The main weakness of the UNCLOS 1 and 11 conferences was the failure to reach agreement on the breadth of the territorial sea. After 1960 Australia joined with Britain and Canada to gain world-wide support from 46 states for a limited multilateral territorial sea agreement that would endorse the six-plus-six formula but the effort collapsed for lack of US support.54 After the law of the sea conferences, a growing number of states
in Asia, Africa and Latin America began to adopt 12 mile limits either as territorial seas or as fishing zones.\textsuperscript{55} There were also a number of less modest claims to 200 mile territorial seas or fishing zones.\textsuperscript{56} Thus the failure of the conferences to agree on the breadth of the territorial sea encouraged unilateral action.\textsuperscript{57}

The third factor serving to undermine the Geneva Convention was the growth of the Soviet Union to full maritime status and a shift in its interests more in line with that of the traditional maritime powers.\textsuperscript{58} Finally technological developments in oil drilling and deep seabed mining, ocean transportation and fishing and expanded ocean use all served to undermine the Geneva Conventions.\textsuperscript{59}

Thus a number of political, legal and technological developments and actions had taken place in the period after UNCLOS 11 that served to weaken the Geneva law of the sea regime. It was against the background of those developments that Australia developed its law of the sea goals when ocean law issues were thrust back on the international agenda when the UN General Assembly voted in December 1970 to convene UNCLOS 111 in 1973. It is to the development of Australia’s international ocean policy in the immediate preparatory period to UNCLOS 111 that we now turn.
CHAPTER 2

PREPARATIONS FOR UNCLOS 111:
AUSTRALIAN OCEAN INTERESTS AND THE
DEVELOPMENT OF INTERNATIONAL OCEAN POLICY AT
THE UNITED NATIONS SEABED COMMITTEE

This chapter is devoted to providing an overview of Australian law of the sea policy as it evolved at the international level in the period 1968-1973 at the United Nations Seabed Committee (SBC). Since Australia’s law of the sea objectives were largely derived from its ocean interests and marine attributes\(^1\) this chapter considers those interests and attributes in the context of the development of Australian policy on the broad issues that were covered in the preparations for UNCLOS 111. It is suggested that by the conclusion of the SBC’s work in 1973 Australia had developed a package of policies that it was to carry with it into UNCLOS 111. Those policies were to a large extent dictated by its interests as a coastal state and mirrored domestic efforts in the late 1960’s to expand Australia’s maritime jurisdiction. Australian law of the sea policy pre-UNCLOS 111 represented a shift from Australia’s support for narrow coastal state limits at UNCLOS 1 and 11 where Canberra regarded a six mile territorial sea with an additional six mile fishing area as being the maximum Australia required or was prepared to concede to other coastal states. That shift can largely be explained in terms of economic interests in wider offshore control along with regional and international coastal pressures.

Seabed Committee\(^2\)

The diplomatic seed which was to grow into the largest multilateral exercise ever undertaken by the United Nations was planted on 17 August 1967 when in an historic address Arvid Pardo of Malta requested inclusion as a supplementary item on the agenda of the General Assembly the following: ‘Declaration and Treaty concerning the reservation for peaceful purposes of the seabed and of the ocean floor underlying the high seas beyond the limits of present jurisdiction, and the use of their resources in the interests of mankind.’\(^3\) Within six weeks the General Assembly had set up an Ad Hoc Committee to Study the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction (SBC). Australia was one of the co-sponsors of the draft resolution that created the SBC\(^4\) and was one of the 35 members of the original committee that worked from 1968 until 1973 studying issues related to the international seabed regime.\(^5\) By 1970 the Committee had produced a declaration of principles to serve as the basis for the deep seabed regime and by 1971 when the Committee, having become
permanent in 1969, was transformed into a preparatory committee for UNCLOS 111 its membership had more than doubled to eighty-six.6

In its expanded format from the end of 1970 the SBC worked to complete possible draft articles for UNCLOS 111. The Committee was nowhere near completing its task when it was replaced by UNCLOS 111 at the end of 1973. In fact at the end of 1973 the SBC had not succeeded in producing a single preparatory document in the form of a set of draft treaty articles.7 It is not proposed to provide a history of the SBC as the ground here has been extensively covered in the literature.8 The following presents in summary form an elaboration of Australian policy on the main issues as they developed at the SBC in the context of Australian ocean interests and marine attributes.

International Seabed Regime

Australia’s major attribute of importance with regard to this issue related to its status as a mineral producer of those metals that were likely to be produced once commercial harvesting of nodules began.9 The metals concerned here were nickel of which in 1975-6 Australia produced 7% of the world’s production, copper of which Australia produced 3% of the world’s production and manganese of which Australia produced 17% of the world’s production. These metals earned Australia around $411 million in export income in that year.10 Those nodules of greatest commercial interest were expected to be in the deepest parts of the Pacific Ocean at depths of up to 18,000 feet.11

The Australian Bureau of Mineral Resources and B.H.P. were involved in the early 1970s in collecting manganese nodule samples and B.H.P. participated in research on recovery techniques but there was no real commitment by Australian mining companies to participate in deep seabed mining.12 Australia’s position in the SBC was to take a compromise position between the developed states, which wanted a regime dominated by national operators and private companies and the developing countries that wanted an international authority that would itself control seabed mining. Australia proposed an agency that could not only enter licensing arrangements with states but also undertake these activities directly from its own income, a position that was to gain widespread acceptance at UNCLOS 111. Australia noted during the SBC that it preferred international commodity agreements rather than production controls to protect its metal market interests, and was careful during the SBC years in formulating compromise positions so as to combine support from all groups. This approach was to carry over into UNCLOS 111.13
Continental Shelf

Australia's continental margin in terms of absolute size, 1,172,600 square miles lies in second place behind Canada with 1,240,000 square nautical miles of seabed adjacent to its coast. In some areas off New South Wales, and much of the south coast of Australia the margin is very narrow but off the north west of Australia the margin extends beyond 350 miles. While we have already noted Australia's claim in 1953 to the 100 fathom depth mark, political and economic interest in this area did not really take off until the mid 1960s where the main interest was in oil and gas made possible by technological developments in hydrocarbon recovery. Until 1960 petroleum exploration in Australia was exclusively on land. In that year BHP secured exploration permits in Bass Strait. Major discoveries in Bass Strait were made four years later stimulating further exploration offshore particularly in the north west. With the Federal government providing specific encouragement to petroleum, exploration promising discoveries were made in areas previously thought too difficult to drill. Following negotiations with the State governments an agreement was reached on a common code for administering offshore resources. The point to note here was that petroleum exploration was to be encouraged by uniform legislation agreed to by the Commonwealth and the States. The shelf was defined in the Petroleum (Submerged Lands) Act 1967 according to the terms of the 1958 shelf definition in the Geneva Convention. The 1967 act also defined adjacent areas, which were areas within which particular designated authorities would apply the rules governing petroleum activities. In some areas the boundaries extended for more than 300 nautical miles.

The delimitation of the outer areas of the shelf of Western Australia, Northern Territory and Queensland under the provisions of the Petroleum (Submerged Lands) Act led to boundary delimitation problems with Indonesia because the area encompassed the area from Torres Strait to south of Timor. Negotiations commenced in March 1971 and while agreement on a less controversial area was reached in May 1971 it was not until 9 October 1972 agreement was reached on the delimitation in the Timor Sea. The details of these agreements are not of concern in this context. Rather what is important to note here is that from the start of the SBC economic interest in offshore hydrocarbons (leading to exploration permits being granted over wide areas of the shelf) combined with the opening of negotiations on a seabed boundary in areas north of Australia during the life of the SBC made Australia more aware of its interests as a coastal state and determined that it would wish to preserve what it regarded as its rights under existing international law.

Pardo's proposal in 1967 with its concept of a precisely fixed boundary between national and international jurisdiction reopened the question of the outer limits of the shelf and
directly affected Australian interests. Since fixing a boundary for the area was in effect fixing a boundary for the shelf jurisdiction of coastal states, Pardo’s initiative would invalidate the flexible definition achieved in 1958. As Australia had founded its 1967 petroleum legislation on the expanding rim theory and legislated for areas far beyond the 200 metre line, Pardo’s proposal raised the possibility that valuable areas of Australia’s shelf would pass from national jurisdiction to be internationalised under Pardo’s International Seabed Authority. Potentially important also was the delimitation of an international boundary with respect to Antarctica. Australia claimed the largest share of Antarctic territory (42%) and there was the possibility arising that claims could be made in the SBC that the southern boundary of any new international body should be the low water mark of the Antarctic continent.

Australia’s position in the SBC was to argue for seabed rights to the edge of the continental margin (shelf, slope and rise), although it only moved aggressively to this position in the last two years of the SBC’s work. Australia was mainly concerned to argue against a flat 200 mile limit as this was considered an attack on the sovereignty of the coastal state and would discriminate against Australia with its broad shelf and potentially valuable seabed resources. The evolution of Australian policy is, however, too detailed to elaborate here but by the end of the SBC Australia had found some other wide margin allies such as Canada, Soviet Union, Iceland, Italy, UK, Argentina, Sweden, Norway, most of the Latin American countries and Iceland, a total of 23 states in all. However it faced opposition from a number of quarters.

By the end of the SBC’s work Australia had presented its case for rights of the coastal state to the edge of the margin basing its case on existing rights under the 1958 Geneva Convention, Australian law and practice (that had seen exploration permits issued over distant parts of the shelf) and the ICJ’s decision in the North Sea cases. Economic interest in offshore resources combined with a certain amount of nationalism underpinned what was to be the basis of Australia’s campaign on the margin at UNCLOS 111. It was a policy that was crudely, but accurately, described by one journalist as Canberra ‘going for grabs’ and seeing how much could be achieved.

Archipelagos

Australia had significant interests relating to navigation, alliance relations and foreign policy considerations on this issue.

Australia’s position at the SBC was to reverse its previous opposition to the archipelagic concept and to give it cautious support. Australia’s support was, however, conditional
Upon there being assured rights of unimpeded passage without notification, at least for surface passage, along sea-lanes established by an archipelagic state through its archipelagic waters and upon the assumption that responsible criteria would be established to limit the number of claims to archipelagic states and the extent of claims by individual and archipelagic countries. Australia was particularly concerned to allow for the possibility of PNG claiming archipelagic status.31

By the end of the SBC Canberra had come to the view that for a variety of reasons, mainly revolving around broad foreign policy concerns that Australia should give support, albeit not of an unqualified kind, to the claims of its archipelagic neighbours. These claims had been successfully asserted prior to the SBC and there appeared few political points to be scored in a policy of opposing such claims. Indeed outright opposition would have been seen by regional countries as a deliberate policy by Canberra to turn its back on the aspirations of archipelagic countries to achieve improved prospects of national security, improved communication and greater economic self-sufficiency through the international recognition of archipelagic principles.32 The question was how would UNCLOS 111 integrate archipelagic principles in any new treaty in such a way as to accommodate the interests of the actual and potential archipelagic states without adversely affecting the interests of states like Australia that had specific interests in transit rights over archipelagic waters. It was by no means certain that by the end of the SBC that this was possible. There was still considerable opposition to the concept from the maritime powers that were concerned that if the concept applied to a considerable number of states that it could lead to military deployments being inhibited.33

Islands

Australia has a number of offshore island outposts. These include Ashmore and Cartier, Christmas Island, Cocos Island, Heard and McDonald Islands, Norfolk Island, Coral Seas Islands Territory, Lord Howe and Macquarie Island.34 It was in Australia’s interest that these islands should have full 200 mile maritime resource zones. Each island if it had such a zone would theoretically generate 125,000 square miles of ocean.35 In order to have maintained a consistent policy on the shelf it was reasonable to expect that Canberra would advocate extension of the shelf area generated by islands to the edge of the islands’ margin.36

Conventional law and Australian practice supported an expansive view of islands at the time of the SBCs deliberations.37 Surprisingly, however, Australia was vague in the SBC on whether islands deserved to generate economic zones in the same way as coastal state territory. The working paper of Australia and Norway on the Economic Zone and
Delimitation submitted to the final session of the SBC was vague on the point simply referring to the zone extending from the ‘applicable’ boundaries for measuring the territorial sea. Australia, however, appeared to lean to the view that islands should generate economic zones, for in the course of its archipelagic statement Australia supported the principle that islands are an integral part of the territory of a state.

**Straits and Territorial Sea**

It was noted earlier that the impetus for convening UNCLOS 111 was partly due to the desire of the United States and the Soviet Union to complete the work that UNCLOS 1 and 11 had left uncompleted—to determine the width of the territorial sea and the question of international straits. The two issues were critically related hence they are treated together here. If the breadth of the territorial sea were universally extended to 12 miles, 116 international straits would be covered by territorial seas as they were less than 24 miles across. High seas corridors would cease to exist in such straits and transit would be subject to the regime of innocent passage. This would mean submarines would be required to navigate on the surface and there would be no right of overflight. The innocent passage regime was considered unsatisfactory by the maritime powers as the right of warships to passage without express consent of the coastal state had been widely disputed. By October 1972 there were 63 states that claimed a territorial sea of 12 miles and the trend seemed irreversible. Australia was one of only 25 countries that claimed 3 miles.

A right of innocent passage when applied to international straits was thus considered unacceptable by the major maritime powers, in particular the US. The restrictions on overflight, the requirements for surfaced transit of nuclear powered ballistic missile submarines (SSBNs) and the potential denial of the right of innocent passage for warships were perceived by the US to pose a threat to the mobility of its aircraft and ships through international straits. The requirement that submarines surface in straits or give advance notification would, it was believed, threaten the credibility of the sea-based deterrent in that SSBNs would expose their locations when surfaced.

Australian interests were directly involved here, specifically freedom of navigation for the Australian navy and airforce, the navigational interests of its main ally, the US and principal trading partner, Japan, and broader foreign policy concerns relating to the sensitivity of the issue among Australia’s South-East Asian neighbours.

Australia supported a 12 mile limit on the territorial sea, but in fact Australia did not, surprisingly, take a high profile on the straits issue in the SBC tending to leave
negotiations to the military powers in the user group.\textsuperscript{46} This was largely for tactical reasons, for while Canberra was concerned that trading routes should not be impeded and that whatever regulations were necessary should be clear and not subject to sudden change, it knew it could accept more regulation such as ‘designated sea lanes (and) prior notification than the nuclear weapons powers would’.\textsuperscript{47}

Little momentum developed in the SBC to reach any real accommodation between the opposing views of the straits states and the maritime powers.\textsuperscript{48} Australia’s position was more sympathetic to the straits states than the maritime position but Canberra identified with the user groups’ views that the straits states position to treat straits as a single entity with a territorial sea was unacceptable. On the evidence of the SBC, however, it appeared that Canberra was unlikely to adopt a high profile on the issue at UNCLOS 111.

**Fisheries**

Australia has never been a significant fishing nation and the resource base of fish around Australia is not spectacular by world standards.\textsuperscript{49} Production had risen, however, from 70,000 lb valued at $7.5 million in 1951-52 to 200,000 lb valued at around $60 million in 1969-70.\textsuperscript{50} In 1971 Australia ranked only 49th among fish producing countries\textsuperscript{51} and its industry was geared to export high value crustacea and molluscs (rock lobster, oysters, scallops and abalone). The industry was dominated in the 1960s and 1970s by owner skippers with relatively small vessels exploiting inshore grounds on the continental shelf.\textsuperscript{52} Australia’s industry prior to UNCLOS 111 was thus not developed to any great extent but Australia was interested in both expanding its own industry and protecting those sectors of its fisheries that were considered to be subject to over-exploitation by foreigners. As far as the first goal was concerned the Australian fishing industry had seen the introduction in the late 1960s of larger vessels capable of extending into more distant waters and exploratory fishing operations indicated the presence of resources capable of commercial exploitation on the continental slope in waters as deep as 800 metres.\textsuperscript{53}

Australian fisheries policy pre-UNCLOS was also, as noted above, concerned with protecting resources that were seen to be vulnerable to foreign fishing activity. Taiwanese fishing around northern Australia was of concern not so much because of competition with local fishermen but because of despoliation of the reef environment and the possibility of the introduction of plant animal and human diseases.\textsuperscript{54} More relevant to Australian fisheries policy makers were increases in Soviet fishing and whaling activity in southern waters and over-exploitation by Japanese tuna long-line fishermen around the Australian coast.\textsuperscript{55}
Thus in formulating its fisheries policy pre-UNCLOS Australia had two major interests. First to develop its small scale fishing industry and second to ensure that the coastal state was able to reap significant benefits from its fishing activities in the face of distant-water fishing nations. Of relevance within this context was Australia’s responsibility at that stage for PNG where there was significant effort being made to develop commercial fisheries. With an undeveloped fishing industry and with foreign fishermen off its coast Australia thus went in to the international negotiations on this issue in the SBC with similar concerns on fisheries to many developing coastal states.

Australia’s position as it evolved in the SBC was to seek a significant increase in coastal state jurisdiction in an attempt to protect its coastal fisheries. Australian gradually accepted a 200 mile limit as the cut-off for a fisheries zone but after 1973 the form of Australia’s fisheries position, as opposed to the detailed principles (which it incorporated in a joint paper with New Zealand in 1972) moved to support the economic zone concept. Here Australia was anxious to ensure that a flat 200 mile limit was not to become the cut-off for national limits, so as to preserve margin rights beyond 200 miles. Australia was also concerned to ensure navigation and communication rights were protected in the EEZ. Australia wanted international arrangements for highly migratory species (HMS) like tuna. The detailed evolution and analysis of this position cannot be discussed here but apart from its position on HMS Australia’s position on fisheries at UNCLOS 111 did not really alter from its basic SBC views.

**Marine Environment**

As a country with more than 24,000 km of coastline including the ‘priceless heritage’ of the Great Barrier Reef Australia had an obvious interest in the preservation of the marine environment. Australia’s coasts, apart from Torres Strait area are, however, not subjected to the effects of passing international shipping traffic and thus Australia has been in the ‘fortunate position where it can exercise a high degree of control over marine pollution by control of ships that enter its ports’. On the other hand Australia’s interest in reducing marine pollution had to be balanced by its interest as a country that is highly dependent on world market as a buyer and seller of goods. As virtually all Australia’s trade is carried by sea by foreign shippers, Australia also had an obvious interest in not introducing unnecessary pollution controls which may affect the competitiveness of Australian goods by imposing added costs on shippers.

Australia’s interest in protecting the marine environment was given added focus when in March 1970 the *Oceanic Grandeur* grounded in Torres Strait causing significant oil spillage. The ensuing spillage and the detergent used to clean up the oil were believed...
responsible for the destruction of the cultured pearl industry which was being established in the area and brought forth outcries from environmentalists concerned about reef damage.\textsuperscript{64} Despite the fact that Australia was an original member of the International Maritime Consultative Organization (IMCO), a member of its Council from 1959-1973 and a signatory to IMCO Convention on Oil Pollution\textsuperscript{65} Canberra was hampered by a number of factors in efforts to control pollution on the reef.\textsuperscript{66}

It was thus against a background of an increasing awareness of the dangers of oil pollution and in particular the potential vulnerability of the Great Barrier Reef\textsuperscript{67} that Australia approached the marine environment issue in the SBC. Australia exhibited active concern on the issue, taking a very strong coastal state line on the need to protect the marine environment. Australia worked with Canada and New Zealand in particular to argue for stronger rights and a larger role for the coastal state in preventing marine pollution and protecting the marine environment. While a strong supporter of the concept of port state enforcement rights, for tactical reasons it appeared that Australia did not push hard on this issue. Again, the details of Australia’s SBC policies cannot be detailed here, but at the conclusion of the SBC Australia’s position was firmly aligned with those coastal states wishing to expand their powers over pollution matters. It did not, however, entirely ignore its interest in the continuation of unimpeded commercial shipping.\textsuperscript{68} Australian delegates had made it clear that Canberra had a significant stake in the environmental issues that were to be debated at UNCLOS 111 and that it was ready to vigorously assert the need for greater coastal state powers over the marine environment even if that meant lining up against traditional allies in the maritime states camp.\textsuperscript{69}

**Marine Scientific Research**

Prior to UNCLOS 111 Australia did not have a significant capability for marine scientific research.\textsuperscript{70} While it had demonstrated a desire to participate in international co-operative ventures in marine research there was no evidence at that stage that Australia was likely to undertake such research on its own in distant waters. Thus on the MSR issue Australian interests were somewhat conflicting. With its limited MSR capabilities Australia had an interest in ensuring that coastal states had adequate power to control activities in offshore areas with regard to resources. On the other hand Australia had interests as a researching state with many Australian scientists associated with international programmes working in foreign waters. In the longer terms also Canberra had to consider the prospect of Australia developing its own distant-water capabilities.

The international law on scientific research was not well developed prior to UNCLOS 111 and there were fairly ad-hoc arrangements applying for researching states to obtain
consent for MSR projects in a coastal states waters. In 1958 the economic and military implications of marine science had not acquired great significance. A number of incidents in the 1960s however created a strong suspicion on the part of coastal states that a good deal of ‘pure’ scientific research had military connections. On the part of developing countries there was also a strong desire to redress what was a widening gap in research capabilities between them and developed countries. In order to exploit offshore areas information was required and in order to meaningfully participate in offshore resource development developing countries argued that they must have the right to control all research in offshore areas.

In the SBC Australia did not devote much attention to the MSR issue. The main focus of the debate was to be later repeated at UNCLOS 111 and concerned the divergence of views between the opponents (mainly the maritimes and superpowers) and proponents (mainly developing coastal states) of greater coastal state control over MSR in areas beyond the territorial sea. The establishment of 200 mile EEZs would bring under coastal state jurisdiction that part of the world’s oceans where the greater part of MSR was conducted as most ocean phenomena occur along the edge of continents. The area had been high seas with no restrictions on research. Researching states were concerned that if coastal states had the right to control research in the EEZ this would hamper MSR.

Australia’s SBC position on MSR was studiously vague but generally envisaged an increase in coastal activity at the expense of the traditional freedom to engage in MSR. This view was to strengthen at UNCLOS 111, although late at the conference Australia swung back to a greater emphasis on the need for researchers’ freedom.

**Delimitation**

Australia’s specific interests on the delimitation of maritime boundaries prior to UNCLOS 111 related to the settlement of maritime boundary issues with Indonesia and PNG. Its interest on the question within the SBC was focussed on general principles of boundary delimitation. In the SBC Australia had two main goals. First it wanted to ensure that when the margin overlapped a 200 mile zone in a situation where opposite states were less than 400 miles apart then the margin should prevail in respect of seabed rights. This was directly related to seabed delimitation problems with Indonesia. Secondly, Australia wanted to ensure that any delimitation arrangement would be effected by agreement, a concern that was particularly important in the context of the extremely complex Torres Strait delimitation between Australia and Papua New Guinea. The SBC made little progress on the issue and it was unclear to what extent Australia would assume a high profile on the issue at UNCLOS 111.
Concluding Remarks

Australia's pre-UNCLOS position as it emerged in the SBC was to identify itself with coastal state views, particularly on the shelf, fisheries and the marine environment. To a large extent the evolution of Australian international policy reflected domestic efforts to ensure greater control over offshore resources as evidenced in the 1967 fishing zone legislation, the 1968 legislation to control all sedentary fish harvesting, the extension of control over seabed resources in the 1967 Petroleum (Submerged Lands) Act and the 1969 assertion of sovereignty over the Coral Seas Islands. In the marine environment area Canberra had moved to extend the sphere of Australian control over ship sourced pollution in the 1970 amendments to the Navigation Act. Economic developments in the area of foreign fleet activity off Australian waters, the discovery of oil and gas resources on the shelf, the opening of discussions with Indonesia on a seabed boundary in areas of north of Australia and an increasing awareness of the dangers of pollution had made Canberra more aware of its interests as a coastal state. At the same time there was strong support in the SBC for expanding coastal state jurisdiction and regional countries in the South East Asia and the South Pacific were part of the general trend calling for such changes. The 1960s had seen an expansion of coastal state jurisdiction undermining the Geneva regimes. Thus both external and internal forces pushed Australian policy towards a more coastal orientation culminating in the support by the government in 1973 for the 200-mile economic zone concept.

Australia's policy at the international level on law of the sea issues was largely completed in the 3 years of preparatory sessions of the Enlarged SBC between 1971-1973. Those years are best seen as the alliance building phase prior to the formal sessions of UNCLOS 111. The effort to build a common position among states with similar interests resulted in the formation of a Coastal States group in 1971/1972, an informal group of about 25 developed and developing coastal states which was chaired by Canada. Australia was a member of the group that was to prove Australia's main vehicle with which to push its policies at UNCLOS 111. Australia had also begun co-operation with other wide-margin states, particularly Canada, as a prelude to coalition-building on the issue at UNCLOS 111. The main groups during the preparatory years of the SBC reflected the early stages of UNCLOS 111, the Group of 77, the maritime powers, archipelagic states and territorialist and the land-locked and geographically disadvantaged states. These groups are discussed in the next chapter but what is important to note here is that Australia's alignment with coastal state positions in the preparatory years culminating with the acceptance of the economic zone concept in 1973 meant that Canberra would undoubtedly find itself at times opposed to the views of the maritime powers that wished
to preserve traditional high seas freedoms against those states that wished to extend their jurisdiction, particularly over resources.
CHAPTER THREE

UNCLOS 111, AUSTRALIAN OBJECTIVES AND CHOICE OF STRATEGY

This chapter is concerned to provide a broad overview of the structure of UNCLOS 111 and to summarize Australian law of the sea objectives just prior to the conference. It considers what level of action offered Australia the best opportunity for it to achieve its law of the sea objectives and argues that the global level offered Australia the best avenue to achieve its ocean law goals.

Structure of UNCLOS 111

The Third UN conference on the Law of the Sea held its first session (devoted to organisational matters) in December 1973 and concluded its work in September 1982. A final signing session of the conference was held from 6-10 December 1982 (see Appendix A). Excluding the signing session the conference met fifteen times for a total 585 days. (Some sessions were described as ‘resumed’ sessions although they were, in all but name, separate sessions). A number of inter-sessional meetings were also held. Around 2000-3000 delegates attended each session. There was no deadline for the completion of the conference. The General Assembly resolution convening the conference in effect left the number of future sessions open. It was the largest, longest and most complex exercise in multilateral diplomacy ever undertaken by the United Nations.1

The structure of UNCLOS and its negotiating processes have been extensively detailed in the literature and it is not proposed to duplicate that work here:2 only the broadest outline will be presented in order to provide an understanding of the overall framework within which Australian diplomacy operated.

UNCLOS 111 continued the structure of the SBC having three main committees where every delegate could, if it chose, be represented. There was a Plenary in which all delegations were represented. Although the settlement of disputes was to be dealt with by each Main Committee, in so far as it was relevant to their mandates, in practice, the question was discussed and negotiated in the Plenary as were the preamble to the Convention and final clauses.3
Most UNCLOS meetings were informal without formal records. There was an enormous amount of unofficial documentation but the official records of the conference were limited to the records of the formal sessions. With over 150 states participating, because of the enormous range and scope of the issues with which the conference had to deal and because the goal of a single comprehensive treaty UNCLOS II was, not surprisingly, an extremely difficult negotiating forum. One of the most important features of the conference was the decision to proceed by consensus. Whereas at UNCLOS I and II the rule was that a proposal would pass by a majority vote in Committee and needed a two thirds majority in the plenary session it was felt at UNCLOS II that consensus was necessary if there was to be a Convention commanding the widest possible support. Thus it was considered necessary both by the developed maritime states and the more numerous coastal state members of G77 to 'work into the rules safeguards against hasty voting, for cooling-off periods and to provide for special majorities. Another underlying rationale was that important interest groups e.g. the major powers, who were numerically in the minority, did not want to be railroaded into voting where they might not have the votes to win'.

The SBC's practice of avoiding the taking of votes on substantive matters influenced UNCLOS procedure. The UN General Assembly adopted on 16 November 1973 a 'Gentlemen's Agreement' that stated that the 'conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus had been exhausted'.

The letter and the spirit of the rules of procedure were observed by the conference. The pattern of negotiations at UNCLOS was avoiding votes and pressing for consensus. There is no doubt that the rules partly accounted for a very long conference for if it was not for the rules discouraging voting votes on numerous issues could have been taken. As Koh and Jayakumar point out: 'The delegates had to keep the discussions and negotiations going, session after session, in the hope that compromise would eventually emerge'.

After 1975 the conference moved to what Buzan calls 'active consensus' which involved a variety of techniques designed to provide impetus towards achieving consensus, which turned out to be a major innovation of the conference. It is not possible to define active consensus other than to describe it as it developed over the conference. The most important techniques involved granting to the President and the three main Committee Chairmen the initiative in providing informal negotiating texts which 'effectively obliged interested states to take positions to encourage or discourage the formation of consensus around them'. Other devices included holding most of the meetings on an informal
basis with no official records, the establishment from April 1975 of informal working
groups and consultative groups, and the development of informal groups outside the
conference structure (see below).

Another feature of the structure of UNCLOS was the ‘package deal’ approach. To quote
Plant:

What is unique to the package deal procedure is the extensive trade-off between functionally unrelated issues which cut across committee and
working group boundaries, often producing mini-packages, but all
contributing to a single ‘grand package’. The process is designed to meet
the minimum requirements of the maximum number of participants. In the
case of UNCLOS 111, however, it also involved the simultaneous
negotiation of a very broad agenda in an effort to achieve a single instrument
covering all of its items; this was useful in permitting the co-ordination of
trade-offs covering every possible subject without necessitating the
reopening of issues already ‘settled’, but in practice it slowed down the
negotiations quite considerably.11

Partly because of the range of the agenda and the number of participants, partly because
the issues themselves cut across many of the standard political groupings in the General
Assembly and partly because of the attempt to construct a grand package deal without
resort to standard voting rules UNCLOS 111 saw the development of many groups as the
preferred way of establishing influence within the proceedings. The use of groups within
conference diplomacy is not, in itself, unusual. As Buzan points out: ‘In a long and
protracted negotiation, only the most powerful states can stand alone and still hope to
forward their interests. For the rest, participation in groups is almost synonymous with
the struggle to achieve influence’.12 Groups were the machinery by which much of the
process of negotiations at UNCLOS 111 was carried out. The description and role of
these groups has been well documented.13 It must be noted however that negotiations in
and between groups was not recorded. This is hardly surprising for as Kaufmann has
pointed out in ‘many international conferences informal conversations, encounters and
meetings, away from the publicity of the open meeting, form the most important part of
the conference’.14

However, in order to understand the structure in which Australia operated at UNCLOS
111 a brief summary of the main groups is necessary. Perhaps the most important point
to note here is that while traditional regional groups operated at UNCLOS new interest
groups that did not exist outside the conference arose and became influential. They were
unique in so far as they ‘cut across geographical groups and across the traditional lines
dividing developed from developing country, as well as across ideological lines’.15
Some traditional groups like Group of 77 were able to form a common position on
seabed mining issues but because of the diversity of views on law of the sea issues
traditional UN groupings such as the regional blocs (Africa, Asia, Latin America, Arab, East Europeans, Western Europe and Others) were for the most part ill-equipped to be vehicles for forging common positions.16

New interest groups sprang up and it was not unusual for a state to belong to more than one interest group because of its marine attributes or ocean interests.17 The largest and earliest was the Coastal States Group which was formed during the SBC and rose to a group of 75 delegations (half the conference) made up predominantly of developing countries under Mexico’s leadership. The common interest of members was to promote their cause of extended coastal jurisdiction and to oppose groups perceived as inimical to their interests—for instance the claims of the Land Locked and Geographically Disadvantaged States (LLGDS) for rights to living resources in the EEZs of other states. The latter group was made up of 59 states, 29 of which were land-locked and 26 of which were in the geographically disadvantaged category—the latter category were developing countries that either derived no substantial economic advantage from establishing a 200 mile EEZ or were adversely affected in their economies by others doing so; or else had short coastlines and could not uniformly extend their jurisdiction. The LLGDS group was chaired by Austria and Singapore. Broad Margin states, or Margineers were those 13 countries that argued that national limits to the shelf should extend beyond 200 miles. The archipelagic states group argued for recognition from the conference for the right to draw strait baselines connecting the outermost points of the outermost islands to create a sense of political unity. The Territorialist Group were made up of 23 countries who were a sub-group of the Coastal States Group and who had declared territorial seas of more than 12 miles. One of the groups’ objectives was to ensure that the proposed 200 mile EEZ conform as closely as possible to their territorialist concept.

The Straits States group was composed of states bordering straits whose interests revolved around what regime would govern passage through straits. There were two groups that formed around support for either equitable principles for delimitation of seabed and EEZ boundaries and another group supporting the principle of the median line. The maritime powers formed a group to preserve traditional high seas freedoms such as military and commercial navigation. There was the Land Based Producers Group, a group of about 30 countries who were concerned that seabed mining would adversely affect their land-based metal mining production. They combined to negotiate production controls on seabed minerals. The Oceania Group made up of island countries of the South Pacific (including Australia) pressed its particular views on the issue of islands and highly migratory species of fish.
There were also a number of very important private groups convened outside the formal framework of the conference whose main objectives were to bring together informally, the leading and important delegations to discuss an issue in a small group. The best known was the Evensen Group of Juridical Experts, named after its convenor, Jens Evensen, the leader of the Norwegian delegation. It dealt with numerous subjects including the EEZ, the marine environment, the shelf, and the rights of LLGDS. There was a private group on straits chaired by Fiji and the UK convened at the third session, the Casteñada Group on the legal status of the EEZ that convened at the sixth session to break the deadlock on the issue of the legal status of the EEZ, the Nandan group set up at the fifth session to resolve issues relating to LLGDS rights and a private group on disputes settlement. These groups achieved vital compromises on such issues as straits and the legal status of the EEZ and compromise texts on a range of issues that were extremely useful to the Chairman of the three committee chairmen.

UNCLOS 111, like any international conference, produced some key individual players, but unlike most diplomatic law making conferences UNCLOS 111 did not have a basic text in front of it when it commenced its work. By the end of 1973 the SBC had not succeeded in producing a single preparatory document in the form of a set of draft treaty articles. Instead the SBC submitted a report in 1973 to the Twenty-Eighth session of the General Assembly with hundreds of proposals and draft articles as well as many reports from the three main committees. The absence of such a single preparatory text meant firstly that it was difficult for delegations to negotiate on the basis of countless different texts because states attached importance to their own proposals and felt they were losing a tactical point if another state’s proposals were used as a basis. Secondly, it meant that the conference itself had to undertake the task of preparing such a neutral text which could be the basis of negotiations.

On the eve of the opening of the March 1981 session, when most delegations hoped to see the completion of the conference, the US announced that it was embarking of a fundamental review of its attitude towards the Convention, because of dissatisfaction with the regime for seabed mining. The review occupied the whole of 1981 and prevented effective US participation in both the 1981 sessions. In January 1982 President Reagan announced that the US would return to the negotiations providing six broad objectives were met. At the eleventh session the US submitted between 150-200 amendments which amounted to unravelling many of the compromises that had been agreed to in the years before 1980. They were rejected by the developing countries and despite the mediating efforts of twelve industrialized countries (including Australia), the US decided it would not participate in the adoption of the Convention by consensus. It
asked that the text and four accompanying resolutions to be put to a vote. The package was adopted by a vote of 130 in favour, including Australia, 4 against (Israel, Turkey, US, Venezuela) with 17 abstentions.

**Australian Objectives and Choice of Strategies**

This section is devoted to first outlining Australia’s policy positions as they stood just prior to the first UNCLOS session in December 1973 and second to considering the question of what level of action offered Australia the best avenue to achieve those goals. The development of those goals has already been dealt with in the previous chapter. Australia’s position on each of the major subjects at UNCLOS is set out under the following headings. Unless otherwise indicated, Australia’s positions are taken from the Government’s own position paper issued in October 1973.

**The Continental Margin**

Australia claimed rights to the edge of the margin (the shelf, slope and the rise). This was an area of about 1,000,000 square miles, a third of the area of the Australian continent. Australia based its case here on the 1958 Geneva Convention on the Continental Shelf and the 1968 decision of the International Court of Justice in the North Sea cases. Because Australia’s margin extends for more than 350 miles from the coast it was not in Australia’s interests to accept a 200 mile limit to coastal state jurisdiction. Australia’s margin claim was linked to support for a 200 mile economic zone so that Australia’s claim was to sovereign rights over seabed resources to 200 miles and to the outer edge of the margin where this extended beyond 200 miles.

**Exclusive Economic Zone**

Australia supported the economic zone concept for three reasons. First, the recognition of such a zone would lessen the validity of claims to a very wide territorial sea. Second, parts of Australia’s margin, particularly the eastern area, the margin is very narrow, extending to less than 50 miles. A 200 mile economic zone would give Australia rights over a considerably larger area of seabed and subsoil. Third, as the economic zone was to cover the water column above the seabed, Australia would obtain rights over fisheries as well as rights over minerals extracted from the sea in that area. Australia placed importance on the need for freedom of navigation and overflight to be maintained in the zone. Australia, therefore, supported the position that the status of the zonal waters as high seas should be maintained.
International Regime for Deep Seabed Mining

Australia rejected the view of those states such as the US, UK, USSR and France that advocated a relatively low-powered Authority, acting mainly as an agency regulating exploration and exploitation of the area by states. Australia supported the wide scope and powers approach to the Authority, in particular the establishment of an organisation with wide powers to exploit the seabed on its own behalf, to engage in production sharing agreements or joint projects with other states, to enter into international commodity arrangements with other states and to control commercial development of the area. Australia felt that support for the Authority would be a *quid pro quo* to states which suffer if Australia’s objective of obtaining a wide area of national jurisdiction were accepted. It was also considered that the wide powers approach coincided with Australia’s interests as a mineral producer and those of the developing countries in exercising an influence over the rate of world mineral production. Power to explore and exploit on its own behalf would help to ensure that big producers and technologically advanced states were not able to obtain a monopoly of these activities in the international area. It was noted that Australia could suffer a drop in nickel exports with an increasing supply of minerals from the seabed. Australia supported the establishment of an organisation which would be empowered to enter into licensing and other contractual arrangements with states (subject to approval of the Council) and also to undertake exploration and exploitation through its own earned income subject to Council approval.25

Territorial Sea

Australia felt that it was politically and legally unrealistic to hold territorial sea claims to 3 miles. Australia supported a twelve mile territorial sea but support was linked to recognition of a right of transit through straits (see below). The government noted that it was in its interests to restrict the territorial sea to a relatively narrow limit in order to ensure that the area of the sea in which there was almost unlimited freedom of passage and overflight was as large as possible.

Archipelagos and Straits

Australia supported the goal of archipelagic states to obtain recognition for the special status of archipelagos. Australia’s support was subject to there being satisfactory guarantees with respect to passage through archipelagos. As far as the issue of straits was concerned the question of the breadth of the territorial sea was important for, as
noted earlier, a 12 mile territorial sea had the potential to convert the waters of 100 international straits (where ships and aircraft enjoyed high seas freedom of navigation) to territorial sea (where submarines would be required to navigate on the surface and where there would be no right of overflight). Australia sought to balance the interests of strait states and maritime powers by supporting a regime of transit passage which would be more restricted than the right of free passage, but would include a right of vessels to pass through a strait without prior notification but not to stop (except in an emergency), nor to manoeuvre except to the minimum necessary for self-defence and navigation. Australia supported both strait states and archipelagic states having similar rights to those which already obtain in the territorial sea—over customs, fiscal and immigration and sanitary matters—and also the right to regulate marine scientific research (MSR) and make regulations for the preservation and control of pollution. Such states would also have jurisdiction over the resources in the same waters and superjacent seabed. The laws and regulations made in the exercise of those rights would be applicable to all shipping in the waters concerned but subject to those laws and regulations all shipping would have a right of transit without prior notification.

Fisheries

Australia’s position was that outlined in its 1972 SBC proposal. Coastal states should have a right to establish fisheries management zones, the limits to be fixed by reference to distance. On 24 January 1973 the Prime Minister announced that Australia supported a distance of 200 miles in the limit of a fishing zone along the lines of the 1972 proposal.26 The coastal state would have exclusive rights to manage the fisheries, but in the interests of maximisation of world food supply, where the stocks were not being fished to the optimum, the coastal state might enter into agreements with states interested in catching surplus stocks. In that way Australia sought to reconcile the interests of distant water fishing interests (DWFN) and coastal states. There should also be in any final convention dispute settlement procedures for fisheries.

Preservation of the Marine Environment

It was noted that Australia’s coastline was one of the longest in the world and that therefore Australia was vulnerable to the effects of marine pollution. It was also noted, however, that it was in Australia’s interest to maximize the opportunities for the development of sea transport while ensuring pollution controls were effective. Australia believed that the coastal state should have the right not only to enforce international standards but also to make its own regulations in certain specified circumstances and subject to certain restrictions. These regulations would be required to be reasonable and
the primary, although not necessarily the conclusive evidence of what was reasonable would be international standards. In any disputes as to 'reasonableness' the matter would be subject to compulsory judicial or arbitral decision.

**Delimitation**

Australia's pre-conference view on delimitation issues was not spelled out in the government's position paper apart from noting the view that where a 200 mile economic zone overlapped the margin of another country Australia believed that the natural phenomenon of the margin should prevail over 200 miles in determining rights to the resources of the seabed. There was no reason to believe that Australia's views on this question had altered from the 1972 Australia/Norwegian paper: that document had stressed 'equitable principles'—when agreement could not be reached by parties, equidistance should apply unless another boundary was justified by 'special circumstances'.

**Islands and Dispute Settlement**

No statement committing Australia to support the principle that all islands generate a full economic zone appeared in the government's position paper. Neither was there any reference to the issue of disputes settlement apart from a reference to supporting the need for disputes settlement for pollution and fisheries matters. There was, however, some indication that Australia favoured compulsory dispute settlement. Such a provision had been incorporated in the 1973 Australian working paper on the Marine Environment tabled in the SBC. The Australian/Norwegian Working Paper on the Economic Zone and Delimitation also provided that disputes be settled by negotiation on the basis of equitable principles and where such negotiations failed the principle of equidistance should apply compulsorily. Australia had acceded to the Optional Protocol for the compulsory settlement of Disputes adopted at the First UN conference on the Law of the Sea in 1958. Pursuant to that Protocol disputes arising out of the interpretation of an application of any of the four 1958 Geneva Conventions on the Law of the Sea were within the compulsory jurisdiction of the ICJ subject to special dispute settlement arrangements which were contained in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas. Australia was also one of the few states which had made a declaration under Article 32(2) of the Statute of the ICJ accepting the jurisdiction of the ICJ on the basis of reciprocity in all cases not expressly excluded by the Declaration. Thus while there had been no statement issued on dispute settlement prior to the conference the indications were that Australia supported compulsory dispute settlement procedures in any Convention.
Marine Scientific Research (MSR)

While Australia was concerned that MSR should be as free as possible from restrictions it sought greater coastal state powers to regulate this activity:

The prior consent of a coastal state should be required for scientific research in all areas within its national jurisdiction. The coastal state should have the right to enforce whatever conditions on such research it considered reasonable and necessary, including safety and pollution control, participation by the coastal state in research, and access to all data and results from it. The coastal state should however not unreasonably withhold consent for 'pure' research as distinct from investigations for the purpose of commercial exploitation. ‘Pure’ research may be distinguished from commercially-motivated exploration in that the researcher should be willing to publish widely in scientific journals the results of his research and lodge the collected data with such bodies as the World Data Centres in Washington and Moscow.28

Australia’s pre-conference position can be summarized as a policy of extending coastal state control over resources and marine activities in its offshore areas. The pre-conference positions as elaborated above were in effect a summary of those positions that Australia had set out in the SBC and represented (apart from the islands issue) a complete defence of Australia’s ocean interests. In terms of Australian goals there was some tension between the resource goals and its interests in navigational freedoms, although whether they would be difficult to juggle would depend, in part, on the actual course of negotiations. It is impossible to establish with any certainty a priority ranking of the government’s view of Australian goals at UNCLOS except in a very crude way.29 A content analysis of the 1973 government position paper based on the number of lines devoted to each subject produces the following ranking:

<table>
<thead>
<tr>
<th>Subject</th>
<th>Lines</th>
</tr>
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<tr>
<td>Continental Shelf</td>
<td>109</td>
</tr>
<tr>
<td>International seabed area</td>
<td>104</td>
</tr>
<tr>
<td>Straits and archipelagos</td>
<td>81</td>
</tr>
<tr>
<td>Marine environment and navigation rights in Coastal zone</td>
<td>68</td>
</tr>
<tr>
<td>Marine Scientific Research</td>
<td>60</td>
</tr>
<tr>
<td>Exclusive Economic Zone</td>
<td>34</td>
</tr>
<tr>
<td>Territorial Sea</td>
<td>16</td>
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That ordering is to a large extent supported by the pattern of major interventions made by Australian delegates in the SBC between 1971-1973,30 although the seabed regime and the marine environment rank higher here. Of the nineteen major interventions in the period six concerned the international seabed area, four concerned the marine environment, three concerned the shelf, three concerned fisheries and one each concerned delimitation, MSR and archipelagos. These priorities were to change very little over the
conference, although obviously more attention was paid to particular issues depending on
the degree of progress being made at a particular time.

Choosing a Strategy

Apart from doing nothing, four levels of action are open to states to achieve their
objectives—unilateral, bilateral, regional and global.31 In that context what were
Australian options prior to UNCLOS 111 to realize its ocean law goals?

With regard to the international seabed Australia had few options apart from global
negotiations. As the government’s position paper pointed out without some authority to
regulate mining there would be a situation where the most technologically advanced
countries would obtain a monopoly of these activities. A free-for-all system would lead
to conflict and confusion.32 If Australia was to make a contribution to preventing that
situation and at the same time ensure some protection for its mining interests, then some
compromise had to be worked out between the mining states and the developing
countries: indeed, Australian policy throughout the SBC had been to work towards that
goal.

On the margin issue Australia had already asserted its legitimacy in existing international
law to the margin. In its off-shore petroleum legislation in 1967-68 and its fisheries
legislation Australia had geared its definition of the shelf to the 1958 Convention on the
Continental Shelf. This had two components; a physical component which referred to the
submarine areas to a depth of 200 metres, and an exploitability component which enabled
the coastal state to extend its jurisdiction beyond that limit where the depth of the
superjacent waters admits of the exploitation of the natural resources of the said areas. In
1970 Australia was asserting that the outer edge of the margin was the limit of coastal
state rights and a reference to the rise as the limits of national jurisdiction appeared in the
1973 Minerals and Petroleum Authority Act. 33 There was no reason that Australia’s
claim could not continued to be asserted in the absence of international negotiations.
However, global negotiations could achieve the backing of the international community
for Australia’s claim, would be useful in opening up linkages with other broad margin
states and of course a global agreement on the limits of coastal state jurisdiction would
settle the limits for the international seabed area, a matter of some priority for Australia.
If a 200 mile limit was accepted Australia would face international pressure to give up
potentially valuable areas of its shelf beyond 200 miles to the international community.
The so-called ‘energy crisis’ of the period also consolidated Australia’s wish to receive
international backing for its margin claim so as to enhance Australia’s prospects of
exclusive access to potential offshore resources.34
On fisheries issues Australia had made efforts at three levels to improve its control over fishing resources: unilaterally, in 1967 in declaring a 12 mile fishing zone to control foreign fishing, bilaterally in negotiations with the Japanese and Taiwanese, and internationally at the 1958 and 1960 UN Law of the Sea conferences. There was the possibility that Australia could extend its fishing zone to 200 miles unilaterally, followed up by bilateral negotiations with the Japanese and Taiwanese. However such action would have created conflict with the countries most affected, Japan and Taiwan. Maritime enforcement issues were also a factor here in militating against the unilateral option. In the early seventies surveillance and maritime enforcement questions emerged as issues on the political agenda. Complaints were made by state Premiers concerning the lack of Federal government control in regulating foreign fishermen in Australian waters. Of most concern here were Indonesian subsistence fishermen operating off North West coast and Taiwanese gathering clams of the Great Barrier Reef. Sightings of foreign fishing boats in territorial waters jumped from 285 in 1973 to 431 in 1974 and there were repeated calls by state Premiers for the Federal government to upgrade its surveillance resources. A unilateral declaration of a 200 mile fishing zone would have added considerably to the political and practical problems of enforcement at that stage and would have involved extensive discussions with the Japanese and Taiwanese in order to avoid some of the surveillance and enforcement problems which the size of the zone would have created. In the earlier 1968 agreement between Australia and Japan, the primary inspection role was given to the Japanese authorities within the new 12 mile fishing zone but allowed Australian authorities to visit Japanese vessels. There was no guarantee that such a solution would have been politically acceptable in a fishery zone of 200 miles.

On the issue of the marine environment we have already seen how Australia had moved in 1970 to extend its control over vessel source pollution beyond the territorial sea to encompass any reef forming part of the shelf of Australia. Within IMCO, Australia was successful in securing the adoption in 1971 of amendments to the 1954 Convention for the Prevention of Pollution of the Sea by Oil which defined ‘nearest land’ for the purposes of the Convention as the outer edge of the Great Barrier Reef. However as noted previously Australia was unsuccessful at the 1973 Marine Pollution conference in having accepted a proposal which would have allowed a coastal state to adopt special measures in areas within its jurisdiction in relation to discharge standards (but which accepted a limitation in relation to ship design not to go beyond international regulations except in waters which had characteristics that rendered the environment exceptionally vulnerable). We have also noted that Australia was unsuccessful at the 1973 conference in securing recognition of the notion of port state enforcement. The failure of IMCO to deal with coastal and port state enforcement powers left these issues to be resolved at the
law of the sea conference. Global negotiations offered the best chance for Australia to advance its broad interest in protecting the marine environment on the one hand (no coastal state restrictions could guarantee protection from actions occurring further out to sea) and on the other hand guarantee to the international community adequate freedom and rights of navigation. Any rights acquired by Australia to control foreign shipping in its waters would also be acquired by about 120 other coastal states in respect of their offshore waters. Global negotiations therefore appeared the best option of ensuring that rights acquired by the coastal state would not result in unreasonable interference with shipping upon which Australia’s overseas trade depended.

With respect to navigation rights through straits and archipelagos we have noted that Australia had come to bilateral arrangements with Indonesia and the Philippines. However, Australia’s interests as a straits user and the interests of its principal ally, the US, appeared to be best met through global action.

If bilateral arrangements proved inadequate in a particular contingency, Australia and (or its allies) would have to force their way through. The use of force has high costs and cannot be resorted to on a routine basis. As the government’s own position paper admitted (in a rather coy manner) there would be ‘political difficulties’ in asserting unilateral passage rights through straits and archipelagos. A stable regime of passage through straits and archipelagos appeared to be best achieved through international negotiations leading to an agreed text. Indeed, as we have already noted the question of straits was one that had led both the US and the USSR to seek a new law of the sea conference in the first place. The straits issue as discussed earlier was linked to the breadth of the territorial sea, with Australia backing a 12 mile limit providing there was satisfactory rights through straits. A unilateral extension here may have compromised Australia’s desire for satisfactory transit right through straits, so a global agreement on the limits issue also appeared the most attractive option.

Australia’s goal of greater coastal state control over MSR could have been undertaken unilaterally. Such action, however, would not necessarily have been without political costs. It may have provoked disputes with marine researching states, particularly the US. Given Australia’s limited capabilities in the MSR field and the size of Australia’s shelf and potential 200 mile zone it seemed likely that for the near future Australian marine research efforts would be conducted with the co-operation of nations who had larger marine science capabilities and more substantial investment in facilities for MSR. For Australia to have unilaterally adopted tighter coastal state controls may have provoked opposition from states that Australia might need to depend on for future research co-operation. Australia also had to consider that at some future time its MSR capabilities
could have expanded and that scientific and economic factors required Australian research access to foreign waters. Thus Australia’s longer term interest in freedom of research had also to be considered. Global negotiations thus offered an avenue to sort out some kind of agreement that would meet Australia’s short and long term interests with respect to MSR.

Professor Nye has argued that ‘the choice of organisational arena has an important effect on setting agendas and influencing outcomes. Actors shop among forums for the power arena that will favour their preferred outcome’. The argument presented here has been that the global level offered Australia the best avenue to achieve its goals, although it also held out the danger that compromise would be necessary and that negotiations may not be concluded quickly. However, Australia had already backed holding a global conference in 1970 so that in a sense Australia had already committed itself to an international approach to its law of the sea goals. Full unilateral claims preceding the conference would have undermined Australia’s credibility as an actor seeking international solutions to global problems. It would have also meant that on issues such as navigation rights and the regime for the seabed where a global approach appeared most important Australia would not have been seen as a committed player.

Australia’s policies pre-UNCLOS were compatible with Canberra giving priority to an international approach to ocean issues. In the event of a failure of the conference to achieve its goals there was some evidence that Australia was contemplating not unilateral action, but some kind of regional agreements on the main issues facing the conference. Whether that option was developed in any detail is not clear but in any event it was through international not regional action that Australia was committed and separate regional arrangements to the extent they were contemplated were a fall-back option. The main question now facing Australia, however, was whether it would be able to go into UNCLOS 111 and successfully negotiate those policy objectives outlined earlier. It is to a detailed history of Australia’s diplomatic activities at UNCLOS 111 that we now turn.
This chapter analyses Australian diplomacy at the first two substantive sessions of UNCLOS 111. Australia's law of the sea diplomacy was largely played out with its coastal state allies, although at times Australia found it difficult to reconcile all its positions with the Coastal States group. Australia did, however, adopt a flexible approach in choosing its negotiating partners on specific issues, a feature that was to characterise Australian diplomacy throughout the conference. In Committee Two, for example, where coastal issues were at stake Australia focussed its diplomatic activity within the Margineers group. In Committee One where the issue of the deep seabed mining regime became highly politicised Australia avoided taking sides in the conflict between G77 and the developed states. Australia's position here, while generally closer to the developing countries, was overall one of seeking to encourage compromise on the issue. On Committee Three issues, where Australia had taken a reasonably high profile in the SBC days, the delegation continued to adopt a strong coastal oriented view. Australia's position on marine scientific research (MSR) was similar to that of G77 and tended to place more emphasis on coastal interests rather than encouraging MSR.

Australia's diplomacy in the early years was to exhibit the same characteristics that dominated Australia's role throughout the conference; flexibility and a willingness to work with states having similar marine attributes and ocean interests regardless of whether such states were traditional allies, a willingness to act as a conciliator and mediator and an overall commitment to defend the integrity of the package-deal approach to the negotiations. Australia's positions in the early years did not change markedly from the SBC period, although by Geneva the delegation was beginning to spend more time on seeking compromise positions (particularly on Committee One issues) rather than working to build support for the concept of wider coastal state powers. This strategy seemed reasonable given the acceptance at the conference of the concept of wider coastal state powers. The United States, the United Kingdom and the Soviet Union had by 1974 all accepted the concept of the 200 mile zone. No significant policy shifts occurred in Australia's position from the second to the third Geneva sessions, although there was some adjustment to policy relating to MSR. On navigational issues generally Australia continued its strategy from the SBC of leaving the maritime powers to make the running directly with the strait states and archipelagic states.
By the end of the Geneva session Australia was faring well in the negotiations and the broad framework of the conference settlement was set. The package included a 12 mile territorial sea, a 200-mile economic zone, an article providing unimpeded transit through international straits and perhaps most important in terms of Australian priorities, coastal state jurisdiction over the margin beyond 200 miles. On lower priority issues such as delimitation and islands the texts contained positions favourable to Australia.

Overall the first three sessions demonstrated that Australia placed great importance on a multilateral solution to ocean issues and that it would fight hard on those issues such as the margin and the marine environment which it regarded as important. On the other hand, Australia also demonstrated that it was willing to play the role of a conciliator and mediator to achieve compromises where it felt that disputes looked likely to stalemate the negotiations. The fact that Australian negotiators had clearly worked out conference objectives, and were well prepared on the full range of ocean issues at the conference greatly assisted the delegation’s task in establishing its early reputation as one of the influential players at the conference. It was a reputation that the delegation were able to consolidate during later sessions of the conference.

First Session: New York. 3-15 December 1973

The first session of UNCLOS 111 was convened to settle procedural aspects of the conference. It agreed to establish three main committees with the same mandate as the three sub-committees of the SBC, a General Committee, a Drafting Committee and a Credentials Committee. Australia was represented by a small delegation at the session. Australian objectives at the session were basically to seek a seat on the drafting committee and a rapporteurship. Most states expected the General Committee and the Drafting Committees to play critical roles at the conference and fought hard to ensure membership. Canada fought vigorously to win the chairmanship of the Drafting Committee for its deputy head of delegation, leaving Australia with the difficult position of choosing to fight for the chair or to relinquish its claim to participate in the Drafting Committee. In the end Australia’s Ralph Harry was defeated in a ballot (81 to 54) in the conference for the Chairmanship of the Drafting Committee by Canada’s Alan Beesley. The Australian delegate Mott was elected Rapporteur of the first committee by acclamation, thus giving Australia a full seat on the General Committee.

The session while settling such issues as the election of officers, agenda and the allocation of work did not settle the rules of procedure, including the all-important and controversial rules relating to decision-making. Australia played an active part in the negotiations here but in the end it was decided that the rules of procedure should be
adopted by voting no later than 27 June 1974 i.e. one week after the opening of the second session at Caracas and 31 January 1974 should be set aside as the time limit for submission of any further amendments to the rules.\(^\text{10}\) (The conference adopted its rules of procedure at Caracas on 27 June 1974.) Australia argued that permanent members of the Security Council should not have automatic seats on both the General Committee and the Drafting Committee and that the principle should be 'one country-one seat'.\(^\text{11}\) In the event the USSR was elected on an East European ticket for both the General Committee and the Drafting Committee.\(^\text{12}\) The US, however, was included in a 'package deal' on the seats in the West European and Others (WEO) category and though it was not nominated by the WEO group it submitted to a ballot for Vice-Presidencies as there were more candidates in the WEO Group than there were Vice-Presidencies allocated to this category.\(^\text{13}\) The US was elected unopposed as a member of the Drafting Committee.\(^\text{14}\) These disputes were in the end rather futile since UNCLOS diplomacy took place in the three main committees and the committee chairman were to be the key players in the drafting process.\(^\text{15}\)

**Second Session: Caracas. 20 June—29 August 1974**

At the first substantive session of the conference in Caracas\(^\text{16}\), Australia demonstrated its commitment to the negotiations by sending a delegation of 20 (there were also five delegates on the delegation representing Papua New Guinea), one of the larger delegations at the session representing a range of bureaucratic interests.\(^\text{17}\) The importance of the conference to Australia was demonstrated by the fact that the delegation was led by the Australian Foreign Minister, Senator D.R. Willesee. The conference had been preceded by six preparatory sessions over three years, and there were literally hundreds of draft proposals before it. After a ten week session the conference, not surprisingly, found it necessary to request the General Assembly to schedule a third session at Geneva in 1975. Australian diplomacy at Caracas was to focus first on the Coastal States group in order to build support for Australia's objectives until that group exhausted itself in an effort to get its paper on the table mid-way through the session (see below).

**Committee One**

Australia's position at Caracas on seabed mining was to elaborate the views presented in the SBC, in particular the views incorporated in the proposal submitted to the sixth session of the SBC.\(^\text{18}\) Australia argued that its interests would be best served by a treaty which established and maintained a strict balance of powers between the Assembly, Council and Operating Arm and where each organ was provided with the powers relating
to their functional responsibilities. The operating arm would have wide powers relating to the exploration of the area and the exploitation of its resources but would have considerable flexibility in determining which form of operation should be utilized.

The major issues on SBM were a continuation of those raised in the SBC and proved again to be politically volatile—who may exploit the area, under what terms and conditions and what would be the economic implications of seabed mining. Australian delegates continued to emphasize the importance of encouraging nodule mining, stressing that the machinery must be able to exploit the seabed 'for the benefit of mankind as a whole'. Australia maintained its policy articulated in the latter years of the SBC that the agency 'should not merely be a regulatory or licensing authority but should be empowered to enter into other contractual arrangements with other states and also undertake exploration and exploitation on its own behalf when it accumulated the necessary resources and experience'. The agency would also give 'preference to the developing countries in distributing benefits derived from production in the international area'.

Australian delegates justified support for international machinery with direct exploitation powers firstly on the basis of Australia's interests as a land based producer of metals that would be mined on the seabed and secondly on the basis of a commitment to a law of the sea Convention that could be threatened if a satisfactory compromise was not reached on the deep seabed regime. The Australian delegate Loomes argued that one of the guidelines that should be institutionalized in any international regime was to ensure an appropriate flow of seabed commodities having regard to the need to provide a reasonable return for land based producers. In this context he argued that one of the tasks of the conference was to include in any international machinery an organ which would be responsible for surveillance of the economic implications of seabed production to consumers and producers. He went on to suggest the establishment of a Commission composed of experts representing the interests of consumers and producers of the minerals to be exploited from the deep seabed with powers to recommend to the Council measures appropriate to deal with any adverse implications which may occur as a result of deep seabed exploitation.

Australia's position was closer to G77 than the developed states (that excluded the Authority itself as a potential operator) since it was Australian policy to seek establishment of an Authority with wide powers of control over exploration and exploitation over the area. The role of the 'good guy' on side with developing states was assisted here by the fact that deep seabed mining appeared to be an activity that would arise well into the future. Australia's position, however, did not go as far as G77 in one
respect. Australia qualified the Authority’s power to the extent that Australia felt that the Authority should only exercise such powers when it had the technical and financial capacity from its own income to do so.26 This qualification was not stated in the G77 text but it appeared that the G77 recognized that the Authority would not have the capacity to undertake these activities itself in the early stages. It was for that reason that the G77 text was sufficiently flexible as to allow the Authority to enter into contractual arrangements with groups to undertake these activities.27 While Australia maintained that the main terms and conditions of exploration and exploitation should be established in the Convention, Australian delegates appeared open-minded on the question of how precisely these needed to be detailed in the Convention.28 The US and other developed states, on the one hand, were advancing almost a mining code, whilst the G77 wanted more general criteria under which activities in the international area might be carried out.29

On the question of controlling the rate of seabed exploitation, Australian delegates were unwilling to commit themselves, apart from supporting the notion that any form of international regulation of seabed mining must be sufficiently flexible to adapt itself and its methods and objectives to a changing economic order and that there was little point in specifying precise measures to deal with problems which may arise in the future.30 This position did not go as far as the developing countries that presented a solid front in expressing the view that the Authority should have the power to control production, a position they linked to the expanding North-South debate on the ‘New International Economic Order’. The developed states, on the other hand, believed that seabed minerals would not disrupt suppliers of land based sources as seabed production would represent a small addition to land based production and that seabed production controls would inhibit mining, a view that was in part shaped by the impact of the OPEC oil embargo.31

Overall Australia’s position on DSBM at Caracas was closer to G77 than the developed states. In particular the support for the establishment of an operating arm with wide powers had distinct advantages to Australia not only as a land based metal producer but also because support held out the promise of distinct tactical advantages within the conference for Australia to gain support for its shelf policy.32

Australia played an active role in Committee One at Caracas33 but it was clear by the end of the Caracas session that too strong support for G77 positions was risky if it was pushed too hard, for there was always the danger of unilateral mining outside the proposed Convention.34 There was a reasonable expectation therefore that Australia would not adopt positions in Committee One that could possibly alienate the developed states from joining an eventual Convention, although as Australia was not one of the
major contenders on the issue it did not appear that circumstances would allow the delegation to take a high profile.

Committee Two

In Committee Two Australian delegates were most active on the shelf issue and attempted to build on the work done by Australia during the SBC years. Australia continued to press its claim to the sovereign rights to the outer edge of the margin. Just prior to the opening of Caracas Australian alternative delegation leader Ralph Harry signalled Australia’s hard line on the shelf by stating that ‘the continental margin is our own real estate and something we cannot be forced to give away’.

The Foreign Minister made it clear at Caracas that Australia’s position was not only to argue that a new Convention must reaffirm the title of coastal states to their resources in their continental margins but that the shelf could be defined in terms of the outer edge of the margin and to link this position to the economic zone. Australia’s claim, therefore, was to sovereign rights over seabed resources to 200 miles and to the outer edge of the margin where this extended beyond 200 miles. Australian alternate leader Harry explained that ‘we cannot refashion nature’ and that the ‘submerged land mass of certain states extends and has always extended beyond 200 miles’. Harry made it clear that Australia stuck firmly to its expansive margin claim by pointing out there was no problems in demarcating the outer edge of the margin and underlined the fact by pointing to a survey that had successfully plotted the outer edge of the Australian margin.

In the Coastal States group, Australia and Argentina tried unsuccessfully to have incorporated in the article on the shelf in the Coastal States paper a specific reference to the margin. Australia felt that the formula which eventually emerged in the Coastal States paper referring to the continental shelf ‘extending through the natural prolongation of its land territory’ was possibly open to the interpretation that it extended only to the 200 metre isobath. As a result of the omission of a reference to the margin Australia was not able to co-sponsor the Coastal States paper. Australia was active in trying to gather support for the margin concept and encouraging new supporters. Australia’s Ralph Harry appealed to the greed of some wide shelf states by pointing out that there was a considerable number of broad margin states which had not declared a position in favour of the margin ‘but which in the maturing awareness of the potential of their continental shelves, might see in such exercise the solution of many problems of development’.

While Australian Foreign Minister Willesee seemed cautious after the Caracas session on whether the conference would accept Australia’s margin claim there were good
grounds for optimism, despite strong opposition from countries still advocating a flat 200 mile limit. As Buzan points out, despite the fact there were twenty three states specifically opposed to the claim:

the margin states were in a strong position by the end of the Caracas session. Their numbers and their unilateral option ensured them a large voice in the final settlement, provided that compromises could be worked out on sharing and that some of the opposition could be set to rest by agreement on a precise definition for determining the outer edge of the margin.47

According to the Australian delegation report forty-five countries could be relied on to vote in favour of a position that would have the effect of preserving Australia’s position on rights to the margin,48 but even if one added those broad shelf states still to declare a view, there was still no guarantee that Australia’s position could be assured of being incorporated by consensus or in the event of a vote by a two thirds majority of positive votes, including an absolute majority of participants in the conference. Buzan’s rider that the margin claim would be accepted providing there was some compromise on sharing revenue with the international community beyond 200 miles also left Australia with some difficult choices. Already a number of developing countries favoured some sort of sharing arrangement and the US draft articles on the economic zone contained a provision on revenue sharing.49 It remained unclear at the end of Caracas whether Australia would show any flexibility on the issue, despite the occasional sign that some concession might be required on the Australian side.50

On issues relating to the territorial sea and straits Australia, as on many other issues through the conference, took a low profile. On the question of the territorial sea, a majority of states, including Australia, favoured a 12 mile limit, maintaining its policy developed in the Seabed Committee of tying this to an acceptance of a 200 mile Exclusive Economic Zone.51

On the straits issue, Australian delegates took a ‘back seat’ with the Foreign Minister simply asserting without elaboration that the conference would have to define a regime for straits.52 Debate ranged from the restrictive view that favoured the concept of innocent passage through the territorial sea wherever it occurred through to more moderate views that would provide assured surface transit but authorisation for warships. At the other extreme was the view of the superpowers that there should be a separate regime of passage through and over straits but the right would be assured for all categories of ships, aircraft and submarines without notification.53
Australia’s ‘back seat’ role was based on the strategy that if the archipelago issue could be resolved satisfactorily there was no need for Australia to take an active position on the straits issue. If a compromise solution satisfactory to at least Papua New Guinea and Indonesia on archipelagic transit was reached, Australia would take an independent position on straits that would take account of the need for freedom of communication and in particular the US need for military deployments. If a satisfactory compromise was not seen as available, Australia’s position was then to support a principle that would give archipelagic waters outside designated sea lanes the status of international waters. The basis of the concession here would be that in return for providing unimpeded passage along sealanes, thus giving sealanes virtually high seas status, the balance would be restored by according the remainder of archipelagic waters the status of internal waters. Australia correctly assessed that in developing a position on the issue it would have to recognize that the straits issue was a sticking point for the major powers and that if there was to be a Convention to which they would subscribe it would need to contain realistic passage rights through international straits.

On the archipelagic issue Australian Foreign Minister Willesee underscored the thrust of the new Labor government’s efforts to focus on regional relations by observing that several of Australia’s neighbours were archipelagic states and were seeking a special status for the waters within the compass of their islands. Australia was ‘confident’ that this would be achieved but with the proviso that there were defined rights of navigation along designated sea lanes. During the Caracas session the most significant progress towards the development of the archipelagic concept was made in negotiations outside the conference, (where Australia played a low-key mediating role) rather than in formal debate.

Australia’s policy at Caracas of trying to encourage the maritime powers to press for only minimum rights of passage consistent with their needs was predicated on the assumption that such provisions would meet Australia’s defence requirements. But by the end of the session it still appeared that Australia had not thought through a position on the important emerging issues of submerged transit and overflight rights over archipelagos, and it also remained uncertain whether Australia would succeed in its efforts to separate the straits issue from the archipelago issue by satisfying the archipelagic states. The Caracas session had demonstrated that there was still was opposition to the concept not only from the maritime powers concerned about the effects on military deployments and maritime traffic but also from states which saw an acceptance of the concept as reducing the common heritage area. Caracas had demonstrated, however, that the Australian delegation would not take a high profile on issues relating to straits and archipelagos.
On the economic zone Australia worked with the Coastal States group to draft articles reflecting Australia’s position on the EEZ. In a lengthy intervention the Australian delegate Harry summarized Australia’s priorities on the EEZ. He made it clear that Australia’s main concerns were that the zone in no way compromised Australia’s margin policy and preserved rights of navigation and overflight.61

Harry went on to support the Coastal States paper on the EEZ as fulfilling these goals and specifically made the point that the articles did not ‘prejudice the rights of a coastal state over the natural resources of its continental margin’.62 As noted above the EEZ articles in the Coastal States paper were satisfactory from Australia’s viewpoint and in no way compromised Australia’s margin claim but Australia did not, however, for reasons noted above, sponsor the paper. At Caracas Australia could take some comfort from the fact that the US, US and UK all publicly supported the EEZ concept for the first time.64 The overall trend at Caracas was clearly for overall support for the EEZ concept.65 In Australia’s major statement on the EEZ it was unclear, however, whether Australia supported the notion that all residual rights i.e. rights not specifically granted to the coastal state, should remain with the international community as favoured by the maritime powers or with other states.66 It would be necessary, therefore, for Australia to consider whether to support the emerging trend in favour of residual rights for the coastal state, with the danger that this could erode high seas rights in the EEZ, or whether to support the maritime powers in insisting that the international community should have the residual rights in respect of the legitimate uses of the sea. The other alternative, of course, was to seek some kind of formulation of residual rights compatible with adequate coastal state rights, a path that seemed to be foreshadowed in Australia’s major EEZ intervention at Caracas.67

On fisheries issue Australia continued to promote the approach it had adopted in the Australia/New Zealand working paper of 1972 but overall fisheries issues took second place to Australia’s efforts to maintain rights over the shelf. Nevertheless the broad trend at Caracas in fisheries was a shift to the Australian approach.69

With New Zealand, Australia tabled a proposal on highly migratory species that provided first that the coastal states’ fishermen had priority catching rights within the zone, second that foreign vessels had access only to surpluses and third that an international or regional body be established to manage the species and determine the catch.70 The second principle was important for both countries. As the delegation report admitted ‘the local fisheries for highly migratory species are essentially coastal in nature, and would be disadvantaged in the face of competition from long range fleets’.71 The Australia/New Zealand paper was tabled partly in reaction against the other proposal on the subject in the
US paper which gave no recognition of coastal rights. Under the USA proposal the 'coastal state would have no special rights over such species when they entered the economic zone. Foreign fishing vessels could operate within the zone in exactly the same manner as the high seas'. The issue of control over highly migratory species, primarily tuna, was to assume greater importance in the context of Australia's UNCLOS diplomacy, mainly because of the interest of the South Pacific states in developing their tuna resources. The Australia/New Zealand paper, however, was introduced at the end of the session so there was no opportunity to test reaction at Caracas. At the conclusion of the session Australia was confident its approach to fisheries would be successful but was also realistic in recognizing that 'many developing countries sought absolute sovereignty over fisheries resources, to the exclusion of all other states'. This was an accurate assessment, for as Gosselin points out, by the end of the second session there were 'numerous' coastal states still determined to avoid a duty to permit foreign access in the 200 mile zone.

On lower priority issues for the delegation the regime of islands issue debate revealed that the issue would be difficult to resolve. While Australia's position was that all islands generate their own territorial sea and have their own margin (and to stress that this was supported by customary and conventional international law), the delegation was instructed to adopt a flexible approach on whether all islands irrespective of size and population should generate a full economic zone. However, Australia did not take an active role on the islands issue for tactical reasons. Australia considered public support for the principle that islands should generate their own economic zone could possibly prejudice Australia's basic continental shelf position in regard to the mainland, focussing attention on large areas of major Australian offshore islands e.g. Norfolk, Lord Howe, Coral Sea Islands and McDonald. Thus for tactical reasons Australia did not publicly endorse the concept that islands should generate a full economic zone. Australia, however, had to bear in mind the interests of South Pacific neighbours with respect to the generation of full marine rights of islands, not only because those countries were pressing such rights but also because Australia was seeking their support for its margin policy.

Committee Three

In Committee Three the area in which the coastal state could exercise pollution control in relation to foreign vessels and the nature of such controls were crucial questions. The adoption of the EEZ concept would give wide powers to coastal states to control resources and the possibility of coastal states obtaining environmental powers in the zone generated fears on the part of the maritime powers that the coastal states might achieve
jurisdiction that would creep outwards until it became tantamount to an extension of the territorial sea to 200 miles.

Australia took the initiative early at Caracas in calling a meeting of the group that had tabled the zonal approach paper at the sixth SBC session. It was decided to propose a new set of draft articles which would refer to the rights and duties of states under a zonal approach to the marine environment. The paper was introduced by Canada, Fiji, Ghana, Guyana, Iceland, India, Iran, New Zealand, the Philippines and Spain. Australia did not co-sponsor the ten national draft for two main reasons. First there were difficulties with article 3(2) relating to 'damage'. The difficulty with accepting a draft including a reference only to 'damage' and not to 'hazard' derived from Australia’s case against France in the International Court of Justice where Australia argued that creation of a hazard was actionable in itself and that it was not essential to prove actual damage. Australia also felt that the broad concept of environmental law should include prevention of injury to the marine environment. Australia also had difficulties with the 'special areas' provision in the ten nation paper. Australia's position as elaborated at Caracas was similar to its SBC position. While Australia supported a position that the coastal state may declare an area to be specially sensitive and lay down supplementary regulations for ships in such areas 'such unilateral action must be reasonable in the circumstances, with appeal to machinery for the settlement of disputes'. In that sense the Canadian approach (that would allow coastal states to regulate ship design and construction in specified cases) and also the special areas provision in the ten nation draft lacked, in Australia’s view, the necessary balance to guarantee adequate protection to the coastal state while at the same time attracting sufficient support from the maritime state to have a reasonable prospect of success at the conference. In particular Australia agreed with maritime states that special measures should not require foreign ships to observe design, construction, manning or equipment standards which differ from generally accepted international rules. Thus while the delegation’s overall position was to support coastal states rights it was also mindful of Australia’s overall dependence on shipping.

An issue at Caracas that ‘transcended’ all others in the debate on the marine environment was the demand by many developing countries for a ‘double-standard’. As explained by two analysts:

Developed states, it was argued, had caused the environmental crisis and even now maintained a high standard of living at the environment’s expense. Why then should the less developed states be burdened with costs of pollution which they had not caused and which would hinder their present development.
The ten nation draft incorporated the double standard and there was intense reaction by the maritime states (including the US, UK, Japan and most European states) that argued that as well as undermining the competitive advantage of their own industries it would militate against the developed states accepting higher international standards in the future since they would be imposing a further disadvantage. Environmentalists also condemned the approach as disastrous as it seemed to leave environmental measures to be taken solely according to national self interest.

Australia's position here was that, in principle, the obligation to protect the environment should apply equally to all countries but that it had to be recognized that the economic capacity of some developing countries to meet the obligation could be limited. Therefore an article which recognized the varied capabilities of countries with respect to the prevention, reduction and control of the marine environment could be supported but that in certain areas such as standards for ships in international transit agreed standards for ships should apply. It was also felt that the principle could only be accepted if there was some provision that would impose the same obligation on all states to take all necessary measures to ensure that activities under their jurisdiction did not cause damage to areas beyond their national jurisdiction.

Australia's position of support for an article which recognized varied capabilities of countries was not in fact a significant concession to the developing countries because at that stage no specific exceptions had been agreed. In this context the point raised by some developing countries that their shipping and shipbuilding industries would be adversely affected if they had to meet the same standards as developed maritime states was relevant. Brazil and others suggested that international standards should be maximum, not minimum and that maximum should take account of the capabilities of developing countries. Australia was opposed to escape clauses enabling developing countries to observe lower standards than internationally agreed in respect of vessel source pollution. Not only would this give a major economic preference to developing countries in a non-tariff area and aggravate the flag of convenience problem in world shipping but these problems could, Australia believed, be exacerbated if, at the same time, the coastal state had no right to enforce stricter standards in its economic zone.

On issues of enforcement the Australian delegate, Petherbridge, referred to the zonal approach to the preservation of the marine environment and argued for broad coastal state powers against those maritime states that still opposed any change to the traditional law of flag state enforcement. States should, argued Petherbridge, be empowered to exercise effective anti-pollution control over ships in a broad zone contiguous to their territorial sea. Petherbridge seemed anxious to placate any fears on the part of the
maritime powers by pointing out that such actions had to be taken without interfering with shipping and that the coastal state should not exercise unfettered enforcement powers: 'My delegation...represents a country which is a major user of world shipping...the consequences of capricious or unreasonable action could be at least a rise in freight rates and even, perhaps suspension of shipping services. No responsible state is wilfully going to run such risks.'

Australia believed that for effective control of vessel source pollution:

> the fullest co-operation between shipping and coastal interests was essential. The total environment would be best protected if shipping was subject to internationally agreed regulations between all interested parties which flag states were obliged to enforce on their own vessels. But, in addition, coastal states must remain able to protect their own environment, including that of the economic zone for which they are responsible and must therefore be able to enforce the internationally agreed regulations. Considerations of time, evidence and distance make local enforcement essential.

However, Australia was insistent that the coastal state must be able to take extra measures in setting standards beyond those established at the international level. Petherbridge pointed out that existing international regulations were not always adequate to protect the marine environment. Amendment procedures could be slow at the international level so that the coastal state may be forced to act on its own. The final Convention must, Petherbridge stated, provide for that. As noted above, however, Australia insisted that such unilateral action must be reasonable in the circumstances and its reasonableness should be appealable to disputes settlement machinery. The issue of the right of the coastal state to take special measures was to occupy Australian delegates in the third committee for the next three sessions.

By the end of Caracas the enforcement issue remained uncertain with an enormous range of proposals on the table with varying provisions relating to inspection, prosecution, control of passage and arrest, flag, coastal and port state enforcement rights. There seemed little reason to suppose that Australia would not seek to achieve wide coastal state enforcement powers in accordance with its pre-conference position.

Australia's position on marine environmental issues had not altered greatly from the SBC position but what was clear from debate at Caracas was that a number of issues were emerging in the conference that required detailed consideration by Australia. Such questions as 'special areas' and whether they should be determined by international agreement or unilaterally, the nature and extent of state rights in the economic zone (including the extent to which a coastal state may make and enforce laws on ship pollution additional to those provided in international Conventions), and questions of
enforcement and liability were all matters that were still to be dealt with by the conference.

In contrast to the marine environment Australia did not take on an active role on the MSR issue\textsuperscript{102} where discussion ranged from the definition of scientific research, general principles and the right to conduct MSR. Australia stressed that MSR must be as free as possible although coastal states had to ensure that interests of the environment were not damaged by unregulated activities, in particular research activities which were in essence exploration for commercial advantage.\textsuperscript{103} Only a few delegations referred to the general principles for the conduct of MSR, as apparently they were considered self evident.\textsuperscript{104} On the question of consent by coastal states to MSR there were four basic approaches at Caracas—an absolute consent regime, a qualified consent regime (consent would have to be obtained, but would not normally be withheld if certain internationally agreed conditions were met), a notification regime (consent would not be required just notification given by those conducting research) and a partial consent regime (resource research would require consent, all other research would be free).\textsuperscript{105}

Australia’s pre-conference position was closest to that of a qualified consent regime, and there was no attempt to elaborate that position further at Caracas.\textsuperscript{106} Compared with issues such as the shelf and the marine environment the MSR issue did not appear to have occupied the delegation at Caracas and there was little indication that it would receive a high priority in Australia’s overall approach to conference goals. The Third Committee did not take up the issue of transfer of marine technology in its informal meetings, although Australia as an ‘importer of technology’ welcomed the introduction of a text submitted by a group of developing countries at the end of the session.\textsuperscript{107}

Disputes Settlement

On dispute settlement Australia’s Ralph Harry co-chaired with Dr Reynoldo Pohl of El Salvador an informal working group of about thirty states on this issue that met eight times and focussed on a number of themes concerning dispute settlement.\textsuperscript{108} Australia co-sponsored the working paper on the issue to enable delegations to consider various issues before the next session.\textsuperscript{109}

Conference Diplomacy and Concluding Remarks

At Caracas Australia worked closely with the Coastal States Group,\textsuperscript{110} which because of its mixed membership of developed and developing countries and because of Australia’s close association with the group from 1972, seemed to offer the best promise as a vehicle
for Australia's policies. Mid-way through the session, however, the group exhausted itself in an effort to get its paper tabled and it fell into disuse for the remainder of the time. Only nine members of the group were in the end willing to sponsor the paper. The split in the group was not just tactical but also appeared to involve internal contradictions relating to whether retention of the entire margin should be part of the group's goals. In general there were countries such as Indonesia, New Zealand and Norway that did not place the shelf at the top of their priorities and were unwilling to risk a hard line on the margin for fear of damaging their interests. The second group included Australia, Argentina and Canada that placed the shelf near the top of their priorities.

With these difficulties in the Coastal States Group Australia turned its attention later in the session to Committee One, as an arena where Australia could coordinate policy among G77 in order to build support from G77 for Australian objectives in Committee Two. Australia also participated in the informal Evensen group (where Australia was able to have its fisheries articles inserted as a central variant in Evensen draft articles on fisheries) and had discussions with the 11 other Antarctic Treaty Consultative parties on problems of delineation between the international seabed area and Antarctica. Australia was concerned that there was a possibility that claims may be made at Caracas that the southern boundary of the international Authority was the low water mark of the Antarctic continent. There was agreement that the twelve Consultative parties should try and reach agreement with the main option being the 60th parallel or outer limit of national jurisdiction as defined by the conference.

The Caracas session demonstrated clearly that Australia would have to operate with other groupings to achieve its goals and that despite problems experienced by the Coastal States Group, it was that group (if it could revive at the next session), that still seemed the best vehicle to achieve compromise positions favourable to Australia's goals. On issues relating to seabed mining, the EEZ, fisheries, and archipelagos Australia took a mediating role and appeared to adopt positions whereby it was careful not to get itself in a position where it could give offence to its coastal state allies. This meant that on questions on straits and archipelagos Australia seemed careful not to identify itself with the maritime powers. Australia was also careful to acknowledge the importance of the interests of the landlocked and geographically disadvantaged states that proved to be a unified group at Caracas, particularly in opposing Australia's margin policy. Australia's position in Committee One seemed very much tuned to the group's demands for a strong international control over the common heritage of mankind, although generally Australia's coastal state interests and wide margin claim put it at odds with the interests of the group. All of this of course required the most complex management of diplomatic
activity, and it is argued later that the delegation was successful in dealing with the difficulties.

Australia's basic policy positions enunciated prior to Caracas underwent no fundamental change and the 'Main Trends' Working Paper issued at the end of the session (which incorporated proposals receiving more than minimal support) held the outline of a Convention that appeared to be broadly favourable to Australia's policy goals as outlined before the conference. In that sense the Minister's comments on his return from Caracas that it was 'heartening' to witness the progress made seemed a reasonable assessment. As the Minister frankly admitted there was now a 'general agreement' on the 200 mile zone and Australia, as a country with a long coastline, would therefore be a fortunate beneficiary of the conference.

Third Session: Geneva. 17 March—9 May 1975

Delegates at Caracas recommended to the General Assembly that a further eight week session be held in Geneva in Spring 1975. At the Geneva session the Chairmen of the three main committees were instructed by the conference to prepare a single negotiating text (SNT) covering the subjects entrusted to his committee. Mid-way through the session the conference President concluded that the session was simply producing a stalemate of set positions and that because negotiations were now operating in several informal consultative groups the conference now had to prepare a single text as the basis of negotiation. As the conference had reached a stalemate among entrenched groups it was decided that by giving the initiative in formulating compromises to the Chairmen that this would overcome the unwillingness of delegates to abandon their own set positions. The Informal Single Negotiating Text, SNT's, (released at the very end of the session) were seen as the basis for negotiating at the fourth session. The texts still left a host of issues unresolved—the terms and conditions to exploit the deep seabed, the balance of rights and duties in the EEZ and dispute settlement but progress was made on straits and archipelagos. From Australia's viewpoint the Geneva session was favourable as the content of the informal texts were in broad harmony with Australian positions.

Committee One

Progress in Committee One was slow at Geneva because radical states within G77 refused to make any concessions to the developed countries on the conditions of exploitation and machinery that would govern mining. With few formal meetings of the Committee there appeared no substantive changes changes in Australia's position. Australia's main concern appeared to be a desire to avoid a situation where articles on
deep seabed mining were unacceptable to the mining states such as the US, USSR, West Germany and Japan which might endanger the achievement of a total package. Australia continued to support a strong and viable authority with machinery with maximum flexibility and justified its particular interest in the issue by reference to Australia's rich mineral production. Australia's firm commitment to a strong Authority was elaborated by Foreign Minister Willesee.

Australia's position was to essentially support the middle ground view of the chairman of the Working Group on Basic Conditions of Exploitation who introduced a personal draft that focussed primarily on basic contractual joint ventures, including reservation of areas for exploitation by states and direct exploitation by the Authority. That proposal was, however, rejected by G77 which felt those draft articles that would require the Authority to provide access to the area at the request of any state and the reservation of areas for private firms represented a derogation of power of the Authority to control all activities in the international area.

In what was the most detailed Australian elaboration of its position on the machinery for seabed mining the Australian delegate Lauterpacht put Australia in the middle ground between the developing countries arguing for the dominance of the Assembly (where the developing countries views would prevail) and the developed states who argued for dominance of the Council with mining countries having most influence. The resulting SNT on the powers and functions of the Council and Assembly appeared to accommodate the points elaborated by Lauterpacht, although in terms of the composition of the Council it ignored the interests of Australia as a land based exporter of minerals which may be derived from the area. From Australia's viewpoint as a minerals producer the economic commission which would maintain continuous surveillance on the effects of seabed mining on land based mineral producers was regarded as the most important commission to be established by the Council, and Australia's objective appeared to be partly attained here when the SNT appeared at the end of the session.

Within the framework of seeking compromise solutions on the deep seabed issue, Australian representatives discussed the merits of particular forms of joint venture operations and emphasized the need for adequate dispute settlement procedures in any final regime. Australia's commitment to a regime that would be negotiated as a compromise was evident in its strong opposition to a notice of unilateral action taken by American mining interests to claim exclusive rights to exploit 60,000 square kilometres of seabed in the Pacific over a period of 30 years after which the area would be reduced to 30,000 square miles for an indefinite period. The Australian Foreign Minister said in
Committee One that this was a development which caused Australia ‘concern’. As the Minister explained:

The company was clearly intending to establish for its own benefit a kind of priority right vis-a-vis the future international Authority and anyone who might wish to exploit that sector before the Authority’s rights were duly recognized...The principle of freedom of the high seas did not permit companies of any nationality to claim exclusive rights over the resources of the high seas, its seabed or subsoil. Use was permitted; appropriation was not.139

Committee One negotiations were by no means free of conflict as the G77 increased their representation on the working group of Committee One and adopted a more vigorous strategy of linking the seabed issue with demands for a ‘new economic order’.140 In fact, the section in the Geneva SNT dealing with the seabed regime contained provisions that went strongly in the G77 direction.141 Given that the SNT provisions dealing with access to the area and its resources were therefore likely to prove unacceptable to the mining states it seemed probable that at the next session Australia would have to devote greater effort to find articles acceptable to the developed states in order that an overall convention could be secured.142

Committee Two

In committee two the shelf issue continued as the number one priority for the delegation. The main activity here was in the Evensen group, where Australia was a member.143 At the same time Australian delegates also participated in a small informal working group on shelf issues.144 The main issues discussed related to revenue sharing in the area beyond 200 miles and defining precisely the outer edge of the margin.145 The US, which had supported the idea of jurisdiction coupled with revenue sharing beyond 200 miles or the 200 metre isobath, whichever was further, indicated that it could go along with applying revenue sharing only in the area of the margin beyond 200 miles and suggested an illustrative schedule.146 Canada also revived the idea of revenue sharing (from its support early in the days of the SBC) as a compromise between the margin and 200 mile limit positions147 and the text was included in the Evensen group’s draft on the shelf and found its way into the SNT at the end of the session.148 Australia’s position was to fight, largely unsuccessfully, against this trend. The delegation took a hard line against revenue sharing ideas at Geneva for reasons of principle and unworkability as well as a fear of economic disadvantage to Australia, but the principal thrust of Harry’s remarks that the concept was an attack on state sovereignty ignored the political fact that other broad shelf states were choosing to assert their sovereignty by opting to support the revenue sharing concept.149
As noted above the revenue sharing idea found its way into the Geneva SNT, and it was unclear whether Australia would continue to maintain the vociferous opposition that was evident in Harry’s intervention. Such opposition ran the risk of upsetting what was, from Australia’s point of view a favourable definition of the margin in the SNT (see below). There seemed little chance, however, based on the strength of Harry’s intervention that Australia would abandon its opposition and positively embrace revenue sharing, so that the main issue seemed a tactical matter of how the delegation would play the question at future sessions.

On the question of delineating the outer edge of the margin a small group of margin states including Australia, was convened by Canada to discuss the definition. Australia took an independent line amongst the broad margin states here by arguing that devising such a definition was not necessary. Australia explained that the law relating to the continental shelf was too well established to have significant doubt cast upon it now. The Australian delegate, Brennan, explained that there was therefore nothing ‘novel’ or ‘uncertain’ about the proposition that the shelf was the seaward prolongation of the continental land mass territory and that the function of the law had been to acknowledge those rights. Brennan did however recognise that political reality demanded some independent review of a coastal states delineation of the margin.

However, the thrust of Brennan’s intervention that Australia did not support the inclusion of a detailed definition was not really tenable. Despite Brennan’s claim that the non-inclusion of a formula on the limits issue did not mean that this necessarily amount to a device for coastal states to expand their shelf claims, that approach was not politically ‘saleable’ at Geneva. As Buzan and Middlemiss point out: ‘Since the outer limit of the margin was geographically imprecise, some fixed formula was necessary to avoid the pitfalls of the 1958 “exploitation” definition. Unless some criteria could be found for drawing a line, problems would occur both in relation to suspicion of creeping jurisdiction by margin states and indeterminacy over which areas came under national, and which under international, jurisdiction’. Thus there was a considerable degree of cross pressure for Australia to cooperate with other margin states in an effort to reach a satisfactory definition at future sessions and it remained doubtful whether Australia could continue to maintain such a position.

Despite these problems with Australia’s position by the end of Geneva there was, from Australia’s viewpoint, positive movement on the shelf issue. The SNT contained a text that made clear that the jurisdiction of the shelf extended ‘throughout the natural prolongation of its land territory to the outer edge of the continental margin’ or to a distance of 200 miles where the margin did not extend for that length. It also,
however, contained an article on revenue sharing (article 69) in payment or in kind in respect of non-living resources of the shelf beyond 200 miles. The rate of payment was not specified but payment would be based on the value or volume of production at the site. Thus while it appeared that a final text would be open for signature which recognized rights of coastal states to the outer edge of the margin it was also likely to contain revenue sharing. It now seemed essential for Australia to examine possible alternatives in light of the fact that proponents of revenue sharing (particularly the land locked and geographically disadvantaged states) were unlikely to withdraw their proposals.

On boundary delimitation issues Australia made its first intervention on the subject since the SBC days. Australia spoke in favour of the need to preserve existing boundaries where no question of delimitation arose and the need to preserve existing rights on delimitation. Australia emphasised that the important element was to promote agreement and the need for the conference to include interim measures which would apply pending settlement. These views were in line with Australia’s pre-conference position and were essentially an outline of the Australian/Norwegian paper presented to the SBC. Already at Caracas there had emerged a division between those states emphasising equidistance (i.e. a median line) and another group supporting ‘equitable principles’. While the earlier Australian/Norwegian paper suggested parties reach agreement according to equitable principles the main thrust of Australia’s intervention at Geneva was to support the principle of agreement. Australia had taken the decision not to align itself with either group as the proposals of both emphasised the importance of effecting delimitation by agreement so it seemed that was an area where Australia would also steer clear.

The question of islands was also of relevance in the delimitation context for a number of Australian islands (Christmas, Heard and McDonald, Macquarie, Norfolk, Coral Seas Island Territory) were potential sources of delimitation if they generated an economic zone. At Geneva Australia for the first time publicly supported the notion that all islands were entitled to an economic zone which appeared to represent a change in tactics from Caracas where a ‘softly, softly’ approach was adopted. Delegation leader Harry pointed out that Australia had ‘not seen any other alternative to treating islands on the same basis as any other territory of the state, thus attracting an economic zone and continental shelf as well as a territorial sea’. This was a clear statement of Australia’s position and supported the South Pacific states who continued to press the importance of islands generating marine space. Article 132 of the SNT largely fulfilled Australia’s policy on the islands issue, although Canberra had to consider its Pacific Islands neighbours here.
Fisheries issues were discussed in depth in informal groups rather than formal committee where fisheries was given low-key treatment. The majority of states were prepared to await articles on the EEZ and fisheries being drafted in the Evensen Group. Australia participated in debate in the Evensen group where negotiations revealed that the distant-water fishing nations (DWFN) had significantly shifted their position since Caracas. They now acknowledged that a convention would provide for a 200 mile zone which would confer coastal state rights over (amongst other things) fisheries, although the EEZ concept was seen as part of an overall package. It is not clear what profile Australia took in the Evensen group but the SNT produced at the end of the session contained fisheries articles which were broadly in line with Australia’s position. In fact in inter-sessional meetings which Australia attended in October 1974 and February 1975 a number of fisheries articles were drafted which largely reflected the Australian view that DWFN should have access to unexploited surpluses of the economic zones of coastal states. At the same time the right of the coastal state to determine allowable catch and the terms and conditions of the other states into its economic zone were recognized.

The fisheries issue that generated a great deal of controversy and which Australia played an active role was the management of highly migratory species (HMS). The issue remained contentious principally due to the high level involvement of the US and Japan in tuna fisheries and the rejection by the US of the economic zone in respect to HMS. There was a hardening of developing coastal state views that sovereign rights in the economic zone could not be undermined by regional or international organisations, a trend that clearly weakened the appeal of the Australian/New Zealand sponsored paper at Caracas, which had proposed either an international or regional body be set up to manage the species and actively determine the allowable catch quotas.

Australia faced significant cross-pressure on this issue from its South Pacific neighbours where the Australian delegation report makes clear that the Australian/New Zealand proposal ‘proved unacceptable to a majority of coastal states, particularly developing coastal states which were not prepared to consider any diminution of their sovereign rights over living resources in their economic zones’. Evensen in fact drafted an article on HMS where international fisheries bodies would have had an important role, but was opposed by group members from both the DWFN and coastal states and was withdrawn at the last minute. Evensen’s final revision, the one submitted to the chairman of Committee Two simply noted the article was ‘still under discussion’. To what extent Australia argued that the joint Australia/New Zealand proposal offered a reasonable compromise was not clear but the final negotiating text on HMS reflected the developing coastal state position although it did appear to require (as proposed by the
Australia/New Zealand paper and again by Australia at Geneva)\textsuperscript{171} that coastal states participate in appropriate regional or international organisations.\textsuperscript{172}

The SNT fisheries provisions that emerged from Geneva were weighted in favour of the coastal states to the detriment of LLGDS\textsuperscript{173} and DWFN. The coastal state had been given sovereign rights for the purpose of exploring and exploiting, conserving and managing the zone and the coastal state alone was permitted to determine both the total allowable catch and its capacity to harvest them. For the most part, however, the SNT fisheries provisions were drafted in such a way to broadly satisfy maritime and coastal states.\textsuperscript{174} As far as Australia was concerned the fisheries regime proposed in the earlier 1972 Australia/New Zealand working paper had largely emerged in the Evensen articles and had been taken up in the negotiating text. Article 53 on HMS was, however, a very much watered down version of Australia’s proposal that the role of regional bodies was actually to manage HMS. Given the intransigence of developing coastal states to this idea (as noted above) with what appeared to be little public support from New Zealand it was unclear whether Australia would instigate or support a move to reopen the article or whether it would take the view that the article represented the best prospect for an agreed position on the management of HMS.

On other issues in Committee Two Australia did not appear to take a high profile. On the economic zone the informal group of the whole held four meetings but ‘many delegations’ simply gave ‘long dissertations on their well-known concepts of an economic zone’.\textsuperscript{175} Negotiations also took place in the Evensen group\textsuperscript{176} where Australia was a member although as noted above there is no evidence on what role Australia took in the group. By the end of the session major disagreements existed between the maritime states, developing coastal states and LLGDS on such issues as coastal state jurisdiction in respect to pollution control in the EEZ, the right of the coastal state to control navigation and scientific research in the EEZ, access to renewable and non renewable resources and the allocation of residual rights in the economic zone. There was no evidence that Australia’s concerns to ensure that articles relating to the economic zone did not in any way prejudice Australia’s claim to seabed resources to the margin and maintained rights of navigation and overflight of the zone had changed at Geneva.\textsuperscript{177}

On both straits issues and archipelagos Australia was again somewhat of a spectator. Australia’s policy on the straits issue from Caracas was to separate out the straits question from the archipelagic issue but at Geneva the issues were very closely linked.\textsuperscript{178} Committee Two held two informal consultations on straits.\textsuperscript{179} A clear majority participating in the debates favoured a regime of unimpeded transit of straits and the dominant trend in the Conference now clearly favoured an unimpeded transit regime.\textsuperscript{180}
Australia was one of thirteen states in a small informal group on straits that was convened by the UK and Fiji although it attended only as an observer. There was some attempt at 'behind the scenes maneuvering' on the straits issue with the group submitting a 'Consensus Text of Private Group on Straits' to the Chairman substantially based on the UK draft articles submitted at Caracas. Canada, Chile and Norway submitted an aide memoir which attacked the 'private' group text in so far as it purported to modify the customary definition of international straits. Australia does not appear to have altered its low profile on the issue but the SNT text on transit passage achieved 'large support' and appeared to hold out the prospect of a workable accommodation of the views of the major maritime powers and the straits states. In that sense the outcome of the straits issue looked promising for Australia, as did developments on archipelagos, although the Geneva experience suggested that the issue would be resolved between the maritime states and archipelagic states. Nevertheless with the straits issue looking likely to have been settled it now appeared much easier to deal separately with archipelagic issues that may arise—the approach Australia had favoured from the Caracas session.

**Committee Three**

Australia continued to take an active role on questions of the marine environment where much of the discussion took place in informal groups. Australia was active in attempting to avoid 'double standards'—i.e. a situation where some states would be permitted to take less stringent standards to protect the marine environment than others. Australia along with other developed countries 'while recognising the concern of developing countries, felt that it was not in the best interests of the environment to permit 'double standards'.' Australia's policy here was, however, unsuccessful with respect to the issue of land based pollution, although the article on pollution from the seabed in the SNT was in line with Australia's position that national laws should be 'no less effective than generally accepted international rules, standards and recommended practices and procedures'.

On ship sourced pollution the main discussions took place in the Evensen Group where Australia was one of a number that argued that in certain limited cases the coastal states should have the right to apply unilaterally devised regulations in its EEZ prohibiting discharge of tanker washings. Australia was, however, the only state to propose effective safeguards to prevent the abuse of the right of the coastal state to take such actions. In the event of objections the coastal state would suspend its unilateral rules and act in accordance with third party adjudication. That view was consistent with its previous intervention at Caracas but no delegation took up the Australian proposal.
Australia's position continued to be opposed by the maritime states. The paper tabled in formal session on vessel source pollution by ten maritime states from Eastern and Western Europe\textsuperscript{198} was not in accordance with Australia's position that the coastal state should have the authority to make laws to control traffic in specially vulnerable areas and that the coastal state should have authority to make regulations which had not been internationally agreed prohibiting discharge of tanker washings. Australia's main problem now in gaining allies on the issue was that many members of the Group of 77 had begun to fear that vesting standard setting in the coastal state would result in barriers to their own vessels.\textsuperscript{199}

On MSR issues Australia was active in a group of about 20 states considering the question of whether consent or only notification should be required for a state to conduct MSR in the economic zone of another state.\textsuperscript{200} At Geneva Australia shifted its position on MSR.\textsuperscript{201} Previously Australia had favoured a consent approach with the qualification that consent should not be unreasonably withheld when certain conditions were met. Australia's position shifted at Geneva with Australia taking a view similar to that of the Soviet Union at Geneva that coastal state consent was necessary for MSR concerning fisheries resources of the economic zone or resources of the seabed within the economic zone and the shelf beyond 200 miles but that consent should not be unreasonably be withheld. For research not falling within these categories notification was considered sufficient.\textsuperscript{202} The Australian approach was, however, taken up in the SNT where the basic distinction was made between 'research of a fundamental nature' and 'research related to the resources of the economic zone', the former subject to notification and the latter category to an absolute consent regime.\textsuperscript{203} The overall effect of the SNT on MSR was thus close to that which Australia was seeking, although there still were some difficulties.\textsuperscript{204}

One shift, or rather addition to Australian policy, emerged in Geneva and that related to technology transfer, an issue ignored in the government's 1973 position paper. Transfer of technology issues received low key treatment at Geneva with only one formal session and two informal sessions.\textsuperscript{205} A proposal by Australia to take into account the language of the UN Charter on the Economic Rights and Duties of States received support.\textsuperscript{206} Australian interests here aligned it with developed states.\textsuperscript{207} Australia was concerned to ensure its interests were represented by the use of terms 'suppliers' and 'recipients' of technology rather than the cruder classification of developed and developing. Australia was also concerned to see that technology sharing was based on voluntary agreements between states so that existing laws relating to technology transfer under coastal state jurisdiction were not threatened. In that sense the main question here appeared to be what attitude Australia would take the SNT provision on technology transfer which gave the
Authority the power to ensure far reaching benefits for developing countries with protection for industrial property rights.208

Disputes Settlement

Australia’s Ralph Harry continued as one of the three co-chairmen of an informal working group on disputes settlement, where over sixty countries took part. The group met three times a week including an important weekend session in Montreux, Switzerland,209 where an informal paper by the Australian delegate Lauterpacht on disputes avoidance210 was reflected in the document submitted by the group at the end of the Geneva Session.211 One of the main areas of dispute here was the extent to which there should be exclusion of certain issues from compulsory disputes settlement.

Three views persisted in the working group.212 One was that no exceptions be permitted, the other was that exceptions may be allowed but only in respect to a limited category of disputes specifically enumerated in the Convention itself and third another view which emphasized the need to recognize complete sovereignty of coastal states and thus suggested total exclusion from the compulsory procedures of any dispute relating to a matter falling within the jurisdiction of a coastal state. It was unclear at this stage which group Australia aligned itself with although it seemed reasonable to suppose that in an effort to achieve agreement Australia would logically have favoured some limited exceptions. However Australia was committed to a workable Convention and that meant it did not seem likely it would favour a system that allowed procedures to restrict compulsory procedures from all the important Law of the Sea disputes.213 For that reason it therefore seemed likely that Australia would oppose the draft prepared by the President that provided that a state would not be required to submit to settlement procedures any dispute arising out of the exercise of its exclusive jurisdiction under the Convention except when it was claimed that the coastal state had violated its obligations by failing to apply specified, internationally agreed standards or criteria.214 The President’s text was to be the subject of debate at the fourth session.

Conference Diplomacy and Concluding Remarks

At Geneva the Coastal States group did not really recover from the problems inherited from Caracas215 and Australia sought to achieve its goals by working in ad hoc and other groupings, particularly the Evensen group. Australia participated in a group of 30 states set up by the Chairman of Committee One on basic terms and conditions governing seabed mining,216 and was an observer in the informal private groups on straits.217 For Australia, however, the most important group at Geneva and the most influential was the
Evensen group which met every day at Geneva and where Australia participated with the key actors in the full range of coastal issues being discussed in that body, particularly on margin related issues. Buzan and Johnson provide a detailed account of the group’s work at Geneva. By the time of the third session, the group had grown from its original 24 in 1972/73 to 35 midway through the session and reached forty by the end of the session. It sought to maintain a representative character but the LLGDS group felt the Evensen group was too coastal in its orientation and unsympathetic in its concerns. The Evensen group served as a device to bring together the chief figures in the major delegations to initiate bargaining and participants were invited by the Chairman. For Australia, like Canada, the transition to the Evensen group was quite smooth as many of the texts of the group reflected coastal state group views and because the purpose and method of the group was to find compromise solutions.

The Geneva texts issued at the end of the session were not final documents but rather the basis for negotiations at the fourth session. Broadly speaking the texts indicated that Australia was faring well in the conference. The texts on fisheries, the shelf (except for revenue sharing), MSR and navigational issues largely met Australian objectives. However the session revealed that successful resolution of Committee Two issues was going to be linked with seabed issues in Committee One. Whereas at Caracas, few delegations were talking about trade-offs between Committees One and Two, at Geneva the G77 indicated that demands on the seabed regime would be linked to their priority items in Committee Two. As the Geneva text on Committee One issues were weighted heavily in favour of the developing countries it was unclear how Australia’s interests would be affected if there was to be continued spill-over effect from Committee One to Committee Two issues.

By the end of Geneva there were mixed views on the likely progress of the conference ranging from those that felt that a Convention could be concluded in one or two further meetings to those that felt that with a number of countries (US, Canada, Norway, Iceland and UK) contemplating extending their fisheries jurisdiction the conference may become irrelevant. Australia’s position was one of optimism. The Australian Foreign Minister told parliament shortly after the end of the session that while ‘of course’ Australia would study the Geneva texts before the next meeting the conference had been a ‘tremendously honest attempt at solving the most tantalising problems that one could possibly get’. Preliminary reaction in Canberra to the texts was favourable and the Foreign Minister was able to inform the United Nations General Assembly in September 1975 that his government hoped that the next session would agree on a text ‘which can be accepted by Governments and which can become the “Convention of Caracas”’. For Australia the SNT was seen as ‘more than a store or stock from which the ingredients of
a Convention' were to be chosen but rather the 'materials have been formed into shapes which already begin to approximate what is desired in the way of finished structures'.

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CHAPTER FIVE

AUSTRALIA AT UNCLOS 111, 1976-1977

UNCLOS 111 met three times in 1976-77, with negotiations totalling twenty-three weeks. While the fourth and fifth sessions made little progress, by the end of 1977 most questions falling under the responsibility of the second and third committees appeared to be on the way to resolution. The regime for deep seabed mining was the most significant unresolved issue. The product of the eight week 1977 session was an Informal Composite Negotiating Text (ICNT) which was a major step forward in the conference, as it had all the appearance of a Draft Convention. The new text met Australia’s key objectives on the EEZ, continental shelf, navigation rights through straits and archipelagos, marine environmental issues and control over MSR in the 200 mile zone.

The conference politics of this period evolved from the earlier sessions with the LLGDS group making a strong effort to get a better deal, provoking a reaction that saw a new expanded Coastal States group of sixty-seven. For Australia the critical event in this period was the government’s announcement on 19 October 1976 that it would implement a 200 mile fishing zone but that it would not act on the decision until after the sixth session.

As far as Australian conference diplomacy was concerned no shifts in policy direction were evident as a result of a new Liberal Government coming to power in December 1975. In fact as will be discussed later bipartisanship was to characterise Australia’s law of the sea diplomacy through the entire conference. In terms of conference coalition politics Australia continued to operate with its coastal state allies, but devoted an increasing amount of its diplomatic effort to the Margineers Group and compromise groups, in particular a fifteen state negotiating group established under the direction of Jorge Castañeda of Mexico.

On Committee One politics Australia was largely a spectator. Its main interest here was now to ensure that the divisions in Committee One did not threaten the gains the delegation had made in the second and third committees. At the same time Australia did direct some of its lobbying activities to improve Australia’s chances of getting a seat on the Council of the Seabed Authority.

In contrast to Committee One Australia had an immediate stake in the emerging texts on the EEZ, shelf and marine environment in Committee Two and Three. The most
significant development here was Australia’s support for a formula on the margin that was tied to the width of the sediments (the ‘Irish’ formula). Australia stuck to its opposition to revenue sharing but this was largely for tactical reasons and it now appeared that Australia recognised that it was an untenable view in the longer term. Navigation in the economic zone was a heavily contested issue in this period and here Australia took on a high profile conciliatory role.

On Third Committee issues Australia moved to a more middle ground view on the marine environment, a position largely dictated by a desire not to see any widespread reopening of the text, as the end of negotiations appeared in sight. On specific issues here, however, Australia acted to defend its interests taking over from Canada the running on the question of coastal state powers in areas of special environmental sensitivity and acting to resist attempts to weaken port state enforcement powers. On MSR, where US security interests made compromise difficult, Australia now moved to try and find some middle ground, but was stymied in its efforts by the Third Committee Chairman. While the LLGDS now took on a more active role, particularly in claiming a substantial share of living resources in neighbouring coastal states zones Australia saw no tactical advantage in taking a high profile in opposing the LLGDS states.

By the end of the sixth session in July 1977 a consensus in relation to Committee Two and Three issues appeared in sight and Australia’s interest in preserving the overall integrity of the negotiating process was thus given added force. The ICNT was proof that Australia was faring extremely well, although on issues relating to revenue sharing, the environment issue and to some extent the issue of disputes settlement it appeared that Australia would have little choice but to accept compromises necessitated by the dynamics of conference diplomacy and politics.

Fourth Session: New York. 15 March—16 May 1976

The fourth session of the conference had before it for the first time a complete text containing articles dealing with all matters under consideration.¹ (The President of the conference had prepared a paper on the settlement of disputes based on the draft articles submitted to him by the working group at the end of the Geneva session and these were the basis of the first formal general debate on the subject.)² At the end of the session the Committee Chairmen produced a revised single negotiating text (RSNT)³ as well as a new SNT on dispute settlement.⁴

The RSNT contained significant changes on the deep seabed regime and on Committee Three matters, although there were only minor alterations to the host of articles on
Committee Two issues. The session was largely dominated by the debate on the exploitation of the deep seabed. The RSNT was, however, seen in G77 as a ‘sell out’ to the US view on a system of exploitation. Committee discussion at New York continued to be informal and Australia worked actively to ensure that the gains it had made on the major resource questions would not be jeopardised. The new Liberal government of Malcolm Fraser demonstrated its commitment to a successful conference outcome by sending the Foreign Minister, Mr. Andrew Peacock, as leader of the delegation.

Committee One

The regime for deep seabed mining was perhaps the most contentious issue before the conference. Australia’s broad concern in Committee One continued to be to find a satisfactory resolution to the differences between some developed states and G77 but for the most part Australia took no sides in the confrontation between the developing states and the developed mining countries. Without such a resolution, however, there was unlikely to be a Law of the Sea Convention so the delegation was concerned to ensure some reconciliation of the divergent views of the developed and developing countries. The SNT had reflected the position of the developing countries and the United States had attempted between sessions to persuade developing countries that the texts, particularly those relating to access to the area, needed to be modified before they would join a Convention.

The Australian legal advisor presided, at the Chairman’s request, at an inter-sessional meeting in New York in November 1975 to discuss key issues and in February 1976 the Chairman called together a core group of 33 countries, where Australia participated, to hold further discussions. Articles on the functions of the Authority and general principles regarding activities in the international area were redrafted and although they were not formally presented at New York they were considered important in facilitating debate. The Australian delegate Lauterpacht chaired a group concerned with rules, regulations and procedures while the Australian Rapporteur John Bailey chaired a small group which prepared the first draft on the financial arrangements to be incorporated in contracts between the Authority and states and companies.

However, Australia was not directly involved in or exercised much influence over the controversial and emotional debate on who shall exploit the area and the system of exploitation where the US was threatening unilateral action on nodule mining if agreement was not reached quickly. Nor was Australia involved in two small private groups that were negotiating and reviewing texts on behalf of the Chairman. It became apparent at New York that there was a movement towards Australia’s moderate position
by certain influential members of G77 that acknowledged the ‘right of access by states and companies to exploit the area directly themselves under a contractual relationship with the Authority and an operating arm, the Enterprise which would also have the right to exploit the area itself or under arrangements with states or companies on behalf of the Authority’. What was very unclear, however, was whether the new texts on the issue would be acceptable to G77.

The new text reflected a dual or parallel system providing a right of access to states, companies, state organisations and the Enterprise on equal terms but was seen by certain G77, as a ‘sell-out’ to the American view. The text appeared to balance the interests of the developed and developing states and the Authority itself by incorporating a banking system, or reserved area system and was along the lines sought by Australia. The new text was certainly much more favourable than the SNT to the developed countries as they now had a right to participate directly in exploitation. As the objectives that Australia had sought had now, in the main, been adopted by the major developed countries, the question, in Australia’s view, was ‘whether the group of 77 will be prepared to follow the lead given by its moderate members’ at the next session. By the end of the session G77 were divided on the issue, but there seemed little reason to suppose that Australia would alter its position from that expressed by the Foreign Minister at New York that ‘we hope for the acceptance of a system of assured access to the seabed areas for individual states and their nationals as well as the seabed Authority itself—a system which will ensure active application of capabilities to the development of seabed resources.’ In that sense it seemed that Australia would try and defend the parallel system in the RSNT.

On the issue of protection for land based producers there was movement towards a compromise to meet the interests of land based producers who may be adversely affected by the exploitation on the deep seabed. During the session the US proposed (following a speech by the US Secretary of State that foreshadowed the move) the inclusion of an article which would give temporary protection for a fixed period by limiting production of the seabed minerals for the projected growth in the world nickel market, then estimated by the US to be 6% per annum. They proposed that such a limitation should apply for a period of 20 years after coming into force of the Convention and thereafter that seabed production be governed by market forces. The American proposal was incorporated in the RSNT. The nickel issue arose right at the end of the session so there was little time for Australia to develop a firm view on the matter. Despite the Foreign Minister’s statement at New York that Australia supported measures made with a view to ‘protecting the interests of those states which are significant producers of the same minerals as will also be produced from the seabed’ the official Australian reaction was cautious. With the end of US objections it seemed probable that other resistance to production controls
would collapse so the issue facing Canberra was not whether production controls would be included in a final Convention but what kind.

Also of interest to Australia as a land based producer was to secure its representation on the Council of the International Seabed Authority. There was some movement at New York toward agreement that the Council of the Authority take into account special interest groups of states and reflect geographic representation, a move supported by Australia, that argued that the organs of the ISA should have a 'satisfactory representation of interests'.

Australia again did not take a high profile in Committee One issues partly because it was not invited to two small group deliberations and partly no doubt because at that stage a high profile would weaken any attempt at compromise between the major players. As a major land based producer of nickel Australia's most pressing requirement would now be to carefully scrutinise and comment at the next session on the RSNT articles that purported to protect such producers.

Committee Two

In Committee Two a 'rule of silence' was adopted whereby it was agreed that a delegation supported the SNT if it made no comment to the contrary. This did not prevent more than 3,700 interventions being made during the session.

On the shelf issue Australia was active in participating in the Margineers group examining the definition of the margin. That group produced a 'rather complicated formula based on a relationship between the thickness of sediments on the rise and the distance from the base of the slope' which received 'widespread support among the margin states'. This was the so called Irish formula. Three other proposed definitions were also advanced in the second committee on this issue but in the end the Chairman of Committee Two did not consider it appropriate to include a precise formula in the RSNT and suggested that 'at the end of the session, a group of experts could perhaps be convened to give more exposure to the question'.

Australian Foreign Minister Peacock continued to stress the need for the Convention to confirm 'the acquired rights of those coastal states which possessed appurtenant continental shelves' and defended the natural prolongation to the outer edge of the margin definition in the Geneva SNT. This was a repeat of the Geneva line that there was no need to define the concept with any greater precision in the Convention. However, such a view would have isolated Australia in the Margineers Group as well as
running against the trend in the conference for an overall settlement of the boundary issue. Thus conference politics pushed Australia to shift its position and move directly to support the Irish formula.\textsuperscript{36}

While Australia’s position on the definition of the margin question was that such a definition was not necessary Australia’s room for manoeuvre in the Margineers Group was limited as the Irish formula received widespread support among the Margineers.\textsuperscript{37}

It was by no means clear, however, whether Australia at that stage had carefully considered what the formula would mean in terms of gains and losses. The main Australian intervention on the issue was silent on this critical point.\textsuperscript{38} Australia’s support for the Irish definition was linked with its support for a Boundaries Commission on shelf limits, a prudent tactic in the face of fears by some LLGDS states that certain states could not be trusted to delineate accurately their margins.\textsuperscript{39}

On revenue sharing Australia continued its minority opposition against the concept,\textsuperscript{40} stressing that it was inconsistent with the principle of sovereign rights with respect to its shelf and was also impractical as ‘we have serious doubts whether revenue sharing of this kind would lead to any increase in real aid flows’.\textsuperscript{41} Apart from the issue of principle there was also interest in prospective areas off the North West Shelf that were beyond the 200 mile limit. Australia was reportedly awaiting the outcome of the conference on the issue of shelf rights before granting concessions on the plateau\textsuperscript{42} so it was not surprising the delegation continued to hesitate on the issue. However, Australia’s main reservation continued to be focussed on the political objection that revenue sharing was a derogation from Australia’s sovereignty rather than the financial considerations of sharing. The Chairman of Committee Two included a resource sharing proposal in the RSNT (Article 70) along the lines of the US proposal at Geneva, although omitting American percentages.\textsuperscript{43}

The revenue sharing issue was clearly a difficult one for Australia where it had few allies in its opposition to the concept. Even a politically acceptable alternative (if it could be devised) would have been unlikely to have gained enough support for the revenue sharing articles to be eliminated from the text and could have jeopardised the continued inclusion of what were, from Australia’s viewpoint favourable shelf articles. While there is no evidence that Australia was actively pursuing any alternative to revenue sharing it appeared that Australia’s final position would be determined when there had been an opportunity to consider the Convention as a whole, but there was no indication Australia would adopt a cautious approach to the question.\textsuperscript{44}
While the fact that some kind of revenue sharing arrangement looked inevitable it was by no means certain that Australia would drop its opposition to the concept. What did seem more consistent with Australia's position as described above was the delegation adopting a greater degree of tactical flexibility on the issue at the next session. There were however limits in which the delegation could move given government sensitivity on the issue. The delegation had clear instructions to oppose revenue sharing. In the event that adherence to that position looked likely to prejudice other Australian objectives the delegation were instructed to inform the Minister who would, if necessary, bring the matter back to Cabinet.

The archipelagic issue was again one where Australia was something of a spectator, as it was on fisheries issues where the LLGDS group asserted their requirements regarding access to EEZ fishery resources. This led to a polarisation of positions between the coastal states and LLGDS, with some coastal states reverting to a position of supporting a 200 mile territorial sea.

In the end, however, the position of the LLGDS was made worse in the RSNT with the new text swinging more categorically to limiting LLGDS to rights to the surplus only. For Australia this situation was difficult—on the one hand Australia was attempting to seek a widely accepted Convention and generally supported the fisheries articles. On the other hand Australia, like other coastal states, was keen to avoid a situation where the LLGDS had rights which might supercede rights in its own EEZ and was careful to ensure that the definition of region or sub-region would not place Australia in the position of having to confer special rights in respect to developing LLGDS in an Australian 200 mile zone. Generally, Australia's tactic here was to adopt a neutral role in the debate on this issue but the delegation attended several meetings of the Evensen group meeting to discuss the issue. Overall there seemed little to be gained by Australia taking a strong position against the LLGDS states.

In contrast to the LLGDS issue, Australia was active at New York in trying to work out a satisfactory compromise to the dispute between coastal states and DWFN states like the US and Japan on HMS. Australia continued to stress the necessity for adequate international management but it was evident that there were still differing views on regional arrangements for the management of HMS. Many coastal states, including the South Pacific states were in favour of a position that either deleted the article altogether or if it were to be retained that any international body would operate only beyond the EEZ. Despite the fact that the article was, as noted earlier, inconsistent with the philosophy of the Australian New Zealand paper (that saw international or regional bodies having an actual management role) Australia swung to the view that in the light of the views of
developing coastal states, in particular the island states of the South Pacific, it represented the best prospect of an agreed position.\textsuperscript{54} As the RSNT was a redraft of the SNT article (although removing provisions relating to marine mammals to a subsequent article) Australia’s view was unlikely to change on the merits of the HMS article.\textsuperscript{55}

The EEZ debate proved highly charged as the LLGDS group asserted that coastal states' rights should be lessened and the more territorialist states introducing amendments that would make the zone more akin to a territorial sea.\textsuperscript{56} Australia played a mediating role here on the critical debate on the juridical status of economic zone. About fifty maritime states and LLGDS states spoke in favour of retaining the status of the zone as high seas except for resource rights accorded coastal states. About the same number argued that apart from rights delegated to third parties for purposes of navigation, overflight and communication residual rights in the economic zone should be vested in the coastal state.\textsuperscript{57} Whereas the previous Australian intervention at Caracas was vague on the question of the juridical status of the economic zone by the fourth session Australia was more on the side of the maritime powers who argued that they should be high seas subject to the rights of the coastal state contained in the Convention.

Australia sought support for the position that the international community had residual high seas rights in the EEZ by introducing a compromise amendment that reflected a middle position whereby the EEZ was neither high seas (the preferred position of the maritime powers) nor territorial seas but had the effect of preserving the EEZ as high seas ‘except with respect to the exercise of coastal state rights contained in this Convention’.\textsuperscript{58} Australia’s position that only resource rights should be given to the coastal state was not new. However, the New York amendment was the clearest Australian expression that the safeguarding of navigation interests was critical to Australia accepting the economic zone articles.\textsuperscript{59}

Reactions to the Australian amendment were favourable\textsuperscript{60} but the Chairman of Committee Two concluded at the end of the session that the question of whether or not the EEZ should be included in the definition of the high seas was the matter over which the committee was most divided.\textsuperscript{61} In his final report the Committee Two Chairman sought a compromise on the issue. He noted that ‘there is no doubt that the exclusive economic zone is neither high seas nor the territorial sea. It is a zone \textit{sui generis}.’\textsuperscript{62} The RSNT was in fact biased towards the territorialist position and away from Australia’s position that had sought the middle ground\textsuperscript{63} and Canberra’s view after the session was that difficulties remained with respect to whether residual rights belong to the coastal state or to the international community.\textsuperscript{64}
Delimitation issues, the regime of islands and transit passage did not occupy the delegation but delegates were active in searching for compromise on the issue of standard setting in the territorial sea.65

Australia proposed an amendment, almost certainly with the Great Barrier Reef in mind which appeared designed to overcome the fact that the SNT had not taken account of areas of special vulnerability to pollution damage or exceptionally hazardous navigation in coastal state laws relating to prevention of marine pollution for ships on innocent passage.66 The amendment attempted to give the coastal state clearer powers over maritime traffic although ensuring that measures taken by the coastal state should conform to international standards. The latter proviso was important as far as the maritime powers were concerned. They were strongly of the view that the coastal state should not be authorized to establish construction, design, equipment of manning regulations more strict than international regulations.67

The relevant article in the SNT was controversial: it provided that while a coastal state may make laws and regulations ‘relating to the preservation of the marine environment ...and the prevention of pollution’ for ships on innocent passage ‘such laws and regulations shall not apply to or affect the design, construction, manning or equipment of foreign ships or matters regulated by generally accepted international rules unless specifically authorized by such rules.’68 The US, Canada, and many other coastal states were concerned about what they saw as the potential restrictiveness of this provision for a coastal states jurisdiction in the territorial sea seeing it as creating an order whereby the flag state would have absolute sovereignty.69 The provision in the article removing from coastal authority any ‘matters’ regulated by ‘generally accepted’ international rules was, it was argued, so vague as to cover virtually any commonplace regulations ‘regardless of how minimal the level of international standards’.70 While not sharing Canada’s and other coastal states concerns the fact that the Australian proposal removed the broader restriction on other ‘matters’ seemed to offer the basis of some kind of compromise, between the coastal states and the maritime powers on standard setting in the territorial sea.71

At Geneva while there was general agreement that activities which constituted non innocent passage should be listed there was no agreement on whether the list was to be exhaustive or illustrative.72 At New York amendments were directed at making clear that the list of amendments was illustrative.73 Australia sided with the maritime states here and did not support these moves believing that the amendments should make it clear that the definition was exhaustive.74 The question now was to what extent Australia would be successful if it decided to press for deletions in the RSNT that broadened the concept
away from the notion that passage was innocent as long as it did not affect the defence and security of the coastal state. The nub of the issue here of course was whether Australia’s interest as a coastal state in expanding its powers in the territorial sea would override its interests in maintaining navigational freedoms for commercial and military purposes.75

One other issue engaged Australia’s direct attention in Committee Two—the issue of Territories Under Foreign Occupation or Colonial Domination. There was general agreement that the ‘rights recognized or established by the present Convention to the resources of a territory whose people had not yet attained full independence shall be vested in the inhabitants of that territory’ rather than in the colonial power.76 However with respect to the provision that where there was a dispute over the sovereignty of a territory under foreign occupation or colonial domination the rights referred to above ‘shall not be exercised until the dispute has been settled in accordance with the purposes and principles of the Charter of the United Nations’, there were a large number of states, including Australia, that argued that the article would have the effect of ‘delaying or denying access of some emerging and developing countries to their resources’ and should therefore be deleted.77 The rationale presumably referred to the fact that the article would prevent such states from establishing an EEZ and thereby allowing unrestricted access by DWFN to the resources of such areas. No doubt also Australian support for the deletion was seen as tactically useful in gaining support of the Oceania group, in particular PNG, for Australia’s shelf policy. Australia’s position here was opposed to that of the interests of France and the US with their overseas territories in the Pacific in view and illustrated the extent to which Australia was shaping its law of the sea policies independently of its major ally.78

Committee Three

Informal discussions on issues relating to the marine environment took place under the Chairmanship of Mr Jose Vallarta of Mexico in the Informal Committee of the Whole and in a smaller group of interested delegations, including Australia, invited by Vallarta to consider the issue.79 A great deal of discussion concentrated on ship sourced pollution.80 Australia’s position on the issue as it related to pollution in the territorial sea was noted above in the context of innocent passage. Australia repeated its view in the third committee that the coastal state should not require foreign vessels, as a condition of the right of innocent passage to observe design, construction and manning or equipment standards which were different from those agreed internationally but that other pollution control measures, including the regulation of marine traffic should be left to the discretion of the coastal state, subject to the obligation not to hamper innocent passage.81 (Australia
had in mind here such things as setting sealanes and traffic separation schemes, prescribing under keel clearances and compulsory pilotage.\textsuperscript{82}

Australia’s position here was again ‘middle of the road’ between the maritime powers, insisting that all coastal states pollution control measures conform to internationally agreed rules and the more extreme coastal states that argued that territorial sovereignty could not be subject to strict limitations.\textsuperscript{83}

On the issue of standard setting in the EEZ, Australia shifted from its Geneva position that supported the right of the coastal state to apply unilaterally devised regulations prohibiting discharge from tanker washings to a position closer to the maritime powers that coastal states should only have the right to enact laws and regulations in the EEZ (apart from ‘special areas’) giving effect to internationally agreed rules and standards.\textsuperscript{84} This did not, however, meet the maritime powers position that were unwilling that these rights should extend beyond 50 miles from the coast.\textsuperscript{85} On enforcement powers in the EEZ Australia expressed the view that it was not necessary to arrest ships or persons on board in order to enable a coastal state to take proceedings. Such proceedings, Australia argued could be taken in absentia providing that there were adequate provisions in the Convention to enable a coastal state to obtain the necessary evidence. Such provisions should also include the right to board in the EEZ where there were clear grounds for believing that a breach of applicable pollution control rules was committed.\textsuperscript{86} There was no indication, however, that Australia drew any support on the issue and it remained doubtful whether such a position would be acceptable to coastal states.

Australia did, however, support the majority coastal state view that supported coastal state enforcement rights throughout the EEZ even extending to proposing that the coastal state should have the right to board vessels in the EEZ for investigation when there were clear ground for believing that the breach of applicable pollution control rules had been committed,\textsuperscript{87} and to expel vessels that failed to comply with an order from a coastal state to cease polluting the zone. The latter proposal did not appear to find much favour as it was not included in the RSNT, although the new text did meet Australia’s objective with respect to the right to board.\textsuperscript{88}

The special areas provision was still of concern to Australia but was only briefly discussed in New York.\textsuperscript{89} The new text, however, was not satisfactory from Australia’s viewpoint and left the delegation with a problem for the next session.\textsuperscript{90}

By the end of the New York Session the general shape of the marine environmental articles was clear.\textsuperscript{91} The RSNT struck a balance between coastal and navigational
interests, but fell short of meeting Australia's claims in key areas. It provided for a moderately strong port state and coastal state enforcement regime along with internationally set standards in the economic zone. The RSNT in providing for the retention of the flag state as the basic authority in standard setting did not meet Australia's requirements with respect to special areas, nor with regard to coastal state enforcement powers did it permit the right of a coastal state to divert a polluting vessel out of its EEZ. On the other hand from the days of the SBC Australia had given support to the notion of port state enforcement and this concept was, for the first time incorporated in the RSNT.92 Given that the principle of the universality of port state enforcement (that the port state could prosecute discharge violations in the high seas) had been an Australian objective it appeared likely that attempts to limit the principle would be resisted by the delegation.

Australian positions on the marine environment shifted at New York from its earlier strong coastal state oriented positions to a more middle ground position. Indeed the Australian delegation was describing its position on the marine environment as a 'middle of the road' line.93 While the closed nature of the sessions make it difficult to determine the precise nature of the shift (from its earlier strong coastal state views) it appeared that with the end of negotiations apparently in sight for the first time it was clear that a 'relatively extreme position on coastal state rights (on the marine environment) was not acceptable at the international level'.94 Australian diplomacy on the marine environment appeared to move with and be shaped by that trend.

On Marine Scientific Research (MSR) there was movement on the part of some states from a strictly notification regime but there was little or no shift on the part of those states seeking a pure consent regime and the delegation found itself involved in an uphill battle to find a middle ground. Differences largely revolved around varying conceptions of the concept of the EEZ with developed maritime states regarding the EEZ as part of the high seas and the developing coastal states regarding the EEZ as an extension of the territorial sea.96

Australia made a strenuous but unsuccessful effort to bridge the gap on the MSR issue in New York particularly in a negotiating group convened by Australia's Keith Brennan.97 Australia did, however, successfully move amendments designed to give coastal states greater access to data produced by MSR activities in a coastal state's offshore waters.98 Australia's Geneva position that coastal state consent should be required for MSR concerning resources of the EEZ and shelf but that consent should not unreasonably be withheld came under some attack.99 The RSNT maintained the SNT distinction of research bearing substantially upon the exploration of natural resources but the revised
text was not in any sense a negotiated text and it seemed certain to come under attack from all sides, thus again holding out the prospect that the delegation would play its increasingly familiar conciliating role on the issue.

Discussions on the development and transfer of technology were dealt with at four meetings of the informal sessions of the Committee of the whole under the Chairmanship of Mr Metternich (Federal Republic of Germany). While Australia did not have a large stake in this issue it joined with developed countries and insisted that the objectives of marine technology transfer was broader than assisting developing countries as the transfer of technology between developed states was of 'great importance'. Australia continued to be concerned to ensure the rights of suppliers of technologies and a number of amendments to ensure adequate protection were in fact incorporated in the RSNT and appeared to satisfy any concern that patents over which the government had no rights would be passed on to the developing countries.

**Disputes Settlement**

Disputes settlement had not been discussed in any committee or in Plenary until New York, having been limited to the activities of the Informal Group on the settlement of disputes co-chaired by Australia's Ralph Harry. The group continued to meet during the early part of the New York session under Harry and Adede of Kenya and was attended by representatives from 84 states.

Australia made a detailed statement in plenary on disputes settlement and elaborated a number of principles that were necessary for adequate disputes settlement. Harry emphasised the importance of disputes avoidance and endorsed Annex 3 of the President's text here. This was in fact the contribution of Australia's delegate Lauterpacht in the informal working group. Harry voiced Australia's concerns that there must be a balance between the protection of coastal state's discretionary rights within the economic zone against that of the international community.

The nub of Harry's argument here, as one of the co-chairmen of the informal group on disputes settlement notes, was against the exclusions allowed under the Article 18(2) of the President's informal text that would give states the option to exclude from compulsory procedures disputes arising out of the exercise of discretionary rights by a coastal state pursuant to its regulatory and enforcement jurisdiction under the Convention. In other words the option favoured by developing coastal states that a coastal state could make a declaration excluding from dispute settlement procedures virtually all disputes under the Convention was clearly not acceptable to Australia (a view
shared by the socialist countries of Eastern Europe). That view was, however, to be gradually watered down in the face of the views of its coastal state allies.

Conference Diplomacy

During the fourth session Australia played an active role in a revived Coastal States group convened early in the session to counter the attack mounted on the EEZ by the LLGDS group. Towards the end of the session the group had expanded to 54 delegations from the original core membership of 16. In particular Australia found the group useful in ‘considering positions’ on the territorialist type attacks on the EEZ concept by the LLGDS. Australia continued to work closely with the Oceania group which met weekly during the session. The group looked to Australian support on the archipelagic issue and were able to offer some support to Australia on the shelf issue. There were also consultations on the HMS issue with the group, and Australia was able to assist in reporting to the group on the work in various committees and developing tactics. Australia attended several of the meetings of the Evensen group that confined itself to the question of landlocked and geographically disadvantaged states and kept a ‘close watch’ on developments (although it was considered tactically preferable not to contribute on an issue where Australia was not directly concerned). The Evensen group’s influence appeared to wane at New York with the LLGDS privately complaining that they could not trust Minister Evensen. Australia, however, continued to give strong support to the continuation of informal groupings as a means of work at the conference.

At the fourth session Australia’s main role appeared to move more strongly to that of a lubricating agent on the deep seabed mining issue as confrontation increased between the US and the developing countries. The main concern of Australia appeared to be prevent Committee One issues undermining the chances of a successful conference. The margin issue was clearly of continuing concern, particularly the revenue sharing provisions but on most committee two issues the RSNT looked to broadly satisfy Australia’s objectives. On issues in Committee Three the MSR issue and dispute settlement still appeared to require further negotiation. The main interest now appeared to ensure that the gains on Committee Two issues were not jeopardised by a breakdown in the conference. Here Australian Foreign Minister Peacock warned that the greatest danger would be countries taking ‘premature’ unilateral action to secure extended coastal state jurisdiction. The US half way through the session established a 200 mile fishing conservation and management zone to become effective on 1 March 1977 and Canada announced one month after the end of the session that it would implement a 200-mile fishing zone by 1
January 1977. At that stage however there were no definite signals that Canberra was impatient at the progress of the conference.

**Fifth Session: New York. 2 August—17 September 1976**

Despite the fact that there was considerable opposition in G77 to a second session in 1976 (both because of other commitments and a desire to study the RSNT), the United States had exerted strong pressure at the fourth session on other delegations to agree to a second session in New York the same year. Both the US State Department and the Pentagon considered that without such a session unilateral mining legislation would be passed in the Autumn of 1976 wrecking the prospects of a Convention. At the beginning of the session the President of the conference circulated a note in which he set out the main areas on which he felt further negotiation was needed. Each committee was to identify the key issues in its respective part of the RSNT and to develop procedures for dealing with those issues. The consideration of the key issues occupied the entire fifth session.

Little progress was made at the session in resolving key issues. The work of Committee One became highly charged with demands by G77 that all issues on DSBM should be open for negotiation. This conflict spilled over into the work of the other two committees. It was clear that the matters being dealt with by the first committee were testing the political will of many governments and that without some movement towards compromise here there would be a diminished chance to achieve a comprehensive Convention. For Australia the concern here was whether these difficulties would threaten the package approach to securing a comprehensive Convention, a key Australian objective.

**Committee One**

Committee One discussions were dominated by the G77 which argued that as a result of the way in which the Chairman of Committee One had produced the RSNT text at the fourth session (through consultation with an unrepresentative group) the text should not have the status of a Revised SNT. The G77 argued that the Seabed Authority should have the power to make all important decisions while the developed states strongly opposed this as a means of limiting access to the area beyond national jurisdiction. The gap here reflected wider philosophic differences over the principle of the common heritage concept with the developing countries seeing the parallel system as one which provided the right of multinational companies to exploit the area. Only the Authority, argued the developing countries, would represent the interests of all mankind.
These differences emerged in a workshop of the whole Committee where Australia participated, and in general discussion where previously stated positions on the issue of assured access and powers of the Authority were rehearsed and little progress made.\(^{128}\) In an endeavour to promote an accommodation US Secretary of State Kissinger in a speech outside the conference made a number of important proposals, none of which appeared to make any real impact on the fears of developing countries that the parallel system of exploitation would meet their interests.\(^{129}\)

Generally speaking the Australian delegation continued its conciliatory role in Committee One, working with Canada.\(^{130}\) As the parallel system in the RSNT was very much along the lines that Australia had sought and was broadly acceptable to the developed states Australia’s approach was to attempt to convince G77 to adopt a more flexible approach by arguing that the issues were not so much political but rather technical and in that sense required further study.\(^{131}\)

With the Committee focussing almost exclusively on the system of exploitation\(^{132}\) Australia’s interests in the nickel issue did not appear to be pursued by the delegation. Whatever the merits of Australia’s efforts to pursue compromise through stressing the ‘technical’ nature of the issues, Lauterpacht’s call for more ‘detailed study’ seemed to fall on deaf ears in the ‘hot house’ atmosphere of Committee One at the summer New York session. Australia, it appeared, could not do a great deal to affect the situation\(^{133}\) and the main concern of Australia was now the real threat the issue posed to the successful conclusion of the conference.

**Committee Two**

In contrast to Committee One politics where Australia was somewhat of a spectator the delegation was active in many of the issues in Committee Two. In Committee Two all negotiations were conducted in open ended negotiating groups established by the Chairman and in small groups when it appeared that the negotiating groups had carried issues as far as possible. Three negotiating groups were established to deal with the legal status of the EEZ, questions of landlocked states and a third to deal with issues relating to revenue sharing and the definition of the outer edge of the margin.\(^{134}\) Australia participated in the first and third groups (to which any state could volunteer) and later in the session in two consultative groups selected by the Chairman on the legal status of the EEZ and the outer edge of the margin.

As noted above a single negotiating group was established to consider the definition of the margin issue and revenue sharing but in practice a smaller informal group of margin
states met on the delimitation issue. A consultative group was also established and Australia was involved here. The shelf issue occupied most Australian attention in Committee Two. In an endeavour to ‘broaden acceptance’ that the shelf extended to the outer edge of the margin the Margineers group proposed the Irish formula along with a Boundary Commission ‘with the power to certify that the boundary of the continental shelf had been correctly delineated’. There was in fact widening support for the principle of national jurisdiction over the margin as evidenced by the Chairman’s comments that ‘recognition of the rights invoked by states with continental shelves extending beyond 200 miles is in fact one of the main components of the package deal’. However at that stage the Margineers formula was losing ground to the simpler US formula of 60 miles beyond the foot of the slope and some Arab and African states continued to insist that the margin should not extend beyond 200 miles.

In the negotiations on revenue sharing between 200 miles and the edge of the margin discussions ranged on the way contributions were to be assessed, whether all states with a shelf extending beyond 200 miles had to contribute, which states would benefit from the contribution and what authority would be responsible for collecting and distributing them. These negotiations took place not only in negotiating group but also in a wider group of coastal states and land locked and geographically disadvantaged states known as the Group of 21. Australia was not a member of this group (see below). While the delegation now clearly recognized that the margin policy would only be acceptable with a revenue sharing component, Australia made clear that Australia’s claim to the margin was not negotiable—only when the margin claim was confirmed by the conference would Australia consider the question of whether to share revenue. The thinking here was that at that stage there was no political advantage to be gained by removing opposition while other more contentious issues of greater economic and strategic importance remained before the conference and that opposition would provide coastal states with a lever to obtain the best possible position for coastal states. This put Australia at odds with most other broad margin states that indicated that a compromise solution might lie in a system of revenue sharing.

The juridical status of the EEZ was the most contested issue in Committee Two. The US made clear that they could not agree to ‘any text which makes it clear that the zone is not high seas. On the contrary, the text must somehow explicitly accord high seas status to the zone but without the recognition that the zone is not high seas with respect to the exercise of coastal state rights provided for in the Treaty’. The US exerted heavy pressure on the residual rights issue since both military maneuvers in the economic zone and scientific research would be restricted by denying the high seas status to the economic zone. The opposite view was expressed by the more territorialist states who
insisted that the zone be characterized as one of national jurisdiction in which other states enjoy only subordinate rights of navigation, overflight, and communication. Australia resisted US pressure to support its views but worked closely with the US to try and find a solution to the problem. While the US indicated that they could support the amendment moved by Australia at the spring New York session, key coastal states indicated that Australia's amendment was not acceptable and Australia did not introduce it again at the session. Australia worked with other moderate coastal states (Canada, Ireland, New Zealand and Norway) to modify proposals of the more territorialist members of the coastal state group. Australia was still anxious to ensure that the EEZ should be defined in such a way as to make it clear that it was not territorial sea but at the same time pointed out to the US that there was no possibility of having all the residual high seas rights accorded to the international community. For Australia it appeared that a consensus could be reached which would state that the EEZ was neither territorial sea nor high seas but which would need to make clearer the extent of the rights of the maritime states in the EEZ. However the fifth session had demonstrated that compromise was still some way off. Given that Australia's amendment proposed at the fourth session had failed to attract support from key members of the Coastal States group it seemed that any attempt to gather support for the amendment would be a sensitive exercise if Australia were not to jeopardize relations with its coastal state allies.

There was initially no discussion of the RSNT fisheries articles. However the fact that in relation to fisheries there was 'the virtual absence of attack on Articles 50 and 51 which confer on the coastal state the power to manage the living resources of the EEZ' was an encouraging signal that a key Australian goal on fisheries had been largely achieved. The key development on fisheries at the fifth session was the formation of a group of ten coastal states and ten LLGDS states to deal with the issues of whether the LLGDS should have a general right to harvest EEZ resources or whether such right (if conceded) should relate only to what was surplus to the harvesting capacity of the coastal state. Australia was not a member of the Group known as the Group of 21 (chaired by Fiji's Satya Nandan). Australia participated in a coastal states working group to develop a coastal states position on the basis for negotiation with LLGDS, but generally Australia appeared to play its consistent low profile on the issue. The general attitude of Australia here continued to be that while the interests of some of the least developed states would need to be accommodated it was important in working towards the conclusion of a Convention that no action be taken which would prejudice the interests of friendly coastal states. That meant Australia supported coastal states views that right of access by LLGDS be limited to surplus stocks only.
While the issue of straits and delimitation occupied some time at the session Australia continued to play a fairly peripheral role. A negotiated settlement on straits, however, seemed closer to achievement.\textsuperscript{157}

**Committee Three**

The Chairman of Committee Three suggested that the key issues facing the Committee were vessel sourced pollution in the territorial sea, MSR in the EEZ and transfer of technology.\textsuperscript{158} Australia took over the leadership of the ‘special areas’ case from Canada and achieved a result that was probably the best that could be achieved. On the MSR issue the delegation’s conciliatory efforts were in the end stymied by the Third Committee Chairman.

Discussions on the preservation of the marine environment were devoted almost exclusively to the question of vessel source pollution in the territorial sea but extended to the question of pollution in the EEZ and related enforcement questions. In total 142 amendments were submitted on the articles in RSNT relevant to this question.\textsuperscript{159} Debate took place in thirteen informal plenary meetings and at eleven meetings of a negotiating group under Mr. Vallarta of Mexico\textsuperscript{160} where Australia was a member.

The debates on vessel sourced pollution in the territorial sea remained largely unchanged and ‘tended to assume the character of a debate on the extent of a coastal state’s sovereignty in the territorial sea rather than that of a search for formulae which would control pollution without hampering innocent passage’.\textsuperscript{161} The debate continued to revolve around the maritime states view that coastal states should not have powers to make laws and regulations which differed from international rules and standards with respect to matters of design construction, manning and equipment. Other states, such as Canada and the United States, felt that coastal state sovereignty would be eroded if their right to make national laws was curtailed.\textsuperscript{162} Again the debate on the vessel sourced pollution was similar: the maritime powers arguing that RSNT articles were adequate and that national laws and regulations should conform to international rules and standards and the extreme territorialist states in favour of unlimited powers for coastal states to control pollution in the EEZ.\textsuperscript{163} No consensus emerged between the groups.\textsuperscript{164}

Australia did not directly enter these discussions mainly because it took the initiative in the area of major concern to Australia in the third committee—protection of the environment in areas where there were special environmental or other conditions. As previously noted the RSNT did not satisfy Australia’s interest here in that it allowed the coastal state to apply to special areas which it might wish to designate within the EEZ.
only those internationally agreed rules and standards. While those rules prohibited discharges within special areas they did not cover ‘rules such as traffic separation schemes, compulsory pilotage or under-keel clearances’ which Australia ‘might want...to introduce for protection of the Great Barrier Reef’. Australia took over the leadership on this issue from Canada at the fifth session and proposed a number of amendments of article 21(5) of the RSNT but these were criticized by the maritime powers. Redrafts were attempted by the Australian delegation to take account of their objections. Australia’s arguments for coastal state flexibility was supported by certain states concerned about passing tanker traffic—Egypt, Malaysia, India, China—as well as by the more territorialist states such as Kenya and Ecuador. However, the Netherlands and Germany argued that the role of the ‘competent international organisation’ be strengthened and were supported by Turkey, Japan, Bulgaria, Argentina, United Kingdom and Liberia.

The text which was read into the official records achieved ‘near consensus’ but gave the international organisation a ‘much expanded role’. For that reason it did not completely meet Australia’s initial preference for no international veto over the establishment of special areas. Australia wanted simply, ‘consultation(s) with appropriate organisations’ with recourse to dispute settlement procedures but in the end even Australian proposals were including a veto element. While Australian reaction within and outside the conference was positive towards the new text it was clear opposition from the maritime states (that feared that economic zones may be turned into ‘special areas’ unless the question was regulated at the international level) resulted in less coastal state flexibility than Australia wanted.

On other marine environment issues Australia was active in resisting moves by maritime powers to weaken port state enforcement powers and pushed for stronger coastal state enforcement powers by authorising the diversion of a polluting vessel providing it did not arrest or unduly delay such vessels. By the end of the session the marine environment text looked reasonably stable with the Chairman of committee three reporting that the basic concepts in the RSNT had received wide support. It thus appeared unlikely that Australia would push for amendments that would have the effect of altering the balance in the text.

On MSR issues the delegation’s role was very much that of the consensus builder, with Australia’s Keith Brennan in particular making vigorous efforts to seek to build common ground. The main discussion revolved around Article 60 of the RSNT—whether the consent of the coastal state should be required before research could be undertaken in its EEZ. ‘Researching states maintained firmly that research other than research
concerning resources should not be subject to the consent of the coastal state. Developing countries not only resisted this stand but sought a strengthening of the Revised SNT in favour of a consent regime...Discussion of these issues...appeared to produce a divergence rather than a convergence of views'.183

The US defence department was particularly concerned that without a clear statement that the exclusive economic zone was part of the high seas an extensive definition of coastal states rights on research, when combined with the already extensive definition of such rights over living and non-living resources would produce the functional equivalent of territorial seas, thus affecting military research and military navigation rights in the EEZ. Secretary of State Kissinger in fact privately told delegations from groups seeking such controls that the US would not ratify a treaty which contained the RSNT articles on MSR.184 Australia was directly involved in the search for a compromise in numerous fora—informal plenary meetings,185 in a group of between 30 and 50 delegations ('Friends of the Chairman' group), in a 'special group of heads of delegations' created by the Chairman186 and finally in private meetings convened by Australia with moderate coastal states. The negotiations focussed on trying to define those situations where the coastal state could exercise controls over researching states in the EEZ or on the shelf. Late in the negotiations the Chairman (Yankov from Bulgaria) presented what he called his 'test proposal' as an amalgamation of the main texts considered by the group.187 His proposal reproduced article 60(i) of the RSNT but sought to place greater restrictions on the exercise of the right to decline consent.188 The Chairman stated that the text was viewed by a majority of delegations as a basis for negotiations,189 but in fact researching states strongly criticized it for moving further towards a consent regime than the RSNT.190 The Chairman's proposal was really a feint in an attempt to retain the RSNT text 191 but it seemed clear at the session that the Chairman was intent on excluding genuine compromise proposals which offered competition to his own proposals.

This was most evident in the way in which an Australian compromise proposal was treated by the Chairman. In Committee, Australia tabled an amended version of article 60 of the RSNT192 which 'did not necessarily reflect the preferred Australian position but was an attempt to mediate on a particularly contentious issue'.193 Keith Brennan expressed the hope, after reading out the text (that closely followed the language of the RSNT and appeared designed to meet both Australian and American concerns to limit the criteria for denying consent)194 that other delegations would give it serious consideration.195 Apart from the US, several researching and coastal states expressed interest in the Australian text (United Kingdom, Federal Republic of Germany, Denmark, the Netherlands, Ireland, Italy, New Zealand, Argentina, Singapore, Portugal, Mexico, Colombia, Republic of Korea), but it was rejected by a number of states taking a more
territorialist line (Kenya, Brazil, Ecuador, Peru, Somalia, Tunisia and Tanzania). Later in a point raised by Brazil, the Chairman reversed an earlier ruling and refused to allow the text to be included in the summary record at which the text had been read because it had not been formally introduced. After Australia had pointed out that other informal proposals had been included in the summary records a heated debate followed where Brazil, Ecuador, Kenya and the Chairman argued that Australia’s proposal not be included in the summary record. Australia, in what appeared to be a move to avoid provocation, withdrew its amendment.

While the Chairman encouraged Australia to continue its effort at finding compromise solutions the incident seemed to confirm the assessment of the US delegation that the Chairman was pushing his own test proposal and ignoring other proposals. With the USSR openly stating for the first time that it was prepared to accept a consent regime for MSR in the EEZ it now appeared more likely researching states would be obliged to accept a form of consent regime and that Australia also would have to accept a more limited consent regime than the mixed regime for research that it preferred. The fifth session demonstrated, however, that Australia’s main interests in the MSR issue was now to find a solution to the stand off positions of polarised groups in order to establish a Convention. That meant that Australia seemed likely to continue its efforts of putting forward proposals that would lead to a generally accepted compromise.

With regard to the issue of transfer of technology the Committee as a whole met in two informal meetings and two meetings of smaller open-ended groups. As already noted this was an issue where Australia had little at stake although of concern to Australia was an Iraqi amendment to delete the reference in the preamble to article 86 to the protection of the rights and duties of ‘suppliers, holders and recipients of technology’. This was a phrase that Australia had succeeded in having included in the RSNT at the first New York session. From Iraq’s statement it was not evident what the motivation was, although it appeared from Australia’s response that Iraq’s view was that the Authority could dispose of acquired technology as it chose. Australia argued that it was: ‘important to retain the reference to the rights and duties of holders and suppliers of technology, not only in the interests of those holders and suppliers but also in the interests of recipients. If the reference was deleted, the International Authority might not fully recognize those rights, and would inevitably impede the transfer of technology. The acquired rights of holders and suppliers of technology must therefore be recognized and protected if the transfer of technology was really to be encouraged’.

The brief session on technology transfer in committee meant that it was not possible to determine whether Australia received any support on the question. On this issue,
Australia’s interests were more aligned to developed states. Technology transfer, Australia believed, should not be limited solely to developing states but also should pass to developed states.  

**Disputes Settlement**

On disputes settlement the informal plenary met to review the President’s first revision of Part IV of the RSNT. The President’s revised articles now no longer required states to make declarations on what disputes should be settled by compulsory procedures and those to be excluded but stipulated a general clause which while extremely complex would have excluded disputes relating to living resources or MSR to dispute settlement procedures (article 18(1)). Article 18(2) provided that a state may expressly accept dispute settlement procedures in relations to specified disputes. These related to seabed boundary delimitations, disputes concerning military activities and disputes in relation to which the Security Council had become involved. The main conflict focussed on what exceptions would be allowed to a compulsory settlement regime. Some delegations, including the Coastal States group felt that with regard to 18(1) the above provision should be deleted entirely as there should be no general international jurisdiction over matters relating to sovereignty over resources and the article did not make this clear. The other extreme was that international law applied and must be recognised as applying to all parts of the ocean in spite of the discretions given to coastal states, a view supported by the maritime states, the US and the Soviet Union. Australia’s formal position as indicated at the fourth session, was that the article 18(1) was opposed to Australia’s desire for a system of compulsory dispute settlement. If there were to be exceptions, then the existing paragraph 1 was far too broad in the categories of dispute which it excluded from dispute settlement procedures (especially MSR and fisheries). Nevertheless conference diplomacy dictated Australia’s response to exceptions permitted under the Art IV of the RSNT. A desire not to depart too far from the coastal states strongly held view, that there should not be a general international jurisdiction over matters relating to sovereignty over resources and a general desire to maintain a balanced relationship with the group, saw Australia adopting a rather moderate stance on a provision that represented a substantial departure from the preferred policy preference of Australia.
Conference Diplomacy and Concluding Remarks

Australia continued to work mainly through the Coastal States group at the fifth session. By the end of the fourth session as previously noted, the group of eighteen coastal states, that had been working together for more than three years, decided to enlarge the group by inviting delegations that shared the position of the group to join the group under the Chairmanship of Jorge Castañeda (Mexico). Australia was approached by the group to be part of a small co-ordinating group (along with Argentina, Canada, Fiji, India, Kenya, Norway, Peru and Senegal).214 It was clear that the territorialist members of the group were becoming more influential on such issues as the status of the EEZ and disputes settlement. In the case of the EEZ lack of coastal state support saw Australia withdraw its amendment proposed at the fourth session to article 75. Clearly Australia was finding it difficult to convince the more territorialist members of the group that the EEZ should be defined in such a way as to indicate clearly that it was not territorialist sea (thus avoiding the problem of creeping jurisdiction). In the case of dispute settlement the overwhelming weight of the coastal states opinion to exclude disputes related to coastal states rights in the economic zone saw Australia adopt a very reserved position on articles that were fundamentally opposed to Australia’s view that disputes settlement procedures would be undermined if exceptions were framed too broadly. Despite these problems the delegation at the end of the session were arguing that ‘the Group remains possibly the best instrument for the advancement of Australia’s objectives’.215

Australia’s activity at the fifth session was mainly directed to compromise so that gains over resource questions (shelf and fisheries) would not be undermined. This was true with respect to issues on MSR and the marine environment. Even on revenue sharing it appeared that Australia was unlikely to adopt a last ditch rigid position of opposition, but rather its position would change in the light of tactical considerations to do with a broader acceptance of its margin policy. For the first time, however, it appeared that Australia was becoming impatient that progress at the conference was too slow, despite the fact that a consensus appeared to be in sight, particularly in relation to Committees Two and Three. Speaking at the United Nations General Assembly twelve days after the session Australian Foreign Minister Peacock argued that Australia was disappointed at the ‘slow progress’ made at the session: ‘We consider it essential that the negotiating momentum be maintained during the inter-sessional period so that delegations can come to New York in May next year with the feeling that agreement is within reach. My Government will play its part in the process of negotiation and consultations to find solutions to outstanding problems. A loss of will or lack of resolve now could put at risk the Herculean efforts of the last few years, and usher in an era of uncertainty and difficulty as
nations may feel compelled to take unilateral action to preserve important economic interests'.

Despite similar warnings on the dangers of unilateralism at the end of the fourth session by the Foreign Minister Australia was clearly considering the unilateral option. Amidst wide press speculation that Australia was considering legislation to declare a 200 mile resource or economic zone Australia pointed out less than a month after the Foreign Minister's statement to the General Assembly that if a successful result was not achieved at the next conference session 'one of the options before Australia would be to take unilateral action to declare Australian jurisdiction over resources to 200 miles' albeit that such action 'would only be taken in consultation with friendly and like-minded countries, including those of the South Pacific'.

Sixth Session:  New York.  23 May—15 July 1977

The Foreign Minister's warning after the fifth session that Australia may pursue the 'unilateral option' was soon confirmed. Speaking in Parliament on 19 October 1976 Foreign Minister Peacock stated that the South Pacific Forum countries, including Australia, had recently agreed to the concept of introducing 200 mile exclusive zones but that all countries had agreed not to act on this decision until after the sixth session of the Law of the Sea conference. Peacock pointed out that the fifth session had been disappointingly slow and warned that the momentum to bring about a Convention should not be lost. While he stressed that a multilateral Convention providing for 200 mile zones was preferable to a unilateral declaration and that a 'series of unilateral declarations before the conference could pre-empt the possibility of a successful outcome' to the sixth session, the Australian government was of the view that if the session should 'not succeed' then Canberra would feel 'bound to consider acting unilaterally in regard to a two hundred mile exclusive economic zone'. The phrase 'not succeeding' was not explained in the Minister's parliamentary statement, although what he appeared to have in mind was a failure to conclude a Convention. The Minister, however, appeared uncertain about the legality of a move to extend offshore jurisdiction in the absence of a Convention being achieved. That uncertainty appeared to be shared by other officials in Canberra who felt that unilateral action could seriously jeopardise the outcome of negotiations and threaten Australia's respected position at the conference. Whatever residual doubts there may have been in official Canberra circles about the effects of a unilateral move to extend offshore jurisdiction, Australia was clearly signalling that it wanted the conference to move rapidly towards a final Convention. By the end of the sixth session Australia could take some comfort from the session's work. The outcome was the production of the Informal Composite Negotiating Text (ICNT), a unified
document containing all the draft articles which until then had existed as separate parts prepared by the Chairman of the Three Committees and Part IV, prepared by the President, on disputes settlement.\(^{223}\) This result was rightly regarded by Australia as a 'significant advance'\(^{224}\) and in that sense the session was judged by Australia as 'markedly successful'.\(^{225}\)

**Committee One**

Negotiations on Committee One issues were complex with the conference devoting the first three weeks to deep seabed matters.\(^{226}\) From Australia's viewpoint the issue of protection of land based producers was the major issue. Australia at both the 5th and 6th sessions let Canada make the running on this issue. Canada and other land based producers like Papua New Guinea, Chile, Zaire and Cuba were concerned that the text in the RSNT did not afford any real protection to land based producers.\(^{227}\) Australia's neutral role here was based largely on the publicly expressed view that in the absence of clear knowledge on the actual conditions which would prevail in the future there was little point in trying to incorporate specific formula in the Convention.\(^{228}\)

In general Australia did not adopt a high profile in Committee One, but rather attempted to facilitate movement on difficult issues.\(^{229}\) Australia did, however, actively push for a seat on the Council and submitted a proposal on the composition of the Council that appeared designed to achieve that goal.\(^{230}\) Australia's efforts were partly rewarded as the ICNT did include, as Australia's amendment had expressed, the opportunity for election of developed exporters in one of the categories.\(^{231}\) On the actual system of exploitation Australia did not appear to have been active.\(^{232}\) The changes made in the ICNT were unacceptable to the US as they still did not provide *inter alia* an adequate degree of certainty in negotiating contracts with the Authority by private firms and there were still serious difficulties with respect to the rights of technology suppliers.\(^{233}\) There was some evidence that Australia, at this stage, was optimistic that the ICNT would provide a satisfactory solution to the seabed mining issue in the near future.\(^{234}\) However, given an extremely hostile reaction by the US to the composite text concerning the system of exploitation there was some indication that the US was looking to Australia to take a mediating role on this issue at the next session, a role that the delegation were now finding quite familiar.\(^{235}\)

**Committee Two**

In the second committee Australia participated in negotiating groups on the legal status of the EEZ and the rights and duties of coastal and other states in the EEZ and a group on
the margin. Australia also played a significant role in the so-called Castañeda—Vindenes group formed towards the end of the session to consider issues related to the EEZ.236

On the shelf question Australia continued to oppose the concept of revenue sharing,237 although participating in discussions on the issue within the Margineers group. There appeared no change to Australia’s line at the fifth session that while Australia was conscious that revenue sharing had achieved a wide consensus Australia was still concerned at the slow progress on the definition question and that the Australian government would be advised accordingly. Australia’s opposition still seemed based on similar tactical considerations that were operating at the fifth session. In any event the question seemed close to a final resolution with the ICNT specifying the precise revenue sharing obligations of coastal state beyond 200 miles for the benefit of developing countries (contributions commencing in the sixth year of production at a particular site at one percent of the value of production and increasing by one percent per year until the tenth year after which the rate would remain at five percent).238 The delegation’s report thus stated unequivocally for the first time that revenue sharing would form part of a new Convention239 and thus the issue for Australia continued to be one of tactical considerations.240

On the definition of the margin issue, where the LLGDS with African and Arab support continued to oppose the broad margin policy, discussion in the negotiating group was focussed around the Irish formula introduced by the Margineers.241 There is no evidence that Australia and other Margineers made any move away from backing the Irish formula. Although the Irish formula drew ‘widespread support’242 it appeared that consensus could not be reached as there was no change to the ICNT shelf definition.243 What was particularly interesting was that Australia had obviously examined the implications of the Irish formula since the fifth session and had found that Australia may suffer some losses. In a revealing admission before the second committee the Australian delegate Guppy admitted that ‘one new effect (of the Irish formula) was to reduce (author’s emphasis) the area of the continental margin substantially, a factor which could have far-reaching effects on Australia’s jurisdiction’.244 Australia’s support for the Irish formula now clearly looked to be based on a wish by Australia to maintain solidarity with the Margineers rather than from considerations of gains in offshore territory. While this was the first public admission that the Irish formula may not have totally suited Australia’s interests in securing the widest area of margin as possible it should not be thought that this signalled a change in Australian backing for the Margineers proposal.245 Generally speaking, the sixth session saw growing support for the Irish formula although the opposition of the LLGDS group was now the major obstacle to be overcome by Australia and the other Margineers.246 In part the opposition of the LLGDS group
related to the frustration at lack of progress on access to the living resources of the EEZ (see below) so that progress on that issue now appeared critical if there was to be a final resolution of the margin issue.247

Australia’s mediatory role within the conference was evident in informal discussions on issues related to the territorial sea. Australia was active in trying to find a compromise on the issue on coastal state powers in the territorial sea with regard to design, construction and manning and equipment of foreign ships. Canada’s view was to support the deletion of article 20(2) on the grounds that it was a totally unwarranted restriction on coastal state sovereignty.248 Australia maintained its view that coastal state should have jurisdiction to regulate marine traffic but not to have power to require foreign ships to observe design, construction or manning standards which differed from generally accepted international rules. The stumbling bloc here was the phrase ‘or matters’ in the article, which as previously noted, was regarded by Canada and other coastal states as so vague as to cover any regulations such as packaging, safety of navigation, containerization, regardless of how minimal the level of international standards. Australia attempted to overcome the latter difficulty and introduced an amendment as follows: ‘Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules’.249 Australia’s amendment proved to be an acceptable compromise amongst the maritime and other coastal states for it was included in the ICNT, thus concluding what had been a controversial issue in Committee Two.250

The EEZ was again the most difficult issue in Committee Two where the maritime powers continued to oppose the territorialists and to express concerns that article 44 of RSNT could adversely affect freedom of navigation. They argued in favour of ‘the preservation as far as possible of the rights of the international community subject only to the subtraction of the resource rights which should be given to the coastal state’.251 In a lengthy intervention in the Consultative Group on the issue of the legal status of the EEZ and the rights and duties of other states in the EEZ Australia supported the fundamental basis of the compromise in the RSNT—that is the *sui generis* character of the zone with the regime of high seas governing the relationship of states one to another in the EEZ except to the extent that the Convention modified that regime in the EEZ.252

The real negotiations on the EEZ were, however, played out in the informal Castañeda—Vindenes Group253, where Australia played a ‘prominent part’ in seeking to break the impasse between the territorialists and the maritime states.254 The group consisted of Australia, Brazil, Bulgaria, Canada, Egypt, India, Kenya, Mexico, Nigeria, Norway, Peru, Senegal, Singapore, Tanzania, UK, USA, USSR and held a total of 13 meetings
between 25 June 1977 and 12 July 1977 at the end of which it submitted to the Chairman of the Second Committee proposed amendments which were accepted by the Chairman and were subsequently incorporated in the text. The work of the group has been discussed by two key participants (one of whom was the leader of the Australian delegation) and it is not proposed to repeat that discussion here. While it is not possible to judge the contribution of Australia to the Castañeda group’s text on the EEZ it is noteworthy that Australia’s Keith Brennan was widely regarded as having played an extremely important role in the group’s work in reaching a compromise. For Australia the outcome on the status of the EEZ which incorporated the Castañeda product was to satisfy the basic Australian objectives of ensuring coastal state rights over resources in the zone, to prevent the EEZ becoming in fact (and law) a territorial sea and to preserve the maximum possible high seas freedom in the EEZ. In so far as the article appeared to enjoy a reasonable consensus it also satisfied Australia’s objective that the EEZ articles be acceptable to both maritime and coastal state powers.

On fisheries issues, the dominant issue concerned provisions for landlocked and geographically disadvantaged states to the living resources of the EEZ but again tactical considerations saw Australia sticking to its cautious approach here.

On the issue of HMS where Australia interests were involved through the relations with Pacific island states in the Oceania group little progress was made. The ICNT, however, contained no new provision on the subject, nor fisheries matters in general. As the RSNT fisheries provisions were satisfactorily settled from Australia’s viewpoint, the ICNT provisions also appeared to meet Australia’s objectives in the fisheries area. On other lower priority items such as delimitation and islands Australia again stood apart, although it did become involved in negotiations on the archipelagic issue.

Only limited discussion took place on archipelagos but informal discussions between archipelagic states and the US reached a ‘satisfactory conclusion and their agreed amendments (were) reflected in the Composite Text’. Australia became involved in an issue that was the subject of direct negotiations between the US and Indonesia—whether as provided in the RSNT commercial aircraft should have the right of archipelagic sea-lanes passage. The US wished to maintain the RSNT not only because it felt that as a matter of principle a high seas route existed and a route with a similar regime should exist after the establishment of archipelagos but also because there could be a spill-over into straits. The right would also leave some bargaining power for negotiations or bilateral agreements in the event of denial of overflight. Indonesia was, however, proposing that archipelagic states may deny overflight above archipelagic sea lanes if such a state denies overflight in its airspace of the civil aircraft of an archipelagic state. Australia supported
the American view that overflight of sovereign territory was not the same as overflight over what were then high seas and what would involve a similar regime for the future i.e. sea lanes. Australia expressed this view to the Indonesians stressing that while Australia supported the notion of archipelagos it did so on the basis of satisfactory guarantees with respect to passage not only through but also over archipelagic waters. The ICNT did reflect such rights and thus there appeared little reason to believe that Australia would wish to reopen the subject in further debate. While Australia lent support to US views here it should not be thought that Australia simply supported its major ally automatically, for as will be shown later, Australia adopted many views on UNCLOS issues at variance with US policy.

Third Committee

On the MSR issue Australia ‘sought to play a mediating role and as far as possible tried to develop proposals calculated to identify and build on the common ground between opposing views’. The delegation’s report explained that the ‘sharp division’ of views on MSR made it all the more desirable that states who ‘might be in a position to contribute to a negotiated solution should seek to do so’. The delegation’s interest in resolving what was now proving to be a difficult issue appeared to be explained by the delegation’s observation that ‘marine scientific research was one of a relatively small number of issues which had to be resolved before the Law of the Sea negotiation could be successfully concluded’. Thus with consensus in sight Australia now clearly felt its role was to aim for the best available compromises on MSR.

Australia participated in the group called together by the Chairman to discuss the issue but it failed to make much progress. In the light of what seemed a stalemate in negotiations Australia’s Keith Brennan called together a group of delegations representing a broad spectrum of views without including delegations adhering to extreme views. The group did produce a text but the initiative appeared to be lost as intensive negotiations, in which Australia was also participating, had begun in the Castañeda—Vindenes group. Indeed it was the text on MSR produced by the latter group that was largely incorporated in the ICNT. Researching states, led by the United States now acquiesced to a regime based on an unambiguous statement of the principle of coastal states consent for MSR projects in their EEZs. They also went along with a formulation of the coastal states duty to grant consent which was limited to ‘normal circumstances’. One of these was if the research was of direct significance for the exploration and exploitation of natural resources. Given that Australia’s main interest on MSR was now to find a regime acceptable to the major researching and developing coastal states
there seemed little reason to believe that Australia would not accept the MSR provisions as part of a delicately balanced package on the EEZ.

On the marine environment Australia participated in discussion in informal meetings and in meetings of a smaller group of delegations with a particular interest in marine environmental issues, known as the Friends of the Chairman. Both sets of meetings were presided over by Mr Vallarta of Mexico. Australia's compromise on standard setting for the control of vessel sourced pollution has already been noted but Australia was also active in defending coastal state enforcement powers against the maritime powers. Australia did not appear to push the amendment it had proposed at the fifth session whereby the coastal states would be given greater power to divert a vessel out of the EEZ but no power of arrest, as 'virtually all delegations accepted a right of arrest in the EEZ for flagrant or gross violations resulting in discharges causing major damage to the coastal state'. Nor is there any evidence that Australia joined a number of delegations seeking to strengthen coastal state powers in special areas. It appeared that the RSNT consensus text now commanded the support of the large majority of delegations and that Australia's position was not to re-open the issue.

Also noteworthy was Australia's resistance to attempts to weaken the universality of port state enforcement. For instance, Australia opposed a French proposal to limit the power of the port state to take enforcement action in respect of discharge offences on the high seas to those cases in which a request for such action had been received by the flag state. As a defender of port state enforcement it seemed that Australia would continue to oppose amendments designed to weaken port state enforcement measures in the high seas (Article 219 of ICNT was the only enforcement measure available for pollution offences in the high seas).

The ICNT provisions on the marine environment were very much of a package nature, with some delicate compromises between maritime and coastal states. As far as Australia was concerned it now appeared that the text on the marine environment had advanced to the stage where it could feel satisfied that its major interests were preserved.

Disputes Settlement

Disputes settlement issues were dealt with again in informal meetings of the plenary where Part IV of RSNT was discussed for the first time. By the sixth session the system of choices proposed under the disputes settlement scheme had been largely accepted by states. Australia found the system of choices proposed acceptable in so far as it maintained a basic obligation of compulsory settlement leading to a binding
decision. The most controversial issue was, however, the scope of applicability of compulsory procedures where some coastal states made clear they would not have their control over fisheries challenged. Some of the LLGDS group however saw the provisions as too restrictive. These issues were central of course to the matters relating to the legal status of the EEZ and the Castañeda group included texts on this issue in its draft articles. In the Castañeda group Australia expressed doubt whether limitation of remedies to conciliation in the case of fisheries would lead to a consensus. Australia argued that there could be cases where a dispute could arise as a result of a failure to exercise a discretion properly because irrelevant matters had been taken into account or relevant matters disregarded. A Tribunal should not substitute its discretion for that of the coastal state but should be empowered to find that the coastal state had exercised its discretion incorrectly and remit the matter for re-determination. This suggestion did not seem to generate much support as it was not included in the Castañeda group’s text (which did, however provide for compulsory conciliation on fisheries issues). In the end the ICNT did not include compulsory conciliation for fisheries, but rather strengthened the position of coastal states regarding fisheries in their EEZ. As noted in discussion on the fifth session the thrust of these provisions represented a substantial departure from early Australian support for exceptions not be be framed too broadly. Australia had reluctantly come to the conclusion that these provisions were ones that were not only generally supported by Australia’s natural allies in the conference (the Coastal States Group) but that they probably represented the best solution achievable given that they had been effected to maintain a close link with the EEZ provisions.

Conference Diplomacy and Concluding Remarks

The sixth session saw Australia play an active role in what was undoubtedly the key negotiating group at the session, the Castañeda group. Australia’s participation did not require any real modification of its goals and Australia’s active role in the group can be explained by the fact that the group’s work soon appeared to be crucial in finding a widely accepted compromise on EEZ issues.

The Coastal States Group was still important in forging negotiating positions amongst coastal states and Australia continued its role on the coordinating Committee of the group. However Australia appeared to focus its activity in smaller working groups of the main committees. For example, when the Evensen group became the Chairman’s negotiating group in the first Committee, Evensen called together a small group of key delegations selected on the basis of their special interest or contributions to the conference to assist in formulating compromise proposals. Australia was included in that group. Keith Brennan’s activity in calling together moderate states on the MSR issue is also
relevant in this context. The Margineers group continued to be active and still offered the best hope of achieving final conference acceptance of Australia’s margin claims.

Australia also continued to liaise with the Oceania Group. It agreed that suggestions that the existing provision on transitional provisions should be deleted and a Protocol to the Convention substituted were not in the best interests of the group as this would simply see a repetition of earlier debates where Arab countries had sought provisions to accommodate the Palestine Liberation Organisation. In what represented a change for Australia (and the Oceania Group) from its position to support deletion of a provision stating that ‘rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf’ the group agreed that reopening the issue would jeopardize what was generally regarded as a satisfactory provision on islands. The only slight element of discord which entered Oceania Group discussions related to difficulties raised by Papua New Guinea in relation to the generation of complete maritime space of islands in the Torres Strait. Papua New Guinea with Torres Strait negotiations with Australia in mind argued that in-shore islands should be excluded from delimitation provisions. It is not clear why but in the end PNG did not raise the issue in the discussions in the second committee. It seemed that in future sessions Australia would have to take more formal account of regional developments in the group. Six weeks after the session was completed Australia and eleven other South Pacific Forum states agreed in Port Moresby to legislate to establish a 200 mile fishing or economic zones as soon as possible, preferably by 31 March 1978. They also agreed to establish a South Pacific Regional Fisheries Agency to be based permanently in the Solomon Islands. In fact two weeks before the South Pacific Forum meeting the government had foreshadowed this development by stating it had decided to proclaim a 200 nautical mile fishing zone with the timing of its introduction to be discussed with Forum countries (and ignoring its previous warning that states should not preempt the conference by unilateral extensions until there was a Convention). It now seemed evident that Australia regarded the conference as already succeeding in generating new legal norms that legitimated the extension of coastal states rights to 200 miles, for there were no signs in the government’s announcement of Australia’s intention to declare a 200 mile zone that such unilateral action would adversely impact on the conference negotiations.

As noted earlier Australia regarded the production of the Composite Text as a major step forward in the conference. The addition of a draft preamble and Final Clauses gave the document the appearance of a draft Convention, although it was in fact only the basis for further negotiations. From Australia’s viewpoint the question of the status of the EEZ had been resolved satisfactorily as well as the fisheries provisions. It also seemed the
marine environmental provisions were accepted by Australia as a broadly acceptable balance between the maritime states' interest in freedom of navigation and the interest of coastal states in promoting coastal states' and port states' powers to regulate and enforce measures to control marine pollution, especially vessel-sourced pollution. There seemed reasonable grounds for believing that the Irish formula that Australia and other Margineers had been supporting would be accepted. Questions relating to production control of seabed minerals, delimitation and revenue sharing still remained for settlement and these were of direct interest to Australia. The ICNT was the first text which covered all the issues before the conference so for the first time it was possible to get an idea of the overall package that might emerge. From Australia's point of view the ICNT was judged as meeting its 'key objectives especially in so far as it would permit coastal states to claim exclusive economic zones, up to 200 nautical miles in breadth, and would confirm a coastal states' sovereignty over the resources of its continental shelf'.

While it was recognised that a final Convention would include revenue sharing beyond 200 miles the Foreign Minister, Mr Peacock, intimated that on a range of other issues such as the width of the territorial sea, navigation rights through straits and archipelagos, marine environmental issues and control over MSR in the EEZ the ICNT was satisfactory to Australia.

Despite Canberra's benign assessment of the ICNT there were other signals coming from Canberra that Australia was becoming somewhat impatient at the progress of the conference and its negotiating methods. Two days after the session had ended Australia signed a letter with six other states requesting the Secretary General review the multilateral treaty making process. In that letter it was stated that the law of the sea negotiations had been 'time-consuming' and 'led only slowly to results which are as yet incomplete' and that 'having regard to the pace at which the conference has moved and the difficulties which it has experienced, there is certainly room for consideration whether the adoption of different methods might have led to better results'. Despite the feeling that progress was slow the official reaction to the ICNT, as noted above, was favourable and there was little doubt that the ICNT while an informal document represented substantial progress towards completion of a draft treaty. That judgement was one that was shared by Canberra for the official view was that the seventh session would be 'crucial' in 'provid(ing) an indication whether a widely accepted Convention is within grasp'.
CHAPTER SIX

AUSTRALIA AT UNCLOS 111, 1978-1979

Over the next two years UNCLOS 111 met four times for a total of 24 weeks. From 1977 negotiations on the regime for deep seabed mining dominated the proceedings and became extremely technical. Many of the issues, however, in turn yielded to negotiations throughout 1978-79. At the eighth session in Geneva the conference was able to issue a revision of the Informal Composite Negotiating Text (ICNT/Rev.1) that included new texts on seabed mining, the shelf, environmental matters and a range of other matters.

Australian diplomacy over this period largely focussed on the issue of delimitation of the shelf where the most important development was a new formula that found its way into a revised text at the end of the resumed eighth session. Australia found the new formula to be quite generous and quickly acted to defend it against Africa, Arab and LLGDS states still pressing for a flat 200 mile limit. Australia initially opposed the decision to modify the formula to take account of the fears of some states that the formula would allow states situated on mid-oceanic ridges to claim much of the deep seabed, but conference politics forced the delegation to modify this stand. Australia also continued to attack revenue sharing schemes but towards the end of the period realised that the task of removing such provisions was impossible. Shelf questions were greatly complicated in this period by virtue of the LLGDS linking progress here to their claims to resources in neighbouring EEZs and Australia worked actively and successfully with the Margineers to break this linkage.

For the most part Australia’s main work in this period focussed on Committee Two issues but the delegation was inevitably drawn into conflict with the US in Committee Three, when the US attempted to rewrite the texts relating to MSR on the shelf beyond 200 miles. Washington was here concerned to gather domestic support by US marine scientists for a final treaty but the Australian delegation ended up taking a reasonably high profile against the US and then later moderating its stand as Canberra’s shelf position looked secure.

In Committee One Australia became actively involved in trying to settle the question of production controls over seabed nickel. Australia’s position now moved from cautious support for controls and from a position where Australia had let Canada and the US make the running on the issue, to an active policy of ensuring the production controls would directly assist LBPs. Australia’s position was not always easy here as Canberra took a
different approach to Canada, its only developed country ally within the LBP group. On other contentious Committee One issues Australia continued to adopt its mediatory role.

Australian delegates continued to operate actively in the Margineers, Coastal States Group and the Oceania group. At times, however, Australia found some of the more territorialist members of the Coastal States group forcing Australia into positions that were not as moderate as the delegation would have preferred. There seemed little alternative, however, for the group was still the most useful vehicle to pursue Australia’s overall goals, in particular to counter the activity of the land locked group on Committee Two issues. Australia’s diplomacy during this period, as through the rest of the conference, was greatly assisted by the fact that the delegation received strong domestic support, as well as having a well co-ordinated approach to the issues under discussion. These matters are taken up later, but here it can be noted that the Australian delegation during this period played quite an active role in virtually all the ocean issues that emerged in the period. By the beginning of 1980 nearly all elements of the package were finalised and the Australian delegation was now increasingly taking on the role of custodian of the package, again a role that will be discussed later.

Seventh Session: Geneva. 28 March—19 May 1978

Notwithstanding the fact that the first two to three weeks of the seventh session were lost due to a crisis relating to the Presidency of the conference the session did prove to be productive. A new method of negotiating was established whereby negotiating groups (NGs) were established outside the formal Committee structure to deal with seven ‘hard core’ issues with the Chairman of each negotiating group reporting to the relevant committees and to Plenary. It was agreed that each hard core negotiating group would be constituted by a nucleus of countries principally concerned but with the understanding that the groups were open-ended. The ICNT was not revised at the session because there was an uneven pattern of progress and there were strong objections by several delegations to revising one part of the ICNT while other parts were being negotiated, particularly as many parts of the text were linked to each other. What emerged from the seventh session was the collation of all the reports of the negotiating groups in one document. That outcome fell short of the original expectation in the conference that the ICNT would be revised, although Australia’s judgement was that ‘the latter part of the session had been one of the most productive periods of negotiation in the recent history of the Law of the Sea conference’.
Seabed Negotiating Groups

Australia attended three intersessional meetings convened between the sixth and seventh sessions. Forty eight states, including Australia, were nominated by the President in consultation with Committee Chairmen and Regional Groups to comprise NG1 but the group was open ended and meetings were widely attended. The negotiating group’s mandate covered three issues; the system of exploitation, resource policy and the Review Clause. Australia does not appear to have taken a high profile in the group.

The system of exploitation was expected to raise difficult problems at the seventh session because of the hostile reaction that the ICNT text had received from the US. Obviously after a closer analysis of the ICNT, Australia shared the concerns of the developed countries, and the US in particular, that the ICNT ‘did not provide a clear right of access for companies or State instrumentalities to the Area’ and bestowed on the Authority ‘wide discretionary power in negotiating with an applicant on such matters as the transfer of technology and financial arrangements’. The issue was not one where Australia could exert much leverage and this time Australia does not appear to have taken an active mediatory role. As real progress was made on the issue of the system of exploitation in bringing the text much more in line with Australia’s preference for a genuine parallel system without making transfer of technology a precondition for obtaining a contract with the Authority, such a role was probably not called for.

The question of protection for land based producers by a production limitation formula was one largely played out by the US (the world’s largest nickel consumer) and Canada (the world’s largest nickel producer) although Australia did occasionally mediate between the two parties. Australia’s position as it had developed over the sessions had been to remain fairly neutral in debates on this issue, believing that there were difficulties in agreeing to a precise formula years before seabed mining became a reality, and that what was required was the creation of an effective mechanism, such as international commodity agreements between producers and consumers that would have the power and flexibility to decide appropriate measures at the time and in the light of prevailing circumstances. While that had remained Australia’s preferred position, it had been recognised before Caracas that some kind of production formula would almost certainly form part of a package. Thus Australia had leaned in favour of land based producers in terms of general objectives. Canada and a number of other developing producer countries felt that the formula in the ICNT was ineffective in protecting producer countries. Canada entered into formal negotiations with the US delegation early in the session and a formula, ad referendum because of the necessity of referring the matter to government approval was agreed to by both delegations and jointly tabled at the
conference. Canada invited Australia to participate in the Land Based Producers Group which Canada formed at the fifth session to co-ordinate interests of developing and developed mineral producers. Previously Australia had not been invited to attend meetings of the group, probably because Australia’s position had not been to publicly support specific formula in advance of seabed mining becoming a reality. While Australia had soft-pedalled this issue the delegation felt that the Canadian-US agreement was a ‘favourable development’, urged other states to consider the proposal sympathetically in the negotiating group and made a point of commenting that Australia ‘hope(d) that the arrangement will provide the basis for a widely acceptable compromise’. Australia’s position here at this stage seemed dictated by tactical considerations. The formula sought to provide protection for LBPS without undermining the incentives for mining to proceed and thus seemed likely to receive the support of both the US and less developed states in the LBP group.

On the other hand Australia did not support the establishment in the ICNT of a special compensation system for developing countries adversely affected by seabed mining. Australia’s view here was that there were liberal compensatory financing facilities which already existed particularly under the IMF Compensatory Financing Facility. However, Australia did not vigorously oppose compensatory financing mainly because it saw no real chance of deleting a reference to a provision that developing states in the LBP group considered important. While, as noted above, the main developments on the production control issue were played out in private Canadian-US negotiations Australia did participate in a group of experts chaired by Mr Archer of the United Kingdom delegation. The group produced three reports which illustrated the enormous complexities involved in the development and application of a production control formula. The work of the group along with the US-Canadian provisions was reflected in the revisions on production limitations and as noted above Australia saw this development as a constructive step towards compromise. Despite the fact that Australia’s approach on the inclusion of a production limitation formula was, as noted earlier, not the same as other land based producers Australia’s positive reaction to the Canadian-US agreement was an indication of how Australia was working towards shoring up genuine attempts at reaching a position that would satisfy both developing and mining states on the seabed issue, and was consistent with its overall approach in Committee One to ensure that negotiations here did not threaten the goal of a universally acceptable treaty.

In NG2, Ambassador Tommy Koh of Singapore was appointed Chairman to consider the financial arrangements of the Authority, Enterprise and financial terms of contracts to be
concluded between the Authority and State Parties. Suggested compromise proposals were put forward\textsuperscript{25} with the Australian Rapporteur Bailey assisting Koh in the negotiations. Australia’s main role in what were extremely complex negotiations was to facilitate discussions and to try and generate support for Chairman’s proposals that were seen to be acceptable to both developed and developing groups. Australia was not really in the lime-light in discussions dominated by potential seabed miners and G77.\textsuperscript{26}

In negotiating group three Australia acted to again ensure that Australia had a voice on the Council of the Seabed Authority. Australia argued against changes that contemplated prospects of two developed land based producers being represented on the Council be reduced to one.\textsuperscript{27}

\textbf{Second Committee and Relevant Negotiating Groups}

Four negotiating groups were established to consider hard-core issues relating to the Second Committee and the Committee itself met informally to consider other issues.\textsuperscript{28} In the negotiating group on the continental shelf there were seven meetings.\textsuperscript{29} For Australia the most significant development here was undoubtedly the shift by the Soviet Union from its long established proposal that the 500 metre isobath should be the outer limit to a new Soviet proposal which would accept the outer limit of the edge of the margin as the limit of the shelf, but provided that the limit would not extend more than 100 nautical miles beyond the outer limits of the EEZ.\textsuperscript{30} Australia and other wide margin states rejected the proposal,\textsuperscript{31} presumably because they saw no merit at that stage in accepting a distance limitation on the Irish formula.\textsuperscript{32} Australia also participated with other wide margin states in meetings with the LLGDS group to try and gain support for the Irish formula but support did not appear to be forthcoming largely because debate on seabed issues was to a great extent becoming a hostage to progress on the rights of access of LLGDS to the EEZ.\textsuperscript{33} The provision of a map by the Secretariat illustrating the various formula for the definition of the shelf did, however, assist the Margineers by showing that the Irish formula was not only workable but also one which limited the margin, as Australia had pointed out at the previous session.\textsuperscript{34}

The question of the access of LLGDS to the living resources of the EEZ occupied NG4 under the Chairmanship of Nandan (Fiji). Australia was one of 17 coastal states represented in the group.\textsuperscript{35} For Australia this issue was becoming more important to settle for as noted above the LLGDS were now quite clearly linking progress on the delimitation of the margin with progress with respect to the question of access to living resources. As mentioned, Australia met with the LLGDS in the Margineers Group to try and gain support from the group on the Irish formula. When the revised text was
presented in plenary\textsuperscript{36} Australia linked the issues in reverse order by stating the accommodation on the revised texts presented by Nandan would be unacceptable unless there was progress on the shelf limits issue.\textsuperscript{37} Australia received strong support here from members of the Margineers and Coastal States\textsuperscript{38} thus indicating that for the texts to be incorporated in the ICNT there would need to be agreement on the shelf question.

The LLGDS issue was also linked with the question of fisheries disputes which was dealt with in NG5 under the Chairmanship of Ambassador Constantin Stavropoulos (Greece).\textsuperscript{39} The problem here, as far as Australia was concerned, was that while it had reluctantly accepted the restrictions placed on the dispute settlement procedures in the ICNT\textsuperscript{40} with regard to fisheries, the attitude of its coastal state allies had hardened from earlier sessions. They would not tolerate any qualification of their exercise of sovereign rights over the living resources of the EEZ, even the limited provision for compulsory procedures in the ICNT. On the other hand the LLGDS and distant-water fishing nations were proposing to strengthen the ICNT to bring more disputes within compulsory adjudication.\textsuperscript{41} The NG5 had to find another third party procedure other than judicial ones which could be used to settle fisheries disputes. The solution was compulsory (but non-binding) conciliation in such cases, which was the method adopted in the earlier Castañeda text.\textsuperscript{42} For Australia this outcome was regarded as 'satisfactory'.\textsuperscript{43} This article may have been satisfactory from the viewpoint of offering a reasonable prospect of consensus being reached\textsuperscript{44} but the provision was (as were the ICNT and RSNT provisions) a substantial departure from the general policy preference of Australia for compulsory system of dispute settlement without broad exceptions. As noted in the previous chapter the fact that the coastal states treated as anathema the possibility of involving compulsory judicial procedures for challenging coastal states powers meant that Australia had little choice but to come to terms with the trend to reject disputes on fisheries being subject to compulsory settlement.\textsuperscript{45}

The second committee met on a number of occasions informally and received proposals on a wide number of issues—territorial sea, straits, archipelagos, the EEZ and delimitation.\textsuperscript{46} Australia's main intervention was to support the package which had been negotiated on the EEZ in the ICNT. In the face of a Soviet proposal supported by the East Europeans to disrupt the package\textsuperscript{47} Australia along with 39 other coastal states proposed, in what appeared to be a tactical device to defend the ICNT package, an alternative to Article 55 on the legal regime of the EEZ.\textsuperscript{48} The coastal states position was opposed by the LLGDS\textsuperscript{49} but no change was made to the ICNT text, and indeed only three minor drafting changes on all Committee Two issues were recommended by the Chairman of the Committee in his Report to Plenary as a result of the discussions in Committee Two.\textsuperscript{50}
Committee Three

Most delegations had considered that negotiations on the marine environment had been closed at the sixth session, exemplified by the fact that the issue was not listed as one of the outstanding issues identified in the intersessional meeting. However, what opened the issue up again, particularly the issue of vessel source pollution, was the Amoco Cadiz oil spill that resulted in heavy pollution off the coast of Brittany.52 The French altered their position from an advocate of maritime state attitudes to an exponent of coastal state positions and the United States, responding to congressional reaction to a series of oil spills off the US coast, strongly pushed for environmental positions.54 Canada also continued in pressing for wider coastal state powers in relation to the question of coastal state rights to set national standard for design, construction, manning and equipment in the territorial sea and generally in support of stronger coastal state rights in protecting the marine environment.55 The renewed push for greater coastal state rights created tactical problems for Australia. As noted previously the ICNT environmental provisions had, as far as Australia was concerned, advanced to the stage where a consensus had been achieved that met Australia’s overall interests. Australian delegates were instructed in fact not to reopen the marine environmental text as this would only prejudice the prospects of final consensus.56 This meant that Australia appeared unsympathetic to amendments proposed during the session designed to strengthen coastal state controls and early in the session adopted positions that placed it on the side of the maritime powers.57

There was no doubt that during the session there was a shift in the conference towards a greater willingness to accept a marginal strengthening of coastal state controls.58 For the most part those provisions on which consensus was reached were broadly in line with Australia’s views, but the negotiations on this issue underscored the importance of not assuming that debate on the marine environment had concluded. Australia’s assumption that any attempt to reopen the marine environment question would be to Australia’s disadvantage because of the possibility that failure may open up further matters for renegotiation was not borne out at the seventh session. The outcome of the session suggested that a number of coastal states did not share Australia’s view that the ICNT should not be reopened. That result clearly required Australia to reassess its position for the next session although the indications were that by the end of the session Australia saw the overall compromises suggested as improving the ICNT text.60

Discussions on MSR and the transfer of technology occupied only one informal meeting at the seventh session, although it was raised in subsequent meetings of the formal committee and in Plenary. The United States argued that the MSR articles should be altered to bring it more in line with the Castañeda-Vindenes text at the sixth session.62
Australia supported the US and also expressed support for the ‘compromise text’ and ‘after referring to the circumstances in which the text was produced, the Delegation gave its own assessment that the text was the nearest thing to a negotiated text that had emerged on this subject’. In formal committee the US and Australian view was supported by FRG, Netherlands, United Kingdom, Israel and New Zealand and opposed by Argentina and Brazil. The earlier Castañeda text incorporated a consent regime but did not include a paragraph in the ICNT text that appeared to confer a coastal states rights in relation to the EEZ that could be interpreted as more appropriate to territorial sea rights. The Soviet Union stated in informal committee that the ICNT text should not be disturbed and both in the informal committee and in his final report to plenary the Chairman indicated he had no mandate to alter the MSR text. As Australia’s stake in this issue was not enormous it seemed likely, therefore, that unless there were further initiatives to amend the ICNT text that Australia would not take moves likely to endanger the consensus on the basic consent regime in the MSR articles.

There was little discussion on the subject of the development and transfer of marine technology, but there was ‘general agreement among developed country delegations, including Australia, that the Third Committee text on this could not be brought to finality until the First Committee “package” became clear.’

Conference Diplomacy and Concluding Remarks

The Margineers and the Coastal States group continued to be the major vehicles for Australian diplomacy through the session. The group had met for two full days prior to the February intersessional meetings in New York and also during those meetings. At the seventh session it met several times during the session. Following an Australian initiative the Coastal States Group decided that:

(i) the group should maintain solidarity with the broad margin states;

(ii) that a link had been established between the work of NG4 (on access to fisheries by the LLGDS) and NG6 (on the continental shelf) by the LLGDS and that the coastal states should insist that the link between the two remain. They should therefore oppose any amendment to the ICNT on the basis of the work of NG4 and NG5 (dispute settlement relating to exercise of sovereign rights in the EEZ) unless amendments to the ICNT based on the Irish formula went forward;

(iii) that the Irish formula was itself a compromise since it involved the surrender by coastal states of substantial areas of continental shelf to the common heritage of mankind; and
that the coastal states group had reached the limit of its negotiating flexibility in regard to the work of NG4, and that the LLGDS should expect no further concessions in the area as the price of agreement in NG6.72

The solidarity of the Margineers Group thus became an even more important consideration for Australia during the session for it was through that group that Australia could exert influence on the Coastal States group on the margin issue. With the LLGDS now making clear that no progress could be made on the shelf delimitation issue, the Coastal States group was obviously of vital importance in trying to induce movement in LLGDS on the margin issue. Given that such socialist countries as Bulgaria, Czechoslovakia, German Democratic Republic, Hungary and Poland were members of the latter group73 there was a high probability that they would support the USSR proposal. It was to be expected, therefore, that the work of the Margineers and Coastal States group would assume greater importance at the next session.

As far as Australia was concerned the session had produced mixed results. On seabed matters in the first committee where Australia was principally concerned to see a settlement, the texts produced were much more acceptable to the developed countries, although it was still uncertain whether the developing countries would accept the parallel system. The work of NG2 involving the complex questions on financing where Australia’s John Bailey was directly involved in facilitating discussions, had produced a useful report. The work of NG3 on voting and composition on the Council revealed that there was still some way to go before consensus could be reached. The accurate assessment of Australia on seabed mining issues was ‘much more needed to be done’ to reach a degree of wide acceptance.74 While the question of boundary delimitation remained deadlocked in NG7 Australia’s interest in ensuring that delimitation should be reached by bilateral agreement was preserved in the ICNT, and it looked likely that that aspect of the text would survive. The main question for Australia concerned the future prospects of the Irish formula that set a limit at the point where the thickness of the sediment was at least one percent of the distance from the foot of the slope. The Soviet proposal appeared to cut across the emerging support for the Irish formula. The issue now facing Australia was whether sufficient support could be generated from the LLGDS group to back the Margineers’ proposal.

Resumed Seventh Session: New York. 21 August—15 September 1978

It was accepted early at the session that the ICNT could not be revised by the end of the session and the outcome of the negotiation was once again reflected in the reports of the Chairman of Committees and of the Negotiating Groups.75 Significantly for Australia, it was not possible to make any real progress on the shelf issue, largely because the Soviet
Union stuck to its position it established at the seventh session that the shelf should have a maximum limit of 100 miles beyond the 200 mile EEZ. Progress on Committee One issues was made more difficult by developing countries criticism that the United States was not negotiating in good faith because of US legislation (that was pushed through the House on 26 July 1978) permitting their companies to mine the deep seabed. Australia’s judgement was that while the session had a promising start ‘little substantive progress on the major outstanding issues’ was achieved, partly because there had been a lack of time between sessions for some delegations to obtain revised instructions.

**Committee One and Seabed Negotiating Groups**

The three working groups established at the seventh session continued their work at the resumed session. The session saw considerable criticism by developing countries of other states that were legislating unilaterally to allow their companies to mine the deep seabed. Chief among these was the United States, where legislation had already passed the House of Representatives and was before the Senate, but it was also understood that Japan and the EEC countries were planning similar action to that of the United States. The Chairman of G77 made a statement in plenary that such legislation was contrary to international law, with several developed countries rejecting that claim. Canada pointed out the negative effects of unilateral action was having on the negotiations while Australia’s approach, along with New Zealand and some Scandinavian countries, was to draw the attention of the conference to the need for a comprehensive Convention, including agreement on seabed issues. Australia’s Keith Brennan argued that: ‘Although some people might feel that the negotiations aimed at establishing an international regime for exploiting the sea-bed were not essential, his delegation wished to re-emphasize the great importance which it attached to those negotiations. The conference on the Law of the Sea had been convened, not only to clear up all of the uncertain areas on the existing legal rules, but also to establish an equitable regime for the seabed. In his view, there was no reason to be excessively impatient over the delays encountered by these efforts, if one bore in mind the considerable progress which had been nevertheless achieved’.

Australia’s response here was an expression of its principal concern that the chances for a successful negotiation of a seabed regime should not be unduly prejudiced while the conference was in progress. The mediating role did not prevent Australia from taking positions that supported its own interests. Although there was no formal discussion of the production control issue at the session, Australia, despite its earlier lukewarm approach to production limits, recognised that such controls were an integral part of the Convention. As the delegation’s report stated if the resource policy did not apply to all
activities in the Area 'then there could be a serious undermining of the concept of production control'.

Australia does not appear to have taken any direct initiatives in Committee One at the session, although Australia's Bailey continued his work in assisting the Chairman of NG2 on financial arrangements. The official Australian judgement of the session's work was that 'considerable work needed to be done' on the seabed regime with the single most important aspect outstanding being an elaboration of the financing and scope and functions of the Enterprise. The basic thrust of Australian activity in the first committee continued to be work towards compromise solutions in order to ensure that the seabed regime did not prejudice the conference as a whole. The main Australian concern was that 'failure to develop successfully a regime for exploitation of the international seabed may undermine the gains made elsewhere in the conference' and that dictated that Australia continue to play a 'leading mediatory role' on the issue. Negotiations in Committee One had now reached a fairly delicate stage with the US willing to resort to national mining legislation as an interim or fall back measure. The point had been reached where both developed and developing countries would have to take high level political decisions for the ICNT to be revised in such a way as to offer substantially improved prospects of consensus. For that reason also there seemed no reason to believe that Australia would not continue to work constructively towards the conclusion of negotiations in the first Committee.

Second Committee and Relevant Negotiating Groups

On the question of access by LLGDS to the living resources of the EEZ there were no substantive negotiations that took place, and on the shelf issue in NG6 there was no real progress made. The problem as far as Australia and other Margineers were concerned continued to be the Soviet proposal that shelf rights should be limited to a maximum of 300 nautical miles. On the positive side from Australia's viewpoint was that there continued to be a slow increase in support for the Irish amendment. As noted above, Australia along with the Margineers, were of the view that unless the margin issue was settled final agreement could not be reached on the issue of access by the LLGDS to the fisheries of other states. As far as revenue sharing was concerned the Seychelles, on behalf of the Africans, submitted a proposal for sharing ten per cent of the revenue beyond 200 miles as the price for support of the Irish formula. Broad margin states resisted attempts to raise the level above the five per cent (starting in the tenth year of production) in the ICNT.
In informal negotiations a number of issues that were of interest to Australia arose. The US proposed a strengthening of the article 65 on marine mammals\textsuperscript{95} and the establishment of a right of an international organisation to regulate such mammals. While the Australian delegation report notes that states with an interest in whaling agreed to consult,\textsuperscript{96} it was difficult to see how this US proposal (in contrast to an earlier US proposals)\textsuperscript{97} cut across Australia’s support for the International Whaling Commission. Australia’s policy on whaling had been to accept the recommendations of the IWC in the determination of quotas and management measures and to actively promote accession of all whaling countries to the IWC.\textsuperscript{98} There was nothing in the US proposal that would suggest the US did not recognize the position of the IWC on whaling issues but at that stage Australian policy on the US proposal was unclear.\textsuperscript{99}

Second, Australia defended the EEZ compromise in ICNT by speaking (along with 27 other delegations) against an earlier Soviet proposal reintroduced to clarify the high seas status of the economic zone.\textsuperscript{100} Australia’s position here aligned it with Latin American and some African delegations that also attacked the proposal on the grounds that it was part of a plan by the maritime powers to convert the EEZ into high seas.\textsuperscript{101}

**Committee Three**

Discussions on the marine environment were discussed in informal meetings of the third committee and in a small working group of invited delegations (including Australia) presided over by Mr Vallarta of Mexico.\textsuperscript{102} The delegation’s judgement was that the marine pollution text ‘appears to have reached an advanced stage, has been extensively negotiated and leaves little room for further amendment’.\textsuperscript{103} Australia would appear to have had no major problems with the proposals on which consensus was reached at the session that broadly speaking strengthened the powers of coastal states.\textsuperscript{104}

The Australian delegate McKeown observed that ‘he doubted whether the Third Committee could improve on the many articles considered during the current session in both Geneva and New York’ and added that while many of the positions agreed to did not ‘reflect Australia’s position exactly’ his country was ‘nevertheless prepared to accept them as compromise solutions’.\textsuperscript{105} It was clear from McKeown’s observation that Australia now had no wish to reopen the marine environment issue. However, as the delegation itself recognised, no final consensus on the marine environment texts was likely to emerge while other important areas of the negotiation, particularly in the first committee were still outstanding.\textsuperscript{106}
MSR issues were only discussed in less than two full informal sessions and were discussed in the context of a series of US amendments tabled late in the session. The effect of these amendments was to ‘reopen a highly controversial question which had been thought to be basically resolved at the sixth session’. While a number of the US amendments were simply aimed at clarifying and simplifying the text:

Other amendments made substantial changes to the text but did not alter the fundamental balance between maritime and coastal state interests effected in the ICNT. However, the effect of the proposal to delete all reference to the continental shelf in the main articles of Part XIII was to introduce a major change to the nature of the marine scientific research regime. Although the consent regime would remain for research in the territorial sea and EEZ, research on the continental shelf outside the EEZ would now be governed by something less than a notification regime. New Article 258 bis would have the effect of making the provisions with regard to the supply of information (Article 249) and the duty to comply with certain conditions (Article 250) applicable to marine scientific research on the continental shelf which was of direct significance for the exploration and exploitation of its natural resources. As the text was silent on the point, it could be inferred that the decision whether or not the project was of direct significance for the exploration and exploitation of the natural resources would be left to the researching State. In situations which fell outside the scope of Article 258 bis, researching States would be under no obligations with respect to research which they conducted on the shelf of another country beyond 200 miles (except the prohibition against drilling contained in Article 81).

Virtually all delegations who spoke regarding these amendments did so in a preliminary manner and reserved more substantive comments for the eighth session, but Australia and other broad margin states expressed reservations concerning the proposal that different treatment be accorded to MSR on the shelf beyond 200 miles. The US was concerned to see this wider margin more easily accessible to foreign research vessels than the shelf within the 200 mile zone in order to build up domestic support for the treaty. US marine scientists were worried about the restrictions of the MSR regime and the US was concerned that the MSR regime as it stood would mean the scientific community would oppose ratification of a final treaty.

Australia had a number of difficulties with the US proposals that would exclude the application of the consent regime to the shelf beyond 200 miles. First, the amendments appeared to downgrade the importance of the resource rights enjoyed by coastal states with respect to the shelf as compared to their rights over the EEZ. The implication that coastal states would not have the right to withhold consent to MSR in respect of the shelf was seen by Australia as implying that sovereign rights to the shelf would merit a lesser degree of protection than sovereign rights of coastal states in the EEZ. Second, in practice the adoption of these amendments would mean that the shelf
beyond 200 miles would be treated on a different basis to the shelf within 200 miles. Acceptance of that proposition by coastal states, particularly at that sensitive stage of negotiations was viewed by Australia as potentially weakening the bargaining position of the Margineers group in securing recognition of their rights over the shelf out to the edge of the margin. Third, the regime proposed by the US was seen as far too permissive, in so far as coastal state consent would not even be required from researching states for projects which were of direct significance for the exploration and exploitation of the natural resources of that part of the shelf beyond 200 miles. The US proposals that researching state obligations were limited to the provision of certain information and compliance with certain conditions was seen as unacceptable. (The US proposal was that if in the opinion of the researching state the research was not of direct significance for the exploration and exploitation of natural resources, then the researching state was under no obligation whatever to the coastal state). Finally, Australia was concerned that by the US pressing these amendments there would be a significantly reduced opportunity to gain a consensus on the MSR text, and to reopen the issue could place in jeopardy the resolution of the EEZ text.

Australia’s position was that with respect to MSR on the continental shelf beyond the EEZ Australia supported a regime involving notification and the opportunity to participate in and the receipt of all the results of MSR related to resources. The coastal state, Australia believed, should have complete control over research and the right to decide whether a particular research project was resource related or not.

Given these views it was not surprising that Australia assessed the US proposal on the MSR regime for the shelf as making a ‘major change’ in the balance of the ICNT. It was to be expected therefore that if the US pressed those changes they would be opposed by Australia at the next session. However, Australia wished to secure a widely accepted Convention and that this meant that tactically Australia would be under pressure to be as helpful as possible in overcoming the difficulties the US had with the MSR text. The Australian delegate McKeown recognized this fact, noting at the end of the session that Australia was ‘prepared to examine any proposal aimed at improving and clarifying’ the text on MSR and it was therefore ‘desirable for the Third Committee to consider at its next session’ the US proposals.

Diplomacy and Summary

Australia continued to work through the Margineers and Coastal States group during the session. The Margineers continued to maintain the link between NG4 and 5 and NG6 which was first initiated by the LLGDS group in seeking a satisfactory solution to
issues in NG4. In view of the problems caused by the Soviet proposal on the shelf it was clear that it was going to be difficult to arrive at any final package in NG4 and 5. The mood of the conference was one of impatience with one observer pointing out that many nations were expressing 'frustration at the interminable nature of the negotiations, doubts that the objectives could be obtained, and disappointment in the lack of political will and proper mechanisms that would enable the conference to make progress. There was also the occasional threat that should the conference resort to voting, it would be possible to have a Convention 'today' by application of the two thirds majority rule'. For Australia a resort to voting would not have been in its interests. Such action would have resulted in the imposition of the will of G77 in the First Committee and therefore what would emerge would not be supported by the developed countries thus undermining Australia's goal of a widely accepted Convention. A vote could also have had adverse consequences with respect to the outer limit of the shelf. Accordingly it was evident that Australia's interest in a comprehensive and widely supported Convention pointed the delegation in the direction of expending greater efforts in promoting an atmosphere in which consensus on outstanding issues could be reached. The fact that the US had reopened the highly controversial issue of MSR (which had been thought to have been basically resolved at the sixth session) meant that if the US pursued their proposals Australia's shelf position would need to be defended, thus potentially complicating any mediatory role in negotiations in Committee One. Australia, however, was also showing signs of impatience, with Australian delegate John Bailey urging the conference to make the revision of the ICNT an objective of its next session.

Eighth Session: Geneva. 19 March–27 April 1979

The eighth session saw a revision of the ICNT. Most of the changes were in the deep seabed text and reflected substantial progress towards the middle ground on the issue. These changes were welcomed by Australia. The most significant developments from Australia's viewpoint here related to ongoing discussions on the production limitation formula. Overall, however, it was the emergence of a new formula on the continental shelf limits that was to occupy the attention of Australia during the session. The Australian Foreign Minister speaking 11 days after the session concluded asserted that he regarded the session as one of 'considerable achievement' with 'important progress' on the deep seabed issue. With regard to the limits of the continental shelf, an issue which he described as of 'absolutely major and fundamental importance to Australia', the Minister felt that the session had made a significant advance by incorporating a text defining the extent and limits of the shelf.
Seabed Mining

The most interesting negotiating development in Committee One was the emergence of a new negotiating group—the Group of 21 to deal with outstanding issues. The Group of 21 took over from NG1, 2 and 3 in the fourth week and was composed of ten delegations from G77, ten from developed countries (selected on a regional group and interest basis) and China and the Chairman of the First Committee, with the addition of the other Chairman of the First Committee Negotiating Groups and the Chairman of the Group of Legal Experts. Australia was a member of Group of 21. This was the ‘first time within the official framework of the conference that a limited membership group (had) been established to enable representatives of developed and developing countries to negotiate directly’. However the attempt to restrict membership of the working group failed: the general Committee had failed to follow its practice of consulting the plenary on major procedural decisions and the group again became open-ended. Australia was elected to the Group of 21 (G21) but the significance of this in terms of placing the delegation in the centre of negotiations on the seabed mining issue was diminished when the group became open-ended and negotiations and consultations on seabed mining continued to be carried on in ad-hoc informal groups set up by the chairman.

For Australia the most important first committee issue was the production policy question and here numerous meetings took place under Ambassador Nandan (Chairman of NG1) between land based producers and industrialised consumers. That group began by meeting informally with over 25 delegations under the Chairmanship of Ambassador Satya Nandan of Fiji but it was cut to ten (Australia, Canada, Chile, Cuba, Indonesia, US, UK, France, FRG and Japan). The critical issue here was the fact that the US and other industrialized countries accounting for more than 80% consumption of the metals to be produced from seabed mining made clear they would be the major miners of the seabed. They wished to impose the 60/40 split, in order to increase benefits to seabed miners in periods of high growth rates and downside protection (i.e. a nickel production ‘floor’ in addition to the ‘ceiling’ of 60%) against low growth rates to avoid a cut-off in access. The land based producer group, including Australia, maintained the position that the formula produced in Article 150 was acceptable. The US delegation observed that the ‘60/40 split has almost become a political slogan amongst land-based producers that will inevitably be difficult to change’.

In fact, the ICNT Rev 1 issued at the end of the session incorporated the revision of article 150 that resulted from the ad referendum agreement between the US and Canada, but by the end of the session it was evident that the US was coming under pressure from its own industry and other consumer countries in Europe and Japan to
make changes to the formula adopted so as to ensure seabed production when nickel
growth was low (i.e. a guaranteed ‘floor’). It therefore appeared that the issue would
remain contentious. Australian policy on the question now seemed to be tied in very
closely with the Land Based Producer (LBP) group. From luke-warm support earlier
Australia now believed that a production limitation formula was a ‘sine qua non’ of an
acceptable regime for seabed mining. However, Australia differed with other land
based producers in seeing production controls as being a short-term measure. Speaking
in Plenary, Australia’s Brennan responded to criticism from West Germany that
production controls would lead to two different resource policies, one for land based and
one for sea-based production which would greatly disadvantage certain countries, by
pointing out that ‘production policies as envisaged in the draft Convention would place
the emphasis on the efficiency and the stability of the markets for products obtained from
the exploitation of the area and sold at prices that would be remunerative for the producer
and equitable for the consumer...the principal instrument of those policies was the
development of commodity agreements, production limitation being merely a temporary
measure’ (author’s emphasis).

Australia did, however, agree with other LBPs on the importance of production controls.
Just after the eighth session ended, the Australian rapporteur of Committee One (Bailey)
stressed that a production control formula would benefit ‘land based producers of the
metals concerned’ and that Australia had to ‘look to its more immediate interest as a
mineral producer’. Bailey noted that any ‘formula acceptable to the major protagonists
would be likely to be acceptable to Australia’ adding that the formula in the Revised
ICNT was a ‘considerable improvement’ on that in ICNT and was satisfactory to land
based producers. Thus at that stage there was no indication that Australia was about to
ditch its approach to this issue, a position that was to emerge in later sessions.

On the system of exploitation Australia does not appear to have made any direct
intervention. It would appear here that both developed and developing countries were
willing to make compromises and the resulting ICNT reflected substantial progress
towards a middle ground position on seabed mining. Australia’s reaction to these
developments was favourable as the delegation recognized that there was finally some
light at the end of this difficult negotiating tunnel.

That is not to say that the system of exploitation in ICNT Rev 1 completely met
Australia’s objectives. Australia, for example, supported US moves to delete the
provision granting the Enterprise immunity on taxation on its assets, property and
revenues. The Group of 77 successfully argued that unless the Enterprise was to be
given some protection here it would be unable to compete against the multinational
corporations which would be its competitors and which could be expected to either force it out of business or to neutralise the effect of its competition. Australia's view was that 'if excessive commercial advantages were enjoyed by the Enterprise, they would introduce into sea-bed mining distortions which would cause national operators to seek protection by subsidies from their governments. All sea-bed production would have non-commercial support—a result which would be harmful for land-based producers including Australia'. On this issue it was clear that the final outcome would depend on the attitude of the mining countries and G77. What was unclear was to what extent Australia would push its views if it appeared likely that these provisions were necessary to obtain the agreement of developing countries to a negotiated package.

Generally, Australia took a fairly low key role on most committee one issues but viewed developments on the seabed at Geneva as positive. In particular it regarded the establishment of group of 21 as making a significant contribution to the development of negotiations. The overall impression of Australian activity on Committee One at Geneva was a continuation of its policy of working towards the conclusion of negotiations in the Committee. Australian Foreign Minister Peacock summarized Australian views on the changes on the seabed regime in the revised text and Australian interests in the Committee One by pointing out that there were now 'new grounds for optimism that the revised formulations developed in Geneva will bring developing and developed countries closer to agreement'.

**Committee Two**

Negotiations in NG6 on the outer limits of the shelf dominated Australian diplomacy during the session. Inter-session negotiations had taken place between the UK and the USSR and had led to what came to be called the 'biscuits formula'. The USSR, had felt that the Irish proposal was deficient for the purposes of drawing lines on a map which clearly set the outer limits of the shelf. During intersessional meetings between the UK and USSR the 'biscuits' formula evolved. This formula restricted the breadth of the continental shelf, as defined by the Irish amendment, by adding to the formulation the proviso that the shelf should not extend more than 150nm from the outer limits of the EEZ or beyond 100 nautical miles from the 2,500 metre isobath, whatever the coastal state chose to employ. Australia had considered the formula before the session and had concluded that on the information available it was unlikely to result in the loss of any areas of major resource interest to Australia. Australia pointed this out to other Margineers but made the point that the timing of accepting the formula needed to be considered, particularly in the light of gaining a full understanding of the nature of the rights that the US (with respect to the MSR) and the USSR was seeking beyond 200
Australia also stated that the ‘biscuits formula’ was only acceptable to Australia if it was a specific amendment to the Irish proposal. In this way the geological and morphological nature of the shelf would continue to be the predominant criteria in determining the outer limit. Finally, Australia stressed to other Margineers that any total package of rights over the shelf must be acceptable to the Coastal States Group as a whole before it could be endorsed.

Australia was involved in a series of negotiations with the Margineers, within the Coastal States Group, bilaterally with the USSR and separately with Chairman Aguilar on the margin issue. Opinions diverged on, inter alia, the extent of distance limits and on how to refer to oceanic ridges. In the end the Margineers, despite some variation in national positions, agreed that a ‘biscuits’ type formula would provide a substantially improved prospect of consensus and the Chairman as a result of consultations with the Margineers agreed to circulate a revision of article 76 with the biscuits formula. In Plenary there was widespread support for the Irish formula and the Chairman’s compromise although some Arab, African and LLGDS states continued to argue for a 200 mile limit. Of importance was the fact that Ireland and the USSR argued that the new text was a step towards compromise but significantly both the US and USSR were linking support for the formula for changes to the MSR regime beyond 200 miles, where both superpowers were concerned to preserve freedom of research and where in both cases their 200-mile zones embraced nearly all their shelf. Australia stated quite bluntly that it supported the compromise text ‘for the simple reason that article 76 would give a coastal state vastly greater areas of continental margin than any other proposal under consideration’.

On the basis of the debate the collegium of the conference decided to include the Chairman’s revision of article 76 in the revised text. The revised text was, as noted above, viewed by Australia as a satisfactory result ‘notwithstanding it involved some limitation of the natural prolongation principle’. Australia was convinced that the revised article was ‘now in a form which will be part of the new Convention (and)...represent(ed) a major step forward in the work of the conference’. From Australia’s viewpoint, it stood to profit greatly from the Biscuits formula and there was every reason to expect that Australia would continue to resist the protests of African, Arab and LLGDS states.

The new article 76(7) ICNT Rev 1 also provided for a Commission on the Limits of the Continental Shelf to be set up under an Annex on the basis of equitable geographic representation. The Commission was to make recommendations to coastal states on the matters related to the establishment of the outer limits of the shelf. The limits of the shelf
established by a coastal state, taking into account the recommendations of the Commission were to be final and binding. Australia as noted earlier had supported the Boundaries Commission at earlier sessions. Although 'not enthusiastic about having its determination of the limits of its continental shelf subject to review' Australia had agreed with other Margineers that the Boundaries Commission was useful in overcoming fears of certain states that proper regard would not be had to geomorphic criteria in determining the limits and useful to the margin states in limiting discussion of delineation to a technical tribunal, thus avoiding the possibility of other states contesting the delineation by reference to dispute settlement procedures. Australia felt that any proposed commission must put the ultimate power of decision in the hands of the coastal state and the revised text made this clear: the coastal state had simply to 'take into account' the recommendations of the Commission.

While the question of revenue sharing was not discussed in much detail because of the preoccupation with the definition of the margin the Soviet Union proposed to increase the rate of revenue sharing to seven percent with a consequential increase in the time period in which this rate was to be reached from ten to twelve years. Despite objections of certain broad margin states to the increase there was considerable support for it and it was included in the Chairman's proposals in SQL Rev 1. While there was no sign that Australia had dropped its opposition to revenue sharing Australia appeared careful not to make its opposition a focal point in the negotiations.

Indeed, with an acceptable definition of the margin incorporated in the revised ICNT it was noted by one senior Australian delegate shortly after the session concluded that the government would now give 'serious consideration' to the proposal with a view to seeing whether Australia could live with such a form of payment as part of an overall package on the continental margin. Australia's main interest now appeared to be to ensure that any revenue sharing provision minimised the financial and economic impact on coastal states. Canada had expressed some concern at the prospect of a relatively high revenue sharing figure and the US also had some concerns, so that there appeared to be some negotiating 'coin' to obtain the minimum rate of payments.

Fisheries issues in NG4 on the issue of LLGDS rights received little attention at Geneva. However, Australia did find itself involved in opposing US moves to strengthen protection for marine mammals. While Australian policy on whales and whaling had changed since the commencement of the eighth session from one of conservation utilization to one of opposing whaling Australian policy was still committed to be a supporter of the International Whaling Commission and through it seek a worldwide moratorium on whaling. Australia objected to US attempts at Geneva that,
according to Australia, provided for one body to protect all cetacea (whales, porpoises, dolphins). Australia emphasized the need to protect all marine mammals (including Antarctic seals, which are not cetacea) and pointed to the possibility that more than one organisation might be needed. The US clearly did not accept the Australian view for what the US saw as 'textual improvements with respect to cooperation in an appropriate international organization for the conservation of cetaceans'. Given the difficulties Australia was having with the US in the MSR area (see below) it was unclear how far Australia would push its view here in the face of strong US opposition.

While opposing the US position on marine mammals, Australia gave strong support to the maritime states, including the US, in opposing a Belgium proposal to include the phrase 'for the safety of shipping' in article 25 on innocent passage in the territorial sea. The suggestion was designed to deal with Belgium concerns with the interference of artillery exercise of the coastal state because of the presence of merchant ships through practice areas, but maritime powers clearly saw the phrase as potentially providing coastal state powers to restrict the passage of nuclear powered/and or armed ships. Australia was particularly concerned as it felt that if the Belgian phrase was added to article 25 there was the danger that archipelagic states might seek its inclusion in article 52 (thus providing the archipelagic states the right to suspend innocent passage for security reasons). Such an addition, Australia felt, could provide additional restrictions on Australia’s right of innocent passage through the Indonesian and Philippines archipelagoes (by allowing specious safety reasons to restrict innocent passage). Australia’s position was that article 25 would best be confined to non-innocent passage for security reasons and there was adequate protection already to regulate innocent passage for safety reasons. A variant of the Belgium proposals ‘or for the safety of ships’ was, however, widely supported and included in the revised text thus leaving Australia a difficult problem for the next session.

**Committee Three**

In the third committee, undoubtedly the most difficult issue faced by delegates was the introduction of the US amendments on MSR from the previous session. The United States, still concerned about US domestic opposition to the MSR text from marine scientists and the USSR, primarily concerned about encouraging freedom of oceanic research, both made clear to the Margineers that acceptance of the ‘biscuits’ formula was linked to the acceptance of MSR amendments that provided for different regimes on the shelf beyond 200 miles. Australia adopted a low key approach on this issue in the third committee but made quite clear in meetings with the leader of the US delegation that linkage of the two issues was creating dangerous uncertainties in the conference and that
the US should avoid such tactics. Only one delegation indicated unequivocal support for the US proposals on the MSR on the shelf beyond 200 miles but Australia avoided public comments on the issue. Australia preferred to discuss its objections directly with the US rather than be seen to take a leading role in opposition. That tactic was largely motivated by a desire to meet the Americans concerns as far as possible with respect to its MSR proposals as the US made it known that US support for a final Convention would be contingent on changes in the MSR regime. In fact Australia publicly expressed a strong supportive attitude to many of the US proposals relating to MSR within 200 miles, and urged other delegations that the conference would need to find some accommodation with the US on MSR articles if the conference were to succeed. It was clear that while Australia would not accept the US position, that would deprive the coastal state from withholding its consent for projects of direct significance for its resources beyond 200 miles, Australia wished to be as helpful as possible to the US in order to ensure that the issue would not undermine the prospect of the US becoming a party to the Convention. The issue looked likely to become more difficult given that G77 were threatening to table proposals for a MSR regime more in the direction of a consent regime if the US persisted in its proposals.

The only proposal to receive detailed consideration and negotiations at the session on the marine environment concerned article 236 on Responsibility and Liability. Negotiations were complex here but the main point of Australia’s active diplomacy on this issue appeared to be to prevent the negotiations becoming bogged down on a highly controversial subject that was probably best dealt with in other more specialised fora.

**Diplomacy and Concluding Remarks**

Australia’s main activity at the Geneva session revolved around negotiations between the Margineers and the USSR on the margin issue and activity within the Land Based Producer Group and Nandan Group on the production control issue. On the former issue the result was favourable as Australia had concluded that it could live with the ‘biscuits formula’. The Margineers continued to be the main vehicle for Australia’s policy on the issue and while receiving group support for the biscuits formula it was more evident than ever (with the rise in percentages in ICNT Rev 1) that Australia’s was somewhat isolated in the group in its opposition to revenue sharing.

With the resolution of the distance issue, it was now likely that focus of attention would shift to revenue sharing formula. While Australia argued that acceptance of such a principle was a derogation of sovereign rights, other Margineers clearly felt that acceptance of such a principle was not a contradiction of their sovereign rights but an
exercise of them—an undertaking voluntary assumed. The issue was becoming more important in tactical terms for Australia. As Kimball observes participating nations were now willing to ‘abide little more than another year’ of the conference. The production control issue was also more critical with the US now indicating it could not accept the previously agreed formula with Canada. Australia had now shifted from early luke-warm support for production controls to a recognition that some kind of formula was necessary for a final agreement. The issue, however, was now becoming more complex with a rejection by the US of a formula that Australia had viewed as largely favourable to land based interests. Australia’s best interests appeared to lie in some kind of resolution between the LBP group and the US and the developed states. There was no reason to expect that Australia would take an independent initiative on the issue, for as noted earlier Australia now viewed the formula as essential for a final package to be concluded, and had tended to let Canada make the running on the issue.

The MSR question was now a difficult one for while there were strong indications that Australia was prepared to meet in part US concerns on the issue, it also had to bear in mind its broader relations with the Coastal States group, many of whom were opposed to the US amendments. The Margineers group would also be important on how best to resolve US concerns with respect to its goal of seeking greater freedom for research on the shelf beyond 200 miles.


At the resumed eighth session Australia played a vigorous role in seeking to resolve the outstanding issues relating to the Council of the new Seabed Authority and continued to play a facilitating role on the financial aspects of seabed mining. The most notable result in the first committee was the achievement of the renegotiation of the texts relating to financing the Enterprise and financial terms under which contractors could mine the seabed. Australia was directly involved in negotiations on the production control issue where the question was left unresolved. The most difficult question for Australia in Committee Two was the issue of oceanic ridges relating to shelf limits which, when it appeared at the previous session looked like predominantly a technical issue but emerged at the resumed session as a political issue which threatened the ‘biscuits formula’. In the Third Committee the United States offered a compromise formula on research on the shelf beyond 200 miles which met Australian concerns. While no revised text was issued to ICNT Rev 1 the conference did agree to adopt a treaty following 10 weeks of meetings in 1980. Signing was to take place in Caracas sometime in 1981. Outstanding issues such as seabed mining, MSR and the continental shelf were deferred to the ninth session.
Outside events were to complicate the session when news accounts appeared detailing a new US policy of naval and air incursions where coastal states claimed territorial seas beyond the three miles then recognized by the US. Australia joined in a statement by the Coastal States Group expressing concern at press reports that the US had embarked on such a policy but Australia’s position here was dictated largely by tactical considerations.

The Group’s statement expressed the view that customary international law recognized a territorial sea up to a limit of 12 miles and that US claims that the regime of high seas commenced beyond three miles were an ‘anachronism’. Several participants resented what they saw as a US pressure tactic to spur completion of a law of the sea treaty.

Seabed Mining

Issues relating to decision making in the Council and production controls dominated Australian efforts in the first committee. The critical issue relating to the Council remained whether western industrialized states could be assured of a blocking vote or not. The ICNT Rev 1 enabled 10 members of the Council (assuming the 36 members were present) to block a decision. It would not therefore have enabled the western industrialised countries who claimed to have an overriding interest in seabed mining to bloc decisions adverse to their interests. As delegates were, after all ‘setting up the executive body of the first international organization with the prospect of automatic revenue of billions of dollars, a body moreover with broad jurisdiction over half the surface of the globe’ the issue was, not surprisingly, highly charged. The main issues discussed revolved around whether the same majority should be required for all decisions of substance and the size of a blocking vote if there was to be one. The G77 were adamant that it ‘would not agree that minorities could bloc all substantive issues. With respect to the size of the blocking vote the United States, EEC and Japan were insistent that they should be able to bloc a decision without the need to secure support from any other group in the Council. The Eastern Europeans on the other hand (would) not permit western industrialized countries to have a blocking vote if Eastern Europeans (did) not have one also’. Australia’s desire to see outstanding first committee issues resolved in the interests of an overall Convention saw the delegation actively involved in seeking compromise.

Australia chaired a small drafting group to consider the issue that was instrumental in producing a formula, that while leaving the crucial blocking figure unresolved and the list of issues over which the industrialized countries needed special protection, did produce a system which was considered by the Chairman of Committee One as one that
'must be kept in view as an idea which may lead to consensus'. In the same group chaired by Australia a proposal was produced relating to the issue of approval of work plans by the Council which again was a sensitive issue between seabed mining countries and G77. Because of the closed nature of this work it is not possible to evaluate Australia's role within the group. It is notable, however, that the Chairman of the Working Group of 21 and NG3 on the Assembly and Council gave special thanks to Australia's Keith Brennan for his work on these issues in the working group. As will be discussed later the high quality of Australia's delegation, particularly its leader Brennan, allowed Australia to often take the limelight in mediating efforts through the conference.

Australia continued its work in the working group of 21 on the question of financial terms of contracts where the group was most successful in renegotiating the texts relating to financing the Enterprise and financial terms under which contractors could mine the deep seabed. Australia's main interest as far as the Enterprise was concerned seemed to be in tentatively raising the issues of the commercial advantage that the Enterprise was seen to enjoy and limiting the financial burden on states with respect to financing the Enterprise. These concerns had been muted at earlier sessions and raising these concerns at this stage seemed inspired by the fact that with a convention now close the new provisions would have immediate financial implications for states once the Convention came into force.

The most difficult issue for Australia in Committee One continued to be the nickel production control issue. Various floor tonnages were prepared by both LBPs and the US, EEC and Japan with the LBPs still concerned that the figures being offered by the consumer countries were below their estimates of market growth, so that an agreement on such a floor would have meant seabed miners becoming their own suppliers, squeezing out the LBPs.

Australia and other LBPs felt that at least some of these countries would, in treating seabed production as domestic production, be drawn into resorting to protective devices such as subsidies, quotas, administrative controls or the like to ensure that seabed production would have a market in a situation of over-production even if it was less economical than land-based production.

Australia felt that the proposals put forward by the industrialized consumer countries at the session only heightened these dangers and 'left the impression that these countries were sensitive only to their own short and medium term interests'. Despite the strength of Australian feelings it should not be thought, however, that the LBPs were totally united on tactics. Australia clearly felt that an over-riding importance was to get
the US committed to the actual level of the floor while other members, particularly Canada, rejected the proposals on the grounds that sufficient compromises had been made. According to the US delegation in the last three days of the session, Australia’s Chairman of the Delegation Keith Brennan, supported by other ‘moderate’ LBPs made ‘an extraordinary effort to reach an agreement on an initial tonnage minimum floor’ and Chairman Nandan ‘worked closely with land-based producers such as Brennan and also with many consumer delegations, especially the US and the UK, in an unsuccessful, last-minute effort to produce a positive result. Despite this effort, the group was unable even to agree on a report of the meeting’. These negotiations were ‘some of the most technically complicated of the whole conference, for many different scenarios were proposed and the number of variables was daunting’. Behind the figures of course was the concern of Australia and other LBPs, that any result did not hurt their land based producers. The indications were that the issue would continue to be a difficult one and that Australia would maintain its position within the LBPs to lock the US into a formula that was seen to offer adequate protection for the LBPs.

Committee Two

Shelf issues dominated Australian policy in New York. At the Geneva eighth session the USSR presented an argument that there would need to be a specific provision to deal with the issue of oceanic ridges and the need for such an acceptable formulation was reflected in a footnote to Article 76 of ICNT/Rev 1. However what appeared as merely a technical issue of plugging a loophole at the eighth session ended up in New York raising very complex issues which had ‘significant political implications’. The nub of the issue was the Soviet fear that ‘enormous extensions of marine territory would accrue to states situated on oceanic ridges, at no point more than 2,500 metres below sea level’. The USSR proposed a cut-off of 350 miles in respect of all oceanic ridges. Australia, however, was not in favour of opening up the definition for the delegation had bureaucratic advice that any exclusion of oceanic ridges from continental margins would have substantial implications for the margin claimed by Australia. However, apart from USSR there also seemed to be support from the US to close what it saw as a loophole in the text. The Margineers agreed to negotiate from the position that a provision on this subject should include a definition so as to protect ridges forming part of the natural prolongation. Australia’s position within the Margineers was difficult. Australia made it clear that no Australian interest required a cut-off limitation be added to the formula in ICNT Rev 1 and that a correct interpretation of the Irish formula did not lend itself to improper exercise of coastal state jurisdiction of submarine areas beyond the submerged prolongation of the land mass.
Indeed it was only after ‘very lengthy private negotiations’ that Australia had come to the view that the acceptance of this ‘quite significant limitation on coastal state rights was necessary in the interests at arriving at a solution which could be more generally acceptable to the conference as a whole’. The Australian delegate McKeown argued that Australian departments responsible for matters relating to Australia’s shelf would have greeted with ‘amazement’ the view that acceptance of cut-off limitations imposed no significant sacrifices on Australia’s part. Indeed the acceptance of a cut-off line on top of the limitations of the Irish formula ‘cumulatively amount(ed) to a very significant surrender of a position of sovereign rights which coastal states believe they already possess under customary international law’.

While McKeown recognized that a solution to the problem would have to avoid a situation in which the coastal state could use ocean ridges to extend their shelves far beyond what is ‘generally understood to be the natural prolongation of their land mass’ it was also necessary to preserve legitimate application of the natural prolongation concept. However, given the Soviet and US position on the issue it seemed the Margineers had little choice but to negotiate a formula that would somehow ensure that any provision would not limit the rights of a coastal state in accordance with the ‘biscuits’ formula.

In the end Australia, despite its reluctance to even have the issue opened, sponsored a proposal on the issue with other Margineers. Australia made it clear, however, that its support for the proposal was only on the basis that it was important for the ‘conference as a whole’ that concerns that abuses could occur be resolved. What lay behind Australia’s approach was a real concern that the shelf limits would come unstuck by an inadequate approach to this issue.

In the event the Margineers’ proposal ran into trouble because the LLGDs group claimed that (like the Soviet proposal) far from limiting the coastal states rights it would enable a coastal state to extend its control over ridges to which it would have no legitimate claim from 200 to 350 miles. A proposal by Japan then emerged that sought to meet these concerns by cutting off mid-oceanic ridges at 200 miles received broad support within the negotiating group thus leaving Australia with the task of considering whether it could live with such a formula at the next session.

Sri Lanka lobbied hard at the session to have its amendment to the Irish formula accepted, which was intended to provide for the unusual Sri Lankan continental margin, where application of the Irish formula would have deprived it of approximately half of its 600 mile wide margin. Australia again demonstrated its sensitivity to any reopening of the biscuits formula here. Australia was opposed to giving Sri Lanka a
unique exemption from the cut-off lines in the ‘biscuit formula’ although it felt that it may be possible to devise some amendments to the Irish formula to accommodate Sri Lanka. While Sri Lanka’s draft received much sympathy Australia was by no means alone in believing that the text should not be ‘cluttered with single state exceptions’ and the issue remained unresolved.

Revenue sharing discussions were overshadowed by the question of the delineation of the shelf and much of the discussion amounted to a ‘reiteration of well known positions’. Australia, however, outlined its views in both Margineers Group and in NG6. While there was broad support for the system outlined in Article 82 there were differences with respect to both the grace period and the rate. The Margineers group held fast on the five year grace period, but some thought that the rate of 7 per cent too high. However, some LLGDS considered the rate too low. Australia stressed its opposition to Article 82 although instead of highlighting its position of in principle objections to revenue sharing acknowledged that such an article was inevitable in any final Convention. Australia’s main concern in participating in discussions was to minimize rates of payment by stressing that marginal projects must not be prevented from going ahead. In particular Australia’s role within the Margineers was to get the group to think through all the implications of the article so as to get the most favourable position for the group in negotiation. The risk here of course was that by taking on a high profile in opposing the issue the delegation was at risk of being blamed for any failure to reach agreement.

Finally on shelf issues Australia worked with other Margineers in negotiations with USSR in an attempt to draft an annex to describe the composition and functions of the Commission on the Limits of the Continental Shelf. The main problem as far as Australia was concerned here was the call by Singapore for a Boundaries Commission far stronger than that envisaged in ICNT Rev 1. Singapore’s proposal involved that the words in Article 76(7) ‘taking into account these recommendations shall be final and binding’ be replaced by ‘shall be in accordance with these recommendation. However a coastal state may deviate from these recommendations in consultation with the Commission and in accordance with a decision mutually arrived at’. It has already been noted that for Australia a basic issue here was the extent to which the coastal state would retain the ultimate power to establish the outer limits of the continental shelf. Australia’s position was, therefore, to support moves to retain the initiative and final decision as to the outer limit in the hands of the coastal state. Given, however, that the ICNT Rev 1 provision was criticized as putting into the hands of the coastal state unfettered discretion to place its outer shelf where it pleased (except that it should ‘take into account’ the views of the Commission) it seemed that a compromise would need to
be arrived at. In that situation Australia’s position seemed likely to be guided closely by the Margineers.

Finally in Committee Two there were two other matters where Australia became involved. First the issue of innocent passage through the territorial sea was an issue left over from the eighth session because of the Belgium amendment and was resolved to Australia’s satisfaction without much controversy.229

Second, Australia now supported US attempts to strengthen protection for marine mammals. Tentative agreement was reached with a group of interested states, (including Australia), called together by the United States to negotiate improvements on the conservation of marine mammals.230 The US draft text231 still referred to the singular expression ‘international organisation’ (and not organisations as Australia thought may be necessary) in the area of management of marine mammals.232 It was reflected in the Chairman’s Final report as the basis for further discussion.233 Australia’s reaction to the US text was this time generally favourable although Australia had some concern that one phrase in their proposal could have been interpreted as weakening international authority over marine mammals.234 Generally, however, Australia was more supportive of US efforts to strengthen the conservation of marine mammals than it had been at previous sessions, a position in part that appeared to be prompted by a desire to reach some accommodation with the US in the MSR area, and also because of the change in policy in April 1979 from one of conservative utilisation of whale stocks controlled by international agreement to an active policy of protection.235

Committee Three

MSR was the only subject discussed in the third committee and the US amendments dominated discussion.236 The main issue for Australia was that of research on the shelf beyond 200 nautical miles. Early in the session a middle ground emerged on a system whereby (1) coastal states would be notified of all research on the shelf beyond 200 nautical miles; (2) coastal states would have rights of participation and have access to results of all such research; (3) coastal state comment would be required for any research entailing the use of explosives, drilling or artificial islands; (4) coastal states would defer the exercise of the right of consent in areas other than those which they designated as being of exploration and exploitation interest to them.237

Australia’s view of the US proposal was that it represented considerable progress on the issue.238 Australia was concerned that if something was not done to meet the US on this issue the American scientific community would actively lobby against ratification of an
eventual convention. Australia was somewhat more relaxed also about the implications for its overall position on the shelf of the acceptance of a dual regime for MSR as the ‘biscuits’ formula was now incorporated in the ICNT Rev 1. The Americans, who had been linking their support for the biscuits formula to gaining support for their MSR proposals, could no longer pursue that tactic so Australia also felt it could adopt a more sympathetic approach to the US position. The notion of giving freedom of research on the shelf beyond the EEZ except in areas where the coastal state designated as being of exploration and exploitation interest was, from Australia’s viewpoint, politically, administratively and legally attractive. It would constitute a compromise more likely to attract consensus than the original US proposal, would protect the coastal states existing interests and arrangements and from a legal viewpoint the shelf rights of the coastal state would not be differentiated solely by reference to the 200 nautical mile limit. The coastal state would retain the right to develop additional areas, thus ensuring that the consent regime would be expanded to cover all areas of future resource interest. The compromise proposal emerged from small group negotiations (in which Australia did not take part) and was seen by some coastal states as going too far in the direction of researching state interests in allowing for designation of areas only in which ‘exploitation or exploratory operators such as drilling is occurring or about to occur’. Nevertheless Australia saw much merit in the proposal.

Australia’s more sympathetic approach to the US position appeared to be one that was generally shared for by the end of the session there was ‘widespread, if grudging acceptance that the text (i.e. ICNT/Rev 1) will have to be improved from the point of view of the United States which is anxious to secure some relaxation of the power of the coastal state to withhold consent for marine scientific research projects on the continental shelf beyond 200 nautical miles’.

Conference Diplomacy and Concluding Remarks

The most awkward issue for Australia in terms of its relations with coastal state allies arose with respect to the group’s reaction to US naval and air incursions where coastal states claimed territorial seas beyond three miles. Australia argued that in the light of US assurances that the law of the sea package on territorial sea and rights of innocent passage was still acceptable to the US there was no need for the Coastal States group to issue a statement. What remained, Australia argued, was a dispute between some governments and the United States on the status of customary international law and such disputes could be resolved bilaterally. If the Coastal States group were to proceed with a statement then the draft would need to be moderate in tone so as not to ‘play into the hands’ of those wishing to weaken the conference. Australia above all appeared
concerned not to adopt a position that could have been used by other states to restrict the freedom of operation of its main ally. Australia worked with other moderate coastal states (Canada, New Zealand, Norway, Ireland) to try and reach an agreement on the best approach. Australia was left with the main burden of moderating the text with a principal aim of including a reference to the fact that the Coastal States group were committed to a package deal on navigation issues. The final statement did not meet Australia’s concerns here\textsuperscript{244} but Australia went along with the text because of the importance with which it attached to the Coastal States group and a wish not to get ‘off-side’ with key coastal state players that may adversely impact on the shelf negotiations. For those reasons Australia did not make any reservation statement in plenary to the Coastal States position.\textsuperscript{245} The incident illustrated the extent to which Australia subordinated traditional alliance relations to its overall conference goals, a point taken up later.

Australian activity with the Oceania Group consisted of co-sponsoring a proposal with Fiji, New Zealand, Papua New Guinea and Samoa to allow Cook Island and Niue to become parties to a final convention.\textsuperscript{246}

From Australia’s viewpoint there were now solid prospects of reaching an adequate agreement on two issues of particular interest—the nickel question and the criteria for determining the outer limits of the shelf. The MSR articles relating to the degree of control a coastal state could exercise over its shelf now looked close to a final compromise that would be satisfactory from Australia’s desire to protect its resource interests. Australia felt that the New York session brought ‘much closer’ the objective of adopting a comprehensive Convention\textsuperscript{247} and saw no reason why the conference could not stick to its agreed program of work intended to result in the formal adoption of a final text at the resumed session of the conference in July-August 1980.\textsuperscript{248}
CHAPTER SEVEN

AUSTRALIA AT UNCLOS 111, 1980—1982

This chapter concludes the history of Australian diplomacy at UNCLOS 111, focussing on the final two year stretch of the conference. This period was dominated by the implications caused by changes in US law of the sea policy. By September 1980 all but a handful of issues had been resolved. Although most states, including Australia, had difficulties with individual provisions in the text, consensus had been reached on hundreds of articles. Apart from refining some of the details the text of the Convention was complete. Indeed the text as it existed at the end of 1980 was little different in substance from the one finally signed at Montego Bay, Jamaica in December 1982.

Immediately prior to the opening of the tenth session in March 1981, a session which most states hoped would end the negotiations, the Reagan Administration which took office in January 1981, announced that it was undertaking a fundamental review of its policy towards the Convention. The review took nearly twelve months and delayed the US from participating in two entire sessions of the conference (the tenth and the resumed tenth sessions). In January 1982 President Reagan announced that the US delegation would return to the negotiations on the basis of six objectives, which he outlined in very general language. The political crunch came at the final negotiating session in March and April 1982 when the US submitted a book of between 100 and 200 amendments that would have involved unravelling much that had been achieved in the years leading up to 1980, including many critical compromises. The amendments were rejected as a basis of negotiation by G77. Twelve smaller industrialised countries, of which Australia was one, submitted amendments which it thought might bridge the gap between G77 and the US. Serious negotiations on these proposals was deferred until it was too late. A decision was later taken by the US that it would not participate in the adoption of the Convention by consensus. It asked that the text and four accompanying resolutions be put to a vote. This was agreed and the final package was adopted 130 in favour, including Australia, 4 against (Israel, Turkey, US, Venezuela) and 17 abstentions.

The thrust of US objections to the treaty were largely ideological and focussed on the regime for deep seabed mining. The mixed economic system for the regulation and production of seabed minerals was not consistent with the new Reagan Administration’s free market philosophy. While earlier US Administrations believed that its law of the sea goals could be achieved through a widely accepted multilateral treaty the new Administration believed that they could be realised through unilateral measures and
bilateral arrangements. The talk in Washington was building up a 600 ship navy and achieving maritime superiority in a decade and of the growing dependence on strategic minerals from overseas sources, which could be provided from the deep seabed. Deep seabed mining was now seen as a high seas freedom and with Vietnam and the Iranian disaster behind it the US was now embarked on a new drive to achieve maritime superiority. This would mean that no longer would the US be required to stick with previous US policy of a willingness to trade off access to resources for navigation rights. More particularly US policy was being driven by domestic politics, in particular the hostility of the US mining industry to the UNCLOS regime. The mining industry found ready access to key US officials in the new Administration who were hostile not only to the law of the sea negotiations but more generally to the concept of a new international economic order and the North-South dialogue.

For Australia the result of the change in US policy towards the negotiations created an extremely difficult situation. The goal of a widely accepted and comprehensive Convention was one Australia had worked towards from the start of the conference. US actions were seen as posing a grave threat to the possibility of realising that goal. The stalemate in negotiations meant that from March 1981 Australia directly nearly all its negotiating efforts toward bridging the gap between the US and its like-minded allies on the one hand and G77 and the East European states on the other. Australia’s delegation leader Keith Brennan played an extremely prominent role amongst a group of 11 middle industrialised countries that drew up concrete proposals in an attempt to bring the US back to the negotiating table, without at the same time undermining the basis of the mining regime. In the end, as noted above, the long cherished aim of the conference in general and Australia in particular, of adopting the Convention by consensus proved unattainable.

Apart from its role as a mediator and as a staunch defender of the package deal approach Australian diplomacy was also directed towards that of initiating a number of proposals in the conference. The period from 1980 saw Australian delegates move into the limelight in Committee One and the LBP group to adopt a vigorous campaign to seek the inclusion of clauses that would prevent states from subsidising the deep seabed mining operations of their nations, as well as from using unfair trading practices in the markets of minerals from the international area. These proposals followed a dramatic turnaround in Australian policy on production controls, where as a result of a direct intention by the Australian mining industry to Prime Minister Fraser, the Australian delegation were instructed to adopt a total free market approach to seabed production. Australia’s change of policy was far too late in the day to be acceptable to the conference, for production
controls had long been accepted, even by potential seabed mining states, as an integral part of a final Convention. The delegation was forced to quickly ditch its ‘free market’ approach. However, Australia was more successful in gaining both an anti-subsidies and free market access clause in the final Convention, an impressive victory fought not only against potential seabed miners but at times against the LBP group that saw their interests being protected through production controls.

The margin issue was finally settled to Australia’s satisfaction, but in this period Australia gave up the fight to jettison revenue sharing, and had to accept stronger powers that it wished for in the Continental Shelf Boundaries Commission. On shelf issues, the most active diplomacy by Australia focussed on attempts to moderate new demands by both the US and USSR for greater freedom for researching states on the continental shelf beyond 200 miles. Australia and other Marginieers had a rather difficult task here and were only partly successful in resisting the two superpowers.

Overall Australian diplomacy in this period was dominated by the actions of the US, and the delegation exhibited all the roles that had characterised Australian activity throughout the conference and that are taken up in the next chapter—iniator, mediator, group actor and defender of the package deal. As will be discussed later when the final Convention is considered in the light of Australia’s negotiating objectives it is clear that the Australian delegation achieved much success.

Ninth Session: New York. 3 March—4 April 1990

The ninth session saw substantial progress on the remaining issues. The most significant feature of the session from Australia’s viewpoint was a radical shift in Australian policy on production controls brought about as a result of the direct intervention of the Prime Minister after lobbying by the Australian mining industry. Australia also adopted a high profile in Committee One in an attempt to alter certain aspects of the financing of the Enterprise. Australia’s unsuccessful action here was a significant departure from the steady-state mediatory role it had adopted to date. In Committee Two the Marginieers were able to reach a consensus with the USSR on ocean ridges and on an Annex providing for a Boundary Commission (there were no negotiations on revenue sharing). On other issues in Committee Two Australia welcomed the adoption of a new version of article 65 on marine mammals and played a role in the proposal to add Southern Bluefin Tuna to Annex 1 (on highly migratory species). The MSR problem on the shelf beyond 200 miles was also solved to Australia’s satisfaction. A newly revised ICNT was released at the end of the session,
which formulated agreed language on virtually the whole gamut of issues at the conference.

First Committee

The most dramatic shift in Australia’s policy on seabed mining emerged at the ninth session when the Australian delegation attempted to unravel the production control articles. On the eve of the departure of the delegation last minute pressure was placed on the government with a visit to the Prime Minister, Mr Fraser, by Sir Arvi Parbo Chairman and Chief Executive of Western Mining and Sir Roderick Carnegie, Chairman of CRA. The successful intervention of the mining industry meant that Australia had no clear instructions on the production policy issue in the early part of the session. The mining industry expressed a clear preference for no quantitative limits on minerals from the seabed, no financial assistance for seabed production by consumer countries to their companies, no preferred access for minerals produced from the seabed by consumer countries to their companies and no protection for land based producers.

They believed that this strategy would be more successful in avoiding a situation where the major nickel consumers, the US, Japan and EEC, could become their own suppliers of nickel and wipe out the market for land based producers. The mining industry view was that if Australia agreed to production controls it would open the gate for consuming countries to argue for the subsidisation of deep-sea mining and therefore to disruption of the market place. If deep seabed mining was competitive, then, so the Australian miners argued, it should be left to market forces to determine. The more rigid the controls placed on seabed mining the greater incentive towards subsidisation. Limits on access to seabed resources would induce greater incentives for would-be participants to rush to secure a place and create disadvantages of a ‘gold rush’ situation. In these conditions if the rate of seabed production was low there would be little impact on other producers. If seabed developers proceeded rapidly then a strong market in terms of demand and price would be a prerequisite. Therefore, the Authority’s revenue would be sufficient to compensate any developing country producer which may have been placed at a consequent disadvantage. Such conditions would also be favourable to the Enterprise. If it had to be accepted that a system of production controls was inevitable then they urged the delegation to support the proposition that governments should not provide financial assistance to seabed mining and that consumer governments should not undertake to give preferred access to their markets for minerals produced from the seabed by their companies.
The direct intervention of the Prime Minister meant that the delegation were instructed shortly after their arrival in New York to embarrassingly reverse their position and opt for no regulation at all. Not surprisingly the ‘market forces’ approach was opposed by all land based producers. Indeed, one journalist observed that ‘other land-based nickel producers were astonished and those countries which saw the potential of the deep sea nodules were amused to find the production limitation clause, which was designed to protect land-based producers when deep sea mining commenced, a point of concern for the Australian industry. Canada, the leading land-based producer of nickel and ore and one of the keen proponents of such a formula, was angry’. Not unexpectedly therefore the Australian delegation reported back that land based producers were intractable on the point and the production limitation formula should stand. The fact that the ‘market forces’ approach proved fruitless would have come as no surprise to the delegation. Before the reversal ‘sections of the bureaucracy’ (undoubtedly the Department of Foreign Affairs) were of the view that things had already progressed too far and that if Australia did not become involved in the negotiations on production controls it could weaken the position of LBPs and result in just the situation the mining interests were seeking to avoid. Australia could not opt out of a negotiation they did not like and at the same time struggle to win much desired concessions on critical issues such as control over the shelf. In any case, the ‘market forces’ approach was irrelevant in the face of the fact that the world’s passionate free-marketeers, US, Japan and EEC, had all agreed to the need for an international structure of controls. While law of the sea officials in the department of Foreign Affairs rejected the free-market approach there was little they could do given the Prime Minister’s direct intervention.

In the event, when the market forces approach met with opposition the delegation ‘sought the addition of provisions aimed at preventing the subsidisation of seabed miners and discriminatory access by them to the domestic markets of the consumer countries’. Australia distributed draft texts on both these issues. Indeed Australia, while acknowledging that a production control formula would include a floor and a ceiling, argued that the provisions requiring non-discriminatory access and non-subsidisation were essential elements of the package. The reaction of countries such as the UK, FRG and Japan was negative—they believed that in principle those matters should be dealt with under the GATT. The Socialist bloc countries objected to the use of the term ‘subsidisation’ and stated that they would not tolerate interference by an international body in matters of economic management which in socialist states included subsidisation of most industries. Industrialised countries, particularly in Europe and Japan did not wish to be prevented from assisting seabed mining if and when they decided it was in the interests of national self-sufficiency in times when access to minerals and metal commodities was threatened. It was not clear at that stage whether all land based
producers shared Australia’s goals of including provisions on market access and anti-subsidisation in the Convention, although Canada and Argentina were sympathetic, but the issue would undoubtedly be complex. The potential seabed mining countries (such as the US, UK, Japan, France) regarded seabed production as domestic production and it was unlikely that they would agree to a provision treating seabed production as imports. An anti-subsidisation provision directed only at seabed mining would thus be difficult for industrialised countries to accept. Australia did, however, succeed in getting the issue on the agenda. Ambassador Nandan in his report agreed with Australia that both the question of unfair trading practice and subsidisation needed to be discussed at the next session and noted that Australia attached great importance to the proposals and ‘conditioned its acceptance of any form of production control on the solution of these two issues’.

In another move that represented a departure from Australia’s traditional mediatory policy in Committee One, Australia attempted to reopen the financial package relating to the Enterprise. In line with the Australian view that if excessive commercial advantages were enjoyed by the Enterprise that would introduce distortions which would cause national operators to seek protection by subsidies from their governments (thus potentially harming Australian producers), Australia sought to have it accepted that the loans from government should be interest bearing and that the ratio between loans from governments and borrowing from financial institutions should be 1:2 instead of 1:1. Both moves, however, were rather clumsily executed and ignored the entrenched nature of these provisions.

The attempt by Australia to reopen the provisions on financing the Enterprise was counter to Australian policy in attempting to reach acceptable compromises and at the end of the session Australia conceded that the provisions were part of the overall package.

**Committee Two**

Shelf issues once again were the main area of Australian diplomacy and during the session NG6 moved close towards resolving the outstanding issues.

Particularly intense consultations and negotiations took place on the oceanic ridges issues, between the Margineers and the Soviet Union. Given Australia’s interventions at the previous session, there was no doubt Australia was seeking some form of words that would not cost it any areas of margin that could have resource prospectivity. Australia defended the existing text as a generous concession. In the end the formulation recommended by the Chairman of the Second Committee which appeared in
the ICNT Rev 2 appeared to meet Australia's concerns, although it was made clear by the Chairman of the delegation (in what was presumably a reference to the Arab Group and a number of LLGDS states that still wanted a simple distance limit to the shelf) that Australia supported the new text 'if' other delegations accepted that formulation as part of the over-all package on the outstanding issues concerning the continental shelf (author's emphasis).26

With respect to the Continental Shelf Boundaries Commission a draft annex was presented which had been produced by Canada (on behalf of the Margineers) and the USSR.27 The text incorporated in the ICNT Rev 2 provided that a coastal state must determine the limits of its shelf 'on the basis of' the determination of the Commission rather than the earlier formulation 'taking account of'. The latter expression was 'unacceptable' to a number of states, on the grounds that it gave unfettered power to the coastal state, but the majority of states raised no objection to the revised formula, no doubt agreeing with the West German delegate that it met 'the need for the boundary commission's findings to be given maximum force'.29 Australia argued that the existing formula 'more accurately reflected the sovereign nature of the rights of coastal states over their continental shelf' rather than the new formulation, a view shared by Canada, Denmark, France, Pakistan, the UK, Uruguay and Venezuela.31 Australia, however, reluctantly accepted the change, despite what it saw as a threat to coastal state sovereignty.

As far as the Sri Lankan exception was concerned it was widely agreed that an exception would best be accommodated in a statement of understanding by the President of the conference incorporated in an Annex to the Final Act of the conference. This approach was probably congruent with Australia's interest (and other Margineers) in that it did not incorporate an exception to the 'biscuits formula' into the Convention.34

However, there was no doubt that a special 'fix', outside the general rules laid down by Article 76, raised the possibility of other states calling for special 'fixes' in relation to the margin or other parts of the Convention. It was not clear at that stage whether Australia and other Margineers would willingly admit that the Irish formulae was not capable of being applied in a universally equitable manner. Too willing an admission, could, as far as Australia and other Margineers were concerned, raise unwelcome suggestions that the fundamental components of Article 76 should be reopened.35

A number of miscellaneous issues arose in Committee Two that were of interest to Australia but issues relating to shelf questions occupied nearly all the delegation's time in the Second Committee.36
Third Committee

MSR was the sole issue discussed in the Third Committee. The most difficult question continued to be the regime for MSR on the shelf beyond 200 miles. At the session negotiations focussed on the level of MSR state activity required before the coastal state could designate areas in which the normal consent regime would apply. Unlike some Margineers that feared that the test for designation of areas was too stringent (arguing that the term ‘such as exploratory drilling’ suggested a stage of development too close to exploitation) Australia argued that the Chairman’s formula from the previous session was a good ‘middle ground’.

As noted earlier, Australia’s position was more moderate than some of its Margineer allies, in particular Canada, which wished for greater flexibility in the designation of areas outside 200 miles in opposition to the US which was seeking a formula restricting the designation by coastal states to those areas where there was substantial evidence of coastal state resource exploitation. Australia participated in a small group of approximately 10 countries (chaired by Ambassador Rozental of Mexico) that produced texts on the most contentious MSR articles. The new texts on research beyond 200 miles contained some concessions to Margineers. Australia, while acknowledging that it preferred greater flexibility in designating areas, curiously seemed more concerned to register the fact that the new text should not give rise to any implication that the coastal state had no discretion to withhold consent in relation to MSR on the shelf within 200 miles. That concern was shared by Canada, Ireland and Norway. Margineers such as Norway, Canada and the UK were not entirely happy with the new text on the grounds that it may have unduly restricted exploratory operations by the coastal states. As far as the researching states were concerned, the US pointed out that the compromise proposals themselves offered far less protection for marine scientific research than the US and the scientific community considered desirable but that the US would accept the new provision in the interests of consensus provided no changes were made. Generally Australia and the other Margineers had a rather up-hill struggle on this issue. As Sanger observes, the Margineers:

found little support from coastal developing states and were up against not only the United States but also the Soviet Union, for with both the superpowers the 200 mile zone embraces nearly all their shelf (except in the Arctic, where natural factors are likely to limit foreign research). So under their joint pressure this amendment was accepted.
Diplomacy and Summary Conclusions

The ninth session had seen Australia's traditional mediatory policy on Committee One issues set aside with a surprising reversal of policy on production controls and an attempt to reopen the financial package in Committee One. The policy change occurred as a direct result of Prime Ministerial intervention as a result of expressions of concern from the mining industry. The policy change was undoubtedly an embarrassment for the delegation coming so 'late in the day'. It was difficult to judge whether Australia's standing in the LBP group was severely damaged, despite Canada's expression of annoyance. What was clear, however, was that Australia would need the support of the LBP group in its drive on the issues relating to unfair trading practices and excessive subsidisation of seabed mining. While Australia's proposals with respect to these issues were not included in the new text the Chairman's report indicated that Australia's proposals would receive further discussion at the next session. Australia's attempt to reopen the final package, like its attempt at a 'free market' approach on the production control issue (that all mining should be controlled by market forces) met with no support from any major grouping and on both issues Australia conceded that there was little point in raising these concerns at the next session.

On Second Committee issues Australia seemed to be reasonably happy with the outcome of the ridges issues although the annex providing for a Boundaries Commission was a stronger version than it would have liked. (Revenue sharing issues were not discussed so that there was no opportunity for Australia to press its concerns here.)

The recommended text on MSR on the shelf beyond 200 miles was probably about the best Australia and other Margineers could have hoped for given the position of the superpowers favouring greater freedom for researching states.

The conference was now moving into its final phases with work on final clauses, issues relating to reservations and participation of entities such as the EEC, national liberation movements and associated states. Consideration was now being given to the establishment of a Preparatory Commission composed of signatories to the Convention to carry out those tasks which would enable the Authority and its principal organs to function as soon as possible after the Convention entered into force. The conference was now on its 'final stretch' and Australia's hope was that the next session could complete negotiations on the remaining outstanding issues in order to produce a final revision of the negotiating text and thereafter move to the formal stage of its negotiations.
Resumed Ninth Session: Geneva. 28 July—29 August 1980

The session saw the revision of the negotiating text and in order to indicate that the revision was close to final form it was given the title Draft Convention on the Law of the Sea. From Australia’s viewpoint the session was successful. In the first committee Australia was able to have included in the new text a market access clause, while the consolidation of the Second and Third Committee texts was in broad harmony with Australian objectives. There was no significant reopening of the shelf package and the text on the difficult issue of MSR beyond 200 miles now appeared well entrenched. Of particular importance in moving the conference towards a final resolution was the fact that there now appeared to be a solution at hand to an issue that had proved most intractable—decision-taking in the Council of the Authority.

Committee One

The production control issue continued to dominate Australian activity but the attempt to have production controls removed was dropped as an Australian goal. Two issues were involved here; the attempt by some LBPs to alter the formula in the ICNT Rev 2 and secondly, the attempt by Australia to secure clauses prohibiting unfair subsidisation of SBM and prohibiting discriminatory market access practices.

On the first issue the LBPs broke into two factions. The seabed miners, and LBPs, including Australia, Indonesia and the Latin American producers were prepared to accept the provisions in the ICNT Rev 2 relating to the ‘floor’ (i.e. if consumption growth should fall below 3 per cent a year, production would be permitted to the levels which would result from a growth rate of 3 per cent) and the safeguard clause that provided under no circumstances could seabed production be authorized in excess of 100 per cent of the estimated growth in nickel consumption. According to Canada, the Philippines and some African land-based producers the floor should be reduced from 3 percent to 2.5 percent and the safeguard from 100 percent to 70 cent. Papua New Guinea also believed the 3 percent regime was too high and provided no protection for land based producers. Australia’s view was that ‘it could not associate itself with these latter suggestions because in conditions of very low consumption growth they could give even less scope to seabed mining than ICNT Rev 1, and therefore be an inducement to subsidised seabed mining’. The Australian view was that the higher the floor the more likely it was there would be no market distortion therefore ensuring LBPs would be able to compete. While Australia saw the formula as having the ‘necessary checks and balances’ to meet the ‘essential needs’ of LBPs Australia believed that the compromise
formula was compatible with support of the 'common heritage' principle. It would ensure that seabed mining would be able to proceed as a viable activity at low growth rates (assuming it was competitive). This was regarded by Australia as 'an essential element in the package if the common heritage (was) to be developed'.59 The text in the Draft Convention was that concluded at the ninth session, but 'the dissatisfaction among some African states in particular'60 pointed to the need for further discussion at the next session.61

Australia’s drive to include clauses prohibiting unfair subsidisation of seabed mining and a prohibition on discriminatory market access practices was partially successful, with the Australian market access clause being included in the Draft Convention.62 While the delegation’s report states that the land-based producers group ‘threw their weight’ behind Australia’s proposals63 the situation was in fact more complex. Canada and some African LBPs saw their ultimate protection not in any market access or anti-subsidy clause but in a more restrictive production ceiling. The market access clause was negotiated in spite of the general opposition of the potential seabed miners64 who feared that such a provision would impinge on their domestic trade policy65 and also in spite of lack of ‘active support from other land based producers’.66 Canada strongly criticized the clause included in the Draft Convention as being ‘extremely weak’ and as one which would encourage seabed miners to classify all production of minerals and commodities from nodules as domestic production.67 These views were also shared by African LBPs.68 Canada wished to classify in any market access clause production derived from nodules as imports. This desire was based on the belief that if classified as domestic production, production of these commodities could be freely subsidized without any recourse to GATT,69 a view which Australia regarded as mistaken.70 While the Australian mining industry saw the clause as ‘something of a compromise’71 and recognised that some delegations doubted its effectiveness72 Australia was satisfied that its clause had been included in the Draft Convention.73

The main question on this issue now for Australia appeared to be how to play the issue at the next session if it came under attack from some LBPs. Given that Australia had negotiated the text with the seabed miners any movement by Australia to support a supposed strengthening of the text could lead to a loss of credibility with that group, which could work to Australia’s disadvantage in discussions on the related anti-subsidy clause.

The anti-subsidies question was clearly much more difficult than the market access issue. The main problem here was that the seabed miners ‘could not accept a clause which was not “even handed”, that is to say, which prohibited the subsidisation of seabed mining
but did not also prohibit the subsidisation of land-based production'.\textsuperscript{74} LBPs were not prepared to accept an 'even-handed' prohibition because the Convention was 'not concerned with mining except mining from the seabed'\textsuperscript{75} and there was generally little interest from African LBPs.\textsuperscript{76} There were also other problems with Australia's proposal. As noted before the socialist countries which include subsidisation of most industries had particular problems with a policy that was seen to intrude into domestic policy.\textsuperscript{77} Another difficulty was what to define as a subsidy. As Chairman Nandan of the Negotiating Group on production policies observed: 'it was noted that the practice of granting aid to certain growth industries by way of tax relief, investment credits, etc was widespread. This could make it difficult to establish that aid to seabed mining could be construed as discrimination'.\textsuperscript{78} In the end Chairman Nandan concluded that it was not possible to propose a text which would take account of all the points of view in a text which 'gives a meaningful protection from unfair practices within the industry and at the same time not run the danger of intruding into the trade policies and domestic affairs of states'.\textsuperscript{79} The issue was thus extremely complex and one which appeared a difficult one for Australia to resolve. While the delegation had been successful in elevating the subject into a major issue in the conference over the previous two sessions it was by no means certain that Australia, with the support of other LBPs, could overcome the difficulties still outstanding on this question.

The most important issue to be resolved in Committee One was the issue of decision making in the Council.\textsuperscript{80} Australia participated in consultations with Ambassador Koh of Singapore on this issue and a paper by Koh presented to the Chairman of the First Committee drew on an Australian proposal that the Council should work by a consensus of interest groups. This was the 'Brennan formula' (named after the leader of the Australian delegation, though the idea originated with Ambassador Rattray of Jamaica) which provided a two tiered mechanism for decisions of substance.\textsuperscript{81} The main negotiations were between G77, Koh himself and the US, on the issue,\textsuperscript{82} with Australia not appearing to play a high profile role. The eventual agreement was a three tiered system for substantive issues and the only decisions taken by simple majority were procedural ones. The most sensitive questions, in particular rules covering seabed mining and distribution of benefits had to be adopted by consensus (defined to mean the absence of any formal objection).\textsuperscript{83} While many delegations expressed reservations on the new texts on decision-making 'it was generally recognized that no other approach seemed likely to command general support'\textsuperscript{84} and in plenary Australia stated that the new system 'provided the necessary measure of flexibility in view of the complexity of the issues with which the Council would be dealing'.\textsuperscript{85}
On financial arrangements for the Enterprise Australia had clearly given up the notion that it could unravel critical aspects of the financial package after its abortive attempt at the ninth session. Australia, however, voiced concern that there was a need to avoid any shortfall provision that may act as a disincentive to early ratification. The amendment to the text on this point was regarded by Australia as meeting that particular concern.

Committee Two

Only one meeting of the Committee took place because the Chairman considered that any amendment to the text in ICNT Rev 2 would reduce rather than increase its prospects of becoming a consensus text. While the issue of revenue sharing was not discussed Australia continued to express its ‘acute difficulty’ both on practical grounds and on a point of principle. However, Australia’s views on the issue were now dominated by a desire not to jeopardise the delicate package on the shelf. Following on from a first meeting between the Australian Petroleum Exploration Association (APEA) and members of the Foreign Affairs Department in June 1980 APEA expressed a number of concerns relating to the revenue sharing article. The government now felt, however, that there would be:

considerable danger that attempts to spell out aspects of the text more definitely could result in clarifications to or interpretations of it which are contrary to the interests we are trying to protect. Moreover while other broad margin states share some of our difficulties they are concerned that any attempt to reopen Article 82 at this stage of the conference could not only result in a revenue sharing provision of greater detriment to broad margin states, but could also lead to a reopening of the provisions which give recognition to coastal states rights over the continental shelf, defined in terms of natural prolongation. Australia shares this assessment.

For tactical reasons then Australia had given up the fight on this issue: the momentum of the conference and the desire by Australia to conclude proceedings meant that pressure from the offshore mining sector was resisted in Canberra. Similarly Australia did not wish to see other contentious issues opened for the same reason.

Third Committee

The third committee met only to examine drafting proposals. Some broad margin states, including Australia, wished to reopen the question of MSR beyond 200 miles but ‘soundings suggested that it would not be possible to secure a change helpful to them and so the idea was not pursued’. While Australia’s plenary statement that the regime for MSR beyond 200 miles still continued to create difficulty for several delegations it was significant that Australia did not associate itself directly with those concerns. Rather
Brennan simply noted that negotiations in the third committee, like those in the second committee, had been essentially completed. Brennan's statement gave a clear indication that Australia did not wish to open up issues that would threaten the early completion of the conference and Brennan's judgement that the work of the third committee had been completed was officially endorsed in the Report of the Chairman of the Third Committee.

Concluding Remarks

The great majority of speakers in the general debate in plenary agreed that the compromises that emerged at the session should be included in the revision of the text. The Australian statement in plenary was generally supportive of the achievements of the session and the 'achievements of the session matched Australia's expectations of what might realistically be hoped for'. In particular from Australia's point of view the further consolidation of the second and third committee texts was looked upon as a favourable outcome and in the first committee the inclusion of market access clause represented an improvement. While Australia had succeeded in raising the issue of the prohibition of subsidies to a major concern in the conference, it was not at all certain that the support from the potential seabed miners would be forthcoming.

The overriding goal of Australian diplomacy at the session appeared to be to concentrate on wrapping up the market access and subsidies issues so that the conference could finish its work. By the end of the session Australia was in fact optimistic that the tenth session would be the concluding session and that a Convention could be open for signature in September 1981. The tenth session, it was felt, would principally be a 'mopping up' operation with its main function to 'reveal whether the world at large accepts or rejects the package that has been negotiated'. Australia at this stage was optimistic that developing countries and industrialised countries would accept the convention pointing to such benefits to developing countries as the EEZ, rights over archipelagic waters and shelf, the 'common heritage' principle and rights of seabed exploitation given to the Enterprise and increased coastal state powers over the marine environment. Industrialised countries would also gain 'substantial benefits' and a rejection by them of the Convention would, Australia warned, give rise to 'disappointment and bitterness amongst developing countries'. This was to be a prophetic statement by Australia as the US moved to a new phase in its law of the sea diplomacy.
Tenth Session: New York. 9 March—24 March 1981

The tenth session\textsuperscript{103} proved against all expectations to be a lame duck session. This was a direct result of the announcement by new the United States Reagan Administration that it had ordered a fundamental review of its policy in regard to the law of the sea. The US delegation spent little time at the session and not surprisingly the US decision had a serious impact on the work of the conference. From Australia's viewpoint the most useful aspect of the session was growing support for a non-subsidisation clause, but overall the US decision meant that there were useful discussions only on a small range of issues.

**United States Policy Review**

All expectations that the tenth session would finally witness the conclusion of a Convention were dashed one week before the session when the new United States Reagan Administration, that took office in January 1981, announced a policy review of the entire draft Convention and instructed its delegation to seek to ensure that the negotiations did not end until that review had been completed.\textsuperscript{104} The previous leader and several other members of the US delegation were removed barely forty-eight hours before the session\textsuperscript{105} and as a consequence the new officials were not active at the session.

The review took nearly twelve months and presented the US from effectively participating in both the 1981 sessions. The US decision was motivated by complex factors relating to fears about the precedent creating effects of the deep seabed regime as well as substantive aspects of the mining text as well as changes in US perceptions on the value of a law of the sea treaty.

The main thrust of the objections were directed towards Part XI of the Convention—the regime dealing with deep seabed mining. Republican critics voiced two classes of objection here. First were objections to specific provisions in the text, such as the provisions on the transfer of technology or the provision for a Review conference. More serious were the ideological objections that essential concepts in the Convention were unacceptable. Here Republicans did not like the idea that an inter-governmentally owned corporation could mine the seabed in competition with private enterprises; that the new Seabed Authority should have sources of revenue which would make it independent of the annual appropriations of States parties and that an industry should be subject to international regulation.\textsuperscript{106}
What concerned Australia was the effect US action could have on the conclusion of a comprehensive Convention. In contrast to many in G77 that spoke in strident terms against the US in plenary, Australia’s public statement, while making clear Australia’s concerns about the effect of the US move, sought as far as possible to ameliorate the position of the US delegation. In what appeared to be an attempt to ensure than the US would not suffer so much embarrassing criticism within the conference that would prevent it from rejoining at an early date, Australia’s Keith Brennan elaborated at length on Australian interests in the law of the sea and pointed out that it was an ‘important objective of his country’s foreign policy that some of the doubts which existed in international law should be removed and that some imaginative new concepts, which had already secured very wide support, should be recognized’. Brennan went on to point out that Australia like many other delegations saw ‘no possibility’ that Australia’s ocean interests could be secured otherwise than under a single widely-accepted international Convention. Brennan stated that:

He hoped that the United States delegation would give due weight to the objectives and views of his Government in its review of United States policy; those objectives were widely shared by the conference, and there was no possibility that they could be achieved otherwise than through a single widely-accepted international Convention. For any delegation to suggest that it might not accept those basic ideas might have the unintended consequence of putting at risk the attainment of those objectives. He therefore urged that the area of uncertainty be narrowed as much as possible and as quickly as possible. The resumption of negotiations on the understanding that those basic ideas represented a consensus would be in the interest of all delegations.

Brennan also attempted to point to the gains that American mining companies would secure from the treaty. Without the guarantee of an unchallengeable right to mine many companies would not be prepared to risk the large amounts of investment needed for deep seabed mining.

While Australia’s public stance was conciliatory on the US need for review in private Australia registered its deep concerns more forcefully to the US. Australia argued that a serious interruption to the negotiating process might jeopardize the attainment of a Convention. Representations were made by the leader of the Australian delegation, and by the Minister for Foreign Affairs, Mr Street in discussions with US Secretary of State Haig during the session. Mr Street told Haig that Australia’s interests would best be protected by an early adoption of a comprehensive and widely supported Convention and that if a Convention was put at risk by the US review ‘both Australia’s vital interest and the strategic interests of the United States could be at risk’. Similar representations during the course of the session were made by Sir
Nicholas Parkinson, the Australian Ambassador to the United States to the Deputy Secretary of State, Mr Williams Clark. The Australian government hoped that the US review would be completed quickly so that a Convention ‘in which Australia has vital interests can be adopted as soon as possible’. Australia recognised, nevertheless, that it was unlikely that the US review would be completed by the next session to be held in August. Australia’s real worry of course was not just that the US review would delay the conclusion of a Convention but as one journalist shrewdly observed that ‘the US might decide to pull out of the treaty negotiations altogether or that the Third World Countries might become impatient with America’s new objections to the treaty and go ahead without it’.

Given the US action the main question now facing Australia appeared to be how to work so as to ensure that there was no overall breakdown of the conference. Australia would now have to rethink exactly how it should approach the task of securing a Convention, in the light of a serious risk that if the US pressed for substantive changes to the Draft Convention (based on objections to the seabed mining text) then the consensus text could unravel very quickly.

**First Committee**

While the first committee saw some discussion on the so-called Preparatory Commission (Prepcom) whose function was to make arrangements to enable the Authority and its organs to function as soon as possible after the entry into force of the Convention, Australia concentrated its attention around its drive for an anti-subsidy clause. (Expected attempts by some LBPs to strengthen the market access clause did not eventuate). Discussion on the subject proved limited because of the US review but Australia took the view that it was important to keep up momentum on the issue for if there was no discussion on it at the tenth session it could have proved difficult to reopen. Australia clearly took some heart from the fact that within the LBP group it had picked up increased interest with support from the Latin American producers.

It appeared, however, that Australia’s position differed from other members of the LBP group on the relative merits of the non-subsidisation clause as opposed to the production formula. Whereas ‘several members’ of the group saw the non-subsidisation clause as complementary to the production control formula Australia apparently hoped that the clause would replace the formula. While ideally Australia appeared to favour a situation where there was no production control formula and the non-subsidisation (and market access) clause(s) stood alone the thrust of Australian diplomacy was to see an anti-subsidy clause included in the text and Canberra was clearly prepared to accept a
situation where such a clause would augment a production formula.\textsuperscript{127} There was criticism from a number of delegations from developed countries that it was dangerous to reopen the whole production control issue.\textsuperscript{128} The overall result of Australian diplomacy on the issue was in fact successful in so far as the issue was kept alive for resolution at a future session, a reasonable result given the US position to review its policies towards the conference made it impossible for the conference to engage in substantive negotiations.

Committee Two

As the US indicated that it was not in a position to negotiate Committee Two issues it was not possible for real negotiations to take place.\textsuperscript{129} The Chairman of Committee Two indicated that delegations should not reopen issues which had been the subject of negotiations over many years.\textsuperscript{130} Nevertheless G77 were adamant that the issue of innocent passage of warships through straits should be reopened so as to require prior authorisation or at least notification of passage to the coastal state.\textsuperscript{131} The proposal by the Philippines and others\textsuperscript{132} absorbed the attention of the committee for most of the four meetings.\textsuperscript{133} The US delegation report stated that of the approximately 70 speakers on the subject, roughly one half opposed the amendment and one half favoured. Those who opposed were split between those who spoke to the substance of the article and those who thought that the Committee text had been ‘highly negotiated’ and should be reopened.\textsuperscript{134} Australia’s remarks straddled both views\textsuperscript{135}, although Australia was aligned here with both the major maritime powers, including the eastern bloc in opposition to the change.\textsuperscript{136}

The other issue that received attention in the Committee was a proposal by the United Kingdom to amend a position in the Draft Convention (article 60(3)) which provided that abandoned or disused oil installations or structures should be entirely removed. This was the legal situation as provided for in the 1958 Geneva Convention on the Continental Shelf, but the UK argued that the provision was too onerous as the costs of entirely removing installations or structures would be enormous.\textsuperscript{137} The UK proposal was to link the requirement to remove installations to the need to ensure the safety of navigation and other lawful uses of the sea, such as fishing.\textsuperscript{138}

The interest of reconciling the needs of fishing interests, navigation and the marine environment made this a potentially difficult issue particularly given the late stage at which the UK introduced its proposal. However the UK move received a surprising degree of support.\textsuperscript{139} Australia supported the UK’s initiative to have the issue of offshore rig abandonment reopened, a reversal of policy by Australia and driven in part
by domestic pressure from the mining industry and state governments and in part by a recognition that a reopening of the article was not likely to unravel other parts of the text.\textsuperscript{140}

In his report to Plenary the Chairman of the Second Committee stated that there was a virtual consensus that it was not desirable or practical to reopen discussion on the basic second Committee issues, which, while they did not in all cases represent a consensus, were the formulae that come closest to commanding general agreement. He went on to point out that it might be possible to introduce minor changes to supplement or clarify the Draft Convention provided they commanded the necessary support but that the text as a whole was acceptable to the great majority of delegations.\textsuperscript{141} The danger here of course was that any widespread attempt by the United States to reopen and renegotiate articles within the Second Committee’s interest could lead to a flurry of counter-actions by other delegations. It was that situation which Australia no doubt hoped would not eventuate at the next session,\textsuperscript{142} although it was recognised in Canberra that with the US policy review most likely not to be completed the resumed session ‘might be a difficult one with the possibility of the United States being seriously at odds with the developing countries’.\textsuperscript{143}

**Third Committee**

No substantive work took place on Third Committee issues as the Third Committee had earlier completed its work at the informal stages of proceedings on parts XII, XIII, XIV of the ICNT. One meeting of the Third Committee was held to determine if there was any wish to reopen discussion on any item.\textsuperscript{144} The most significant intervention was from the United States that reminded the Committee of its position that as far as the US was concerned all of the Draft Convention was within the scope of its current review.\textsuperscript{145}

**Concluding Remarks**

The US review meant that the session proved to be disappointing in resolving outstanding issues.\textsuperscript{146} Some progress was nevertheless made. The work of the Drafting Committee in preparing the final form of the different language texts was ‘one of the more encouraging aspects of the work of the session’.\textsuperscript{147} From Australia’s viewpoint it was also encouraging that the eligibility of the Cook Islands and Nuie to be parties to the Convention was accepted in principle as well as other categories of associated states, such as in due course, the United States Pacific Trust Territories. Australia spoke, along with other countries from the Pacific region, in support of this outcome and the issue, unlike other aspects of participation, proved to be non-controversial.\textsuperscript{148}
Nevertheless there was no escaping the fact that the conference had run into serious trouble. The fact that there emerged no consensus about the purpose of the resumed session was ‘further grounds for misgivings’. Australia could only hope that the outcome of the US review would not reopen the whole package, for as the delegation remarked ‘there have been clear warnings from the conference that there will be major difficulties ahead if the result of the review is that the United States seeks too many substantive amendments to the Draft Convention or seeks fundamental changes in the approach that has been taken to the regime for the exploitation of the resources of the seabed beyond national jurisdiction’.

**Resumed Tenth Session: Geneva. 3 August—28 August 1981**

On a number of occasions between the announcement of the US policy review and the opening of the resumed tenth session the Australian government made representations to the US government on the importance it attached to securing a widely accepted Convention on the Law of the Sea and the value it attached to the United States participation in such a Convention. The US had not in fact completed its review before it came to the session and the US delegation was under instructions to keep open all options, including the option that the United States might ultimately disengage completely from the negotiations. The United States had a long list of ‘concerns’ the negotiability of which the US delegation was under instructions to assess without entering into actual negotiations. Because the US delegation ‘was not in a position to negotiate, its “concerns” could not be heard in any of the negotiating bodies of the conference. Consequently, it had to have recourse to informal procedures in order to air its “concerns” and test their negotiability’. Most of the American ‘concerns’ were with the seabed regime and voting in the Council, but by the middle of the session the US delegation was at loggerheads with the rest of the conference. Even sympathetic delegates were fed up and one journalist observed that only efforts by other delegates to break the deadlock allowed the session to end without great tension.

**Australia’s Response to US Action**

Australia’s general approach to the US position was to ‘volunteer’ its services in generating an atmosphere for discussion of US views and work for the adoption of procedures to assist in averting any breakdown of the conference. The delegation ‘did everything possible to assist the United States Delegation in having its “concerns” listened to and in being given every opportunity to assess the negotiability of those “concerns”.’
The G77 in informal plenary sought to highlight the dangers of the US undoing a delicate package of compromises and that no one state could be justified in upsetting the entire package by attempting to renegotiate settled issues. In Australia's statement Keith Brennan generally supported the sentiments expressed by the G77. After outlining the reasons why the conference had been convened and stating that the Australian government had concluded that it would best protect Australian interests through a comprehensive and widely accepted Convention Brennan argued that while Australia supported the present text there was some scope for changes, and that the US demands be at least considered by the conference.

In response, the US made clear it was not bound by a flawed text and advised that the current text would not obtain the consent of the Senate. Australia's stance in wishing to pursue a dialogue with the US was more conciliatory than many other countries as 'many delegations wished to avoid an open ended commitment to renegotiate when the United States had not affirmed its support for a treaty in principle and was not in a position to make concrete proposals or to give an exhaustive list of its problems'. The real problem was that US, in refusing to co-operate with Koh, labelled themselves as intransigent in the eyes of moderate delegates, on whom they had to depend if they were to get anything at all for the United States.

Australia's wish for negotiations with the US on areas of its concern was partly realized, however, when informal consultations were convened by the President of the conference and the Chairman of the First Committee. At these informal meetings the leader of the US delegation delivered an eight point statement of US concerns which covered the whole gamut of the seabed mining regime. Australia's tactic in these negotiations was to stress the fundamentals of the package, although leaving some scope to reexamine some of the provisions in Part XI (the seabed mining section).

Despite Australia's conciliatory plea for some consideration of US concerns the fact was that the US was not in a position to negotiate nor offer concrete proposals. The basic criticisms by the US to the treaty were essentially ideological, and with the change of leadership from Carter to Reagan, seabed mining was elevated to top priority ahead of the political and military interest in freedom of navigation and overflight. In this situation there was little Australia could do to alter that situation, apart from assisting the US in having its concerns aired and listened to by others, but negotiations proved impossible without the US.
Anti Subsidy Issue

On other first Committee issues Australia was, however, able to make progress on the insertion of an anti-subsidies or 'unfair practices' clause, with the Chairman of Committee One encouraging 'serious consultations' on the matter. Discussions with potential seabed mining countries revealed that to be negotiable any such article should not go beyond obligations they had already accepted under existing multilateral trade agreements (for example GATT) and that the article should avoid duplicating existing international dispute settlement systems. Australia was the most visible protagonist on the issue and arranged three informal meetings of the LBPs to discuss the anti-subsidy proposals. It was evident that there was a degree of suspicion on the part of some LBPs that Australia may have concluded an arrangement with the US to ditch the production formula for an anti-subsidies clause.

Australia’s intervention to the LBPs seemed to satisfy the LBPs that Australia was not out to throw over the production formula for the group was able to produce a text which was read into the formal records of the conference. In his statement to plenary the leader of the delegation, who had been invited by the Chairman of Committee One to present the results of Australia’s consultations on the issue, made it clear that Australia regarded the negotiated text as so eminently reasonable that seabed miners would have difficulty in refusing it. In particular it was evident that Australia and other LBPs were convinced that a clause which went beyond the obligations accepted under existing multilateral trade agreements would not be negotiable with the seabed miners.

Applying the GATT rules and the GATT dispute settlement procedures did not satisfy all the LBPs but at that stage it was probably about the best that could be achieved in the circumstances. Nevertheless the plenary session ‘witnessed the strange sight of the British delegate speaking on behalf of the whole European Community against the inclusion of this anti-subsidy clause’. Britain said that interested parties had not made progress towards consensus and that they did not consider it appropriate that such a clause be included in the Convention. The statement was relatively mild but Australia’s Keith Brennan ‘robustly’ replied that he could see no reason for this opposition since the obligations under the clause were the same as those accepted by all industrialised countries under GATT, and that there were provisions on that subject in agreements between Australia, the United Kingdom and members of the EEC. Brennan added that the unfair economic practices clause had commended itself to several Asian, African and Latin American delegations and he hoped the UK reservations would be withdrawn. No other formal comments were made on Australia’s statement.
The only other First Committee matter where progress was made was on the selection of a site for the International Seabed Authority and the Law of the Sea Tribunal. On a vote Jamaica was chosen for the site of the Authority and Hamburg for the Tribunal. Australia supported both the winning candidates. It was somewhat surprising that Australia did not support its regional neighbour Fiji for the site of the Authority given that Fiji was an important member of the Oceania group at the conference, a group that Australia had given strong support. However, the reason appeared to be that Australia had already committed itself to support Jamaica in 1975 at a time when Jamaica was the only candidate in the field.

Other Issues

The most noteworthy advance in the second committee came on the delimitation issue (which Australia had not played a direct role). Both the leaders of equidistance and equitable principles group confirmed that they would support a new text which was inserted in the revised Draft Convention which eliminated any reference to median or equidistance line and limited the entire provision to a rule of delimitation by agreement that did not, as such, purport to lay down a normative rule to be applied in the absence of agreement. As Australia's main interest had been to try and ensure that the principles in any Convention were flexible enough to cover all particular circumstances and that emphasis was placed on effecting delimitations by agreement the compromise here met Australia's concerns.

Other issues such as offshore installations and innocent passage of warships (where a number of delegations expressed a desire for change that would require prior authorisation) that were the subject of corridor discussions were not discussed in Second Committee despite attempts by several delegations to have the matters raised.

Concluding Remarks

While Australia made progress on the anti-subsidy front its main diplomacy was focussed on trying to create an atmosphere whereby US concerns could be discussed. To some extent it was successful in so far as the US was given the opportunity to air its concerns in informal gatherings which allowed it to assess the 'negotiability' of those worries but as noted earlier Australia's position was hamstrung because the US refused to even cooperate with the conference President in the negotiations. The danger therefore that the Convention could still be scuttled was still real. G77 were unwilling to renegotiate substantive parts of the seabed mining provisions and the US was still not in a position to negotiate until its review process was completed. US participation was really now the
main outstanding issue. Australia’s Keith Brennan argued shortly after the session that ‘the fact that the Americans were able to gain the hearing they did and that moves to formalise the Convention for signature were staved off enables the Session to be rated as successful’. To the extent the session survived the strains of the uncertainty of US intentions Brennan’s view seemed reasonable. Australia’s position was to stress the fundamental consensus package of the Convention, including Part XI, but being prepared to leave some possibility for meeting American concerns if that was at all feasible. Whether that was a realistic option was becoming increasingly doubtful for many delegations, largely those of G77, made it clear that although they would prefer the US to participate in the Convention, they intended to ensure that a final Convention on the Law of the Sea would be open for signature in later 1982, whether or not the US was ready to join. For the US part it was now also becoming increasingly clear that what the new Reagan Administration wanted was to dismantle the provisions on the seabed and replace it with an ideologically ‘sound’ free enterprise system that would amount to exploitation by only the most technologically advanced states.

Eleventh Session: New York. 9 March—30 April 1982

The eleventh session concluded on 30 April 1982 with the adoption of the text of a Convention. The Convention and the accompanying resolutions were adopted by a vote of 130 in favour, 4 against (Israel, Turkey, United States of America, Venezuela) with 17 abstentions. Australia voted in favour of the Convention. The session was dominated by the diplomatic effort, in which Australia played a leading role, to bring some resolution to US concerns, but in the end the US decided to stand aside from the Convention because of what it regarded unacceptable elements in the seabed mining regime.

Australia and US Policy

Australia’s determination to get the US back to the negotiating table was evident when less than one month after the resumed tenth session, the Government and Opposition voted unanimously in the Parliament for a motion urging the US to join with the rest of the world in working for a successful conclusion of the conference at the next session. Speaking in support of the motion, the shadow spokesman on Foreign Affairs Lionel Bowen (who proposed the motion), elaborated at length on the importance of the conference to Australia and its Pacific neighbours and argued that ‘the greatest single power in the world and our ally, the United States, has thrown the success of the project into doubt’ as the US had made no final commitment to attend the eleventh session. Bowen referred to a conversation with a Prime Minister of one of the ‘leading Pacific countries’ who told him that the US would not have a ‘friend left in the Pacific’ if it did
not co-operate. The Opposition nor the Government wanted to see that happen, argued Bowen.192 Seconding the motion, Foreign Minister Street stressed the importance of the conference to Australia as ‘an island continent with extensive off-shore areas and heavily dependent on international trade’193 and explained that Australia’s hope that the US would work towards a successful conclusion of the conference was one ‘widely shared around the world.’ He pointed out that the Forum countries in the Pacific had suggested that the conference be discussed at the next Commonwealth Heads of Government Meeting.194 The Leader of the Australian delegation was also publicly warning that if the US withdrew from the negotiations it would ‘divide the world’.195

By December 1981, the Australian government was growing increasingly impatient at the nine months it had taken for the US to complete its review and come to a decision on whether to rejoin the negotiations.196 The US finally made its decision to rejoin the conference after completing its review on the 29 January 1982, but the six objectives announced by President Reagan were judged by the leader of the Australian delegation to be so general that it was not possible to determine whether they would involve few or many changes to the Convention.197 Nevertheless, both he and Foreign Minister Street welcomed the US decision with Street expressing the hope that the US would adopt a constructive attitude towards achieving a comprehensive and widely accepted Convention.198 As noted above, the Australian delegation leader viewed President Reagan’s objectives as too general to judge whether they would involve many changes to the Convention but speaking just prior to the final session he was clearly down playing the problems ahead. Just prior to the final session, Brennan told a seminar at Columbia University attended by leaders of delegations, that it was the view of many in G77 that an agreement had already been reached which met substantively Mr Reagan’s requirements and that in recent sessions ‘scores’ of amendments were made in the text in the interest of seabed miners.199

Brennan urged the US not to overload negotiations in the first weeks of the session on matters which had been brought to finality and pointed out that it was unrealistic to expect the conference to alter its position on issues which had already been exhaustively dealt with. It may be difficult, Brennan asserted, to secure a reopening of matters simply on the grounds that the US would like to reconsider them.200 Indeed, in addressing a number of US concerns relating to seabed mining Brennan argued that while Australia would prefer the production ceiling not be included in the Convention (and reminded his audience that Australia had attempted to have it deleted) ‘our experience leads us to believe that no Convention will be open for signature which does not contain something close to the present text’. He went on to state that Australia would welcome some measure of simplification of the system for approval of contracts, pointing out that the
Australian delegation had identified 17 obstacles which an applicant would have to overcome which would not prevail if he were applying for a licence in Australia, but poured cold water on US hopes to change decision making procedures in the Council. He gave mild encouragement for the US demand to reexamine the issue of transfer of technology stating that Australia would like to see some loosening up of the provisions which might scare investors. The thrust of Brennan’s remarks were thus to point out that from Australia’s viewpoint US demands for fundamental changes to the text were not practical, but marginal amendments were possible.

Indeed, Brennan only a few days prior to the session made it clear that Australia would make every effort to ensure that the US join a final treaty. While not predicting how the session would turn out, Brennan was ‘encouraged’ that President Reagan chose to use the word ‘objectives’ when discussing United States’ areas of proposed change in the treaty, rather than outlining a hard and fast list of demands. Australia’s cautious optimism was, however, soon disappointed. During inter-sessional meetings the US representatives had communicated the Reagan objectives in the form of a comprehensive paper without suggesting specific language. The Group of 77 however rejected such language. The United States in a response prepared a set of between 150 and 200 amendments based on the most extreme of its proposals which became known as the ‘Green Book’. Australia was dismayed at what ‘would have involved the unravelling of dozens of critical compromises that had been agreed in the years leading up to 1980, many on the insistence of the USA itself. In their totality, they seemed to us (i.e. the Australian delegation) to go far beyond what was necessary to secure President Reagan’s six objectives. It was immediately apparent that such far reaching proposals could only be counter-productive’.

After considering the amendments for two days, the Group of 77 rejected the Green Book, even as a basis for negotiations. The conference was therefore deadlocked. At the initiative of Canada the leader of its delegation convened a meeting of the following eleven delegations: Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden and Switzerland. The Netherlands subsequently joined the group. The group became known variously as the Group of 12, Group of 11, the Friends of the conference and the Good Samaritans. Australia along with Canada, Norway and Denmark, Austria, Finland, Iceland, Ireland, New Zealand, Sweden and Switzerland submitted proposals on four key areas where changes appeared possible without completely undermining the seabed regime. What followed was a period of ‘delicate maneuvering’ involving a certain amount of ‘shuttle diplomacy’ by Australia and the G12 to initiate discussion on the points of substance dividing G77 and the US and the other potential seabed miners—UK, France, FRG and Japan—the so-
called Consultative Group of Five. The Group of 12’s credibility was assisted by the fact that representatives participated in their personal capacities and were not permitted to advance their own nations positions in the Group, but there were problems for both G77 and the US in the Group of 12 proposals. In plenary Australia referred to the necessity for negotiations between G77 and seabed miners and urged that essential elements be addressed if consensus was to be reached.

While Australia’s head of delegation was optimistic two weeks before the end of the session that consensus would be found, in the end the response from Washington was an apparent rejection of the Group of 12 proposals. The deputy leader of the US delegation later suggested this may have contributed to a ‘tragic failure of communication’ within the conference. The US only fully accepted the Group of 12 package on the final day of the conference but by then it was too late. The President did not feel able to put forward all of the amendments proposed by the Group but the text of the Convention contained important concessions by G77 to the US. It was the view of the Australian delegation that the conference came within hours of consensus and did not in fact because there was lack of time to properly consider the Group of 12’s proposals. From Australia’s view it was indeed ironic that one of the major stumbling blocks for the US in securing improvements in areas that it regarded as critical in the text was its insistence until almost the very end that the production ceiling should be totally eliminated. It was exactly those provisions which Australia had tried unsuccessfully to remove at the ninth session but which Australia had publicly emphasized just prior to the final session were an integral part of any final Convention.

On the issue of Australia’s drive for an anti-subsidy/unfair practices clause Australia was finally successful. The detailed negotiations on the issue have been recorded elsewhere and it is not proposed to duplicate that history here. In broad outline Australia was joined for the first time directly by Canada to push for the clause. The clause was also supported by the LBPs but some expressed reservations about the references to the GATT in the proposed revision, (in particular they did not accept that disputes arising out of the interpretation of the provision in the Law of the Sea Convention should be referred to another dispute settlement procedure). Most industrialised countries opposed the proposal taking the view that the matter should be left to GATT. By the end of the fourth week four delegations specifically referred to the subject in plenary with Australia, Canada and Zaire supporting the inclusion of such a proposal and the US considering it not appropriate. The Reagan administration opposed the idea, largely as a tactic to get the necessary bargaining leverage that would permit the production ceiling formula to be deleted. Australia and Canada worked closely together and co-sponsored an anti
subsidies proposal which in general debate drew support from Argentina, Zambia and Zaire.

Opposition was expressed by a number of European Community delegations and by Japan both in formal plenary and in informal negotiations. The United States said the proposal was 'totally unacceptable on the grounds which included the consideration that under the Draft Convention being negotiated it might be necessary for some seabed mining countries to subsidize their companies' operations'. What followed was a complex set of negotiations involving Ambassador Nandan of Fiji undertaking (at the request of the conference President) negotiations between Australia, Canada, France, FRG and the United States which eventually led to a text being included in the final Convention. While a watered down version of Australia's early draft it was still one which Australia felt provided something that Canberra could 'hang its hat on' in relation to subsidisation by acknowledging the competency and primacy of the GATT to seabed mining.

Other Issues

Many suggestions were put forward at the final negotiating session that had failed to gain sufficient support to be included in revisions of the Draft Convention. A number were important from Australia's viewpoint.

First, a number of states from G77 attempted to reintroduce the issue of prior authorisation or notification of warships through the territorial sea and a large group of states introduced a formal amendment which would have given a coastal state the explicit right to make laws and regulations relating to innocent passage through the territorial sea for the prevention or infringement of its security laws. This amendment was understood to mean that the coastal state would be able to make laws and regulations requiring prior authorisation and notification for innocent passage of warships. Australia joined maritime powers and the superpowers in arguing that 'if the traditional right of innocent passage was subject to the authorisation of a coastal state, it would no longer be a right but merely a facility to be granted at the discretion of the coastal states. Similarly, a requirement of prior authorisation could be used to impede or suspend lawful innocent passage'. Before the amendments on the issue could be voted on, the President prevailed on the sponsors to withdraw saying that if they were pressed and voted on the prospects of achieving consensus would be destroyed.

Australia felt that an important objective at the session was to get acceptance of the UK proposal on abandoned or disused offshore structures. The UK introduced a
proposal that was supported by Australia and thirteen other states when it was first introduced. Later in second committee Australia again spoke in support of the proposal along with 21 other countries. The proposal by the UK was the only substantive change made in the Draft Convention outside the area of seabed mining and represented an often quoted example of the utilisation of the consensus procedure in the conference. The article would permit partial removal of offshore structures provided adequate provision was made for the safety of surface and sub surface navigation and provided that rights of others, particularly fishermen was protected.

The straddling stocks issue with which Australia had become associated through its co-sponsorship of an earlier proposal that sought to place coastal states and harvesting states under an obligation to reach agreement on conservation measures for such stocks was, in the end, withdrawn in the hope that the Convention might be adopted by consensus. From the viewpoint of the Australian fishing interest it was probably no great setback for as noted earlier Australia’s support for the proposal had more to do with solidarity with the Coastal States Group.

On the issue of straits, a common understanding on the application of the Convention to the Straits of Malacca and Singapore was presented to the conference by Malaysia on behalf of the littoral states (Malaysia, Indonesia and Singapore). As well as the three littoral states, the states participating in the understanding were Australia, FRG, Japan, the United Kingdom and the United States (France took note of the understanding and the confirmatory letters). The issue here had arisen because an amendment proposed at the fifth session of the conference which sought to amend the SNT while allowing straits states to enforce laws ‘limiting the right of transit passage of vessels, which because of their insufficient under keel clearance, constitute a grave danger to safety of navigation or to the marine environment of that state’. The maritime powers were unwilling to introduce an exception into the text to cover straits with ‘special peculiarities’ and the states bordering the Straits of Malacca and Singapore ‘then took the approach that the best way of protecting their interest would be to enter into an understanding with the major users of the Straits, including Australia, on the purposes and meaning of Art 233 of the Convention (which related to enforcement or threatening major damage to marine environment of straits) in its application to those straits’. Australia first participated in the preparation of this statement at the resumed seventh session but as a minor user of the strait Australia’s role was fairly limited and consisted largely of offering comments on various US draft statements.

Finally, it should be noted that Australia participated ‘actively’ in the discussions on the question of which entities other than states (such as international organisationas and
national liberation movements) would be able to participate in the Convention and in the work of the Drafting Committee and of the English language group. From Australia's viewpoint the most important aspect of the participation debate was that entities such as Cook Islands and Niue and (at a later stage) the US Trust Territories could participate in the Convention.

The Adoption of the Convention

On 30 April the Convention and its accompanying resolutions came up for adoption. The US delegation notified the President in writing that it wished the Convention to be put to a vote. The Convention and the accompanying resolution were adopted by a vote of 130 in favour (Australia) 4 against (Israel, Turkey, the US and Venezuela) with 17 abstentions (Belgium, FRG, Italy, Luxembourg, Netherlands, Spain, Thailand and East Europeans). Three potential seabed mining industrialized states voted in favour—Japan, France and Canada. Australia's immediate reaction to the adoption of the text of a Convention was to describe it as an event of 'historic occurrence' culminating years of endeavour by the international community. The fact that the Convention was not adopted by consensus with the US voting against the adoption and the abstention of UK, FRG and USSR, was regarded by Australia as a 'bitter disappointment'. Four days after the session had ended the Foreign Minister stated in Parliament that the adoption of the Convention had 'brought one step closer the objectives of this Government, and, indeed of the Australian Parliament, of getting a comprehensive and widely accepted international Convention...'. The Foreign Minister went on to state that it was:

disappointing that the text was not adopted by consensus, and it was particularly disappointing to us that the United States voted against the Convention. We understand the concerns of the United States ... but I hope that, as the heat of the debate cools in the aftermath of the conference, the United States and other countries which did not support adoption of the Convention will carefully reconsider their positions as the Convention is open for signature. I hope that they will look again at the advantages of working within a secure and agreed international framework, even though it might be at some cost to their own national goals. I hope they will agree to do that.

The government's hopes were dashed on this score when on 9 July President Reagan announced that the US would not sign the Convention. At bottom the US rejection was based on ideological objections to the text and domestic politics. The President stated that while the United States approved of 'those extensive points dealing with navigation and overflight and most other provisions of the Convention' it could not support the provision in the Convention relating to the exploration and exploitation of the deep seabed beyond national jurisdiction. Free market philosophy had it appeared finally dictated
US policy, but at the end of the day US domestic politics saw the Reagan Administration turn its back on multilateralism. Republican opposition and the US mining industry hostility to UNCLOS 111 to the seabed regime in the end determined US policy.262

Two days later the Australian Foreign Minister expressed fairly muted criticism of the US decision pointing out that the government was ‘disappointed’ in the US decision, that the Convention offered substantial navigational and resource benefits to Australia and that a Convention would provide a secure and agreed framework for all aspects of the uses of the seas. He pointed out that the government had urged the US to look more favourably on the negotiations and that the US decision could weaken the effectiveness of the Convention and was a ‘setback to those many countries that had worked so hard to try and ensure that the new Law of the Sea was supported by global consensus’.263 The government specifically stated that it shared the concerns of those countries that if the US tried to mine the seabed outside national jurisdiction there could be ‘serious repercussions for international relations, particularly in the North/South context’.264

In the autumn of 1982 President Reagan sent a personal emissary, former Secretary of Defence Donald Rumsfield, to EEC capitals and to Japan to encourage those countries not to sign the Law of the Sea Convention.265 Australia made clear it had absolutely no sympathy with this approach for when Canberra announced its decision to sign the Convention on 18 November 1982 it specifically gave as one of its reasons the fact that by signing the Convention Australia would be in a better position to encourage other countries, including regional states, to sign early and to influence attitudes to the new Convention.266 The Foreign Minister stated that Australia’s decision was based on a number of factors, including the achievement of Australia’s long-term objectives of freedom of navigation and access to living and non-living resources: ‘If countries with substantial maritime interests were not to support the Convention, difficulties over transit and resource exploitation arrangements would almost certainly increase’.267 The Minister also stated that the decision would allow Australia to participate fully in the work of the Preparatory Commission whose task was to prepare detailed rules and regulations for the operation of the International Seabed Authority and the Law of the Sea Tribunal. While Australia would have preferred seabed mining provisions ‘based more on the operation of free market forces’ the provisions were the ‘best that could be negotiated in the circumstances’.268

At the signing ceremony in Jamaica in 6-10 December 1982269 the leader of the Australian delegation in a lengthy statement emphasized the importance of the package deal nature of the Convention, the ‘historic’ achievements of the conference and rejected any attempt by states to work outside the seabed mining regime in the Convention.270
Australia was one of 117 states that signed the Convention on the day it was opened for signature (10 December 1982) in Jamaica—never before had so many countries signed a Convention on the first day. For Australia, as for many delegations, it was not the end of their work, but it was the achievement of the goal of the conference after 14 years of negotiation—eight at UNCLOS 111 itself and six in the SBC.
CHAPTER EIGHT

AUSTRALIA'S ROLE AT UNCLOS 111

This chapter is concerned to provide an overview of Australia's role at UNCLOS 111. It was noted earlier that UNCLOS 111 was the most ambitious intergovernmental conference in diplomatic history. The complex political processes involved in multilateral conference diplomacy with the importance of key individuals, issue linkages and group politics is nowhere better illustrated than the structure and process of negotiations at UNCLOS 111. Again as noted earlier much of the negotiations at these kinds of conferences is simply not observable to the outside analyst where negotiations take place in informal networks and groups. In the case of UNCLOS where there is a paucity of formal records and where group politics dominated the problems of evaluating the role of a single state actor are compounded. Nevertheless the approach taken here is to analyse the material from chapters four to seven in order to provide an overview and understanding of Australia's role at the conference.

Australia's various roles at the conference largely derived from the set of objectives that Australia established at the start but important aspects of Australia's UNCLOS diplomacy were shaped by the imperatives of alliance building and conference politics. The game of ocean politics demanded the players adjust to the demands of multilateral political negotiations and Australia, like other players, found itself selecting goals and compromises that were not always to its liking. How well Australia fared in the negotiations and the reasons why the outcomes were favourable for Australia are reserved for the next chapter. The emphasis in this chapter is, however, on Australia's role within the structure of ocean politics as it was played out at UNCLOS 111. Australia's role can be considered under the following: initiator, group player, mediator and 'Package Deal' custodian. These categories are not meant to suggest that a particular activity can only be seen within the context of one particular role. Clearly aspects of Australia's wide ranging diplomatic activity at the conference spill-over into more than one role e.g. an initiative to mediate. Nevertheless the four roles elaborated here encompass and broadly delineate the wide ranging diplomatic and political activity of Australia over the life of the conference.

Initiator

Australia's broad goals at UNCLOS were to increase the rights of the coastal state to control offshore resources. Thus it supported the extension of the territorial sea to twelve
miles, the 200 mile EEZ and sought a formula to secure shelf rights to the edge of the continental margin. Apart from the margin claim these goals were in line with the broad trends of the conference and the whole development of the coastal state movement that had been developing prior to the conference. This point is taken up in the next chapter but the point to note here is that in terms of Australia’s overall role in the conference there were few occasions when it can be said that Australian goals required it step outside of group politics at the conference and undertake an independent initiative to seek specific Australian objectives. (Attempts at mediation and protecting the package deal are, however, relevant here and are considered below.)

In the area of Committee One Australia’s main interests were first to reconcile the conflicting views of the developed and developing countries, which was seen as the prerequisite of obtaining a comprehensive Convention (see below). Second, Australia was interested in protecting its nickel production from deep seabed mining that may have had an impact on world nickel markets. Australia, along with Canada, is sometimes given credit for first suggesting a parallel system in which the ISA and private companies or state enterprises would conduct mining operations alongside each other but on separate sites. Certainly Australia was an early proponent of a parallel system and its formulation in the SBC for an International Seabed Operations Organisation mirrored the eventual system in the Convention. On Committee One issues Australia independently pushed for market access and anti-subsidies clauses. Its attempts, however, to have production controls deleted proved to be simply unacceptable. The production control idea was accepted as an integral part of the Convention and Australia’s initiative simply came too late in the conference. Similarly Australia’s late initiative to reopen some of the finely balanced compromises on the financing of the Enterprise in an attempt to reduce what were seen as the commercial advantages enjoyed by the Enterprise was unsuccessful. Neither the G77 nor the seabed miners saw any advantage so late in the day to renegotiate this issue.

In Committee Two the coastal state issues of high priority were negotiated—the margin, EEZ, fisheries and navigational questions and Australia attached highest priority to this committee. Australia’s independent attempt to oppose the concept of revenue sharing did not meet with any success as other margin states accepted the fact that some gesture would need to be made to the conference (particularly the LLGDS group) in order to win acceptance for the margin claim. Australia’s isolation on the issue did not see Australia formally accepting the provision but did witness a change in tactics from one of high profile vociferous opposition to a quieter policy of participating in negotiations with a view to minimizing the financial impact for coastal states. Australia’s opposition did not, as indicated, see the removal of the revenue sharing provision but its hard-line stance that
a mandatory obligation to share revenue was inconsistent with the sovereign nature of a coastal states' rights may have assisted the Margineers Group in countering more extreme demands for revenue sharing and probably provided some negotiating coin to the Margineers in the negotiations regarding such issues as the rate of payments and the area in which revenue sharing would apply.

In the fisheries area Australia's early 1972 proposal (with New Zealand) was an attempt to strike a middle ground between DWFN and coastal states. Later Australian delegations endorsed the earlier approach and the principles of coastal states rights and duties relating to fisheries in the final Convention are very similar to those in the earlier Australian/New Zealand paper.4

In Committee Three Australia was largely left by itself from 1976 to fight for a provision which would give coastal states a limited degree of discretionary rights in relation to special areas and at the fifth session initiated and successfully negotiated the provision which basically appeared in the Law of the Sea Convention. While the final compromise was weaker than Australia would have liked Australia's initiative was in the face of determined opposition from the maritime powers.

Australia also found itself in a minority position at the sixth session on the issue of coastal state enforcement powers. In opposing the power of arrest in the EEZ Australia found itself at odds with the overwhelming majority of coastal states and several of the maritime powers that accepted the right of arrest as part of an overall package.5

For the most part the actions of other states and sometimes events outside UNCLOS set the agenda throughout the negotiations and provided the negotiating boundaries within which the Australian delegation operated. The broad trend towards coastal states rights meant that there were few occasions where Australia was required to step outside the general structure of conference politics.

Group Player

As discussed earlier UNCLOS 111 was dominated by group politics. In any multilateral negotiations, and particularly one of the size and scope of UNCLOS 111 no state can hope to achieve its objectives by acting alone. As Nye points out patterns of influence within conference diplomacy are often different from what could be predicted from current or underlying structural indicators, such as size of GNP or military strength.6 Even in the case of the superpowers there is a necessity to build up support from other delegations, although of course the number of such delegations will vary from issue to
issue and also relate to the size of negotiations. In the case of UNCLOS 111 where the rules of consensus prevailed it was critical for states to work with other states as negotiating partners in order to achieve their goals.

Through the life of UNCLOS an enormous number of groups were formed and like most states at the conference Australia soon realized that no one group would serve to realize Australia’s broad interests at the conference. (The role of compromise groups is discussed below.) The range of issues at UNCLOS combined with the geographic attributes of states created a diverse patch-work of interest groups that did not fit neatly within the existing geographic or political groupings within the United Nations. Nevertheless, Australia right from the beginning of the conference had a clear view that its overriding goal at the conference was to push for its coastal state interests. That is not to say defence and trade interests in maintaining freedom of navigation across EEZs, straits and archipelagos were ignored. Indeed, Australia’s interests in seaborne trade and freedom of mobility for its navy and its allies invariably saw Australia line up with the major maritime powers on most navigational issues. However, the desire by Australia to seek broad resource rights in offshore areas and a desire for a more effective regime for the protection of the marine environment, though one which emphasized internationally agreed measures (as opposed to unilateral coastal state action), meant that on many issues related to its coastal state interests Australia was opposed to entrenched maritime interests.

Thus Australia’s role in the overall conference was played out for the most part in those groups which were often opposed to the positions taken by friendly Western States which were adopting more maritime positions. Clearly the view was taken that for Australia to realize its objectives to achieve greater rights and control over offshore areas then it would be necessary for the delegation to have the widest choice of negotiating partners and to choose those partners on the basis of particular issues.7 Australia’s influence at the conference stemmed in large part from its ability to build coalitions. This was related both to the technical expertise of the delegation and its diplomatic skill. (see Chapter Nine).

Australia’s choice in joining the Coastal States Group was significant in terms of building coalitions. That group was a major actor within the conference and pushed for interests that would expand coastal state resource control and improve coastal protection. It was the major group in opposition to the maritime group whose basic position was to protect traditional high seas freedoms. As a member of the Co-ordinating Committee of the group Australia was an important player and saw the group as possibly the main political support for many of Australia’s policy goals against not only the maritime group but also
against the LLGDS group on delimitation of shelf issues as well as on fisheries matters. That is not to argue that Australia’s role within the Group was always easy. At times Australia no doubt felt uncomfortable with the more territorialist states in the group—those that favoured a 200 mile zone more akin to a territorial sea. At times Australia’s membership of the group seemed to restrict its ability to achieve preferred outcomes such as in the area of dispute settlement. Here a desire by Australia to keep in step with the group’s views saw Australia adopt a kind of grudging acceptance of the watered-down version of the disputes settlement provisions that Australia preferred. Similarly the statement of the Group at the resumed eighth session on US policy on challenging territorial sea claims was stronger than Australia preferred. On the whole, however, the decision to join and actively participate in the work of the group undoubtedly raised Australia’s profile at the conference.

The active role taken by Australia in the Group also allowed Australia to demonstrate its support at the conference for the interests of the developing world, as the group was predominantly made up of developing countries. Particularly relevant here was Australia’s support in Committee One for a seabed regime that would benefit the developing world. Australia insisted throughout the conference that developing countries could not be simply spectators in the development of seabed mining. Australia’s identification with the developing world on Committee One issues through its diplomacy in the Coastal States Group was also self-serving and involved some general trade-offs, for Australia clearly recognized that forming strong relationships with many of the developing countries was critical for the success of many Australian positions. In Committee One Australia’s position of general support for the developing countries was based partly on tactical considerations: Australia did not wish to create the impression that it was attempting to grab every last inch of marine resources (through its margin claim) while not making any attempt to secure a seabed mining regime that would take into account the particular needs and interests of developing countries. On the other hand Australia was at times able to build up its support for its margin position within the Group.

Australia’s diplomacy within the Group also served the broader foreign policy goal of support for the developing world. From the start of the conference the Labor government and from 1975 the Liberal/National Party government generally gave strong support to demands by the developing world for a new international economic order. Indeed, from 1975 when the Liberal Party assumed power Prime Minister Fraser made himself an ‘earnest advocate of the Southern position in the North-South dialogue’ and from the US viewpoint ‘tiresomely insistent on...global negotiations for a New Economic Order’. From the start of UNCLOS the north-south conflict was the major backdrop against
which conference negotiations were played out, and the G77 saw the oceans as one area where there was an opportunity to decrease the widening gap between the rich and the poor states. Australia’s role within the Coastal State Group complemented the broader thrust of Australian foreign policy here, which was to take a higher profile in support of the interests of the developing world in its overall foreign policy. As an active and influential actor within the Group Australia developed a reputation in the conference as a reliable interpreter of the views of developing states.

The work of the Margineers group was also extremely important in its goal of ensuring that a Convention would state unequivocally that the sovereign rights of the coastal state extend to the edge of the margin. Australia’s Keith Brennan often assumed the role of spokesman for the group. Australia devoted an enormous amount of its diplomatic energy in pushing its margin claim through the activities of the Margineers, in particular opposing the LLGDS, the Arab states and the Soviet Union. From about 1975 the margin claim looked like it would be accepted within the conference, but as noted earlier Australia’s role within the group was to reject the quid pro quo on revenue sharing. The problem of finding a satisfactory formula for delimitation of the margin saw Australia accept the Irish formula even though it felt it involved some compromise from Australia’s support for the principle of natural prolongation. Support for fellow Margineers was a factor in Australia’s support for the Irish formula. That formula combined with the extra cut off limits found in the final formulation reflected the anxiety of Margineers not to ‘prejudice unduly the significance of the common heritage of mankind. This was...all the more necessary while a fair number of states, led by the Arab group, were pressing for a limitation of the continental shelf to a breadth of 200 miles’. Australia adopted a high profile role in the group on the issue of oceanic ridges largely because the delegation was advised that significant areas of margin were at stake. However, its preference not to have the issue even raised was unsuccessful mainly because the Soviet Union with support from developing coastal states saw some potential for abuse in the Irish formula. Australia, along with other Margineers recognized that a Boundaries Commission might be useful in over-coming the fears of those countries that argued that it was not possible to delineate the outer edge of the margin and in limiting discussion to a technical tribunal (thus avoiding the possibility of other states contesting the delineation by reference to dispute settlement procedures). Australia’s work with other Margineers did not pay off here as the recommendatory body they had in mind was not reflected in the final text. The role of the Margineers was critical to Australia’s campaign to building support within the conference for the margin claim and resisting attempts to set the margin at 200 miles. Australia was a leading actor in the group. The fact that early in the conference it appeared that Australia’s margin claim would be successful undoubtedly strengthened
Australia’s drive to find compromises on other issues that would bring about a final Convention.

The Land Based Producers Group also permitted Australia to pursue its goals to protect its metal export interests. Probably because of a certain ambivalence about the value of production controls Australia was not a prominent supporter of such controls and was not invited to attend early meetings of the group formed by Canada. However, the group later turned out to be an important vehicle for Australia’s later goals on market-access and anti-subsidy clauses. Australia and Canada were the only developed states in the group and Australia’s interests as an exporter of minerals likely to be mined from the seabed were thus opposed by other industrialized countries who were all importers of those minerals. Australia’s role in the group from 1976-1980 was, however, to let Canada make the running on the issue, adopting the view that any formula acceptable to the miners and Canada would be acceptable to Australia. In 1980 Australia’s relations with the group suffered a setback, when the delegation unsuccessfully attempted to adopt a ‘free market’ approach to the issue. Whatever the strain in relations caused by Australia’s policy reversal here it did not do lasting damage to Australia’s reputation in the Group: Australia was able to build up support for its anti-subsidies drive although its success in securing the market access clause was largely achieved in spite of other LBPs. Certainly in the case of the anti-subsidies drive it would have been improbable that Australia’s campaign would have been successful without the support of the LBP group.

The Oceania Group permitted Australia to support the ocean aspirations not only of its Pacific neighbours and G77 but also Australia’s support in the Group for the archipelagic concept (which was important to countries such as PNG, Fiji, Tonga, Vanuatu and the Solomon Islands) permitted Australia to back the archipelagic aspirations of its Southeast Asian neighbours, Indonesia and the Philippines. From the start of the conference Australia made clear that it would ‘have in mind the interests of its friends and neighbours in the Pacific area and Southeast Asia’. Australia’s role within the group to achieve that aim was evident in several ways. First, Australia provided practical help through the conference to a number of members of the group in the form of secretarial assistance, reporting of developments in the conference and advice on tactics. This practical assistance over nearly a decade was not unimportant as a number of the smaller island countries simply did not have the resources to properly monitor the various committees. Second, Australia supported the demands by the Pacific countries that all islands generate an economic zone. At first Australia was instructed to adopt a flexible approach to this question but by the third session Australia support was strongly behind the principle. The delegation was active in supporting South Pacific states in resisting proposals to limit the maritime space to be generated by islands. Generally speaking Australia’s
support here was cost-free: not only was it in Australia's interest that its own small offshore islands generate a 200 mile zone but also there was in fact surprisingly little opposition to restrict the rights of owners of islands to maritime space. This was partly because of the difficulty of devising an objective definition of an inhabited island that did not result in arbitrary distinctions between islands generating EEZ and shelves and those not, and partly because of the sympathy for the predicament of small, isolated and not very populous oceanic states.16

Third, Australia offered the group support, albeit more qualified than in the case of the islands issue, to the archipelagic principle. Speaking at the Caracas session of the conference, Foreign Minister Willesee stated that 'several of his country's neighbours were archipelagic states which were seeking a special status for the waters within the compass of their islands. His delegation was confident that a way could be found to recognize that status, while allowing defined rights of navigation along designated sea lanes'.17 Australia's overall role on this issue was not to adopt a high profile but to offer support for the principle, whilst insisting that reasonably precise criteria had to be established to determine what was an archipelagic state and that adequate freedom of navigation and overflight should be preserved. The overall impression of Australia's approach to the question within the group (and also in the wider conference) was to offer Australian support for the concept while making clear to the archipelagic states the need to accommodate the interests of navigation. As far as the issue of archipelagic passage was concerned Australia stayed clear of negotiations here. The navigation question with respect to archipelagos and straits issues was largely played out in direct negotiations between archipelagic states and straits states and the major maritime powers. Australia's approach here was largely motivated by the assumption that a solution acceptable to the military and maritime powers would be acceptable to Australian interests.18 In the sense that a high profile on navigational rights in straits and archipelagos ran the risk of alienating Australia's regional friends, there was probably little point in Australia making a 'song and dance' within the conference about concerns that were being forcefully pushed by Australia's major ally, the United States. There was also, of course, the possibility that in the event of the conference failing to reach agreement on this issue Australia would have had to fall back on bilateral arrangements with those states to ensure adequate passage rights through their areas. For that reason also there was probably little point in duplicating the work of the military powers, particularly the US. Sanger's comment on Australia's approach to the straits issue in the SBC years applies equally well to Australia's approach to the issue of archipelagic and straits passage at UNCLOS 111: 'Australia...tended to leave negotiations to the military powers in the user group (i.e. users of straits) because (it)
knew (it)...could accept more regulation (designated sea-lanes, prior notification) than the nuclear weapons powers would'. For the reasons cited above this was probably a realistic strategy on Australia’s part: it lessened the risk that the delegation could be criticized by important strait and archipelagic states such as Indonesia and the Philippines and members of the Oceania group that Australia was simply promoting US interests.

Within the Oceania Group, Australia supported the rights of coastal states to control highly migratory species against the views of DWFN like the US, USSR and Japan. Control of tuna resources was of critical importance for the island countries of the Pacific where they were looking to their fishery resources in their ocean zones for long-term economic gain. Australia’s position was, however, not as strong as the island countries earlier in the conference, where Australia was promoting with New Zealand a more international approach to tuna management (albeit with the association of the coastal and fishing nations). With the Oceania group members opposing international management into the economic zone Australia was largely isolated within the group on the issue. From around the fifth session and in particular from the time of the South Pacific Forum countries decision in October 1976 to proceed with the establishment of 200 mile zones and in principle to establish a South Pacific fisheries agency (later endorsed at the Forum meeting in August 1977) Australia’s position on HMS was strongly and directly linked to the South Pacific states.

Australia also supported the Oceania Group on issues relating to participation in the final Convention and co-sponsored a proposal on this issue. While the island countries in the group looked to Australia for support on issues relating to islands, archipelagos and HMS, Australia looked to the group for support on the margin issue. Although none of the group had margins wider than 200 miles members of the group did on occasions lend useful support to Australia’s claims (although not Australia’s objections to revenue sharing) on the margin beyond 200 miles. Australia in turn was able to offer support not only on the issues noted above but also its general orientation on seabed mining issues supported the aspirations of the developing island countries to ensure that the seabed mining regime offered advantages to the developing world.

The Oceania Group proved to be a most useful regional grouping for Australia enabling the delegation to assess not only the views of the region on Law of the Sea issues but also served to provide a window into G77 views, thus enabling Australia to gain a greater understanding of G77 thinking. (Because the straits and archipelagic issues were dominated by direct negotiations between the maritime powers and individual states in Southeast Asia, the Oceania group was a more effective vehicle for Australia to tap the thinking of G77 than the ASEAN states). The group maintained close co-operation
throughout the conference and its stature within the conference was assisted here by the importance of a key figure within the group—Ambassador Satya Nandan of Fiji who at various times chaired NG4, was Rapporteur of Committee Two and Chairman of the Group of 21. Apart from the Latin Americans the Oceania group was probably the most cohesive of the regional groups, and caucusing and lobbying together as the Oceania Group 'was perhaps the first experience the countries of the Pacific had of working together at the international level'. Such cohesiveness was not disturbed in any real way by virtue of PNG's different position on prior authorisation or notification of warships. The one issue that could have potentially served to disrupt Australia's relations with the group were the negotiations between Australia and PNG on the Torres Strait. PNG was a member of the 'equitable' principles school on delimitation issues where Australia avoided taking sides. However, PNG supported the Australian position that existing negotiated boundaries should remain, and while at times the Torres Strait issue spilled over into PNG's UNCLOS diplomacy it did not do so in a way as to undermine the group's cohesiveness at the conference.

Australia's membership of the West European and Others Group did not undermine the support for members of the Oceania group. WEOG mainly functioned for electoral purposes, organisation and procedural matters and as Miles notes, Australia (along with Canada and New Zealand) constituted a sub-group within 'this very diverse group of 27 countries and on law of the sea issues (was) closer to the Group of 77 than to other advanced countries'. Nor did Australia's alliance with the US exert any great leverage over the Australian delegation's ability to act within the group, despite the fact that Australia's position on a number of issues was opposed by the US (see next chapter).

**Mediator**

Australia at various times throughout the conference adopted the role of mediator either in compromise groups in which it was invited or initiated, or by presenting statements of positions in formal and informal meetings. Such statements took a number of forms from detailed oral analysis of a problem, to presentation of draft articles or papers. Australia's skill at organizing coalitions was also evident in its role of mediator.

The possibility of acting as a conciliator to moderate opposing positions and finding some middle ground in multilateral diplomacy is 'usually open when an actor has no direct stake in the negotiations and is not associated with a strong viewpoint on the issue'. This observation was generally true as far as Australia's mediatory role was concerned although on occasions (such as the EEZ) Australia did attempt to play a mediatory role where it was directly concerned with the outcome.
In Committee One, Australia had few direct interests at stake apart from protecting its metal exports as no Australian mining interests were seeking to participate in seabed exploitation. Australian policy was basically to 'steer a middle course between the aggressive demands of Western mining interests and the ideologically opposed developing states with Australian delegates Mott, Bailey, Harry and Keith Brennan seeking to bring about compromises between the main parties'. In NG1, 2 and 3 and later in the Working Group of 21 Australia consistently adopted middle ground positions. Apart from a strong desire not to see the collapse of the conference (see next section), Australia's mediatory policy in Committee One was also based on tactical considerations: a conciliatory policy on seabed mining was seen as useful in building support for Australia's margin claim in Committee Two. In the end of course Australia could not determine the outcome of the seabed regime, for other states basically set the agenda.

Australia played an active role in two of the most important compromise groups of the conference—the Evensen Group and the Castañeda group (where Australia's Keith Brennan became the Chairman after Castañeda became the Foreign Minister of Mexico). These groups played an extremely important role in the conference in getting compromise solutions to a number of difficult issues in Committee Two and Three. Australia's participation in the Evensen group inter-sessional meetings allowed Australia to have an opportunity to contribute to the work of the group. On the EEZ issue Australia was concerned that a final solution on its legal status not compromise navigation rights but this did not prevent the delegation from pursuing a mediatory role between the more extreme territorialists in the Coastal States Group and the United States. To what extent Australia was successful here is difficult to say as there is nothing on the public record concerning the details of these negotiations, although Australia's proposal on the EEZ at the fourth session was not pushed for lack of support from both camps. The most that can be safely said with respect to Australia's mediatory efforts on the EEZ issue was that it played a 'prominent' part in the work of the Castañeda Group whose product was incorporated in the ICNT at the end of the sixth session.

On the MSR issue Australia played a leading role in promoting a settlement. Australia's goals were to some extent conflicting here. On the one hand Australia had limited capabilities to conduct MSR and therefore argued that the coastal states should have adequate power to control and regulate activities in its offshore area with regard to resources and the preservation of the marine environment. On the other hand from the scientific viewpoint Australia's interest was as much that of a researching state. In the past many Australian scientists had worked in foreign waters and for an understanding of important aspects of Australia's marine environment it was necessary for research to be carried out in foreign waters (in particular waters adjacent to Indonesia, PNG and New
These two concerns led Australia to take a middle of the road stance on MSR as a solution acceptable to the researching states and coastal states was always likely to be acceptable to Australia. Australia at various times throughout the conference proposed compromise texts and initiated private meetings of moderate states to find solutions to the problems surrounding MSR. The latter course was tactically not without risk: in forming private groups the reputation of the Chairman and his delegation were at stake. Compromise texts could result in criticism not only of the proposal but also the Chairman. Australia's efforts in the MSR did not appear to have attracted any adverse reaction even though efforts late in the conference to meet some of the concerns of the US on the MSR issue saw Australia adopt a more accommodating position than some of its allies in the Coastal States Group. In adopting such an attitude it appeared that Australia's emphasis early in the conference for a fairly strong coastal states rights orientation with respect to MSR shifted slightly at the end towards a greater degree of support for the value of freedom of scientific research.

On the marine environment issue Australia's position shifted from a fairly strong coastal state position to a more middle of the road view that sought to reconcile the interests of shipping with adequate protection of the marine environment. The best example here was Australia's compromise proposal (included in the final Convention) on the issue of coastal state sovereignty in the territorial sea relating to vessel source pollution that had been on-going from the second to the sixth session.

In the area of navigational issues Australia generally sided with the maritime powers but did play a role in group discussions which sought to clarify the circumstances where innocent passage could be suspended. In the area of dispute settlement Australia participated in the private group on this issue which saw Australian actors Harry and Lauterpacht play active roles (Harry being a co-chairman of the group). Australia was one of eight members of the group that submitted a working paper to the conference containing alternative texts on basic provisions of a chapter of the Convention on dispute settlement. The working group in fact made a 'significant contribution towards the evolution of the disputes settlement part of the final convention'. In the mediatory role Australia's proposal at Caracas on procedures for the conference contributed to the compromise solution that was reached on the rules of procedure.

Custodian of the Package Deal

Right from the start of the conference Australia made it clear that it wanted a comprehensive and widely accepted Convention. Critical to the achievement of that goal was for states to accept certain articles that may not meet their interests in order to achieve
an overall Convention: ‘Implicit in this package deal concept was the assumption that the Convention should meet the minimum interests of the largest possible majority while accommodating the essential interests of the major powers and the dominant interest groups...implicit in this package deal concept was that there would be trade-offs and reciprocal support between various claims...’.44

Australia’s role in Committee One can be largely seen in terms of Australian delegates ensuring the survival of the ‘package’ approach. Australia’s interest in a comprehensive treaty meant that ‘no-one issue should threaten to collapse negotiations. When it soon became evident that the seabed mining issue was going to be the most difficult to resolve, Australia worked hard to ensure that the issue did not threaten the whole law of the sea conference’.45

Australia’s protests at Caracas against US unilateral action in regard to seabed rights, its pleas to the US for patience in the light of US intentions to enact legislation for unilateral seabed mining were evidence of Australia’s desire not to see a collapse of the ‘package deal’ approach at the conference. Australia’s moderating role at the resumed eighth session in the Coastal States group on negotiations on how to respond to US policy on challenging territorial sea claims wider than 3 miles was also (partly) motivated by a desire to protect the prospects of securing widespread agreement for a final package approach to a Convention.

Similarly, Australia’s warnings early in the conference against unilateral offshore claims was motivated by a fear that the package approach may be undermined. It could be argued that when Australia joined in 1976 with other South Pacific states to introduce 200 mile zones that Australia’s commitment to a final package was weakened. By that stage of the conference, however, it was already clear that the conference by incorporating such provisions, had already succeeded informally legitimating such action. In that sense the timing of Australia’s announcement did not really appear to be a contradiction of its role of protecting the integrity of the UNCLOS negotiations. In fact Australia delayed introducing the formal legislative changes to implement the zone until April 1978 and the zone was not proclaimed until 1 November 1979. When the government introduced the amendments to the Fisheries Act to assert jurisdiction over fisheries to 200 miles in April 1978 it stated that one of the reasons for the delay was the ‘desire to work towards a comprehensive Law of the Sea Convention’ and that the extension of the zone by 1979 was not likely to be prejudicial to agreement in other areas.46 There was no doubt, however, that the unilateral declaration of EEZs and fishing zones did contribute to a hardening of the position of certain coastal states on the issue of access by LLGDS.47
Nowhere was Australia’s role in promoting the ‘package deal’ more evident than in its work at later stages in the conference to bridge the gap between the US and developing countries. Australia clearly recognized that the US action of reviewing the treaty risked collapse of the negotiations and that an eventual Convention without the US would be a weaker treaty than one to which it was a party. The ANZUS treaty was to play no part in moderating the US stance. The delegation while stressing that the failure to achieve a comprehensive Convention would have adverse effects on Australia’s interests tried to assist in generating an atmosphere in which the US views of Australia’s alliance partner could be discussed. Australia’s effort was most concentrated at the final session in the Group of 12 but in the event consensus could not be reached.

Australia’s defence of the ‘package deal’ in order to arrive at a comprehensive and widely accepted Convention needs to be seen in the context of broader concerns of Australian foreign policy and its overall ocean policy goals at the conference.

First, much of the discussion in Committee One was viewed by the developing countries as arriving at a seabed regime that would ensure real benefits to the developing world. Throughout the period of the conference, as noted earlier, Australia supported demands by developing countries for a new international economic order. Part of that support from the period of the Liberal government’s assumption of office in 1975 was based on a belief that if the demands of the developing world were not at least partly met then many of these countries would turn to more extreme solutions and look away from the West to realize their demands for international justice. A breakdown at UNCLOS would have been viewed by the developing countries as a severe blow in their search for a new economic order. Australia’s efforts to preserve the grand package approach must therefore been in the context of the wider Australian foreign policy objective to minimize the strains in North/South relations.

Australia’s role in preserving the package deal also complemented Australia’s broader support for the United Nations in general and its role in the multilateral treaty making process in particular. Through the period of the conference Australia had given strong support (particularly in the period of the Whitlam Labor government) to the work and principles of the United Nations. A breakdown in the ability of UNCLOS to deliver a widely accepted package Convention would certainly have undermined confidence in the UN as an institution to find solutions to pressing international problems and thus been regarded by Australia as constituting a setback for the institution.

Australia had also supported the work of the UN in multi-lateral treaty making and wished to improve that role. In what was later described to be a ‘timely’ initiative
Australia proposed in 1975 that the United Nations undertake a study of the multilateral treaty making process within the UN. Australian Foreign Minister Peacock speaking before the General Assembly in 1976 noted Australia’s call the previous year for a review of the process by which the international community legislates and argued that ‘the ways in which we approach multilateral treaty making area are varied, chancy, frequently experimental and often inefficient. They place great burdens upon the governments of members—especially upon the developing countries. And it is open to question whether the community could not find more economical and efficient methods of drafting Conventions’. Peacock’s comments served to underscore the fact that Australia did take the role of the UN in multilateral treaty making very seriously. Canberra’s support for the integrity of the UNCLOS negotiations thus demonstrated its wider commitment to the UN in its law-making role.

Finally, Australia’s role of trying to ensure the integrity of the multilateral bargaining process must also to be understood in the context of what Canberra perceived as the costs of conference failure. As Professor Shearer has observed: ‘If one could put Australia’s objective (at UNCLOS 111) into one word or phrase it was stabilisation of the international law of the sea. What was sought was some stable basis upon which national claims to seabed resources and jurisdiction in maritime areas could be harmonised and put on a clearer basis than was previously afforded by the interaction of customary international law and the earlier Geneva Conventions’. Australia’s goal of seeking greater certainty in the Law of the Sea would not have been achieved if the conference had broken down. Indeed Australia saw the conference as vital in overcoming the uncertainties that had emerged on ocean law in the 1960s.

Protecting the integrity of the international negotiations was thus vitally linked with Australia’s assessment that a comprehensive and widely accepted package would restore some certainty and predictability to international ocean affairs and that a breakdown could see a reversion to the disorder of the 1960s. The costs of such a reversion in terms of a strong possibility of creeping jurisdiction and a greater possibility of conflict over living and non-living resources were perceived by Australia to be significant enough to work consistently throughout the conference to ensure that a comprehensive and widely accepted treaty would be produced.

**Concluding Remarks**

This chapter has sought to analyse Australia’s role at UNCLOS. It has been argued that Australia’s role was affected both by the nature of the objectives to achieve greater control over offshore areas and more generally by broader foreign policy concerns. Interests in
securing rights to the shelf to the edge of the margin, a fisheries regime favourable to coastal states, a stable regime for transit through straits and archipelagos and a clear basis for the assertion of coastal state rights over pollution matters in the EEZ could all be argued to have been dominant goals, since Australia took a strong position on these issues (although leaving the running on navigational issues to the maritime powers). Australia’s reactions and responses to such issues as revenue sharing, MSR beyond 200 miles, and shelf rights were strongly influenced by considerations of sovereignty protection.

Priorities in Australian goals did of course alter over the conference—for instance there appeared to be more emphasis on the marine environment in the early years while issues relating to MSR increased in importance later with US moves to introduce a separate regime for MSR beyond 200 miles. The issue of protecting metal exports via anti-subsidies and market access clauses ‘took off’ later in the day. The margin goal was the top priority over the life of the conference. Direct trade-offs were for the most part unnecessary for as different alignments formed around various issues there were in fact few areas where states could sacrifice one set of interests to achieve others. By and large Australia’s approach to the negotiations was functional and focussed on issues, and policies evolved in the course of negotiations.

Did Australian policy goals undergo substantial alteration as a result of conference diplomacy? It would appear that Australia’s position on revenue sharing was moderated by reluctantly accepting its isolation on the issue and policy changed from vocal opposition to trying to moderate its effects. Australia’s position on HMS was altered by the views of the Oceania group. Its acceptance of a watered-down version of its disputes settlement preferences resulted in large part from the imperatives of diplomacy within the Coastal States Group. The acceptance of the Irish formula was partly motivated by the need to keep in step with the Margineers. Other shifts such as a stronger emphasis on the interests of shipping in environmental controls or a desire for a greater coastal state flexibility on rig abandonment are less easily explained in terms of the imperatives of UNCLOS diplomacy, although support for the UK on the latter issue was partly the result of the fact that the UK proposal gained enough support not to threaten opening up other Committee Two issues. It is possible to suggest that a shift in Australian policy on MSR late in the conference that placed more emphasis on freedom of research for MSR (as opposed to coastal state rights) was due to a desire to meet US concerns on the issue in order to bring the US into a Convention.

The most striking aspect of Australia’s role was, however, the fact that Australia’s initial goals remained substantially the same despite certain alterations of emphasis and one
major alteration in priorities (the late move against production controls and the goal of an anti-subsidies clause). The only two major goals that were effectively abandoned were the goals of seeking revenue sharing removed and the objective at the ninth session to have production controls dropped. None of the changes (apart from the move to a ‘free market’ approach on the production control formula) constituted significant departures in policy direction but for the most part were really tactical shifts to accommodate the changing patterns of conference diplomacy. Nye has observed that the politics of conference diplomacy are a special political process in which ‘influence in the conference is not the same as power outside the conference’.\textsuperscript{56} UNCLOS 111 with its emphasis on consensus, group politics, coalition formation and issue linkages opened up the possibility for smaller states to play an influential role within the conference. Australia was able for reasons examined in the next chapter to take advantage of the structure of the conference to exert influence at UNCLOS 111 beyond its economic or political weight.

Australia was one of the leading actors at UNCLOS 111 and Australia’s policies played an important role in shaping the final Convention. Edward Miles, a close observer of UNCLOS diplomacy, included Australia in a list of the twenty five most influential countries at the conference and Australian delegates Harry and Lauterpacht in his list of the 36 most influential individuals at UNCLOS.\textsuperscript{57} Professor Nye includes Australia in a list of 20 important countries at the negotiations.\textsuperscript{58} Two most important figures at the conference (including one of the most important players) include Australia in a list of fifteen of the most active and influential members of the 76 member Coastal States Group.\textsuperscript{59} Sanger includes Australia in an illustrative list of 6 countries that achieved more ‘clout’ at the conference than they would normally have expected at the international level.\textsuperscript{60} President Carter’s Special Representative on Law of the Sea Issues, Elliot Richardson, pointed out that Australia had been resourceful at developing approaches to difficult issues and that the Australian delegation had a ‘high degree of respect and influence’.\textsuperscript{61} Timagenis lists Australia (along with Canada and New Zealand) as one of the developed states that played leading role as coastal states at all fora (UNCLOS as well as the IMO) on marine pollution issues.\textsuperscript{62} One of the leading figures at the conference described Australia’s delegation leader Keith Brennan as a ‘pillar’ of UNCLOS 111,\textsuperscript{63} while another observer has pointed out that Brennan was ‘trusted by everyone’ and worked without credit on some of the most intractable problems in Committee One.\textsuperscript{64} Given that more than 150 nations attended UNCLOS (virtually every country in the world) and that between 2000-3000 delegates attended most sessions these judgements testify to the diplomatic skill and effort by Australia over the life of the conference. They also underscore the importance with which Canberra attached to the negotiations. Australia’s overall goal in the conference it was suggested was to realise its coastal state interests in a setting where the main division was between coastal and maritime interests.
Australia’s broad foreign policy goal of supporting the thrust of the arguments of the developing world on North-South issues happily coincided with Australia’s interests as a coastal state, for most of the Coastal States Group were developing countries. Thus Australia was able to demonstrate its support for developing states while fairly aggressively pushing its own coastal state concerns. That fact raises broader implications for the future direction of Australian foreign policy that are sketched in the concluding chapter.
CHAPTER NINE

AUSTRALIA, THE 1982 LAW OF THE SEA CONVENTION AND AUSTRALIAN SUCCESS

This chapter first outlines the structure of the final Convention and argues that it went a long way towards meeting those objectives that Australia worked for during the conference. In the light of that analysis, the second section considers the reasons for Australia’s success at the conference. While it is suggested that broad trends in the law of the sea favoured Australia, other factors are necessary to explain Australia’s successful and influential role at the conference. The chapter concludes by considering whether the UNCLOS 111 experience carries any lessons for future Australian participation in global conferences.

The 1982 Law of the Sea Convention

The final Convention is a mammoth document running to over 320 articles. It is not proposed to outline the Convention in any detail here. The author has provided a broad overview elsewhere and there is now a sizeable literature analyzing various aspects of the Convention. What is proposed here is simply a summary discussion of the Convention in terms of how it meets Australia’s objectives as outlined by Australian negotiators through the conference.

Resources and National Limits

On the continental shelf the text incorporates the Australian position that the coastal state exercises control to the edge of the continental margin. This was the dominant goal of Australia throughout the conference. As Australia’s shelf extends beyond 200 miles it was felt that a limit of 200 miles would compromise Australian sovereignty and ‘lose’ offshore resource rights. In two areas relating to the continental shelf the Convention did not meet Australian objectives. These relate firstly to making payments or contributions in kind in respect of the exploitation of the margin beyond 200 miles (Art. 82) and second the provision relating to the powers of the Commission on the Limits of the Continental Shelf (Art. 76(8) and Annex 11). As we have already seen Australia opposed the revenue sharing provision throughout the conference but in the end accepted it as part of a final package. It has not, however, formally accepted the revenue sharing provision.
Coastal states must submit information on their shelf limits to a Commission on the Limits of the Continental Shelf and the Commission makes recommendations to the coastal state on matters related to these limits. Following this procedure, the outer limit would be firmly fixed. Australia while supporting the establishment of a Commission preferred that the Commission be advisory only and not make its own determination of the outer limits.

As well as incorporating Australia's position on the limits of the margin the Convention also incorporates Australia's position on the territorial sea limits. The Convention provides that nations can adopt a 12 mile territorial sea (Art. 3), finally settling an issue left unresolved from the earlier UN conferences.

The Convention provides for a 200 mile exclusive economic zone and for the right of Australian island territories to generate such zones, both Australian goals. In a compromise which departed from previous international law the Convention provides that rocks which cannot sustain human habitation or economic life of their own do not have an entitlement to a territorial sea, EEZ or continental shelf (Art. 121(3)). Australia along with other Pacific island countries sought to have this rider removed although it was accepted by the Oceania group, including Australia, that this would not be possible. Australian past practice had with regard to the Barrier Reef and Coral Sea Islands not supported such restrictions, as will be noted in the next chapter. Australian practice has continued to regard islands as generating their own maritime zones even if they could be regarded to amount only to rocks. Australia has not yet declared an EEZ but its 200 mile fishing zone proclaimed in 1979 is the world's third largest 200 mile zone, although both the countries whose EEZ are larger owe the size of their zones to overseas territories. The fisheries provisions benefit the Australian fishing industry as the Convention preserves the fisheries of the 200 mile zone primarily for the coastal state. While the Convention does provide for the interests of DWFN by allowing access to the surplus it is the coastal states that has the final say over setting that surplus and who is allowed to fish in the zone. The Convention also confirms that the coastal state has sovereign rights over highly migratory species—a particularly important goal of the South Pacific island countries that Australia supported in the Oceania group.

Two other issues are also relevant when considering the issues of limits and resources in the new Convention. First, the Convention basically preserves the earlier baseline rule in the Geneva Convention on the Territorial Sea and Contiguous Zone, although adding a provision on islands having fringing reefs (Art. 6). Australia's only interest here was for the conference to leave open the possibility of Australia drawing baselines along the outer edge of the Great Barrier Reef. The issue of baselines did not occupy the
conference and Australia felt that on tactical grounds specifically pushing for a provision relating to the Great Barrier Reef may have adversely impacted on Australia’s margin claim, with some countries possibly regarding it as an attempt by an already advantaged state to further extend control over offshore waters. From 1979 the question was not an issue in any event, as the option of drawing baselines along the outer edge of the reef was decided not to be pursued for domestic political reasons.

Australia’s goals with respect to delimitation were also largely achieved. Australia was concerned to emphasize the importance of effecting delimitation by agreement and protecting existing agreements. The delimitation articles 74 and 83 achieve those goals with respect to delimitation of the continental shelf and EEZ. Australia was unsuccessful in its attempt to ensure a provision relating to protecting its position with respect to prior sovereign rights designed to strengthen its position with respect to first Portugal and then Indonesia in the Timor Sea. It is extremely doubtful whether this disadvantaged Australia in any way with the Indonesians.

**Navigation**

The Convention recognises the 200 mile zone as legally *sui generis*. As we have already seen because of the fear of creeping jurisdiction the maritime powers argued that the EEZ should have a residual high seas character, i.e. that any activity not falling within the clearly defined rights of the coastal state would be subject to the regime of the high seas. The Convention (articles 55 and 86) makes it clear that the EEZ does not have a residual high seas character. Nor does it have a residual territorial sea character i.e. it does not create a presumption that any activity not falling within the clearly defined rights of non-coastal states would come under the jurisdiction of the coastal state. The EEZ is a separate functional zone of a *sui generis* character. Australia supported the *sui generis* compromise that was incorporated in the ICNT at the conclusion of the sixth session.

The Convention recognises the sovereignty of an archipelagic state over the waters enclosed by archipelagic baselines drawn in accordance with the Convention and to the air space over them (Art 49). This was an important goal of Australia’s Asia/Pacific neighbours that Australia supported. At the same time the Convention provides the balance that Australia sought between the rights of archipelagic states and rights of other states to sea passage and overflight of archipelagic waters by providing for archipelagic sea lanes passage which cannot be suspended. If the archipelagic state does not designate sea lanes or air routes that right may be exercised through the routes normally used for international navigation.
As far as passage through straits is concerned Australia's navigational interests have been strengthened with the introduction of the concept of transit passage which is the same in effect as archipelagic sealanes passage. There may be a temporary suspension of innocent passage in the territorial sea, but no suspension of transit passage in straits used for international navigation. Transit passage includes overflight which is not a right in the territorial sea. As was noted earlier the right of satisfactory transit rights through straits was considered critical by the maritime powers and Australia tied its acceptance of the twelve mile territorial sea limit to a satisfactory regime of straits passage, as a twelve mile territorial sea would close off as territorial sea 116 straits used for navigation which previously had high seas passage. Sixty three of these straits affected by the Convention’s 12 mile territorial sea limit lie in the South Pacific, Western Pacific, South East and East Asia. In the words of one senior Australian naval officer, the regime of transit passage 'can only be regarded as an important new contribution to freedom of navigation', although how navigational freedom will be protected will depend in part on the operational practices of the world’s navies. The straits regime applies in Torres Strait and may potentially apply in Bass Strait if Australia moved to a 12 mile territorial sea.

The regime of innocent passage adds more detail to the regime than existed under the 1958 Convention. The Convention provides for an objective rather than subjective test for innocence, since the test for innocence is linked to activities while in the territorial sea, rather than passage itself (Art. 19). Australia supported the elaboration in greater detail of the meaning of innocent passage, although it objected to the listing of two activities 'any act of wilful and serious pollution, contrary to this Convention' and a catch-all provision 'any other activity not having a direct bearing on passage' that appear in Art.19 of the Convention. To the extent that the Convention reduces the ambiguity of the earlier 1958 Convention by providing an objective rather than a subjective test of innocence it meets Australia’s goal of not compromising navigational freedoms without derogating from previously held sovereign rights. Much will depend on the practice of states here. This will be the case particularly with regard to the question of whether warships need to notify the coastal state or obtain authorisation before exercising the right of innocent passage, a question that the Convention leaves unanswered. Australia’s position is that prior consent or notification is not necessary for the passage of warships through the territorial sea.

Other Issues

The new regime for MSR gives the coastal state the power to regulate MSR in the EEZ, although in 'normal circumstances' it should grant its consent to states and competent
international organisations. The regime thus favours Australia’s position that those intending to engage in research within 200 miles must obtain the consent of the coastal state, yet these should not unreasonably withhold consent. States may withhold their consent where the research is of direct significance to the exploration or exploitation of the natural resources, involves drilling or the use of explosives, or construction of artificial islands, though this discretion does not exist in relation to the margin beyond 200 miles except in specially designated areas. To guard against undue bureaucratic delay there is a provision for implied consent. Researchers may proceed within six months of supplying the required information, as long as the coastal state has not within four months questioned the objectives or asked for more information (or decided to withhold consent under one of the categories mentioned above). The right of coastal states to participate in MSR projects is provided (Art. 249), an important objective for Australia as a country with limited MSR capabilities that wanted maximum data on its offshore areas. Generally the new MSR regime supports Australia’s objective of seeking a consent regime while at the same time not placing unreasonable restrictions on MSR.30

As far as the provisions on marine pollution are concerned they are quite in harmony with Australia’s desire for increased coastal state control while ensuring that coastal state abuses of such control that may pose a threat to navigation were minimized.31 The text reflects in a number of areas opportunities for coastal states to extend their jurisdiction to control pollution but also includes an obligation ‘to protect and preserve the marine environment’ (Art. 192). In other words not to do so will be a breach of international law. That goal was one Australia had supported since the SBC. States that are parties to the Convention are required to work in the international community to establish rules and standards through competent international organisations or general diplomatic conferences. A state may proceed against an offending vessel in one of its ports, notwithstanding that a discharge has occurred outside the states jurisdiction (Art. 220). Australia had been a strong supporter of port state enforcement at the conference. Of particular concern to Australia was the protection of the Great Barrier Reef, so Australia argued for greater coastal state flexibility in taking measures that might not be incorporated in international instruments. A provision (substantially drafted by Australia) appears in the Convention and despite the fact that it was something of a compromise, met Australia’s requirements.32

The Convention’s environmental provisions represent a careful balancing of coastal state interests in the protection and preservation of the marine environment on the one hand, and the rights and interests of others in preserving navigational freedoms and various shared uses of the world’s oceans on the other.33 Australia welcomed the Convention’s
environmental provisions describing them as a 'new and promising regime for the protection of the marine environment, particularly in offshore waters'.

Seabed Mining

As far as Australia’s interests in the deep seabed regime are concerned the Convention does meet Australia’s wish that the developing countries achieve real benefits. The area beyond national jurisdiction and its resources are the ‘common heritage of mankind’. Traditional ideas of free exploitation on the high seas have been replaced by principles of non-appropriation, international management and equitable sharing of benefits. The ‘parallel system’ whereby national firms may mine the seabed alongside the Enterprise was supported by Australia right from the start of the conference. Australia’s interests in protecting its seabed exports were partly met in the Convention through market access and anti-subsidies clauses (Art. 150(j), 150(8)). The Convention does contain production limitations on seabed mining which Australia unsuccessfully tried to remove at the ninth session. While the anti-subsidies clause negotiated at the final session by no means provides a guarantee against subsidised mining Australia has found it useful as a ‘peg’ on which to hang its arguments for a strengthening of anti-subsidies in the work of the Preparatory Commission for the International Seabed Authority and the International Tribunal for the Law of the Sea (Prepcom), which was established at the end of UNCLOS 111 (see next chapter). The Convention, however, grants many commercial advantages to the Enterprise which Australia felt may cause national operators to seek subsidisation. Whatever the shortcomings of the mining regime as far as Australia was concerned Canberra accepted them on the basis that they formed part of an overall package in the Convention.

Australia’s interest in Committee One matters was very much determined by Canberra’s wish to conclude a comprehensive treaty, and to prevent the mining regime from becoming an obstacle to achieve a widely accepted Convention. In that context the mining regime did not suit Australian interests because it was that part of the Convention that caused the US not to sign and other supporters such as UK, FRG to stand out. The UK and the FRG are participating in the Preparatory Commission, although the US still refuses to participate as an observer.

Dispute Settlement and Development and Transfer of Marine Technology

Australia supported a system of comprehensive dispute settlement in the Law of the Sea Convention. A detailed discussion of the disputes settlement provisions of the Convention is not possible here but generally speaking the system combines direct
negotiations between states and obligatory third party settlement. The Convention, in so far as many multilateral treaties make no provision for binding dispute settlement, does represent progress and to that extent meets Australian objectives of including such provisions in the Convention. The Convention by prohibiting all reservations eliminated a loophole for dispute settlement. However whether the Convention will resolve difficult and protracted disputes is open to question, given that there are escape clauses to avoid procedures. Given that Australia wanted a comprehensive dispute settlement system it remains to be seen how the dispute settlement system meets that objective. Ultimately it will be judged on ‘how workable the system is going to be in its application to concrete situations’.

In the area of technology transfer Australia was concerned to protect the rights of holders and suppliers of technology and this was incorporated in the Convention (Art. 266). Australia was also concerned to support the interests of developing countries in gaining access to marine technology, although it did not adopt a high profile on this issue. The Convention goes some way to meet the general objectives of the developing countries here and to that extent Australia supported the technology transfer provisions. Part XIV of the Convention deals with the Development and Transfer of Marine Technology and for the most part the provisions are fairly bland: they do little more than exhort states to cooperate in facilitating marine technology directly or through competent international organisations. Art. 273 does, however, require states to ‘cooperate actively’ with competent international organisations and with the Authority to encourage and facilitate the transfer to developing States, their nationals and the Enterprise, of skills and marine technology with regard to activities in the area. Art. 275 imposes an obligation to ‘promote’ and to give adequate support in establishing and strengthening national marine scientific and technological research centres, particularly in developing countries.

The technology transfer provisions in Part XI formed an important part of the unease that prompted the US to not sign the Convention, and to the extent these provisions resulted in a lack of overall consensus they did not meet Australian interests. It should be noted, however, that Australia itself did not regard the conditions imposed by the Convention as constituting unreasonable burdens on any Australian company that might one day become involved in seabed mining and therefore incur obligations of technology transfer to the Enterprise.

Antarctica

As a country claiming 42 percent of Antarctica it is necessary to make some brief comments on the Law of the Sea Convention and Antarctica. It was noted that Australia
discussed with the Antarctic treaty parties questions of boundary delimitation and the International Seabed Authority.\(^46\) However, Antarctica did not really figure at UNCLOS 111. While suggestions did turn up at the conference that Antarctica should become part of the common heritage of mankind such suggestions met with strong opposition from the Antarctic Treaty parties.\(^47\) Generally, however, there was a feeling at the conference that adding Antarctica to the list of conference problems would only add to the difficulties of any final settlement.\(^48\) The Antarctic Treaty parties operating under the Antarctic Treaty system have attempted to offset potential jurisprudential conflict with the Authority operating over the deep seabed. The new Antarctic Minerals Convention if it comes into force will apply on the continent of Antarctica and all Antarctic islands including all ice shelves south of 60° south latitude and in the 'seabed and subsoil of adjacent offshore areas up to the deep seabed'. For the purpose of the Convention 'deep seabed' means the seabed and subsoil beyond the 'geographic extent of the Continental Shelf as the term continental shelf is defined in accordance with international law'.\(^49\) The obvious intent here is to establish limits of jurisdiction over the circumpolar seabed similar to the limits set out in the Law of the Sea Convention for coastal states over their shelves. The issue of any conflict between an International Seabed Authority and the Antarctic minerals treaty is at the moment an academic issue in the sense that neither treaty is in force. However it is possible that jurisdictional questions on mining rights in the southern ocean may arise at some future date, although it does seem likely that any exploitation offshore will be regulated by the minerals regime and not the Law of the Sea Convention.\(^50\)

With respect to declaring 200 mile zones, Australia declared 200 mile fishing zones off its sub-Antarctic islands, Heard and McDonald in 1979. However, with regard to Australia’s Antarctic territory Australia decided not to enforce the provisions of the Australian Fisheries Act against foreign fishermen in Antarctica. The proclamation establishing the Australian Fishing Zone (AFZ) applied to all foreigners on 1 November 1979 but with effect from the following day foreign fishermen in waters off Australia’s Antarctic Treaty were exempt from the ambit of the proclamation.\(^51\) Australia was not alone in being cautious not to offend the international community here. Although all seven states claiming sovereignty in Antarctica have declared economic zones or fishing zones around their metropolitan territory none has enforced such limits around Antarctica.\(^52\)

The interaction between the Antarctic Treaty and the Law of the Sea Convention and the degree to which the latter will become more important in the management of Antarctic maritime activities remain uncertain at this stage, although undoubtedly Malaysia and other states will continue to press for the internationalisation of Antarctica.\(^53\) The main effect, or rather side-effect of the Law of the Sea Convention on Antarctic matters has
been to sustain calls by some third world states for Antarctica to become the ‘common heritage of mankind’. Australia has vigorously opposed such arguments at the UN and has continued to assert that the Antarctic treaty system remains the best legal and political base with which to govern Antarctic affairs.

Summary

The argument presented here has been that, in terms of those goals laid down by Australia prior to the conference Australia fared extremely well if judged by the provisions of the final Convention.

The winners from UNCLOS I were countries with long coastlines and significant living resources off their coasts and with wide continental margins. For the most part these are developed countries. Australia along with countries like the US, USSR, Canada, the UK and Norway were the major beneficiaries of the negotiations. The ‘losers’ were landlocked countries and countries with short coastlines and narrow continental shelves. The establishment of 200 mile zones has led to some redistribution of resources—largely from distant-water nations to the states off whose coasts they fished: ‘Although the former are nearly all developed states, the latter are by no means exclusively—and perhaps even principally—developing states. As regards resources other than fish, in the case of offshore oil and gas the introduction of the EEZ effects no redistribution. Where the EEZ covers areas of the seabed that are continental shelf, any oil or gas there already belongs to the coastal state under the continental shelf doctrine. In areas of the EEZ where the sea-bed is too deep to be continental shelf under the pre-LOS C regime, it is highly unlikely that there is any oil or gas’. Sanger’s judgement on this result and on the overall benefits to developing countries is extremely shrewd:

Certainly there is an unequitable division between states, and some of them enjoy in jackpot quantities the lack of geography and geology. But there is inequity in national land boundaries, in the size of a country’s population, in its degree of social and economic development. There is no way to alter all these imbalances in a single treaty. What most developing countries have gained are sovereign rights and control over areas which other countries (richer than they) could previously plunder at will. What the world as a whole has gained is the assumption of responsibilities by coastal states for one-third of the oceans, where previously all the talk was of “freedom” and there was dangerously little consideration given to management and conservation of resources.

Reasons for Australia’s Success

The argument presented in the previous section was that Australia suffered no major defeats at UNCLOS, and that the final Convention incorporated the large bulk of
Australia's negotiating objectives at UNCLOS 111. This section considers the reasons for that success—how and why did Australia achieve its law of the sea goals throughout the international negotiations to create a new ocean regime?

The answer suggested by Brumm in her study is quite simple: 'Australian interests were favourably situated within the structure of issues of the conference, and in relation to the major power groups, and from the outset of the conference appeared certain of gaining recognition of its maritime claims'. Brumm goes on to suggest that Australia's objectives were incorporated in the Convention 'not due to its own lobbying and negotiating tactics but largely as a result of conference structure and trends which favoured coastal states...trends evident...through the 1960s and confirmed by UNCLOS 111'.

There is no doubt that there is a great deal of force in that argument. The conference was in effect a clash between coastal states and maritime powers. The law of the sea trend through the sixties and seventies had seen what Professor Gold has called the 'rise of the coastal state', so that Australia's support for an expansion of coastal state interests was simply part of that broad movement. Johnson and Zacher make a similar point and have observed with respect to Canada that Canadian negotiators at UNCLOS 111 were 'fortunate as well as skilful in that law of the sea trends favoured coastal states'. It is clear that Australia was in the same boat here—it was 'fortunate' that pressures had been developing through the late 1960s by developing countries that meant at UNCLOS 111 there would be a strong push for an ocean regime more favourable to coastal states. However, Australia's success at the conference cannot be explained solely in terms of the delegation going along for an historical ride. A strategy of 'sitting pat' would not have seen Australian success in areas such as its margin policy, anti-subsidies and market access clause, and balanced marine environmental and MSR provisions. Nor does the 'historical ride' explanation account for the fact that, as noted earlier, Australia played an influential role throughout the negotiations. Australia was probably dealt a 'winning hand' at UNCLOS 111 but a 'winning hand' still needs to be played skilfully. Other reasons are therefore necessary in order to account for Australia's overall success at the conference. Several factors are offered below which explain why Australia was one of the most effective players throughout UNCLOS 111.

**Early Establishment of Clear Goals**

Winham points out that 'most real negotiations at the outset are fluid, unstructured, complicated, and noisy (in a communication sense). The first problem for negotiators is to structure the situation; hence, the emphasis in preparatory work and the establishment
of a negotiating framework'.63 Australia had supported the calling of an international conference on the law of the sea right from the days of the SBC and had worked diligently from 1970-73 to establish clear and carefully worked out objectives across virtually the whole gamut of law of the sea issues. The government’s 1973 position paper64 defined in summary form Australia’s law of the sea objectives and also carried clear evidence that the government had thought how best, in tactical terms, to achieve those objectives. In statements and interventions it was evident that on most issues before the conference Australia’s views were considered. In contrast many delegations objectives were vague, contradictory sometimes incoherent. This could be said with respect to both the US and Japan (although it would not apply to Canada).65 Having a clearly defined package from the start no doubt assisted Australia’s image at the conference as a competent and informed actor on law of the sea issues. Australia’s clear objectives were the result of good planning not only at the conference (where the delegation met every morning and evening to plan tactics and strategy) but also back in Canberra.

Strong Bureaucratic Co-ordination

One student of international negotiations has pointed out:

What is most evident in external negotiation is the interplay between a negotiator’s instructions and his bargaining behaviour; it is commonplace to describe good negotiators as individuals who can maximize their opportunities within the constraints or limitations of their instructions. In internal negotiation, however, the fabrication of those instructions is at stake, as well as the contingent planning that creates the flexibility needed to permit accommodation (or at least the possibility thereof) with the adversary. Of the two processes, the former emphasizes manipulation and is a classic concern of diplomatic history, as well as of modern theories of interpersonal bargaining. The latter emphasises political and bureaucratic policy making, and it is quite likely the more creative portion of the act of negotiation.66

One closer observer of UNCLOS 111 makes a similar point by pointing out that a ‘prerequisite for successful negotiations was the most solid unity over policy-making in the home capital that an interdepartmental or an inter-agency committee could possibly build. No team of negotiations could have worked confidently without a formulation of firm support at home’.67 Australia’s law of the sea objectives and priorities through the conference were undertaken by an interdepartmental Law of the Sea Task Force which was established on 16 October 1974.68 Before this there had been an interdepartmental committee. The Task Force was described by one former member as ‘made up of a number of public servants but its effect was far more wide ranging. It was the basis upon which considerable consultation was undertaken with industry and the States’.69
Without access to official records it is impossible to state with any certainty to what extent bureaucratic conflict was prevalent in the setting of Australian law of the sea priorities. There were some hints of departmental differences, which is hardly surprising over such a long period and considering the broad range of issues the Task Force would have considered. While some policy differences may have been inevitable there was never any suggestion that Australia's unity of purpose was compromised at the conference. As opposed to Washington, the phenomenon of bureaucratic politics did not appear to play a major role in Canberra on law of the sea issues.

The Department of Foreign Affairs was the dominant actor in setting Australian law of the sea policy and never really lost control even though law of the sea policy required the input of a range of departments. It provided the officers that formed the backbone of the delegation at UNCLOS 111 (see Table 1) and had the legal expertise (ably helped by key people in Attorney-General's) necessary to give the lead on many of the complex issues that the conference generated. It chaired the IDC on the law of the sea and the government's Law of the Sea Task Force, and was the department with easiest access to Australian diplomatic personnel to keep it informed on LOS issues between sessions. (Meetings were held in the offices of DFA). As the author has noted elsewhere bureaucratic differences did not compromise the overall coherence of Australia's position for 'within the bureaucracy DFA (Department of Foreign Affairs) was the custodian of the package approach to UNCLOS: no issue should be pushed so hard as to threaten the chances of achieving a comprehensive and widely accepted Convention. Generally speaking, other departments, while occasionally voicing concern that DFA was not pressing hard enough on some issues were willing to let foreign affairs make the running on law of the sea policy'.

Unlike say in the US where there was often divided leadership between the delegation and their Inter-Agency Task Force and where a 'limping state of co-ordination hampered those in the US Administration who hoped for clear overall objectives and a consistent policy to achieve them', in the Australian case key people on the Task Force were the delegation members. The DFA played the key co-ordinating role with respect to the numerous working groups of the Task Force which formed over the life of the conference. The fact that at five substantive sessions of the conference the delegation was led by the Foreign Minister assisted here: Ministers through briefings became knowledgeable about law of the sea issues and helped to bring about a situation where any policy differences were brought under control. Policy differences were ironed out in the Task Force and Cabinet submissions on law of the sea issues were joint submissions.
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Table 1: Representation of the Australian Delegation at UNCTAD 1973-1982
(although drafted by DFA) based on submissions of the Task Force. No separate departmental submissions were put to Cabinet although the Foreign Minister was charged with taking the law of the sea issue through Cabinet. The fact that the Task Force was able to generate confidence between various departments with an interest in UNCLOS 111 issues was an important factor in Australia's negotiating position for it permitted the negotiators from Foreign Affairs to freely pursue negotiations at the conference without feeling constrained by bureaucratic rivalries within the delegation. The fact that differences were ironed out in the Task Force often meant that the delegation were able to anticipate the range of views of other states at the next session of the conference.

**Domestic Support**

An important factor in successful international conference negotiations is to build the necessary domestic support for a state's negotiating team. As Winham points out in 'any major negotiation the interests of large groups must be accounted for, and this creates a problem of organisation, distillation, and representation for the negotiating team'.

From the beginning of the UNCLOS 111 negotiations the Australian delegations enjoyed the strong support from the Australian government, state governments and industry groups, such as fishing, and the mining industry. That support meant that there were no dramatic changes of policy (apart from the production control issue) that could have led to undermining the delegation's credibility. The fact, noted earlier, that Ministers attended five sessions contributed to the impression of a delegation with the strong backing of its government.

Australia's law of the sea policy received bipartisan support during the period of the negotiations, which strengthened the delegation's hand by the knowledge a change of government would not result in any radical shifts of policy. Australian policy was bipartisan both in the sense of inter-regime continuity of policy (i.e. during the Whitlam Labor government and the Fraser Liberal government years) and from the viewpoint of inter-party convergence on law of the sea policy within the life of the Whitlam government (1972-75) and the Fraser government (1975-82). There was really no attempt by the Opposition parties to make any political capital on law of the sea issues during UNCLOS 111 and the bipartisan spirit was demonstrated in the unanimous support given to a resolution introduced by the Opposition Labor party that urged the US government to look more favourably on the UNCLOS negotiations. Parliament itself played virtually no direct role on law of the sea issues, although the Joint Committee on Foreign Affairs and Defence did issue an interim report on Antarctica and the Law of the Sea. The bipartisan support for Australian law of the sea objectives meant that the
subject never attracted sufficient controversy to arouse widespread parliamentary interest.  

Despite the fact that for most of the conference period there was a great deal of intergovernmental conflict between the Commonwealth and the States over offshore matters, these matters did not affect the support by State governments for Australia’s stand at the conference. The only real tension with the States arose in 1976 when all States except New South Wales requested the federal government to be granted observer status at the conference, basing their claims on four Canadian provinces that had been granted such status at previous conference sessions. However, their claim was rejected by the government for fear of weakening Australia’s position at the conference. Following pressure from Premiers during the October 1977 Premiers’ conference, the government allowed the States to be represented on the Australian delegation. The supportive role of the Australian State delegates on the Australian delegation at UNCLOS 111 is analysed by Herr and Davis, who first point out that the Canadian provinces opted for individual representation in the Canadian delegation:

By contrast the Australian States perceived a much greater ambit of common interests and adopted a collective approach to their involvement in the national delegation. Each of the six States took it in turn to represent all State interests at UNCLOS 111 on the basis of rotation from each session or resumed session. Although...State...delegates were formally listed as advisors they were fully integrated into the national delegation... Rather than attempt to protect each State’s interests separately, the Australian States pursued a ‘trip wire’ strategy of maintaining only one State representative who could sound a general alarm were either the Commonwealth or the UNCLOS 111 agreement to trespass upon the States’ interests. Financially this approach had clear advantages since all States shared the costs of their UNCLOS representative. Nevertheless, it also demanded a very large commonality of interest and a considerable amount of faith in one’s fellow States. Furthermore, to work effectively, the cooperative agreement required a high degree of liaison among the States. A primary vehicle for the coordination of the collective approach of the States to UNCLOS 111 was the regular meetings of the States’ Solicitors-General. These crown officers were, of course, the major source of legal advice to the States on the maritime issues discussed during the UN conference. Indeed, the importance of their advice was both emphasized and strengthened with the appointment of the first State’s Tasmanian Solicitor-General, Mr Roger Jennings, QC. All subsequent appointments were either from the ranks of, or recommended by the States’ Solicitors-General. Regular meetings of Solicitor-General not only served as arenas for reaching agreed positions for the States’ representative at UNCLOS 111 but also provided a venue for assessing progress to date. Practice varied as to reporting after each session. Some States’ advisors circulated an assessment to their State colleagues on their return from a session while others regarded the comprehensive national delegation’s report as sufficient... The absence of inter-state conflict amongst the Australian States at UNCLOS 111 extended also to relations between the States and Canberra. When rare differences of opinion arose the usual practice was for the two sides to continue to confer until a consensual position emerged. At first the novelty of the situation led to some
circumspection by both parties especially the experienced Foreign Affairs negotiators who were uncertain of the role that the States’ representatives were to play. As the relationship developed and it became clearer that the States’ advisors would not jeopardise the national negotiating position, the States representatives assumed a more active role not just at UNCLOS 111 but also in the preparation for the sessions.\(^83\)

Australian States support for Canberra’s positions at UNCLOS 111 was assisted by the fact that in contrast to say Canada there were no real conflicts over fisheries issues and that in coming to the negotiations rather late it ‘would have been almost impossible for the States to alter official positions taken over many years of hard bargaining’.\(^84\)

In the case of industry groups there was, apart from one issue, general support for the Australian position at UNCLOS 111. The interest of the land based industry came late in the day. As explained by John Reynolds, one of the mining industry representatives that was to later join the delegation:

> ...consultation (with the Federal government) commenced in 1976 when the (mining) industry met on a few occasions with representatives of the Department of Trade and Resources who at that time were making an input into the Australian delegation’s work on Part XI of the Treaty dealing with the exploitation of non-living resources of the area of the international seabed. Contact was lost in the late 70s but again renewed early in 1980 when, upon learning of the trend of discussions at the United Nations, some members of the Australian mining industry appealed to the Prime Minister of the day to take into account its views particularly on the application of the production control formula.\(^85\)

As a result industry representatives were attached to the delegation through 1980, 1981 and the first session of 1982. While the mining industry intervention resulted in a change to Australia’s policy on the production control issue and the industry was hostile to the seabed mining section of the treaty, the industry never directed any criticism against the ultimate objective of the delegation to achieve a widely accepted Convention.\(^86\) Industry delegates, while observers at the sessions they attended, were able to provide technical advice to the delegation on aspects of the seabed mining regime.\(^87\) In the case of the offshore sector of the industry they appeared to be consulted on a formal basis fairly late in the conference.\(^88\) The Australian Petroleum Exploration Association (APEA) did, however, have an officer from BHP attached to the delegation for the resumed ninth session and tenth sessions. As the government’s opposition to revenue sharing was long established, APEA clearly felt no requirement to intervene to change policy as did the land based miners with regard to production controls. Industry views in favour of greater coastal state flexibility on offshore rig abandonment were also sought and no doubt contributed to the government’s change of direction on this issue late in the conference.\(^89\) (There is no evidence that APEA had any direct input into Australia’s margin policy). In the case of fisheries interests there were criticisms made that the
government was delaying too long in extending jurisdiction to 200 miles and were over-cautious in accepting the delays associated with the international negotiations.90 This criticism ceased when the government moved formally to alter its fisheries jurisdiction in April 1978.91

It is difficult to judge whether there was widespread public support for government policy on law of the sea issues as no survey data exist that questioned public attitudes on ocean policy issues.92 There was certainly no evidence of public opposition to government policy over the life of the conference, a situation partly due, no doubt, to the very minimal press coverage that the conference received in Australia.93 The fact that there was no official public education on the issue may have also contributed to a lack of public interest in the issues at the conference.94 Early criticism that the government was adopting a greedy attitude in promoting coastal state jurisdiction to the edge of the margin and that the promotion of the 200 mile zone concept would deprive developing states of offshore resources never gathered sufficient strength to undermine the delegation.95 Most media treatment of Australia’s positions at UNCLOS 111 was supportive of Australian policies.96

The support from industry groups and the states did not come about by chance—as noted earlier the Law of the Sea Task Force did undertake consultations in order to reach consensus on Australia’s position.

**Strong Delegation Team**

Winham points out that ‘most modern negotiations are carried out between teams that represent bureaucracies, and in large negotiations the teams themselves approach the status of small bureaucracies’.97 UNCLOS 111 was dominated by delegations with the UN Secretariat playing very much a facilitating role.98 In terms of its continuity and quality the Australian delegation contributed enormously to Australia’s overall negotiating success at the conference. On the issue of continuity it is important to note that ‘in the succession of encounters that constitute day-to-day negotiations, the teams achieve various kinds of organisational learning: they gather and store information, they develop procedures for communication, and they adopt organisational goals to fit the possibilities in the situation. Above all countries perceive the problems that are up for negotiation, and what priorities these countries place on different issues’.99 Australia was well served here in the stability of its delegations,100 and in particular its leader Keith Brennan. Brennan was deputy leader from the third session until the sixth session where he took over leadership and maintained that position for the duration of the conference.
Sanger in fact points to the continuity of leadership of the delegation as a key factor in Australia’s influential role at the conference:

...those (states) which enjoyed ... continuity of leadership achieved more clout than they might normally expect to have internationally: for example, countries like Chile and Ireland, Australia, Kenya, Fiji and Canada. They knew the by-ways of the text, which had already been tried and failed, the time and means to introduce a new idea and a possible solution. They were also known to each other; friends negotiated as much as countries. This camaraderie involved, after a time, a determination to ‘see it through to the end’. A momentum was built up for success...those states (including several in Western Europe) that paid little heed to continuity and frequently changed their delegation heads had less influence on the outcome of UNCLOS 111 than they might have expected to have...The most striking example of Chop-and Change was the United States, which had six delegation heads in a dozen years.101

As can be seen from Table 1 the Department of Foreign Affairs provided the backbone of the delegation, but it is clear that the Department recognized that other departments had a vital role to play in the negotiations. (Final delegation lists were approved by Cabinet, with individual departments selecting their own delegates). Many of the interventions in particular areas were made by the departmental representative that had particular expertise in the area, for instance the Transport Department delegate spoke on issues relating to marine pollution, the representative from Primary Industry on fisheries, Foreign Affairs officials were the Chief Spokesmen on Committee One issues, dispute settlement and MSR. The delegation carried experts across a wide range of subjects to enable interventions on specialist subjects. In any negotiations it is ‘especially important that negotiations be able to project an image of being in control of their portfolio’.102 Australia’s image of a strong and united delegation was assisted by the fact that the delegation had a large pool of members with specialist knowledge in areas such as hydrography, pollution control, fisheries management, and geomorphology. This enabled Australia to participate across the gamut of UNCLOS issues. By having the qualified people ‘on call’ Australia could move not just to protect its own interests but was also in a good position (which the delegation took advantage) to promote compromise formulae when negotiations became difficult. This contrasted with many delegations from the third world who often lacked the qualified delegations to make an input into many of the more technical areas of debate.103 Australia’s strong delegation contributed to the confidence that other delegations had in Australia’s ability to play a useful role in negotiations, particularly the ability to call meetings.104 The continuity and high-calibre of the Australian delegation was undoubtedly a reflection of the fact that early on Australia had decided that at UNCLOS 111 Australia was playing for ‘high stakes’ and that a significant commitment of bureaucratic resources would be required to ensure the delegation’s success. The fact that delegates participated in the Task Force work in Canberra meant they were trained to think in terms not only of their own department’s
interests but wider Australian positions at the conference. Again, the continuity of Task Force members assisted this process.

Wide-Ranging Choice of Negotiating Partners

In the previous chapter it was pointed out that geographic accident and economic interests cut across traditional blocs at UNCLOS 111 and produced sometimes strange negotiating bed-fellows. In Australia's case its choice of negotiating partners was largely dictated by its decision to promote its coastal state interests. It is not proposed to duplicate the discussion in the previous chapter on Australia's role as a group player. Here it is simply noted that Australia's decision to promote coastal interest meant that for the most part Australia worked with parties which did not adhere to traditional patterns of alignment. This can be seen in Table 2 that summarizes Australia's alliance-building in terms of the number of countries Australia sponsored or co-sponsored a proposal during UNCLOS 111.

[see Table 2]

The fact that Australia decided its goals at the conference would override traditional loyalties was no-where better illustrated than in its contrasting approach to law of the sea issues to that of its principal ally, the United States. At various stage throughout the conference Australia found itself opposing the US on:

(a) seabed mining where differences reflected a broader philosophical difference. Australia, as already noted, broadly supported the claims of G77 on deep seabed as part of its general sympathy for the South on North-South issues, whereas the US was at first unsympathetic and later adopted an openly hostile approach to those demands within the framework of the conference.

(b) On highly migratory species with Australia supported the right of coastal states to sovereign rights over tuna in their economic zone and the US stressing international management.

(c) marine mammal protection where (at first) Australia saw US proposals as weakening the position of the IWC.

(d) On marine scientific research where the US favoured a separate MSR regime on the shelf beyond 200 miles which Australia saw as an attack on 'sovereignty'.

(e) the US hard-line stance in opting to basically drop-out of the conference in 1981.

These differences in approach did not spill-over into relations between Australia and the US delegations. In fact Australia worked closely with the US delegation on a range of issues throughout the conference particularly in the first committee, in the Evensen and
Table 2: AUSTRALIA'S NEGOTIATING PARTNERS AT UNCLOS 111

<table>
<thead>
<tr>
<th>Countries</th>
<th>Number of Times Country Sponsored or Co-sponsored a Proposal with Australia</th>
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<tbody>
<tr>
<td>Angola</td>
<td>1</td>
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<tr>
<td>Argentina</td>
<td>3</td>
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<td>Austria</td>
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<td>Belgium</td>
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<td>Bolivia</td>
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<tr>
<td>Brazil</td>
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<tr>
<td>Canada</td>
<td>9</td>
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<tr>
<td>Cape Verde</td>
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<td>Chile</td>
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<td>Columbia</td>
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<td>Congo</td>
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<td>Costa Rica</td>
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<td>Denmark</td>
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<td>Egypt</td>
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<td>El Salvador</td>
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<td>Fiji</td>
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<td>Mauritius</td>
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<td>Peru</td>
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<td>Philippines</td>
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<td>Portugal</td>
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<td>Romania</td>
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<td>Sao Tome and Principe</td>
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<td>Samoa</td>
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<td>Senegal</td>
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<td>Sierra Leone</td>
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<td>Singapore</td>
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<td>Sweden</td>
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<td>United States of America</td>
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<td>Uruguay</td>
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<td>Venezuela</td>
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<td>Yugoslavia</td>
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Source: Compiled from UNCLOS 111 Official Records; Platzöder Collection.
Casteñideda groups and later in the conference in attempting to resolve the problems that the US had with the seabed text. The point to be made here, however, is that on a number of law of the sea issues Australia approached the issues differently to that of its major ally. In terms of the stakes at UNCLOS 111 Australia stood more to gain than most in terms of ocean space. A hard-headed approach meant that negotiating partners had to be chosen in terms of those countries which were prepared to give political backing to Australian positions. Traditional loyalties or ideological affinities would thus count for less if it meant that policy objectives could be compromised. Australia demonstrated a keen willingness to search out allies where it was necessary and to co-ordinate positions with those countries. Often those allies varied from issue-to-issue and changed at various times in the conference. The Australian delegations’ instructions at the conference were normally quite specific but the means chosen to achieve those objectives were largely left to the delegation. Australia’s freedom of manoeuvre here was used to good advantage in the way in which the delegation quickly formed negotiating relationships with those states that looked the most promising negotiating partners.

Lessons for Future Australian Conference Diplomacy

Australia’s success at the conference in terms of achieving its pre-conference goals was in large measure due to the fact that law of the sea trends favoured coastal states. Once Australia had taken the basic policy choice to realize its coastal state interests it aligned itself with the dominant trend within the conference. However, it was also argued that Australia’s ‘hand’ was played skilfully and that in some areas Australia’s successes did not run entirely with the major trend and direction of the conference. Conference diplomacy redistributes influence toward less developed countries, allowing poor states to some extent to penetrate the richer and stronger states. Conference diplomacy thus can lead to an incongruence between power inside and outside of the conference diplomacy. The Australian case at UNCLOS 111 supports the notion that multilateral conferences permit opportunities for smaller to medium powers to exercise a degree of influence that they would otherwise not expect to have in world politics. Buzan’s point with respect to Canada’s position at the conference applies with similar force to the Australian case:

...a well mobilised and resourceful middle power has a reasonable chance of making a disproportionate impact on a selected multilateral negotiation. The key to this influence, issue factors aside, seems to lie in well-organised, coherent, early, and adequately backed diplomacy. Although the circumstances in which this can be carried off effectively may be constrained by types of issues and patterns of alignment, it seems most likely to work in relation to functional issues that cut across traditional diplomatic lines.
Whether Australia's experience at UNCLOS 111 has any short term lessons for future Australian involvement in international multilateral negotiations is probably doubtful, simply because of the unique nature of the kind of law-making negotiation that was involved in the law of the sea. No previous law making exercise has been as big, complex and ambitious.

Plant points out that four main elements would seem necessary for a repeat of the UNCLOS 111 model for future UN law-making conferences: a politically important subject requiring regulation by a general international treaty which involves large elements both of codification and progressive development and limited but substantial amounts of 'legislative' innovation; the existence of major conflicting interests requiring trade-off; global concurrence on the need for action, because, for example, large areas and not merely aspects of the existing law are perceived to be in disarray, incomplete or unfair; and the prospect of substantial economic or political gains for the participants. Plant point out that while developing countries may be predisposed to repeat the UNCLOS style negotiations because the final Convention created precedents for 'development' provisions in future treaties, western states may wish to avoid a repetition because such conference are expensive and because in that case the result was not wholly satisfactory to them.108 He goes on to point out that:

Even assuming willingness on all sides to repeat the experiment, however, there remains the present paucity of subjects to which the procedures might realistically be applied. The legal aspects of outer space, Antarctica, the geostationary orbit and certain other areas which some suggest might become parts of the common heritage of mankind are examples of possible candidates for such treatment, but there is little evidence of these possibilities being pursued at present. Although the UN is fast running out of areas of international law ripe for codification and a limited element of progressive development—indeed, the legal office of the secretariat has been considering the possibility of a special appointment to prepare an exhaustive list—it is nevertheless still engaged in that search. There is little sign of any moves to broaden the work of UN legal organs into new "progressive law-making" negotiations in which, as with the law of the sea, the "legislative" content of the conference's work would be substantial...Many matters, moreover, which might be dealt with under procedures similar to UNCLOS 111 are already on the agendas of UN political organs. When the legal organs have substantially completed their codification efforts, pressure might arise to transfer these matters to those organs or to law-making conferences. But it is equally likely that the political organs will resist encroachments on their bailiwicks.109

Thus the factors contributing to Australia's successful UNCLOS 111 experience may not have immediate short term relevance as the UNCLOS kind of mega law-making conference may not be repeated in the short term. However, the adoption of consensus and the package deal approach, the use of small groups and ad hoc informal consultations
was carried to new heights by UNCLOS 111 and the law of the sea negotiations made a substantive contribution to the process of multi-lateral diplomacy. The UNCLOS 111 model of procedure has been applied flexibly in both the Preparatory Commission on the Law of the Sea and during the Antarctic Treaty mineral negotiations.\textsuperscript{110} In the longer term the prospects are that other UN conferences negotiating difficult issues such as global climate and environmental questions while perhaps not on the scale and duration of UNCLOS 111 will resort to UNCLOS 111 style consensus conference procedures.\textsuperscript{111}

Australia’s experience at UNCLOS 111 demonstrated that in the event of a new era of global negotiations with law-making mega conferences the UNCLOS 111 style conference offers opportunities for medium powers such as Australia to make a significant contribution to the negotiations and that Australian foreign policy makers should be alert to the possibility of exploiting these opportunities. Australia’s law of the sea experience demonstrates that Australian interests can be promoted through such multilateral conferences, although they also pose risks that must be anticipated. The key to success appear to be in a number of factors; careful and early preparation of positions, the careful selection of delegations and the continuity of negotiators; the integration of conference diplomacy with overall foreign policy objectives; strong bureaucratic organisation to co-ordinate positions; consultation with interested groups to build public support for negotiation positions at the conference; coordination of positions with those countries that are most likely to be of assistance in the negotiations; and the inclusion of representatives from the States, the private sector and other groups that may be able to serve in an advisory capacity on matters requiring particular knowledge. For the most part these factors are hardly surprising: what needs to be stressed, however, is that the UNCLOS 111 case demonstrates the particular importance of these factors for a middle ranking country such as Australia and the necessity for Australia’s foreign policy makers to absorb these lessons if Canberra is to take advantage of the opportunities offered by future multilateral conferences to promote a co-operative approach to global problems. Through skilful conference diplomacy Australian negotiators played a key role at UNCLOS 111—the factors that have been outlined earlier deserve attention if Australia is to participate effectively in future global conferences.
CHAPTER TEN

CONFERENCE FOLLOW-UP: RATIFICATION AND IMPLEMENTATION OF THE 1982 LAW OF THE SEA CONVENTION

This chapter considers Australia’s follow up to UNCLOS 111 in terms of the implementation of the treaty. It first considers the issue of treaty ratification and then various modes of implementation. It is argued that Australia has developed a successful policy of implementation since the treaty was concluded although its hesitancy in ratifying the Convention undermines the extent to which Australia can be seen as a leader in developing policies of implementation. As a consequence Australia’s clear diplomatic success at UNCLOS 111 could be strengthened if Australia moved to ratify the Convention.

Treaty Ratification and Implementation

While an overwhelming majority of States have signed the LOS Convention the treaty will come into force only for those states ratifying it one year after following the receipt of the sixtieth ratification. As at August 1990 forty-three states have ratified. All indications are that the Convention will come into force in the early 1990s. Australia has not ratified the Convention. The major event colouring the period since the completion of the Convention was the US decision not to sign the treaty. It also declined to participate in the Preparatory Commission, the body designed to establish the technical regulations regarding seabed mining that will guide the International Seabed Authority (see below). The only major US allies not to sign the treaty are the UK and FRG although both participate as observers in Prepcom. US policy has been to express support for the provisions of the treaty not dealing with deep seabed mining. It proclaimed an exclusive economic zone in 1983 and argued that those parts of the LOS Convention that protect navigational rights are part of customary international law, particularly the right of transit through straits. It has also attempted to undermine the regime for sea mining by unilaterally granting licences to US firms for deep seabed mineral exploration, but has been unable to bring other mining states into a separate regime that would operate outside the LOS Convention.

Before discussing the issue of Australia’s ratification and implementation of the treaty it is useful to point out that ratification and implementation are different concepts. Most multilateral treaties of the general law making type require almost ten years to come into
force under the law of treaties and many treaties are never fully implemented in the manner intended even by those states that ratify. Johnston points out that relatively few global conventions are ratified, much less fully implemented by a majority of the nations participating in the process of treaty making. Johnston goes on to point out that for many highly complex multilateral treaties the act of ratification and the process of implementation may be mutually independent, and that ratification is a symbolic act signalling that the state is committed to the promotional and demonstrative purposes of the treaty. Implementation on the other hand is not an either-or proposition.

**Ratification**

Eight years after the completion of UNCLOS 111 Canberra has offered virtually no hints about its decision on ratification. While Australia was initially very enthusiastic about the outcome of the conference and despite the fact that Australia was a major beneficiary of the new law of the sea, curiously no senior Australian politician has ever found it necessary to explain publicly why ratification has not occurred. The only hints offered on the issue have come from some Australian officials.

In March 1986 the then head of the law of the sea section in the Department of Foreign Affairs, Mr Peter Shannon, stated that ‘we are moving slowly on the question of ratification’ and offered the reason that the government had been reviewing the whole question of the offshore constitutional settlement of 1980. Shannon then offered three perspectives on the issue of Canberra’s thinking on ratification. First was the question of whether Australian ocean interests would be enhanced by Australian ratifying the LOS Convention. Here Shannon pointed out Canberra had to consider the consequences of non-ratification on Australia being able to enjoy transit and navigation rights in a situation when Australia’s archipelagic neighbours (Philippines, Indonesia, Fiji) had already ratified the Convention. Second, how would the ratification affect Australia’s economic interests. Shannon noted that ‘what our financial burden in the Prepcom context will be a matter for consideration’. Finally, Shannon raised the whole question of ratification as a foreign policy issue. He pointed out that the expectation of the international community of Australia as far as ratification is concerned was one of the factors that Canberra needed to consider in deciding on ratification and that a decision based on giving weight to economic factors could mean that Canberra could find itself in a ‘rather lonely’ position given ratifications by Australia’s neighbours. Shannon observed that if the Convention comes into force Australia’s neighbours who have ratified ‘will look towards Australia saying “what are you going to do?”’.
Since Shannon’s statement in March 1986 the Department of Foreign Affairs commissioned a legal study on the domestic legal implications of ratification by Mr W.R. Edeson of the ANU Law Faculty, but there has been no sign that Canberra perceives any urgency on the question.

Should Australia ratify the Law of the Sea Convention?

It is clear from the comments quoted above that any decision on this issue will need to take into account Australia’s ocean interests, economic factors and foreign policy goals.

(a) Ocean Interests

As far as Australian ocean interests are concerned we have already argued that one of Canberra’s strong interests in the negotiations at UNCLOS 111 was to gain some stability in ocean law. The more states ratify the Law of the Sea Convention the stronger the Convention will be in terms of a basic guide to state action. Part of the drive for a comprehensive Convention was because many states, particularly the maritime powers, felt that customary international law of the sea was uncertain. Australia’s reliance on the Law of the Sea treaty is much more predictable than customary law. Of course states have already adopted parts of the treaty irrespective of ratification. The issue of what parts of the Convention are already customary law has generated a considerable literature. There is no question, however, that the 200 mile economic or fishery zone and the twelve mile territorial sea is part of customary law.

The option of simply adopting parts of the treaty as custom is one that should not be seen as attractive in the longer term simply because ‘customary international law tends to be a blunt instrument, often difficult to determine and harder to enforce’. In fact Canberra’s policy has been to question whether the alternative of relying on customary law is an acceptable alternative. Speaking in November 1986 the then Head of the Treaties and Sea Law Branch of the Department of Foreign Affairs, Mr Ian Nicholson, stated that the US position that, except for the deep seabed provisions, most of the remaining provisions, especially those on navigation and overflight, were grounded in customary law was ‘too sweeping’. Nicholson pointed out that the Convention did not merely codify existing customary international law: ‘it also clarified and resolved uncertainties and conflicts about what the law was, and provided appropriate rules to govern activities where the law had not developed in line with technological and other advances. The preamble to the Convention refers to the “codification and progressive development of the law of the sea achieved in this Convention”. It is difficult to argue, for example, that concepts such as transit and archipelagic sea lanes passage, which were put forward for the first time in
UNCLOS, were part of customary international law, and subsequently codified in the
Convention' (emphasis in original). The notion of selectively relying on customary
law would also appear to undermine the way in which the Convention was negotiated as
a package deal. Again, Australia was a strong defender of the package deal approach,
and since UNCLOS 111 Canberra has explicitly rejected the 'picking and choosing'
approach to the Convention.

In terms of whether Australia should ratify the Convention to secure specific benefits
created by the treaty there is probably no specific need. Australia while still having a 3
mile territorial sea could introduce a 12 mile territorial sea without arousing any criticism
simply because, as noted earlier, the twelve mile limit is undoubtedly part of customary
international law. Any increase in the territorial sea may, however, result in political
conflict with state governments who may well want the extra area to accrue to them.
Australia proclaimed a 200 mile fishing zone in 1979. Australia has not proclaimed an
EEZ although again Australia could move here without any need to ratify the Convention
because of the customary law status of the EEZ. As parts of the continental margin of the
New South Wales coast, part of the Victorian coast and much of the south coast of
Australia are less than 200 nautical miles wide an EEZ would provide Australia with
seabed rights to two hundred nautical miles. The proclamation of an EEZ would also
enable Canberra to move to exercise greater control over MSR in the 200 mile zone (see
below).

Australia was a strong supporter of the view that it was entitled to jurisdiction over the
full extent of its continental margin and as was noted in the previous chapter was largely
successful at UNCLOS 111. Because Australia's margin extends beyond 200 nautical
miles off the North West Shelf Australia along with other broad margin countries,
rejected any cut off limits at 200 miles. As we have seen a very complex formula (Article
76) was incorporated in the Convention by which the broad margin states can exercise
jurisdiction over the margin to almost the full extent of the shelf. Australian legislation
concerning the shelf is based on the 1958 continental shelf definition which permits the
exploration of sovereign rights for the purpose of exploration and exploitation beyond a
depth of 200 metres 'to where the depth of the superjacent waters admits of the
exploitation of the natural resources'. The Seas and Submerged Lands Act 1973, Sect
12, also gives Australia latitude in regard to the extent of the shelf (although the adjacent
area boundary generally serves as an artifical limit on Australia's legislative
jurisdiction). The Convention would however permit Australia to claim 200 nautical
miles where the margin is narrower than 200 nautical miles, and as noted in the context of
the EEZ Australia's shelf is narrower than 200 miles in places. Edeson, however,
points out that: 'For Australia, the ratification of the Convention will be important not so
much for accepting a new, more complex definition of the continental shelf (see Art. 76), as for the acceptance of two particular constraints on the exercise of sovereign rights with respect to the shelf where it extends beyond 200 miles. These are: (a) the obligation to make certain payments or contributions in kind in respect of the exploitation of the margin beyond 200 miles (Art. 82); (b) the obligation to determine the outer limits of the margin 'on the basis of' the recommendation of the Commission on the Outer Limits of the Continental Shelf (Art. 76(8) and Annex 11').

The revenue sharing provision is considered below. As we have already seen Australia was unhappy about the role of the Commission believing it should be advisory only and not a body that could make its own determination on the limits of the shelf. Annex 11 requires the coastal state to submit particulars as soon as possible but in any case within '10 years of the entry into force of this Convention for that State' (Art. 4). Ratification would permit Australia to play a role in the formulation of membership of the Commission. An argument against ratification would be based on the notion that Canberra should not be restricted in setting its shelf limits and that there is, in any case, insufficient information to apply the complex formula of Art. 76. In that sense Canberra would be better off not setting a fixed limit—new technological developments could arise as to permit Australia under the 1958 Shelf definition to later move its boundaries outwards.

As far as other Australian ocean interests are concerned ratification would not have any adverse impact on Australian ocean boundaries. The most intractable issue here—the Australia/Indonesian boundary in the so-called Timor Gap has been resolved by the declaration of a Joint Development Zone and in the outstanding bilateral ocean boundaries the compromise articles (74 and 83) neither frustrate nor help Australia's position.

On navigational issues we have already argued that the Convention strikes a reasonable balance between coastal and maritime states and thus benefits Australia as a user of ocean transport and with interests in naval mobility. Whether third states can rely on the transit passage provisions is, as noted earlier, a debatable point. However there is no doubt that the Convention will provide a better basis for parties to preserve navigational freedoms and that Canberra's interest in navigational freedoms would be best protected through ratification of the treaty rather than customary law. This argument has been well expressed by Professor Ivan Shearer who in addressing the issue of Australia's ratification stated:
When you deal with a world that is as heterogeneous as ours, where every country has such a sophisticated appreciation of the processes of customary international law, it is very useful indeed to have an agreed text, something on which you can actually read out the permissible limits of a claim to archipelagic waters or the definition of the rights of passage through straits, or the limits to which a country can interfere with your shipping when you are transiting that country’s economic zone. All of those sorts of questions can well arise and be possible great hindrances to our trade, to our Navy and to our general dependence on overseas communications. All of those things would be greatly clarified by our adherence to the Convention so that we can plead it against other countries, not merely as a convenient statement of customary international law but as a text which is actually binding, contractually, between us. That’s why I said that it was particularly significant that both Indonesia and the Philippines are parties to this Convention because we have had problems of transit rights with both of those countries. Both countries, Indonesia in particular, have had a somewhat exaggerated idea of their archipelagic entitlements and the Philippines has had a long-standing claim to its waters as historic and thus has required express permission before transit, at least by warships, is allowed. Now in the light of the Convention those positions can no longer be maintained.31

Reliance on customary law for rights of transit may have an impact on Australia’s foreign relations and this is considered below. It could be suggested, however, that while the US continues to adopt deliberate policy of challenging excessive maritime claims and insisting on navigational freedoms32 that Australia’s will continue to derive these benefits irrespective of ratification. The obvious point to make here is that there may well be situations where Australia would be acting without US assistance and where a coastal state allowed passage to only those states accepting the Convention regime.

On disputes settlement ratification of the Convention should not cause concern because Australia will become subject to compulsory disputes settlement. As Edeson has observed Canberra has ‘had a virtually open acceptance of the compulsory jurisdiction of the International Court of Justice for some years now. Furthermore, Australia has been a party since 1963 to the Optional Protocol on the Compulsory Settlement of Disputes, 1958, which covered the “interpretation or application” of any of the four Geneva Conventions’.33 On the marine environment the Convention provisions on the 200 mile zone include marine pollution. Until Australia establishes a full exclusive economic zone it would not appear that Australia will assert its coastal enforcement jurisdiction for pollution purposes outside the territorial sea.34 For the most part Part XII of the Convention is a framework code for future measures. Where there already exist treaties on marine pollution and which are covered by the Convention Australia has already taken such measures (see below). With regard to MSR the proclamation of a full EEZ would enable Australia to move towards exercising greater control over MSR in the 200 mile zone. At present there is only very limited legislative controls over MSR.35 Ratification
would put Australia's control over MSR on a strong legal footing, even though it is arguable that the main features of the new regime have become part of customary law.36

From the viewpoint of Australia ocean interests there appears to be clear grounds for ratification. The Convention represents a very acceptable balance between Australia's desire for coastal state rights and the need to preserve navigational freedoms. The desire by Australia for greater stability in the law of the sea37 evident through UNCLOS 111 would be enhanced by Australian ratifying the Convention thus strengthening the treaty, as opposed to a reliance on customary law. Finally ratification would offer the opportunity for Australia to generate a more coherent and directed approach to ocean matters. As Edeson has observed:

At present, responsibility for ocean affairs is scattered across several Commonwealth government departments, as well amongst and within state and territorial governments. Given that many provisions of LOSC provide a framework for future action, in which international negotiations in some cases leading to further multilateral treaties will figure prominently, it is vital that the occasion of ratification is seen not simply as the completion of a regime but rather a stage in the evolution of an important new regime for Australia, one which should be accompanied by an enhanced perception of the significance of ocean affairs to Australia.38

While it is true that ratification of the Convention would restrict Canberra's ability to expand its jurisdiction it would be highly unlikely that Australia would ever wish to act unilaterally and go beyond the maxima i.e. either 350 nautical miles or 100 nautical miles from the 2,500 metre isobath. Thus based on a consideration of Australia's ocean interests Canberra should ratify the Convention.

(b) Economic Interests

In the period preceding UNCLOS 111 and during the conference the new ocean regime was perceived as holding out the promise of economic benefits to states in terms of expanded state jurisdiction. As far as Australia is concerned Canberra proclaimed its 200 mile fishing zone in 1979 so in terms of resources Australia will not 'miss out' if a decision is taken not to ratify.39 Australia is, however, almost totally dependent on seaborne commerce so that to the extent that ratification strengthens the stability of ocean navigational rights Australia derives some economic benefit.40 Australia's economic interests are more directly affected by the regime for deep seabed mining and the costs that Australia will bear if Canberra ratifies.
(i) Seabed Mining Regime

Potential seabed mining states have been concerned with the way in which the seabed mining provisions will operate in practice. Since 1982 Australian interests in the mining regime have revolved around its interests as a land based producer of minerals that one day may be mined on the ocean floor. The main fear has been the threat to land based mining by possible subsidisation of seabed mining. (Australia ranks 3rd in world nickel production and fifth in manganese). Since 1983 Australia has taken quite a high profile in the Preparatory Commission. This Commission was established by a resolution of UNCLOS 111 and has been drafting the detailed rules necessary to implement the provisions of the LOS Convention. All of the seabed mining states have made it clear that there must be a satisfactory set of rules for sea bed mining before there can be ratification. The UK and FRG have attended the Prepcom as observers but the US has refused to participate (even though its signature of the final act would allow it observer status).

Australia's role at Prepcom has been detailed elsewhere by the author and it is not proposed to repeat that discussion here. It should be noted in this context, however, that Australia has made it clear in the Prepcom that a critical factor for Australia in any ratification decision is that any regime for deep seabed mining should protect Australian metal producers from the dangers of subsidised mining. This has become a key focus of Australia's Prepcom policy. Australia's main fear has been that the Enterprise or national entities will undertake deep seabed mining for non-commercial reasons, entailing subsidisation and thereby annexing market shares which would otherwise be available to Australian producers, with consequent reduction of their market shares. Australian delegates at Prepcom have argued that the answer to potential problems posed by deep seabed mining is not compensation or production controls (the latter perhaps even promoting subsidisation in the race for an artificially limited number of mine sites) but rather in ensuring that seabed mining is a strictly commercial operation. Structural adjustment, it is argued, not compensation, is the only medium to long-term solution to loss of competitiveness that may follow the commencement of seabed mining. Australia has argued vigorously that its economic interests will best be protected if seabed mining is developed on a commercial basis i.e. at a profit, and has worked actively at Prepcom to develop a mining code which is not onerous or complex. In this policy Australia has consulted closely with the Australian mining industry and its views seem to have been influential in the drive by Australian delegates to resist compensation and to push a strong anti-subsidisation line. It is not the case that Australian delegates have accepted all industry's views. Australian delegates have not supported a policy of total opposition to Part XI, or assumed that Part XI will be subject to major renegotiations, or that the
benefits of the Convention will accrue to Australia as part of customary international law and therefore Australia need not worry if Part XI is removed from the Convention. Such views, that have from time to time been expressed by the Australian mining industry, have not been endorsed by Australia at the Commission.45

At the time of writing the Prepcom is still meeting to determine the details of the deep seabed mining regime. The progress has been slow partly because the economics of the world mineral industry as well as that of seabed mining have changed significantly since UNCLOS 111 and the predicted shortages of copper, nickel, cobalt and manganese have not eventuated. It was predicted that demand for minerals would continue to increase steadily at previous rates and that the production of nodules from the deep seabed would be competitive with the increasing expensive extraction of the same minerals from the depleted and a less accessible land-based resources. As the Council of Ocean Law has pointed out ‘those predictions have proven to be mistaken. Altered market conditions, discoveries of additional land-based sources, and the improved efficiency of land based mining, will result in a long term postponement, (if not abandonment) of, and slower projected rates of growth for, commercial deep seabed mining operations.’46 In a major study undertaken by the Australian Bureau of Mineral Resources carried out for discussion at Prepcom the conclusion was reached that much higher metal prices, probably double current prices, would be needed for a project to give a satisfactory commercial return. Deep seabed mining, it concluded, was unlikely to be commercially viable for the foreseeable future at least not until the next century.47 The Australian mining industry’s position has been that Australia should not ratify the Convention until the details of the regime are known and until it can be demonstrated that seabed mining may be viably developed on sound commercial principles.48 Given the pace at which Prepcom has worked the full parameters of the regime may not be available for some years. During Prepcom Australia has placed considerable importance on the need to protect Australia’s mining industry from the potential dangers of subsidised mining but given that Australia’s own study on the economics of mining has demonstrated that mining will not take place until into the next century if at all it can be argued that the seabed mining regime should not be given a high priority in Australia’s eventual decision.

(ii) Financial Aspects

The financial costs of Australia’s ratification have been a very important factor in Australian thinking on ratification. This is most clear in Australia’s policy at Prepcom where Australian delegates have continually raised the issue of the financial implications of Prepcom’s work and to generally encourage a lean Authority and Enterprise.49 The Seabed Authority is expected to be self financing through revenue generated from seabed
mining, but prior to this the Authority will be funded by the parties to the treaty based on
the scale of assessment used for the regular United Nations budget. Australia pointed
out at the Prepcom that taking a worse case, but by no means worst cast scenario (where
the Convention came into force with countries paying only 10% of the UN budget) the
cost to Australia would be $15.5 million a year. In 1985 this contribution to the
Authority represented about 25% of what Australia paid to all international bodies to
which it belonged. Annex IV, Art. 11.3(b) of the Convention requires States Parties
to the Convention to provide interest-free loans to the Enterprise for half of the funds
necessary to explore and exploit one mine site and to transport, process and market the
minerals recovered and to meet initial administrative expenses. These loans would be
pro-rated to countries UN contributions (adjusted to take account of non-members of the
UN). In addition, State Parties are required to guarantee the debts incurred by the
Enterprise in raising the other half in accordance with the same scale.

Australia pointed out at the fifth session of the Prepcom in 1985 that the financial costs of
funding a new international organisation would strongly influence Australia’s attitude on
the ratification issue. Australia has thus been extremely active at Prepcom to ensure
that a mining regime will be sufficiently attractive to bring in the major seabed mining
states who are the major contributors to the UN budget and has sought to ensure that the
Prepcom does not create some huge unwieldy bureaucratic structure.

Australia may also face economic costs through ratification by virtue of the revenue
sharing provision in respect of mineral resources on the shelf beyond the 200 mile limit.
As we have seen Australia fought strongly against this provision and argued against it not
only on sovereignty grounds but also because it would discourage exploration on its
margin. Australia’s hydrocarbon activity takes place within 200 miles and at present
there does not appear any likely prospect that Australian production would be beyond the
200 nautical mile limit. However the revenue sharing provision is an element that
Australia would need to consider in any ratification decision. However, even if Australia
chose not to ratify the Convention it is arguable that Australia would still have some
obligation regarding revenue sharing as this was part of the overall package on the
continental shelf concept and Australia would not wish to be seen as adopting a ‘pick and
choose’ approach to the Convention.

From an economic viewpoint it is difficult to argue that Australia would derive any
obvious benefits from ratification. The financial implications of ratification are unknown
as far as the seabed mining regime are concerned and further developments at Prepcom
will have to occur before Canberra has a clearer picture on this issue.
It was noted earlier that part of Canberra's thinking on ratification is the foreign policy implications. A number of questions are involved here. First Australia would have to consider the reactions of its major ally, the United States. While the Reagan Administration was openly hostile to the Convention the reaction of the Bush Administration is unclear. Without the US it could be argued that the seabed regime will be rather weak particularly if other seabed mining countries categorically reject the treaty. In part Australia's policy at Prepcom has been predicated on that assumption for Australian delegates have worked consistently to ensure that the mining regime is sufficiently attractive to bring in the potential deep seabed mining countries, such as US, UK and FRG. It is doubtful, however, whether deep seabed mining would take place outside the Convention. As noted earlier deep seabed is unlikely to take place until the next century, because of the state of the metal markets. Potential investors would have to consider also a possible legal challenge to mining outside the Convention and in any event it would be doubtful if such a mining operation would have a sufficiently clear legal title to a mine site to borrow the necessary capital. Thus even if the US continues to stand out from the DSBM regime being hammered out by the Prepcom the eventual outcome is likely to command the overwhelming support of the world community. On that basis it is possible to argue that irrespective of the US decision Canberra should consider its decision on ratification in the light of broader foreign policy factors than bilateral relations with the US.

Particularly important here is Australia's relations with the developing countries. As noted previously Australia supported the developing countries on ocean issues at UNCLOS 111 (in part because Canberra's interests coincided with the developing countries on the substantive issues at the conference). Generally speaking Australia has built up a great deal of credibility on North-South issues since the mid 1970s. UNCLOS 111 was in part seen by the developing countries as part of their drive for a new international economic order and North-South conflict at the global level was injected into the whole question of a new ocean regime. Australia's neighbours Indonesia and the Philippines have ratified the Convention as has Fiji. Given Australia's high profile throughout the conference and the fact that in terms of ocean space Australia emerged as a beneficiary of the final negotiations, Canberra's credibility as a supporter of the developing countries would probably be boosted if Australia ratified the Convention.

More generally a positive move on ratification would demonstrate Australia's support for the UN. We have already noted that Australia's UNCLOS diplomacy should be seen within the context of Australia's support for the United Nations. Ratification would
demonstrate in a positive way Australia's support for the UN in general and in particular the way in which through consensus agreement was able to be reached on virtually all issues (apart from seabed mining) at the conference. Australia has, like other middle powers, been able to find the UN forum a useful one in which to exercise some influence by gathering support from smaller states for its positions.\textsuperscript{63} This has, for example, been true with respect to disarmament in recent times.\textsuperscript{64} The multi-lateral forum of UNCLOS 111 suited Australia precisely because it was able to gather support from other states for its positions while at the same time raising its diplomatic profile by being seen as playing a useful role within the forum in helping other states have their concerns raised. Australia was a major beneficiary of the multilateral approach of the UN in its negotiations on a new ocean regime so that a decision in favour of ratification would be consistent with Australia's support for multilateral negotiations within the UN system. Canberra's ratification of the Convention would demonstrate that not only was Canberra interested in the Law of the Sea Treaty but also was prepared to support the UN in the important areas of multilateral treaty making, and multilateral (and opposed to unilateral) approaches to global problem areas.

We have already argued that Australia played a leading role at UNCLOS 111. For Australia not to ratify the Law of the Sea Convention would not sit comfortably with its high profile during the negotiations and the efforts which Australia gave to supporting the integrity of those negotiations. While non-ratification would not seriously detract from Australia's support for the UN or its credibility with developing states non-ratification could not be seen as helping Canberra's diplomatic credibility in either the UN or in those fora where North-South issues are raised.

\textbf{Concluding Remarks}

Lack of progress at Prepcom has discouraged and in some cases prevented many states from ratifying the Convention. The Law of the Sea Convention should, however, enter force in the next few years. Canberra will thus at some stage have to make a decision on ratification. The main arguments against ratification for Australia revolve around the uncertain financial applications of ratification, that through customary law Australia can pick up the major navigational benefits and that land based mining interests should dictate caution before we know the full details of the mining regime. The most forceful argument in favour of ratification is the treaty provides an acceptable balance between coastal and maritime interests and therefore represents the best long term basis for stability and predictability in ocean affairs. Australian ratification would also be of important symbolic value in demonstrating Canberra's commitment to the UN system and the multilateral approach to global problem solving. In particular Australian ratification
would provide greater diplomatic credibility if Canberra wished to pursue a more active role on regional and international policy issues (see Final Conclusion). Canberra’s decision will obviously weigh economic and ocean interests as well as foreign policy considerations in any final decision. The argument presented here would tend to give weight to ocean interests and foreign policy factors in any final decision.

**Treaty Implementation**

Implementation, unlike ratification, is not an either-or decision. With the Law of the Sea Convention already national responses have varied from ratification and full implementation to simply ignoring it entirely. Johnston points out that the Convention might be regarded as involving the exercise (and possible reinforcement) of entitlements and fulfillment of softly articulated responsibilities as well as the discharge of specific duties.

While the language in the Convention will raise questions of interpretation generally speaking Australia ‘look(s) to the Convention as an authoritative guide to the modern law of the sea and, for the purposes of national policy formulation and implementation (is) acting in accordance with its provisions’.

**Regime of EEZ**

Australia has not made any formal claim to an EEZ, but in 1979 proclaimed a 200 mile fishing zone. The claim brought under national jurisdiction 1854.02 sq. n.m. of ocean. A number of issues have been involved in implementing the fishing zone provisions of the Convention. First Australia’s proclamation of the two hundred mile zone overlapped the claims of Indonesia, Papua New Guinea, France (Kerguelen Islands and Australia’s Heard and McDonald Islands), Solomon Islands and New Zealand. Agreements have been reached with all these states, apart from New Zealand and some areas with Indonesia. In the case of Indonesia a provisional fisheries and enforcement line was concluded in 1981 after Indonesia argued that the median line which gave full effect to the islands of Ashmore and Cartier Reefs put Indonesia at an unfair disadvantage. Indonesia urged instead that the median line should be drawn without reference to Australia’s offshore islands. Australia compromised and gave Indonesia control over about 70 percent of the disputed area. In reaching these boundary settlements Australia has taken into account the Law of the Sea Convention provisions on delimitation. That is not, however, a significant obligation to discharge. These articles as previously noted simply require parties to solve their disputes by agreement in order to reach an equitable solution.
The second issue relates to the discretionary language used in the EEZ fishery provisions in Articles 61-67 which grant the coastal state the pre-eminent role in determining who harvests how much of which stocks designated in its area and the coastal state is given wide latitude within eleven categories of national ‘laws and regulations’ designated in Article 62(4). In its *Fisheries Act* Australia has legislated to give effect to the wide coastal state discretions over fisheries. Particularly important in the context of Australia’s fisheries policy with respect to HMS Canberra has given strong support to the island countries of the South Pacific in their position that the coastal state has jurisdiction over highly migratory species as provided for in the Law of the Sea Convention. As a member of the FFA Australia was involved in two year negotiations between 1984-1986 that culminated in 1987 with a treaty between FFA member states that would allow fishing by US vessels in specified areas and on terms and conditions set out in the Treaty.

The Convention also has a good faith requirement: under Articles 61 and 62 the coastal state is obliged to determine the total allowable catch, to avoid overfishing through proper conservation and management, to comply with the maximum sustainable yield objective of conservation as qualified in the Convention, to make allowance for associated or dependent species in its conservation measures, to promote the objective of ‘optimum utilization’, to determine its own harvesting capacity and to determine the existence of surplus stocks which other states should have access as a matter of entitlement. Australian law and practice has demonstrated that Australia has been prepared to facilitate the negotiation of access arrangements. As the former Director of the Australian Fisheries Service has observed ‘when it comes to negotiating fisheries agreements with Japan, Korea and so forth we (i.e. the Australian Fisheries Service) all work as if the Convention was firmly bedded down’. Australia has permitted access by foreigners to the AFZ through either bilateral agreement or joint ventures with the most important countries being Japan, Taiwan and South Korea.

**Archipelagos**

Australia does not claim to be an archipelagic state thus its interests here relate to the implementation of that part of the treaty by others, particularly Australia’s neighbours. Former Foreign Minister Bill Hayden stated in 1985 that ‘Australia accepts the concept of archipelagic waters as an equitable balance between the interests of archipelagic states and of maritime states’. Canberra has served to shore up the Convention here protesting at the Philippines government’s declaration made upon signature of the Convention in 1982.
and again in August 1984 upon ratification. The Philippines government made declarations that:

The Provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines or an archipelagic state over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence and security; the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high seas from the rights of foreign vessels to transit passage for international navigation.80

Australia protested to the Secretary General of the UN in September 1988 that the Philippines claim that the concept of archipelagic waters was similar to the concept of internal waters in the former constitution of the Philippines and reaffirmed in Art. 1 of the New Constitution of the Philippines in 1987 could not be accepted:

It is clear...that the Convention distinguishes the two concepts and that different obligations and rights are applicable to archipelagic waters from those which apply to internal waters. In particular, the Convention provides for the exercise by foreign ships of the rights of innocent passage and of archipelagic sea lanes passage in archipelagic waters—Australia cannot, therefore, accept that the statement of the Philippines has any legal effect or will have any effect when the Convention comes into force and considers that the provisions of the Convention should be observed without being made subject to the restrictions asserted in the declaration of the Republic of the Philippines.81

Similar protests have been submitted to the UN office of Ocean Affairs and the Law of the Sea by the USSR, Czechoslovakia, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic and Bulgaria.82

Straits

In the application of the straits articles to Australia’s coastline the two key areas are Torres Strait and Bass Strait.83 In the case of Torres Strait Australia has concluded special arrangements with Papua New Guinea in relation to navigation through Torres Strait. A guaranteed right of passage through routes used for international navigation in the strait is recognized. The right is defined by reference to the provisions contained in the negotiating text current at UNCLOS 111 at the time the Torres Strait treaty was concluded in 1978. These provisions appear basically unchanged in Arts. 34 to 44 of the Law of the Sea Convention.84

In Bass Strait, the need to consider the straits regime will arise only if Australia proclaimed a 12 mile territorial sea, and if particular islands are employed as base points
for measuring a territorial sea.\textsuperscript{85} It would be possible to proclaim a territorial sea of a lesser distance in the Bass Strait, or to proclaim a territorial sea of 12 miles only from certain islands, 'thus leaving a strip of EEZ or high seas through which ships could continue to pass without coming under the straits or territorial sea regime'.\textsuperscript{86}

Australia has adopted the view that the Law of the Sea Convention reinforces Australia's shipping and air passage rights through the Indonesian and other archipelagos.\textsuperscript{87} With that in mind Australia lodged a protest with the Indonesian foreign affairs department for the temporary closure in September 1988 of the Sunda and Lombok Straits for the purpose of sea and air battle manoeuvre exercises. Australia protested along with the US and West Germany. In an Aide Memoir handed to the Indonesian Department of Foreign Affairs on 10 October 1988 Australia stated that:

Australia considers that these straits are important routes for international navigation through and over which all ships and aircraft enjoy rights of passage, and that passage through and over these straits may not be hampered or suspended under international law. The Embassy is pleased to note, however, that no information has come to the attention of the Australian Government of any ships or aircraft having been actually hampered or prevented from passing through or over the Lombok and Sunda Straits on the dates mentioned in the Navigation warnings...Australia has long supported the Indonesian Government's wish to establish and maintain a special regime for waters within its archipelago. At the same time, the Australian Government has always made it clear that its support has been given on the understanding that satisfactory guarantees would be provided to the international community with respect to passage not only through but also over archipelagic waters. The regime for archipelagic waters, including archipelagic sea lanes passage, is now set out in the United Nations Convention on the Law of the Sea...Australia reserves the right for its ships and aircraft to exercise rights of passage through and over Indonesia's archipelagic waters, in accordance with the provisions of the United Nations Convention on the Law of the Sea, and expresses the hope that Indonesia will respect these rights, which are enjoyed by the ships and aircraft of all countries.\textsuperscript{88}

**Territorial Sea and Contiguous Zone**

Australia has not extended its territorial sea to 12 miles and under the permissive language of Art. 3 the coastal state is not obliged to go to 12 miles. Australia is only one of 11 countries that continues to claim a three nautical mile territorial sea. (Australia has agreed in the Torres Strait Treaty not to extend the territorial sea around certain Australian islands north of the seabed line beyond the existing three mile limit. A decision to extend Australia's territorial sea would need to have regard to this provision). Under Art. 24 the 1958 Convention on the Territorial Sea the coastal state could exercise contiguous zone jurisdiction to 12 miles. Under Art. 33 of the 1982 Convention the limit is 24 miles from the territorial sea baselines. So far Australia has, under the earlier Convention, exercised
legislative jurisdiction only with respect to customs within 12 nautical miles of the coast\(^89\) but if Australia wanted to retain a 3 mile territorial sea limit it could extend its contiguous zone type jurisdiction up to 24 miles.\(^90\)

No problem exists as far as implementing the baseline provisions of the Convention is concerned. The 1982 Convention has adopted substantially the same baseline provisions to be found in the 1958 Convention on the Territorial Sea and Contiguous Zone\(^91\). Australia drew its baselines for delineating its territorial sea in 1983. Australia’s regional strait baselines are modest\(^92\) and Australia has behaved fairly conservatively in drawing its baselines. One of the leading authorities on maritime boundaries, Professor Prescott, has pointed out that ‘most of the straight baselines are above reproach, and in the region of the Great Barrier Reef Australia has drawn lines well landwards of those which could have been justified’.\(^93\)

**Continental Shelf**

Implementation of the Convention for Australia would involve new legislation clarifying the area of its shelf in accordance with the complex formula in Art. 76\(^94\) and to submit information on its limits to the Commission on the Continental Shelf. It will also involve Australian authorities in ‘defining the foot of the slope and to discover whether the application of the sediment formula will allow claims to be made more than 60 nautical miles seaward of the slope’.\(^95\) As we have already noted irrespective of ratification Australia may also be obliged to participate in revenue sharing in areas beyond its 200 mile limit. Difficulties have arisen in the negotiations of a continental shelf boundary delimitation between Australia and Indonesia but in 1988 the two states have agreed to resort to an offshore joint development arrangement in lieu of a fixed delimitation settlement.\(^96\) Whether this will be a successful solution remains to be seen.\(^97\)

**High Seas**

The provisions on the High Seas are for the most part a restatement of the 1958 High Seas Convention or in some instances an elaboration of that Convention. Two new freedoms of the high seas are to be found in Art. 87: the ‘freedom to construct artificial islands and other installations permitted under international law subject to Part VI’ and ‘freedom of scientific research, subject to Parts VI and XIII’. It is not evident that this would have particular relevance for Australia. There are new provisions for the suppression of illicit traffic in narcotic drugs and of unauthorised broadcasts that may be more relevant.\(^98\) Johnston point out that because of the EEZ regime which encompasses most of the world’s most important commercial fisheries the newly renegotiated regime
of the high seas has only a minor impact on the contemporary international law of fisheries. The one notable exception here is driftnetting which is noted below.

The main provisions of the 1958 Convention are excluded from the 1982 Convention and 'in their place the new treaty underlines the need for conservation of the living resources of the high seas, urges all states to cooperate to that end, and outlines the same guidelines which are applied to fishery conservation in the EEZ'. While Australia is not a distant fishing state Australia has participated in fisheries bodies such as the Indo Pacific Fisheries Council, the Indian Ocean Fisheries Council and the South Pacific Forum Fisheries Agency to work for cooperative conservation of the living resources of the high seas. Most significantly Australia has taken a lead in attempting to ban the destructive practice of driftnet fishing, a practice that occurs mainly in international waters in the South Pacific. Because the target fishery (albacore tuna) is mainly fished in international waters national fisheries laws and regional states laws cannot be applied to prevent the likely over-exploitation or to ban driftnet vessels. To achieve this international cooperation is essential. Both at the domestic and regional level Australia has adopted a very high profile in implementing the international legal requirements on the Convention relating to high seas fisheries conservation, management and environmental principles. One rather rhetorical flourish in the High Seas Convention states simply that the 'high seas shall be reserved for peaceful purposes'. Implementation here might be interpreted as a call for diplomatic action and here Australia's action in introducing the notion of a nuclear free zone in the South Pacific at the 14th Meeting of the South Pacific Forum in 1983 is relevant. The treaty entered into force on 11 December 1986, when Australia became the eighth Pacific nation to ratify the treaty. Australia was careful in ensuring that navigational rights were preserved in the treaty and that the language did not disturb existing US security arrangements in the area.

The International Area

Implementing Part XI concerning the seabed beyond the limits of national jurisdiction cannot be undertaken until the Seabed Authority is established and the entry into force of the Convention, 12 months after the date of the 60th instrument of ratification or accession. Signatory states have a responsibility to participate in the work of the Preparatory Commission and to refrain from any activity on the deep seabed incompatible with the purposes of Part XI. Australia has attended every session of Prepcom since its work commenced in 1983 and been an active player within that forum. In Prepcom Australia has given strong support to the common heritage principle. Australia has worked hard to achieve the goal of a widely accepted Convention and to that end Australian delegates have continued their role at UNCLOS 111 of playing the part of a
bridge builder, finding solutions and compromises which would bridge the gap between G77 and the Western Miners. Australia has sought to play a constructive role within Prepcom mainly in order to ensure that the Commission’s work is not a disincentive to states to conform with and eventually ratify the Convention. Australian policy has thus been very much ‘pro-Convention’ rather than simply ‘pro mining’.104

Islands

The provision in the Convention (Art. 121(3) that rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or Continental Shelf has not been acted upon by Australia. Australia has taken the view that any island generates full maritime rights. In the Torres Strait Treaty the most miniscule of islands was accorded a territorial sea in the drawing of baselines and in the Coral Sea Australia has used small sandy cays as base points in the drawing of delimitation lines with France.105

Preservation of the Marine Environment

The implementation of the environmental provisions of the Convention has been detailed by Edeson106 and is also covered, in part by Burmester.107 Only a brief discussion of the issue is possible here.108

First as far as land based pollution is concerned the Convention provides a ‘best endeavours’ clause (Art. 207), although Art. 213 imposes a duty to enforce such laws adopted.109 Land based pollution is a serious problems in Australia,110 as elsewhere.111 Australia had not legislated at the national level to control land-based discharges into the ocean. Agreement was reached in 1980 that the states would control discharges into the territorial sea, and the Commonwealth beyond that area.112 Burmester points out that as a result the only legislation controlling matters such as the discharge of sewage effluent into the ocean from pipelines remains entirely a subject for state legislation, as no pipelines extend beyond 3 miles. General state water pollution legislation also controls discharges into rivers or estuaries which may end up in the ocean. This is one area where some Commonwealth supervision or involvement would seem to be required if Australia is to discharge properly its international obligations.113

There is no global convention apart from the Law of the Sea Convention that deals with land based pollution but at the regional level there are several which address the issue.114 Within Australia’s region Australia participated in the negotiations to draw up the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.115 Art. 7 of that Convention reiterates the obligation recognized in Art. 207 of the Law of the Sea Convention. Edeson has pointed out that as state laws operate
for the most part in the territorial sea, they may prove to be inadequate to deal with land
based pollution having an effect beyond that sea.\textsuperscript{116}

As far as pollution from vessels is concerned the Law of the Sea Convention integrates
and reinforces many of the features of pre-existing multilateral convention on vessel
sources pollution—OILPOL and MARPOL. OILPOL—the International Convention for
the Prevention of Pollution of the Sea by Oil, 1954 was ratified by Australia on 29
August 1962. A 1971 amendment enabled the ‘nearest land’ to be defined for the
purposes of the Convention as the outer edge of the Great Barrier Reef and this has been
incorporated into Australian law.\textsuperscript{117} OILPOL was found to be inadequate in certain
respects and new efforts to negotiate a new Convention were made to cover not only oil
but other pollutants. This was known as MARPOL—International Convention for the
Prevention of Pollution from Ships, 1973, which has been amended by a Protocol of
1978. New legislation to replace OILPOL legislation was enacted in 1983 which
repealed OILPOL legislation, and incorporated certain aspects of MARPOL.\textsuperscript{118} While at
UNCLOS 111 Australia managed to extend the range of matters for which special
measures may be made. Until recently Australia has not felt it necessary to propose
special measures for the Great Barrier Reef or other areas.\textsuperscript{119}

Pollution by dumping is covered by Art. 210, while enforcement measures are covered
by Art. 216. Australia signed the London Dumping Convention in 1973 and the
Environment Protection (Sea Dumping) Art. 1981 (amended 1986) gives effect to the
Dumping Convention and largely anticipates Art. 210. The Act has also been made
applicable to the AFZ by the Environment Protection (Sea Dumping) Regulations
(Amendment) 1984.\textsuperscript{120} While Australia supported the jurisdiction of the coastal state to
control dumping on its shelf at UNCLOS 111 and such jurisdiction is granted in the
LOSC Australian legislation is fairly weak on this point.\textsuperscript{121} The Environment Protection
(Sea Dumping) Act would enable dumping of low level radio active wastes in accordance
with international guidelines and higher level radio active wastes are now covered by the
1986 Amendment to the Act.\textsuperscript{122} It is provided that this prohibition applies in all waters to
which the legislation applies and that no state legislation can deal with this issue. The
issue was considered to be of national importance and unlike the 1981 Act the legislative
amendments in 1986 prohibiting the dumping of any radioactive wastes at sea does not
have any ‘roll back’ provision to enable state laws in the territorial sea if their laws are
consistent with the London Dumping Convention. The issue was related directly to
Australia’s obligations in the South Pacific Nuclear Free Zone Treaty and the South
Pacific Environment treaty to prohibit radioactive waste dumping. The national and
international significance of the issue was judged such that state involvement in control of
this type of dumping should be excluded.\textsuperscript{123}
Finally the Convention imposes for the first time in a global treaty the general obligation to ‘protect and preserve the marine environment’ (Art. 192). The implementation of this provision really depends on ‘further and future detailed practical measures for it to have effect. In fact, Art. 197, which urges states to cooperate on a global basis, and as appropriate on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules and Art. 235(3), which requires states to cooperate in the further development of international law relating to responsibility and liability, clearly underscores Art. 192 as a commitment as much to the future as to the present’.

Australia’s has cooperated on a regional basis in negotiating the South Pacific Regional Environmental Program treaty and on a bilateral basis Australia and Papua New Guinea have agreed to take legislative and other measures necessary to protect and preserve the marine environment in or in the vicinity of the Protected Zone, which has been established in the central Torres strait area. One of the purposes of the Protected Zone is to protect and preserve the marine environment.

Australia has also acted to carry out its more general obligation to protect and preserve the marine environment by establishing the Great Barrier Reef Marine Park. The legislation provides for zoning and management plans and provides the Authority with extensive management powers. In order the fulfil its obligation to take measures to prevent or control pollution Australia has also established a National Plan to Combat Pollution of the Sea by Oil that became operational in October 1973. As part of a states general environmental obligation states have an obligation ‘to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life’ (Art. 194(5)). Australia has been in the process of establishing marine and estuarine protected areas and more attention has been given in recent years to the conservation objective of coastal zone management.

**MSR and Transfer of Marine Technology**

Most of the provisions of the Convention deal with the maintenance of the consent regime set up to control and regulate MSR in the EEZ and on the shelf. ‘Implementation’ here involves taking of prescribed administrative measures by coastal and requesting foreign states. Australian practice here has involved relying solely on executive action to control MSR by foreign non-governmental vessels within 200 miles of Australia’s coast. This is in the form of a note issued on 21 October 1983 to all Diplomatic Missions in Australia and non-resident Diplomatic Missions accredited to Australia that basically implements the consent provisions in the Convention.
While there are rather scattered reference to MSR in Australian legislation the reliance on executive action to control MSR potentially raises difficult issues in Australian domestic law and it would appear desirable that Australia rely on a new legislative regime for MSR that covered the territorial sea, the EEZ and the margin. Australia has also participated in wide-ranging international cooperation in the MSR field which is relevant to the obligation of Art. 243 that calls for states to 'create favourable conditions for the conduct of marine scientific research in the marine environment and to integrate the efforts of scientists in studying the essence of phenomena and processes occurring in the marine environment and the interrelations between them'.

In articles 275-277 of Part XIV (Development and Transfer of Marine Technology) emphasis is placed on the promotion of national and regional centres in ‘marine scientific and technological research’. Australia's political support for marine science has not been strong in recent years, but Australia has attempted to implement its obligation to promote the development of marine science and technological capacity of regional states through various aid programs.

Concluding Remarks

This brief survey has shown that Australia has made considerable effort to accept its responsibility as a signatory to the Convention on the Law of the Sea to implement the Convention although it has not declared either 12 mile territorial sea, an EEZ nor drawn the limits of its continental shelf in accordance with the Convention. There has also been some bureaucratic inertia with respect to translating into domestic law the new rules on the EEZ, continental shelf definition and marine scientific research. Australia's general approach since the conclusion of UNCLOS 111 has been try and preserve the Convention from an erosion of legal significance by treating the Convention as the most authoritative guide to the law of the sea in terms of Australian ocean policy. Australia's overall example with respect to implementation has been good and Canberra's reluctance to ratify in this context becomes more difficult to understand. Ratification would demonstrate to the international community in a very clear way that Australia was pro-Convention. Australian implementation policy since the Convention was concluded has been quite consistent with its law of the sea diplomacy at UNCLOS 111. That is to say Canberra's view since 1982 has clearly been that the Convention contains compromises that offer the best balance of interests that are possible and that Australia's interests are best served by safeguarding those compromises by a policy of implementing the Convention. Just as prior to and during UNCLOS 111 Canberra has since 1982 rejected the notion that unilateral action will provide an effective basis for constructing a stable ocean regime.
CONCLUSION

After fourteen years of complex global negotiations the international community produced the 1982 Law of the Sea Convention, an immense law-making treaty which consists of 320 articles and nine annexes. The Convention is unique: no global treaty has been negotiated on the scale of UNCLOS 111 and it would be difficult to find any legal instrument of the scope of the Convention. The bulk of the Convention reflects a boldly innovative approach to the progressive development of international law.

The Convention represented the culmination of the work began in the summer of 1968 at the United Nations Seabed Committee. The Committee soon expanded its agenda to include virtually the entire body of the law of the sea. The desire to open the whole law of the sea area came about largely as a result of the push for coastal state expansion. Until well into the century, the law of the sea was stable and generally agreed. Its essential principle was the freedom of the seas, which implied freedom of navigation and freedom to fish. The exception to freedom for all was a small territorial sea where the coastal state exercised exclusive rights, subject to a right of innocent passage for vessels of other states. The last half century has seen the once stable law of the sea become unclear and unstable. Coastal states increased their control over foreign vessels and foreign nationals further from their shores. Even the maritime powers joined the expansionist trend. By the late 1960s the international community began to reopen the law of the sea to determine what kinds of authority and at what distance could the coastal state exercise jurisdiction and how much freedom could be guaranteed to other states. The question also arose as to how one could best provide a legal foundation to answer the questions relating to coastal state rights.

This study has attempted to show that Australia took a leading role in the attempt to restore order and stability to the law of the sea at UNCLOS 111. In the earlier UN law of the sea conferences Australia was firmly in the western camp. Australia believed that a six mile territorial sea and an additional six mile fishing zone was the maximum Australia required (or was prepared to concede to other coastal states). In the 1960s we saw how Australia developed a more coastal oriented view of its interests with increases in foreign fishing off Australia, a greater awareness of the dangers of marine pollution, the development of offshore energy and the opening of maritime boundary negotiations with Indonesia. At the domestic level Australia attempted to increase its control over offshore resources and activities and these moves were mirrored at the international level at the UN
Seabed Committee. Here Australia basically set the package of policies that it was to take into UNCLOS 111.

UNCLOS 111 was significantly different to UNCLOS 1 and II. The earlier conferences were basically codification exercises, whereas UNCLOS 111 was attempting to create a new body of law. The range of issues and the number of countries was much larger at UNCLOS 111 and the developing countries played a far bigger role at UNCLOS 111. The North-South division rather than East-West Division dominated UNCLOS 111 and the earlier conferences did not adopt the same consensus procedures of the later conference.

These contrasting features saw Australia playing a different role and they affected Australian diplomacy in different ways at UNCLOS 111. From a country strongly aligned to maritime powers on the law of the sea issues in the earlier period Australia chose to move towards a greater assertion of coastal state rights at UNCLOS 111. To the extent that the conference saw Australia play an influential role in an environment where many of the issues revolved around maritime and coastal state splits it can be argued that Australia was a significant actor in the development of the broad based coastal state movement.

The analysis presented here has shown that Australia not only successfully adjusted to the changes in the international regime of the oceans but that Australia made a significant contribution to the evolution and development of the single most important conference that transformed the international oceans regime. A number of features of Australian law of the sea policy clearly emerge from the study. First, an emphasis on multilateralism. Right from the early years of the SBC Australia was on the side of those countries wishing to negotiate a new package on the law of the sea and Australian always saw its interests closely bound up with a widely accepted and comprehensive multilateral treaty. Unilateralism was seen by Australian policy makers as weakening that goal.

The second feature of Australian policy was consistency; Australia perceived its primary goal as achieving greater control over offshore resources and activities (while balancing maritime interests) without any dramatic shifts. While it was prepared to accept tactical retreats on certain issues (except on the margin policy) Australian policy stayed fairly closely to those objectives that it had laid down in 1973, despite certain additions and subtractions. The study showed that on most issues at the conference Australia’s main goals were well matched with the changing structure and dynamics of conference politics.

Third, Australian law of the sea diplomacy was skilfully handled. Here we noted the early setting of its conference objectives, strong bureaucratic co-ordination and a high quality
and stable delegation contributed to that. Fourth, Australia diplomacy was not governed by its major alliance partner, the US, or its traditional maritime state allies. At the earlier law of the sea conferences Australia was for the most part prepared to play the role of the junior ally of the maritime states and to take a modest supportive role. At UNCLOS 111, however, Australia saw the conference as involving exceptionally high stakes given Australia’s wide-ranging ocean interests. That perception dictated an enormous bureaucratic effort over the eight years of the conference. The analysis displayed a country with skilful negotiators which, while aggressively pursuing national goals was also willing to embrace new concepts (like the ‘common heritage of mankind’) and which was independent in selecting those negotiating partners most willing to assist in achieving its goals.

Fifth, Australian diplomacy was reasonably hard-headed. Australia’s drive to realise its coastal interests derived from a clear recognition that a global solution to ocean issues would favour Australia given that UNCLOS 111 would favour the majority of states supporting an expansion of coastal state control of ocean space. This had now become more internationally acceptable given the changing structure of ocean politics to support the trend towards coastal state expansion.

Was UNCLOS 111 worth the effort that Australia devoted to it? The answer must be ‘yes’. The innovative nature of the conference was evident in the creation of the regime of the EEZ, in the development of rules relating to the development of deep seabed mining, and a degree of creativity in the rules governing the prevention and control of marine pollution. Concepts like transit passage, archipelagic sealanes passage and the regime of archipelagos were also developed at UNCLOS 111. It certainly changed state perceptions of the law-making potential of the UN multilateral conference. Even the United States which refuses to sign the Convention because of the provisions regarding deep seabed mining has expressly accepted that, apart from deep seabed mining, the US will act in conformity with the provisions of the Convention and seek similar compliance from other states. A generally accepted Convention is the best means the international community has of slowing down the rate of creeping jurisdiction. While some parts of the Convention are clear others are very ambiguous and here, of course, the meaning will evolve from state practice. The significance of the Convention here, however, is that it does provide a kind of boundary around acceptable behaviour, shaping expectations about what is seen as permissible.1 From Australia’s viewpoint, the Convention represents a fair balance between its coastal interests (and there Australia was a significant beneficiary in terms of increased ocean space), and its interests in preserving navigational freedoms.

Does UNCLOS 111 carry any lessons for Australian foreign policy makers? Again the answer is ‘yes’ on two counts. First, there is a clear inference from this study that
Australia should give ocean policy matters a high profile in Australian foreign policy. Australia’s UNCLOS diplomacy was largely played out amongst coastal states from the developing world where Australia’s interest in wider coastal state control coincided with the broad interests of mainly developing states making up the coastal state movement. Australia is now well placed to build on its reputation at UNCLOS 111 as a supporter of coastal state rights and responsibilities in the area of ocean development. Australia could well make a substantive contribution to facilitate the ocean management capabilities of those countries in the Asia-Pacific region that are increasingly looking to the opportunities that the era of expanded coastal state jurisdiction holds out.

Australia’s high profile at UNCLOS occurred in part because of the well considered views on the gamut of ocean issues at the conference and expertise in marine policy matters that made possible the preparation of clear objectives. There is no reason why Australia should not creatively elevate ocean policy matters in its international diplomacy. In such areas as the development of legal regimes, marine management techniques, marine science and technology, fisheries management, hydrography, maritime surveillance, marine information systems and maritime training, Australia has an enormous reservoir of skills and expertise that it can draw on to assist those countries in its region that are attempting to realise the benefits of expanded ocean control.2

Australia should also make every effort to participate in ocean related issues at the regional and international level, particularly in UN programmes and agencies such as UNEP, FAO, IMO, UNESCO and the IOC. While Australia is already active in these programmes and at the regional level with the South Pacific Forum and the Forum Fisheries Agency, the argument here is that as a major beneficiary of the new law of the sea and as prominent actor on law of the sea issues for over 14 years at the SBC then at UNCLOS, Australia is well placed to support the developing world’s aspirations for greater economic justice through realizing the benefits of a redistribution of ocean space.

Speaking at the first substantive UNCLOS session Australian Foreign Minister Willesee stated that Australia hoped that UNCLOS would bring ‘not only order and certainty but also justice and equity into the law of the sea’.3 Ultimately Australia’s success at the conference will be judged not only in terms of whether Australia as a country with a long coastline and wide margin was able to benefit from the new ocean regime but whether Australia supported an international oceans regime that benefits all countries within the framework of the Law of the Sea Convention.

The second lesson for Australian foreign policy makers in our history of Australia’s law of the sea diplomacy is that multilateral diplomacy can greatly assist a middle ranking power like Australia to define its role in the international system. Our study showed that a
well organised and well prepared delegation with clear objectives can play a very influential role within a multilateral forum. In contrast to the government’s recent statement on foreign policy that stated that Australia’s emphasis must be on bilateral diplomacy it is arguably the case that given the range of environmental issues on the international agenda that will require global action, Australia will need to give greater prominence to the practice of multilateral diplomacy. Issues relating to the atmosphere and planetary climate are now being addressed in a large number of multilateral bodies at the global and regional level. Australia’s economic, social and security interests will be directly affected by these multilateral forums. UNCLOS 111 demonstrated that Australia can play a creative and constructive role in a multilateral setting. Most importantly Australia demonstrated that it can play an independent role in such forums, a political position that is increasingly being forced on Australia with the passing of traditional blocs and groupings.

Over the next few years environmental issues that transcend national borders will test the commitment of the rest of the world to multilateralism. UNCLOS 111 demonstrated that Australia can pursue its national interests in highly complex multilateral negotiations in a rapidly changing global environment. In that sense Australian law of the sea diplomacy demonstrates the advantages of Australia taking its role within multilateral settings very seriously. It may also have implications for the training and organisation of the Department of Foreign Affairs and Trade. (The law of the sea, for example, may well play a prominent role as a case study in the training for new recruits on conference diplomacy).

As far as oceans policy is directly concerned, it is very doubtful whether the conditions exist to trigger another global conference on the law of the sea. Most of the 1982 Convention achieved consensus among 155 states. It would be unlikely that states would feel the necessity to embark on further arduous work on ocean law, particularly as there would be no guarantee of limiting discussion just to the more contentious area of the seabed mining regime. If UNCLOS IV were to happen it would be up to a new generation of law of sea policy makers in Canberra to decide on whether to change the priorities that Australia set through UNCLOS 111. It is to be hoped that such policy makers would continue to insist that multilateral negotiations on the basis of consensus should dictate a final agreement and that the rules of the law of the sea must fairly balance the respective interests of all states.
## APPENDIX A

### Sessions of UNCLOS 111: An Overview

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<th>Session</th>
<th>Dates</th>
<th>Location</th>
<th>Comments</th>
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<tbody>
<tr>
<td>First</td>
<td>3-15 December 1973</td>
<td>New York</td>
<td>Focus on organization and procedural matters</td>
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<tr>
<td>Second</td>
<td>20 June-24 August 1974</td>
<td>Caracas</td>
<td>Substantive negotiations begin</td>
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<tr>
<td>Third</td>
<td>15 March-9 May 1975</td>
<td>Geneva</td>
<td>Production of first negotiating texts and <em>Informal Single Negotiating Text</em></td>
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<tr>
<td>Fourth</td>
<td>15 March-7 May 1976</td>
<td>New York</td>
<td>Production of <em>Revised Single Negotiating Text</em></td>
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<tr>
<td>Fifth</td>
<td>2 August-17 September 1976</td>
<td>New York</td>
<td></td>
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<tr>
<td>Sixth</td>
<td>23 May-15 July 1977</td>
<td>New York</td>
<td>Production of <em>Informal Composite Negotiating Text</em> (deals with all the law of the sea issues in one comprehensive text).</td>
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<td>Seventh</td>
<td>28 March-19 May 1978</td>
<td>Geneva</td>
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<td></td>
<td>Resumed: 2 August-15 September 1978</td>
<td>New York</td>
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<tr>
<td>Eighth</td>
<td>19 March-27 April 1979</td>
<td>Geneva</td>
<td>Revision of <em>Informal Composite Negotiating Text</em></td>
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<td>Resumed: 19 July-24 August 1979</td>
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<td>Ninth</td>
<td>3 March-4 April 1980</td>
<td>New York</td>
<td>Revision 2 of <em>Informal Composite Negotiating Text</em></td>
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<td>Tenth</td>
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<td></td>
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<tr>
<td></td>
<td>Resumed: 22-24 September 1982</td>
<td>New York</td>
<td>Final Drafting Committee Changes Approved</td>
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### APPENDIX B

Gensors at UNCLOS III

#### A. The Coastal States Group

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<td>37</td>
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<td>38</td>
<td>Kenya</td>
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</table>
### B. The Land-Locked and Geographically Disadvantaged States Group (LL/GDS)

<table>
<thead>
<tr>
<th>Land-Locked States</th>
<th>Geographically Disadvantaged States</th>
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<tbody>
<tr>
<td>Afghanistan</td>
<td>Algeria</td>
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<td>Austria</td>
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<td>Bhutan</td>
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<td>Botswana</td>
<td>Ethiopia</td>
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<tr>
<td>Burundi</td>
<td>Finland</td>
</tr>
<tr>
<td>Byelorussian SSR</td>
<td>Gambia</td>
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<tr>
<td>Central African Republic</td>
<td>German Democratic Republic</td>
</tr>
<tr>
<td>Chad</td>
<td>Germany, Federal Republic of</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>Greece</td>
</tr>
<tr>
<td>Hungary</td>
<td>Iraq</td>
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<tr>
<td>Lao People's Democratic Republic</td>
<td>Jamaica</td>
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<td>Lesotho</td>
<td>Jordan</td>
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<tr>
<td>Liechtenstein</td>
<td>Kuwait</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Netherlands</td>
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<td>Malawi</td>
<td>Poland</td>
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<td>Mali</td>
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<td>Romania</td>
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<td>Nepal</td>
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<td>Sweden</td>
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<td>Rwanda</td>
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<td>San Marino</td>
<td>Turkey</td>
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<tr>
<td>Switzerland</td>
<td>United Republic of Cameroon</td>
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<tr>
<td>Uganda</td>
<td>Zaire</td>
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<tr>
<td>Upper Volta</td>
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<tr>
<td>Zambia</td>
<td></td>
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<td>Zimbabwe</td>
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</table>

### C. The Territorialist Group

<table>
<thead>
<tr>
<th>Territorialist States</th>
<th>Territorialist States</th>
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</thead>
<tbody>
<tr>
<td>Benin</td>
<td>Madagascar</td>
</tr>
<tr>
<td>Brazil</td>
<td>Mauritania</td>
</tr>
<tr>
<td>Cape Verde</td>
<td>Mozambique</td>
</tr>
<tr>
<td>Congo</td>
<td>Panama</td>
</tr>
<tr>
<td>Democratic Yemen</td>
<td>Peru</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Sao Tome and Principe</td>
</tr>
<tr>
<td>El Salvador</td>
<td>Senegal</td>
</tr>
<tr>
<td>Equatorial Guinea</td>
<td>Sierra Leone</td>
</tr>
<tr>
<td>Gabon</td>
<td>Somalia</td>
</tr>
<tr>
<td>Gambia</td>
<td>Togo</td>
</tr>
<tr>
<td>Guinea-Bissau</td>
<td>Uruguay</td>
</tr>
</tbody>
</table>

### D. The Margineers or Group of Broad-Shelf States

<table>
<thead>
<tr>
<th>Margineers States</th>
<th>Margineers States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>Madagascar</td>
</tr>
<tr>
<td>Australia</td>
<td>New Zealand</td>
</tr>
<tr>
<td>Brazil</td>
<td>Norway</td>
</tr>
<tr>
<td>Canada</td>
<td>Sri Lanka</td>
</tr>
<tr>
<td>Iceland</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>India</td>
<td>Venezuela</td>
</tr>
<tr>
<td>Ireland</td>
<td></td>
</tr>
</tbody>
</table>
E. The Straits States Group

| 1. | Cyprus                      | 6. | Oman                        |
| 2. | Greece                      | 7. | Philippines                 |
| 3. | Indonesia                   | 8. | Spain                       |
| 5. | Morocco                     |    |                             |

F. Group of Archipelagic States\(^a\)

| 1. | Fiji                         |
| 2. | Indonesia                    |
| 3. | Mauritius                    |
| 4. | Philippines                  |

\(^a\) Mauritius dropped out of the group in the latter stages of the Conference. Although the Bahamas was not formally a member of the group, it cooperated closely with its members.

G. The Delimitation Group Supporting the Median Line

| 2.  | Barbados                     | 14. | Italy                       |
| 3.  | Canada                       | 15. | Japan                       |
| 5.  | Chile                        | 17. | Malta                       |
| 6.  | Colombia                     | 18. | Norway                      |
| 7.  | Cyprus                       | 19. | Portugal                    |
| 8.  | Democratic Yemen             | 20. | Spain                       |
| 10. | Gambia                       | 22. | United Arab Emirates        |
| 11. | Greece                       | 23. | United Kingdom              |

H. The Delimitation Group Supporting Equitable Principles

| 1.  | Algeria                      | 16. | Mali                        |
| 2.  | Argentina                   | 17. | Mauritania                  |
| 5.  | Bhutan                      | 20. | Nigeria                     |
| 6.  | Congo                        | 21. | Pakistan                    |
| 7.  | France                       | 22. | Papua New Guinea            |
| 8.  | Gabon                        | 23. | Poland                      |
| 9.  | Iraq                         | 24. | Romania                     |
| 10. | Ireland                      | 25. | Senegal                     |
| 11. | Ivory Coast                  | 26. | Syrian Arab Republic        |
| 12. | Kenya                        | 27. | Somalia                     |
| 13. | Liberia                      | 28. | Turkey                      |
| 14. | Libyan Arab Jamahiriya      | 29. | Venezuela                   |

I. The Oceania Group

| 1.  | Australia                    | 5.  | Samoa                       |
| 2.  | Fiji                         | 6.  | Tonga                       |
| 3.  | New Zealand                 | 7.  | Trust Territories of the Pacific |
### J. The Group of Maritime States

<table>
<thead>
<tr>
<th>1. France</th>
<th>6. Norway</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Germany, Federal Republic of</td>
<td>7. Panama</td>
</tr>
<tr>
<td>3. Greece</td>
<td>8. USSR</td>
</tr>
<tr>
<td>4. Japan</td>
<td>9. United Kingdom</td>
</tr>
<tr>
<td>5. Liberia</td>
<td>10. U.S.A.</td>
</tr>
</tbody>
</table>

### K. The Great Maritime Powers

<table>
<thead>
<tr>
<th>1. France</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Japan</td>
</tr>
<tr>
<td>3. United Kingdom</td>
</tr>
<tr>
<td>4. U.S.A.</td>
</tr>
<tr>
<td>5. USSR</td>
</tr>
</tbody>
</table>

### L. Co-ordinating Group of Five

<table>
<thead>
<tr>
<th>1. France</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Germany, Federal Republic of</td>
</tr>
<tr>
<td>3. Japan</td>
</tr>
<tr>
<td>4. United Kingdom</td>
</tr>
<tr>
<td>5. U.S.A.</td>
</tr>
</tbody>
</table>

### M. The Group of Twelve

<table>
<thead>
<tr>
<th>1. Australia</th>
<th>7. Ireland</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Austria</td>
<td>8. Netherlands*</td>
</tr>
<tr>
<td>3. Canada</td>
<td>9. New Zealand</td>
</tr>
<tr>
<td>4. Denmark</td>
<td>10. Norway</td>
</tr>
<tr>
<td>5. Finland</td>
<td>11. Sweden</td>
</tr>
<tr>
<td>6. Iceland</td>
<td>12. Switzerland</td>
</tr>
</tbody>
</table>

*a  Netherlands subsequently joined the group as its twelfth member.*

### N. The Land Based Producers

<table>
<thead>
<tr>
<th>1. Argentina</th>
<th>12. Gabon</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Brazil</td>
<td>15. Ivory Coast</td>
</tr>
<tr>
<td>6. Canada</td>
<td>17. Peru</td>
</tr>
<tr>
<td>7. Chile</td>
<td>18. Philippines</td>
</tr>
<tr>
<td>8. Colombia</td>
<td>19. Venezuela</td>
</tr>
<tr>
<td>11. Egypt</td>
<td>22. Zimbabwe</td>
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</table>
# O. The Traditional Groups

<table>
<thead>
<tr>
<th>Region</th>
<th>Countries</th>
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<tbody>
<tr>
<td>Arab</td>
<td>21. Palestine Liberation Organization*</td>
</tr>
<tr>
<td>Latin American</td>
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</tr>
<tr>
<td>Eastern European</td>
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<tr>
<td>Western European</td>
<td></td>
</tr>
<tr>
<td>Others (WEO)</td>
<td></td>
</tr>
</tbody>
</table>

* Participating in the Conference as an observer.

**Source:**