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Reflections on the Royal Australian Navy and the United Nations Convention on the Law of the Sea 1982

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Introduction

On 16 November 1994, the United Nations Convention on the Law of the Sea 1982 (LOSC) entered into force. At the time, there were significant concerns regarding the ramifications of LOSC for Australia, and in particular the potential impact on Royal Australian Navy operations in Australia's immediate maritime environs and distant waters. 2014 marks the 20th anniversary of the entry into force of LOSC. In the period since, there have been profound impacts on the operations undertaken by the Royal Australian Navy in support of Australia's national security interests, territorial sovereignty and in a supporting law enforcement role.

On 18 November 2014, the Sea Power Centre - Australia, in conjunction with the Centre for Military and Security Law at the ANU College of Law, conducted a seminar at Fleet Headquarters to:

- offer a retrospective consideration of Australia's negotiating position during the third United Nations Conference on the Law of the Sea (1973-82)
- reflect on the operational impact of LOSC over the 20-year period it has been in force
- consider emerging trends in state practice and good order at sea issues within Australia's region to identify those factors that might impact on the future employment of the Royal Australian Navy.

The three short papers in this Soundings paper are the keynote speeches from the seminar, outlining the importance of LOSC to the RAN, and personal reflections from attendees at UNCLOS III.

Keynote Address

Stuart Mayer

Australia has the third-largest marine jurisdiction in the world but is only the sixth largest country by land area. We are the world's largest island state, and we are surrounded by three oceans. Australia relies on the sea for the vast bulk of its international trade, so the sea is important to Australia.

Unfortunately, the seas are not always a peaceful place, they are the epitome of international commons, where nations, vying to exploit vast resources, sometime conflict. The Law of the Sea Convention is the result of a long project, or rather series of projects, to set down a law of the oceans, so that their use would not so often lead to conflict between nations.

It was a long and difficult project; the third United Nations Conference on the Law of the Sea started in 1973 and did not finish its work until 9 years later, with the completion on the *United Nations Convention on the Law of the Sea 1982* (LOSC). The lead up to the conference was a period of contest in the oceans, including the 'Cod Wars' between the United Kingdom and Iceland. The tension in the oceans only increased as the technology to exploit and control the sea advanced because at the same time the desire of states to both protect the sea close to their shores, and to exploit the most distant oceans also increased.

The Royal Australian Navy before 1982 was a very different creature than that of today. Following the end of World War II there was an initial maintenance of naval capability through to the 1960s. Australia in this time maintained the ability to deploy a carrier battle group and men and woman of the RAN served in conflicts throughout the Cold War period. But by the 1980s Australia was taking a more defensive posture, and the RAN was subsequently smaller and less focused on power projection.

The ratification and entry into force of LOSC signalled the start of a new role for the RAN, one that continues to be vitally significant to this day. LOSC introduced a 200 nautical mile exclusive economic zone to the territories of all nations with an ocean coastline, and several Southwest Pacific island nations found themselves responsible for policing an area of ocean that was larger than their land mass and that was beyond their capability. In response to this problem, the Australian government created the Pacific Patrol Boat Program to provide suitable patrol boats to nearby island nations, along with training to support these ships. The Program was officially announced by Prime Minister Bob Hawke during the South Pacific Forum meeting in 1983 and the RAN continues to provide advisors and expertise to participating nations.

At home the RAN became responsible for fisheries, immigration and a host of other law enforcement activities in Australia new, vast, exclusive economic zone. This responsibility dramatically changed our focus and force structure with an increasing focus on patrol boats and at different times our far southern and far northern waters. The LOSC enabled these operations, by creating the space in which to enforce laws and in some cases, like with hot pursuit, giving us as a navy the tools to be effective. These changes are still felt by the RAN today as Operation SOVEREIGN BORDERS remains one of our most important tasks in support of government-directed operations.

For Australia, the rules, institutions and principles established through LOSC are of crucial importance to our national security, our continuing prosperity and our relationships with other countries. The rules establish access to vast resources for Australia, from the fish in our exclusive economic zone to the oil beneath our extensive continental shelf. The very existence of clear rules for who owns what in the oceans and mechanisms for resolving disputes has meant that the oceans are less likely to be a source of military dispute between nations. The Law of the Sea regime has also enshrined important navigational freedoms, rights that ensure access to trade for our nations and the mobility of our military assets.

There are of course still disputes between nations over these rights and freedoms, there are disputes between us and the states of Indonesia and Philippines over archipelagic sea lanes and there are disputes between us and our neighbours over oil and gas resources. There are even disputes between us and our friend the United States over some of Australia's claims to historic waters, though they have not as yes ratified the convention. The greatest change bought about by LOSC is not that disputes no longer exist (although they are much less likely to arise) but that they have been today resolved in the context of the convention, peacefully and based on law, rather than more kinetic activity. Yet there is still a role for the RAN in dispute resolution.

LOSC, like any international law, changes over time as a result of state practice. As it is such a vital part of Australia's national security architecture, it is important that the ADF, and especially the RAN, play an active role in maintaining the hard fought rights and freedoms it has created. Naval assets maintain the law in a myriad of ways, by enforcing our resource laws (as occurs in SOVEREIGN BORDERS), by demonstrating our navigational freedoms (through freedom of navigation transits) and by adhering to the rules set out in the convention. Through these activities, and our continuing military to military diplomatic efforts to encourage compliance with the Convention, the RAN is helping to maintain the legal framework for the oceans, which is such a vital piece of our national security.

The future of the Convention looks bright, but it is important disputes are not allowed to fester. The international community must, as they did over 20 years ago, maintain a concerted and dedicated effort to ensure that our constitution of the oceans remains relevant and that it continues to provide answers to the questions that may lead States to conflict over the oceans. All nations, including Australia, would be well served by spending the time and effort to maintain the convention, and taking some time, like we are doing today, to remember, just how important a peaceful ocean is to all of our fortunes.

Australian Naval Representation at UNCLOS III

Ian Knox

The almost worldwide trend towards reserving certain adjacent areas of the sea and the seabed, which had formally been considered high seas, for the exclusive use of the nations whose coastline abutted those areas, commenced in the immediate post WWII period. In 1945 the United States announced its rights to declare 'conservation zones' beyond territorial waters. The first such declaration was in September 1945 proclaiming jurisdiction over the adjacent continental shelf to protect American oil interests in the Gulf of Mexico. A number of countries proceeded to proclaim 12 mile territorial waters. In the Santiago Declaration of 1962, Chile, Ecuador and Peru proclaimed limits of 200 nautical miles, mainly to preserve the rich fishing grounds off the west coast of Latin America. Argentina made a similar claim and in 1957 Indonesia made claims of territorial waters in areas enclosed by her islands as did the Philippines.

These conflicting claims to increasing large areas of the adjacent sea and seabed resulted in a confusing situation. In an effort to resolve this, the first United Nations Conference on Law of the Sea was convened in Geneva in 1958 and on 29 April 1958 four conventions were agreed:

- *Convention on the Territorial Sea and the Contiguous Zone*
- *Convention on the High Seas*
- *Convention on Fishing and Conservation of the Living Resources of the High Seas*
- *Convention on the Continental Shelf*

Agreement was, however, very limited and the conventions were ratified by about one-third of the world community.

A second Conference was held in 1960 with the objective of securing agreement on important issues where agreement could not be reached two years earlier. It was not successful in achieving any agreement.

My first involvement with law of the sea issues was in 1959 when I was on exchange service with the Royal Navy, after finishing my Long Torpedo/Antisubmarine Course. I was serving in HMS *Jutland*, a Battle class destroyer, and the Icelandic government proclaimed a territorial sea of 12 nautical miles. The British had been fishing off Iceland for many years and were not impressed with this, and the first 'Cod War' commenced. I had three deployments in the area - there were usually three destroyers there with a tanker. We defined baselines around Iceland at 4 miles and protected the fishing fleet out to 12 miles. British fishermen would go inside the 4 miles and even 3 miles if they thought they could get away with it, and we were there to keep them honest, and protect them from the Icelandic gunboats when they were within the zones the United Kingdom recognised.

My second involvement was during the Vietnam War when I was the Executive Officer of HMAS *Perth*. We were there from September 1967 to April 1968 and spent most of our time off North Vietnam on Operation SEA DRAGON, interdicting coastal traffic supplying their troops and the Viet Cong south of the Demilitarised Zone. There were usually two units of two ships, patrolling between Haiphong and the Demilitarised Zone, occasionally we were with an 8-inch cruiser, when we provided their air defence and carried out suppression fire of the coastal batteries while they took on the primary target. We usually steamed about 15 miles off the coast and closed the coast to engage targets. They had reasonably effective coastal batteries and we were fired on many times, and were hit once when about 300 4-inch shells landed around us - one coming inboard and causing a reasonable amount of damage. The lesson here is that when you get involved in a hot war you do not worry very much about international law.

The rules of international law codified at the 1958 Conference favoured the developed maritime nations who had the resources and the power to use the oceans for their own interests; trade, fishing,

exploitation of the seabed, projection of power and other military purposes. Since WWII many new nations emerged from the colonial era, they were mainly poor, underdeveloped and they linked the freedom of the seas with what they regarded as their countries' exploitation by their colonial masters. They formed into a powerful bloc and were attempting to achieve a new economic order.

Additionally, the unsatisfactory nature of the Convention on the Continental Shelf influenced the United Nations in 1967 to declare the seabed beyond the limits of national jurisdiction to be 'the common heritage of mankind' and to set up a 'Committee on the Peaceful uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction'.

Although the impetus for a new regime of the international law of the sea derived from these factors, the pressure for revision quickly spread to other areas and it was agreed to convene a third conference on the law of the sea. The Conference was charged with the revision of the rules of international law covering all uses of the sea, and the airspace above it, and the exploitation of the resources of the sea and the seabed. In other words it was seeking an international legal system to govern 70 per cent of the earth's surface.

The Australian delegation to the Conference usually had representatives from the following departments: Foreign Affairs, Attorney-Generals, Special Advisor on International Law, Defence, Fisheries, Mineral Resources, Treasury, Transport and Environment. I represented the Department of Defence and attended the 3rd, 4th, 5th and 6th Sessions.

The 1st session of the Conference was held at the end of 1973 and the first part of the 8th session completed on 27 April 1979. Because of the complexities of the problems and the diverse political, economic and security interests of the 150 or so countries involved progress was slow.

The Conference was organised into three committees. Committee I dealt with the deep seabed beyond the limits of national jurisdiction, which was termed 'the area'. Committee II was concerned preparing treaty articles governing uses of the sea and that part of the seabed which is subject to national jurisdiction. As part of this task it was responsible for deciding the limits of national jurisdiction. Committee III was responsible for dealing with the questions of preservation of the marine environment, marine scientific research and transfer of marine technology. The question of dispute settlement was considered in the plenary of the Conference.

As with all United Nations organisations, the power structure in the Conference was divided between the regional groupings. The president of the Conference was from Asia, the chairman of Committee I was from Africa, the chairman of Committee II was from Latin America and the chairman of Committee III was from the Eastern bloc. This approach created political difficulties as it is hard to imagine the chairmen not being influenced by the ideology of their regional groups.

As it was almost impossible to conduct meaningful negotiations with the necessary compromises being reached in the large committees, procedures were found whereby negotiations were conducted in smaller groups. However, delegations were reluctant to permit their vital interests to be represented by other delegations. Another factor which made for slow progress was that the negotiations were conducted on the assumption that the result will be a 'package deal'. Thus, no final decision on any issue was taken until all parts of the treaty were acceptable to the Conference by consensus or, if necessary, by an affirmative vote of two-thirds of the representatives present and voting.

Given the importance of matters before the Conference, and the need to ensure that what was being propounded in one committee would not cut across what was being done in another committee, it was understandable that delegations were cautious to commit themselves until all the elements in the package, which would have far reaching implications, were clear.

The first breakthrough in the Conference occurred at the end of the 3rd session in May 1975 when the chairmen of the three committees produced the informal 'single negotiating text'. It was expressly stated to be informal and to be the *basis* of negotiation rather the *outcome* of negotiation.

Most importantly, it set out in one comprehensive document a possible framework for a law of the sea convention. These texts were discussed during the 4th session and a revised single negotiating text was produced which took account of discussions of that session. The 5th session made little progress and no amendments were made to the revised single negotiating text.

The vast majority of the articles in the revised single negotiating text were acceptable to most states in the Conference as they reflected a great many trade-offs and informal or tacit understanding and commitments. However, at the end of the 5th session negotiations were deadlocked on three critical issues: the legal status of the 200 mile exclusive economic zone, the legal system for exploiting the deep seabed, and the rights of 'landlocked and geographical disadvantaged states'.

In the 6th session, completed in July 1977, there were intensive negotiations on critical issues and useful discussions on important issues which had only received preliminary treatment in the past. The session produced the 'informal composite negotiating text' which unified the four parts of the revised single negotiating text and made some significant amendments to that document to reflect successful negotiations on some of the critical issues.

The 7th session was conducted over two periods and made little progress.

The 8th session concentrated on seven hard-core issues which had been refined from unresolved elements of the broader critical issues. Considerable progress was made on these issues and a revision of the informal composite negotiating text was produced by the president and chairmen of the main committees. The document was still a *negotiating* and not a *negotiated* text and one more session was required to produce the formal text.

As a rich country with a small population and abundant resources on the fringe of underdeveloped Asia, Australia did not want to appear selfish in its policy and negotiating position in the Conference. Australia's 200 mile zone would be one of the largest in the world helped by its offshore islands. Whilst the Australian position thus needed to reflect its interests as a coastal state, it also needed to reflect the fact that as a nation dependent on overseas trade it would not wish to see traditional freedoms of navigation reduced by extensions of maritime zones. Seen in this light, Australia played an important mediatory role in the critical negotiations on the legal status of the exclusive economic zone and some other important issues - mainly conducted in informal groups.

The task of administering such a large 200 mile zone could be much easier by the maximum possible international recognition of the zone. Australia's primary objective at the Conference was therefore to negotiate a treaty which would be acceptable to the vast majority of nations while satisfying Australia's major interests. Because of this objective, Australia also played a mediatory role on issues where her major interests were not involved.

The various 'defence' representatives formed a 'club' at the 1st session and this continued throughout the Conference. Usually we had lunch once a week and between 20 and 40 representatives would turn up - it was a very useful gathering for me as you could normally get an honest answer to a question.

Reflections on the Convention

Ivan Shearer

We meet today [18 November 2014] to mark and evaluate the *United Nations Convention on the Law of the Sea*, which was signed on 10 December 1982. It did not, however, enter into force until 12 months after the deposit of the 60th instrument of ratification, that is, on 16 November 1994.

The lengthy period between adoption and signature, and entry into force, invites consideration in itself. It also provides the occasion for recalling Australia's role in resolving the deadlock and in helping to bring about sufficient ratifications to give life to the Convention. There are now 166 states parties reflecting a wide geopolitical acceptance. The major non-party continues to be the United States.

I offer an informal review of the steps that led up to the Convention, and of the negotiation process itself, based on my own experience.

As a law student in the late 1950s I regarded the international law of the sea as a somewhat esoteric subject. Our teacher of international law at the University of Adelaide, Professor DP O'Connell, however, was greatly engaged with it, especially with the developing law of the continental shelf, on which he published a number of articles. Our student irreverence was shown in a revue sketch I remember when a song was sung about O'Connell called 'My Continental Self'. The pun here was based on the fact that O'Connell had just returned from study leave in Europe accompanied by a newly acquired German wife. The subject was, however, treated seriously by the Australian government: the Solicitor-General, Sir Kenneth Bailey, led a team to the Geneva Conference which adopted the four Geneva Conventions on the Law of the Sea of 1958.

Already in 1953 Australia had proclaimed a continental shelf and legislated to give effect to that Proclamation in amendments to the *Pearl Fisheries Act 1952*. This brought Australia into conflict with Japan whose nationals were active in northern Australian waters in taking pearls from the oyster beds. Japan proposed testing the matter in the International Court of Justice (a reversal of the later positions of Australia and Japan in international law disputes); the matter was shelved through the adoption of a *modus vivendi*.

It is important to recall that the Geneva Conventions of 1958 were based on the preparatory work of the International Law Commission, which studied all aspects of the law of the sea from 1949 to 1956. With very little change, the diplomatic conference adopted this body of work in a remarkably short session from 24 February to 27 April 1958. The Geneva Conference converted the International Law Commission texts into four treaty instruments. The reason for four separate conventions, dealing with the territorial sea and contiguous zone; the regime of the high seas; fishing, and the conservation of the living resources of the high seas; and the continental shelf, is that it was thought that interest in ratification would differ between states. To open for signature a composite combined text might inhibit demonstration of the degree of acceptance of the various components. This approach stands again in contrast to the Third United Nations Conference on the Law of the Sea (UNCLOS III) that laboured to produce a single composite text, not subject to reservations, between 1973 and 1982.

The First Geneva Conference of 1958 failed to find consensus on the permitted breadth of the territorial sea. As is notorious, a Second Conference, called in 1960 for the specific purpose of deciding this issue, failed by one vote short of the required two-thirds majority to adopt a compromise 6 plus 6 formula for the territorial sea and a fishery zone. State practice thereafter, spanning by now the rapidly multiplying newly independent states absent from the roll call of 86 states represented at the 1958 Conference, moved to fill the gap by asserting territorial sea claims to a 12 mile limit. This, however, was resisted by the major maritime powers which insisted on a 3 mile limit for territorial waters and a further 9 miles for the contiguous zone.

Developments subsequent to 1960 that led to the calling of UNCLOS III in 1973 will be well known to this audience and need no detailed elaboration. They included pressures to recognise an extended territorial sea, and for the recognition of preferential or exclusive fishery zones, the extent of the continental shelf beyond a depth of 200 metres, the character of the waters lying above the continental shelf, and passage rights through straits in the event that territorial waters were extended to 12nm. Prompted by the activities of Howard Hughes's *Glomar Explorer* revealing that the mineral resources of the seabed were accessible to harvesting at any depth, and at the urging of Malta's Ambassador Arvid Pardo, the United Nations established a Committee on the Peaceful Uses of the Seabed in 1968, a year that also saw recognition of the moon and other celestial bodies as the common heritage of mankind. It soon became apparent, however, that no agreement on the seabed could be reached without opening up all other aspects of the law of the sea. The Declaration of Deep Seabed Principles of 1970 was thus accompanied by a decision to convene another conference on the law of the sea.

The inaugural session of UNCLOS III in 1973 was largely formal, but opened up one vital aspect of the procedure to be followed. It became clear that it was governments, not legal experts, which would take the lead. There was to be no reference to the International Law Commission. The UN General Assembly had declared that the Conference 'should seek to accommodate the interests and needs of all states, whether landlocked or coastal', thus directing that universal agreement was the desired outcome.

The first substantive negotiating session was held in Caracas, Venezuela, in 1974. Its first task was to agree on the procedures that would conduce to universal agreement. The outcome was the adoption of a principle of decision making by consensus. Although technically it was provided that procedural questions would be decided by a simple majority, and substantive issues by a two-thirds majority, these familiar rules were supplanted by a so-called 'gentlemen's agreement'. This agreement provided that:

> the Conference should make every effort to reach agreement on substantive matters by way of consensus and that there should be no voting on such matters until all efforts at consensus have been exhausted.

There we have the ethos of UNCLOS III: exhaustive and exhausting.

The Caracas Session of the Conference, which ran from 20 June to 9 August 1974, was notable in that all the essential elements of what was to become the 1982 Convention began to emerge. The Conference was divided into three main committees in which the search for consensus was conducted. Committee I was concerned with the deep sea bed, the issue that had first prompted the conference, Committee III was devoted to the newly emerged topic of protection of the marine environment. All other issues were assigned to Committee II. These included the territorial sea and contiguous zone, the continental shelf, fishery zones - soon to be dealt with as the exclusive economic zone - straits and archipelagos, and the regimes of innocent and transit passage. Periodic plenary sessions were held under the presidency of the Conference chair (Ambassador Amerasinghe of Sri Lanka, followed by Ambassador Tommy Koh of Singapore) to assess progress in each of the committees and to begin the task of preparing unified composite drafts of a convention.

My own experience was confined to Committee II, chaired by Venezuelan Ambassador Aguilar. In many ways this was the most interesting committee since it covered discrete but interrelated issues of the law of the sea where state practice had been most at variance. Committee II also dealt with the issue of land-locked and geographically disadvantaged states which was my special interest. I should explain why.

In 1971-73 I had obtained leave from my university to serve under the UN Development Programme as adviser on treaty succession to the government of the Kingdom of Lesotho. My mandate later widened to include advice on other international law issues facing Lesotho as a land-locked country totally surrounded by South Africa. Issues of transit across South Africa to and from

Lesotho were constantly arising. Lesotho saw UNCLOS III as an opportunity, in collaboration with the other 28 land-locked states represented at the conference, to revise and strengthen the rudimentary provisions on transit contained in the Geneva Convention on the High Seas of 1958.

We were a small delegation of four. Perhaps for that reason our attendance *en bloc* at the many receptions being offered went unnoticed until the whistle was finally blown: our head of delegation was informed that the invitations were personal to him and not to his entire delegation. In the meantime, however, we had enjoyed lavish hospitality on a number of occasions. One I especially remember was a reception hosted by Iran (then under the Shah). We enjoyed caviar and champagne in a large marquee with magnificent carpets underfoot. Screen monitors were set up in order for us to hear the speech of President Nixon in which he announced his resignation of the Presidency of the United States. An historic moment...

The atmosphere in the negotiating committees, and especially in the plenary sessions, was often tense. There was a pervading sense that all positions in the law of the sea were up for grabs and that now was the time to pull out all stops to advance national policies and aspirations. Developing states were especially encouraged by the passing in the same year by the UN General Assembly of the Charter of Economic Rights and Duties of States (also known as 'The New International Economic Order') which led to somewhat overoptimistic ambitions as to what the Conference could achieve. Delegations sought to make common cause with like-minded states in order to strengthen their negotiating positions, and much activity of this kind took place in small meeting rooms, corridors, and at informal dinners. Some of the alliances thus formed saw unlikely bedfellows, as China was not slow to point out in relation to the strong community of interest between the United States and the Soviet Union. Australia was a leading member of the so-called Margineers Group, which sought to maximise claims to the continental shelf extending to the continental margin, such as the physical extent of the continental shelf to the edge of the continental rise (the final text of which was arrived at, typically for the Conference, on the basis of a Soviet/Irish compromise formula). I, of course, was a member of the 'land-locked and geographically disadvantaged states' group, which sought more secure transit rights against neighbouring coastal states as well as equitable access to the living resources of the exclusive economic zone.

The febrile atmosphere of the Conference made possible the rumoured existence of secret negotiating committees hatching plots behind the scenes. One I especially remember was a spoof paper circulating among delegates announcing the establishment of a 'Committee on Nomenclatural Disadvantage', to which was appended a report by a Professor Rhindquist.[1] The learned (and totally fictitious) professor promoted a concept of equity between states on the basis of the unremarkable finding that 'some states are bigger than others'. Thus major adjustments were required to national boundaries in order to achieve a more equitable distribution of land and maritime resources. But not only that: it was unfair that some states had grand and powerful names, such as the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Union of the Soviet Socialist Republics and so on, while others laboured under the indignity of such names as Togo or Swaziland. This had to be remedied by a random exchange of names, achieved by a lottery conducted under the supervision of the delegation of The Bahamas. The paper provoked both mirth and a brief welcome reduction in tension. But what was sad about it was the number of delegates who took it seriously and were to be seen prowling the corridors looking for the room in which these alleged meetings were taking place.

I should mention one set of meetings on the fringes of the Conference that were not secret but had remarkable results. A study group was convened under the chairmanship of Professor Louis B Sohn of Harvard Law School to examine possible dispute resolution procedures in the law of the sea. This topic was not initially on the agenda, perhaps because it seemed too visionary: it proceeded as a private initiative. At first the meetings were attended only by delegations from the developed Western states, but after a while the Soviet Union unexpectedly began to attend and afterwards some other delegations. It is a long story, but a highly modified yet substantive text on dispute resolution was adopted as Part XV of the Convention, together with Annexes. Compulsory dispute

resolution under the Convention, in the International Court of Justice, in the International Tribunal of the Law of the Sea, and by way of Annex VII tribunals, is now an increasingly frequent occurrence.

Suspicions among delegations abounded. I illustrate this by the following story. The plenary sessions were held in a vast auditorium contained within the conference venue, the Parque Central. As is usual United Nations practice, the arrangement of the delegations was achieved by drawing a letter of the alphabet out of a hat for the front row, with delegations in alphabetical order following behind. On this occasion the letter L was drawn and thus Lesotho was seated in the front row between Lebanon and Liberia. I had been deputed to make arrangements for a weekend excursion to the River Parana on the borders of Venezuela and Brazil by several friends from other delegations. During the course of one meeting Philippe Kirsch of Canada, Bernie Oxman of the United States, and Perry Nolan of Australia successively descended the steps to discuss arrangements with me.[2] Their movements were quickly noted with alarm by the delegate of Upper Volta (now Burkina Faso), a member of the land-locked and geographically disadvantaged states group, who raced down to find out what these countries were offering by way of compromise to our firmly held negotiating position. It was difficult to persuade him that this was an innocent matter with no relevance to the Conference proceedings.

I tell this story, trivial in itself, to underline a more important point. The Conference was a highly politicised one, in which the law was often pushed into the background by political considerations. This is reflected in many articles of the resulting Convention. Take, for example, articles 58 and 59. In article 58 it was important to achieve a balance in the regime of the exclusive economic zone to ensure that that zone was not to be a mere expansion of the territorial sea. Thus, high seas freedoms were to prevail where not inconsistent with exclusive economic zone rights. But this could not be said in direct language, thus dashing the hopes of those states which were pressing for a maximalist view of the exclusive economic zone. Instead, article 58(2) has the wording, easily overlooked by superficial readers, that: ‘Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.’ One has to turn to those articles to find out that they comprise the regime of the high seas. In simpler language it meant that there was a presumption of high seas freedoms where exclusive economic zone jurisdiction was not explicitly granted. A similar sleight of hand is evident in relation to the - for many states - neuralgic issue of underwater passage of straits in article 39(1)(c), by camouflaging the right to such passage under the formula ‘normal modes of continuous and expeditious passage’. Not that anyone was fooled by this: it simply meant that delegations could accept a compromise in wording that was more easily palatable to their home authorities. I come then to article 59, described by Sir Elihu Lauterpacht as the worst drafted article of the entire Convention. It was clearly the work of politicians, not of lawyers:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal state or to other states within the exclusive economic zone, and a conflict arises between the interests of the coastal state and any other state or states, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

For all these reasons, the resulting Convention is an imperfect and incomplete instrument, showing distinct signs of its origins in shaky political compromise. Professor O’Connell was a sceptic of the attempt to codify the law of the sea in this way. He thought that the law of the sea should develop through the classical processes of claim, protest, counterclaim, and acquiescence constitutive of customary international law. I do not now agree. I think it is the shaky instrument we had to have. The forces driving it were irresistible. For all its imperfections the resulting 1982 Convention provides a degree of certainty and a necessary framework for application and further development in governing the rights and duties of states in the sea.

I cannot end without recalling Australia's role, as a 'friend of the Convention', in rescuing the Convention from almost certain failure by reason of the slow rate of ratifications after 1982. By 1993 only developing states had ratified it (unless one counts Iceland as a developing state).The stumbling block was Part XI of the Convention on the Deep Sea Bed. This was the principal reason given by the United States for not becoming a party, announced to a stunned audience at the final session of the Conference in 1982 (at which I was also present). And if the most powerful economy of the world was not going to become a party, then other developed states would also stay their hand. Unlike the 1958 Conventions, the 1982 Convention could not be broken into parts for separate acceptance. Article 309 makes this clear. With the deposit of the 60th instrument of ratification in 1993 necessary to bring the Convention into force 12 months later, the clock was ticking. There would be no possibility of revising the Convention for 10 years after its entry into force (article 312) and even this possibility was hedged around with restrictions (article 314). The strategy chosen by Australia and the other states forming the friends of the Convention group was to devise a separate Agreement for the Implementation of Part XI that would enter into force prior to the Convention itself. This provided that the parties to the Implementing Agreement would apply Part XI only in accordance with the terms of that Agreement, which radically altered the terms of Part XI. The purpose was to address the objections of the United States and the other developed states to the restrictive regime of Part XI. It was a bold and unprecedented move, but it ultimately proved successful in breaking the impasse. All the major powers eventually came aboard, except (ironically) for the United States.

I feel I was present at an historic moment in 1991 when Dr Greg French of the Department of Foreign Affairs and Trade produced his draft of the Implementing Agreement, breaking the deadlock, in what became known as 'the Boat Paper'. At that time I was working in the department under the academic-in-residence program. Some urgent matter (I forget what) caused me also to be working late on the night that Greg finished his draft, close to midnight. As an inspired afterthought, just before sending it off to the other 'friends', he drew a computer graphic of a boat for the title page. He brought it in to show me. It has rightly gone into the history of the law of the sea.

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[1] The author of this paper was rumoured to be an officer of the Australian Attorney-General's Department seconded to the delegation of Papua New Guinea.

[2] Philippe Kirsch later became an ambassador and was also the first President of the International Criminal Court. Professor Oxman's regular reports on each session of the Conference for the *American Journal of International Law* are an invaluable source of information on the progress of the negotiations. He has since served as a judge *ad hoc* in law of the sea cases in both the International Court of Justice and the International Tribunal of the Law of the Sea.

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About the Sea Power Centre - Australia

The Sea Power Centre - Australia was established to undertake activities to promote the study, discussion and awareness of naval strategy, doctrine, history and maritime issues within the Royal Australian Navy, the Department of Defence and the wider community. Its mission is:

- to promote understanding of sea power and its application to the security of Australia's national interests
- to manage the development of RAN doctrine and facilitate its incorporation into ADF doctrine
- to contribute to regional engagement
- to contribute to the development of maritime strategic concepts, and strategic and operational level doctrine, and facilitate informed force structure decisions
- to preserve, develop and promote Australian naval history.

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